

Recognizing a Defendant's Right to a Fair Plea Bargain Offer from the Prosecution

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Abstract

Plea bargains dominate criminal justice systems. In the US, 97% of convictions in federal criminal proceedings and 94% in state proceedings are obtained through the rapid path of *plea bargain* → *confession* → *conviction*, without inquiry into whether the defendant actually committed the offense he was charged with and without a trial in which witnesses are heard and evidence presented. The US Supreme Court held that although a defendant has a right to effective representation by counsel during plea negotiations, the prosecution has no duty to offer a plea bargain, and its discretion on this matter is unrestricted. Prosecutorial discretion is almost absolute: a prosecutor who happens to dislike the defendant or is antagonistic because of the defendant's group affiliation or political opinions, or is simply harsher than his colleagues, may lawfully offer an excessively severe plea or refuse to negotiate entirely. Conversely, an offer may be unusually lenient merely because the prosecutor is a former law-school friend of the defense counsel. The current system imposes no constraint on the prosecution and grants no right to the defendant. The article proposes that the plea offer should not depend on prosecutorial whim but constitute a right grounded in the principles of equality and proportionality, in the right to due process, and in the duties of fairness and good faith of the prosecution; and suggests practical mechanisms for recognizing and enforcing this right. Formally, defendants possess rights in criminal proceedings—some even enshrined in the US Constitution, but in most cases, that conclude in plea bargains, defendants effectively have no rights. Ideally, mainly due to the phenomenon of false convictions, the plea-bargaining system should be abolished or at least drastically curtailed. As this is unlikely to happen, there should be at a minimum a legally enforceable right, preferably statutory, alternatively judicial, that ensures fairness in a process that has become the default mode of adjudication. Even those who support plea bargaining may endorse recognition of such a right, as it would render current practice somewhat more legitimate.

Keywords: Plea Bargain; Criminal Law; Criminal Procedure; Prosecution; Defendant's Right; Criminal Evidence

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Introduction

Plea bargains dominate criminal justice systems. In the US, 97% of convictions in federal criminal proceedings and 94% in state proceedings are obtained through plea bargains.¹ The same is true of the Israeli criminal justice system:² in roughly 90% of cases, the criminal process follows the rapid path of *plea bargain* → *confession* → *conviction*, without inquiry whether the defendant actually committed the offense he was charged with and without a trial in which witnesses are heard and evidence presented.³

Although the plea bargain is no longer an exception but the main mode of criminal adjudication, in Israel, it is not regulated by statute, indeed, not mentioned by it, not even under its recent euphemistic name of *plea arrangement*.⁴ The US preceded Israel in the shift toward a plea-bargaining mill. The US Supreme Court held that although a defendant has a right to effective representation by counsel during plea negotiations, the prosecution has no duty to offer a plea bargain, and its discretion on this matter is unrestricted.⁵ Likewise, Israeli case law imposes no such obligation on the prosecution.⁶

Consider, for example, that defendants charged with nighttime burglary of a business (as distinct from burglary of a dwelling, which endangers occupants) who have no prior conviction for that offense are customarily offered by prosecutors a bargain that does not include imprisonment. Yet in the case of John Doe, which is materially identical with these cases, the prosecution offers a deal that includes a prison sentence or refuses any plea arrangement altogether. Now consider that to defendants charged with negligent vehicular manslaughter who have no prior traffic convictions, the prosecution routinely offers a one-year sentence, yet in the case of Jane Doe, whose circumstances are materially not different, it offers two years or no plea arrangement at all.

Under existing law, neither John nor Jane has any means of challenging such a decision, even if it is arbitrary. Prosecutorial discretion is almost absolute: a prosecutor who happens to dislike the defendant or is antagonistic because of the defendant's group affiliation or political opinions, or is simply harsher than his colleagues, may lawfully offer an excessively severe plea or refuse to negotiate entirely. Conversely, an offer may be unusually lenient merely because the prosecutor is a former law-school friend of the defense counsel. The current system imposes no constraint on the prosecution and grants no right to the defendant. I propose that the plea offer should not depend on

prosecutorial whim but constitute a right grounded in the principles of equality and proportionality, in the right to due process, and in the duties of fairness and good faith of the prosecution.

In my previous writings on plea bargaining, I focused primarily on the phenomenon of wrongful convictions arising from plea bargains and proposed safety solutions.⁷ The present article concerns *all* defendants, including those who are guilty. Even the guilty are entitled to fairness and equality of treatment.⁸ In the many studies and judicial decisions I have reviewed, mainly from the US and Israel, I came across many concerns that plea bargains may be too lenient, but none that they may be too harsh. These concerns reflect the mistaken assumption that as long as the punishment remains below the statutory maximum, and certainly if it is lighter than what might be the outcome of a full trial, it cannot be considered excessive. Based on the principles of equality and proportionality, I explain below why that assumption is wrong.

The present article argues and substantiates a defendant's right to receive a fair plea-bargain offer from the prosecution. It lays down its theoretical, moral, and normative foundations, and suggests practical mechanisms for recognizing and enforcing this right: enshrining it in legislation; recognizing it judicially as a key expression (at least, as a practical matter) of the right to due process; regulating plea-bargaining practice by statute (or case law) by imposing limits on prosecutorial discretion and by assigning courts a more substantive role than the near-automatic approval they currently provide; requiring the prosecution to formulate and publish clear plea-bargaining policies; and publishing every plea agreement together with annual data about concluded plea arrangements, enabling courts to monitor general policy and to determine, in individual cases, whether a defendant was treated fairly or arbitrarily.

Formally, defendants possess rights in criminal proceedings—some even enshrined in the US Constitution, but because those rights apply to trials in which witnesses testify and evidence is presented, they are relevant only to the small minority of cases that reach trial. In the vast majority of cases that conclude in plea bargains, defendants effectively have no rights. Ideally, the plea-bargaining system should be abolished or at least drastically curtailed. As this is unlikely to happen, there should be at a minimum a legally enforceable right, preferably statutory, alternatively judicial, that ensures fairness in a process that has become the default mode of adjudication. Even those who

support plea bargaining may endorse recognition of such a right, as it would render current practice somewhat more legitimate.

This article is structured as follows: *Part I* describes the problematic *status quo*: what plea bargains are, what the “plea-bargaining mill” entails, the arguments for and against it, and the division of discretion between courts and prosecutors. *Part II* presents the proposed right of defendants to receive fair plea offers and the theoretical-moral basis of that right. *Part III* outlines practical means for recognizing and enforcing it. *Part IV* considers possible objections. The article concludes with a brief summary.

I. The Plea-Bargaining Mill: The Problematic Current Situation

1. Plea bargains and the plea-bargaining mill

I propose a distinction between a plea bargain and the plea-bargaining mill (or the plea-bargaining system). A plea bargain is an agreement between the prosecution and the defendant, in which the defendant agrees to plead guilty to a specific offense or offenses, and the prosecution agrees to forgo a particular offense or offenses, or a particular charge or charges, or agrees to ask the court to impose on the defendant a lighter sentence than it would probably have requested without the plea bargain.⁹ After a brief formal proceeding in which the court approves the plea bargain, the defendant pleads guilty to the agreed-upon offense, and the court convicts and sentences him, almost always in accordance with the agreement.

What I described here is a single event that has its advantages and disadvantages. The plea-bargaining mill refers to a situation in which a given legal system uses plea bargains extensively, and only rarely resorts to the traditional method of conducting a trial: hearing witnesses whose testimonies are examined and presenting evidence before the court to prove guilt or to create doubt about its existence.

How extensive is “extensive,” and how rare is “rare”? There are no fixed measures or criteria. It is possible to envision a dividing line at 50% and say that a legal system in which plea bargains are the rule and evidentiary trials the exception is a plea-bargaining mill. In any case, there is no doubt with regard to legal systems in which more than 90% of criminal proceedings follow a sequence: plea bargain → confession →

conviction.¹⁰ Today, American and Israeli criminal law systems are plea-bargaining mills.

This difference between the single instance and the system-wide practice is important because even if it is possible to point to particular cases where a plea bargain may be regarded as the lesser evil and its advantages outweigh its disadvantages, it is still necessary to examine the effect of the mill as a whole on criminal justice.

2. Arguments for and against the plea-bargaining mill

Inspired by the Kantian injunction to “act only according to that maxim whereby you can at the same time will that it should become a universal law,”¹¹ I propose not to focus on the possibility that a particular plea bargain serves the accused and the public interest, but rather to examine whether the broad phenomenon of plea bargaining is normatively justified.

The central argument in favor of the plea-bargaining method is efficiency.¹² Because its cost is much lower than that of an evidentiary courtroom trial, and because to enforce criminal law effectively, the enforcement system must obtain a large number of convictions, the efficient way to do so is through plea bargaining. The plea-bargain method is efficient and cheap.¹³ It saves prosecutorial resources, which can then be allocated to additional cases.¹⁴ Indeed, the prosecution does not have the resources needed to conduct evidentiary trials for all defendants.¹⁵

Alongside the central argument of efficiency, additional advantages, albeit less central, have been attributed to plea bargains in the case law and academic literature, such as shortening the time between the offense and the legal outcome.¹⁶ The advantages for the defendant include avoiding a protracted, stressful, and costly criminal proceeding,¹⁷ an idea encapsulated in the phrase “the process is the punishment.”¹⁸ Another argument concerns the choice given to the defendant, between admitting guilt as part of a plea bargain and going to a full trial. The choice should be based on a rational assessment of the expected punishment in each track: the likelihood of a conviction (high in a full trial, but contingent upon the circumstances of the case; 100% in a plea bargain, almost by definition) multiplied by the expected sentence in each track.¹⁹ Even the very act of

dialogue between the prosecution and the defendant regarding the agreed-upon sentence may be seen as an advantage.²⁰

The central argument against the plea-bargaining system is that, in the absence of a serious inquiry into whether the defendant indeed committed the offense attributed to him, and certainly in the absence of proof of guilt beyond a reasonable doubt, the plea-bargaining system leads, in addition to many convictions of the guilty, to numerous convictions of the innocent, whose choice to confess to an offense they did not commit generally stems from their fear of being convicted of a more serious offense despite their innocence.²¹ This fear intensifies in light of the determined stance of the police and the prosecution, which is reflected in the very filing of an indictment at the conclusion of the investigation; and given the tempting gap between the sentence expected following a conviction after a full evidentiary hearing and the sentence offered within the framework of the plea bargain.²² Additional incentives for accepting the plea bargain are the harsh legal process,²³ which often involves detention until the end of the proceedings, the low rate of acquittals, and the pressures exerted on defendants to plead guilty by prosecutors, defense counsels, and even judges.²⁴ The concern is not merely theoretical, but has been shown to materialize frequently, through DNA comparisons conducted as part of the American Innocence Project, as well as in many additional studies worldwide.²⁵

In American legal scholarship, vastly different characterizations of the plea bargain exist: a contract,²⁶ a compromise,²⁷ torture,²⁸ and a disaster.²⁹ In my view, when the defendant is guilty, characterizing the plea bargain as a contract, a compromise, or a compromise-contract is appropriate. But when the defendant is innocent, it is a matter of torture that leads to disaster. In the Middle Ages, the accused was forced to choose between physical torture and confession. Modern torture is manifested in forcing the accused to choose between insisting on his innocence and risking a mistaken conviction at the end of a trial based on the evidence,³⁰ often involving detention until the end of the proceedings and a subsequent severe sentence, or confessing to an offense the defendant did not commit, with a less severe sentence. The disaster is the false confession of an innocent person and the subsequent conviction, stigma, and punishment, often including imprisonment.

Mainly because of the phenomenon of wrongful conviction of innocent people within the plea-bargaining framework,³¹ my position is that the plea-bargaining system should be abolished, and we should return to evidentiary trials, where an effort is made to uncover the truth and to do justice. But this is not a realistic option for the near future, given the broad support that the plea-bargaining mill enjoys from all the key actors in the criminal process: prosecutors, defense attorneys, and judges.³² Elsewhere, I applied the advanced System Theoretic Accident Model and Processes (STAMP) safety model to the plea-bargaining system and proposed imposing constraints on the criminal justice system to confront the hazards of a plea bargain and a confession leading to the conviction of an innocent person. I also suggested control mechanisms for enforcing the necessary constraints on the criminal justice system.³³ The present article concerns not only innocent defendants but also guilty ones, and proposes recognizing the defendant's right to receive a fair offer for a plea bargain from the prosecution.

Returning to the disadvantages of the plea-bargaining system and the arguments against it. Plea bargains create inequality in sentencing,³⁴ whether we compare those who entered into a plea bargain with those who chose to conduct a full evidentiary trial; those who confessed without a plea bargain and those who did so as part of a plea bargain; or different defendants who received different plea-bargain offers, and even those who received no offer at all. Plea bargains harm the search for truth because the court forgoes inquiring into it and is satisfied with approving the plea bargain.³⁵ They grant the prosecution excessive power because it decides whether to file an indictment, which offenses the defendant will be charged with, which offenses the defendant will be convicted of, and what his sentence will be.³⁶ They erode the moral meaning of a genuine confession because it is no longer possible to distinguish it from a confession motivated by considerations of utility.³⁷ They undermine the publicity and transparency of the criminal process, and implicitly, public confidence in the judicial system.³⁸ They hurt the feelings of crime victims.³⁹ They harm due process directly, regarding the case that is the subject of the plea bargain, and indirectly, regarding other cases, where defendants who insist on their innocence go through a trial, and if convicted, are punished with excessive severity.⁴⁰ Plea bargains lead to over-criminalization, to conducting unnecessary proceedings because of the low cost of prosecution, and to the failure to filter out weak cases, and instead attempting to obtain any conviction at all.⁴¹ Finally, plea bargains force defendants guilty of a certain offense to confess to an

offense they did not commit based on “facts” that are untrue, harming the honesty of the criminal process, contaminating it, and humiliating the defendant.⁴²

Regarding the (im)moral character of plea bargaining, note that, as Dervan argued, plea bargains developed in the US at the beginning of the 20th century and were plagued by prosecutorial and judicial corruption, with judges accepting bribes in exchange for lenient sentences.⁴³ Initially, courts in the US and Israel (which adopted the plea-bargaining model) regarded plea bargains with aversion. The US Supreme Court stated in this regard: “Justice and liberty are not the subject of bargaining and barter.”⁴⁴ In Israel, in a ruling from the early 1970s that served for decades as the leading precedent, the justices deemed the practice morally defective and, at most, a regrettable but necessary act.⁴⁵ Kenneth Kipnis compared the plea bargain to a situation in which a professor tells a student that he reviewed only the first page of the student’s paper and considers it poor; therefore, without bothering to read the rest, he is willing to give the student a grade of B, and the student agrees, foregoing the possibility of receiving an A after proper review of the paper. The plea-bargaining system embodies systemic as opposed to accidental injustice.⁴⁶

3. Who are the decision makers? Judicial vs. prosecutorial discretion

My proposal to establish a right for the defendant to receive from the prosecution a fair plea offer is intertwined with judicial discretion regarding plea bargains both retrospectively and prospectively:

Judicial discretion is limited → recognition of a right to a fair offer is required → broad judicial discretion will be needed.

There is no dispute that a plea bargain is subject to court approval,⁴⁷ and the court is indeed authorized to impose on the defendant a sentence that differs from the one agreed upon, whether harsher or more lenient.⁴⁸ Yet the prosecution enjoys enormous discretion in shaping the terms of the plea bargain, and in practice, judges approve almost all plea bargains, almost automatically. Judicial discretion is so limited, and prosecutorial discretion so broad (and generally used as leverage to pressure defendants to plead guilty),⁴⁹ that the decisive actor in most criminal proceedings is not the judge but the prosecutor. A defendant who agrees to enter into a plea bargain effectively

relinquishes the rights intended to ensure due process, including rights enshrined in the constitution, and releases the prosecution from the obligation to prove guilt beyond a reasonable doubt, despite this being the key mechanism for preventing wrongful convictions.⁵⁰ Indeed, the prosecution is exempt from proving guilt with any level of probability.

Current mechanisms for preventing baseless prosecutions, including grand juries and preliminary hearings, are ineffective.⁵¹ Grand jury proceedings, held without the participation of the defendants and their legal counsel, are not headed by a judge. Prosecutors need to show only probable cause, reminding one of the jibe, attributed to a judge, that a prosecutor can get a grand jury to “indict a ham sandwich.”⁵²

The proposed right to receive a fair plea offer is essential to a fair criminal process. At the same time, it is also necessary to revise the case law or the statute itself and impose a far more significant role on the court than the almost mechanical and nearly automatic approval of plea bargains that is currently prevalent. The court needs far greater discretion than it currently exercises.⁵³

I wish to express particular reservation regarding one of the considerations that courts, for some reason, accept as a legitimate prosecutorial consideration in deciding to enter into a plea bargain: *evidentiary difficulties in the case*.⁵⁴ If the prosecution has difficulty proving that the defendant committed the offense, this means that it lacks evidence establishing their guilt. If it lacks such evidence, how are we to know that the defendant indeed committed the offense? In the absence of a direct line to God, the only way for us mortals to know whether the defendant committed the offense is through admissible and reliable evidence proving guilt. In the absence of such evidence, the prosecution ought not to file an indictment, in the hope that it might intimidate the defendant and then entice him into entering a plea bargain and pleading guilty, which will almost automatically lead to conviction and punishment. I find it perplexing that courts approve plea bargains with defendants against whom there is insufficient evidence establishing that they committed the offense. A guilty plea offered under the pressure of an indictment and within the framework of a plea bargain does not indicate that the defendant committed the offense.

II. The Defendant's Right to Receive a Fair Plea-Bargain Offer from the Prosecution

1. The offer

I propose that, so long as the plea-bargaining system (or mill) remains in force, it is necessary to establish a *right* for the defendant to receive from the prosecution a fair plea-bargain offer, which would impose a corresponding *duty* upon the prosecution. This right would be grounded in the principles of equality and proportionality, in the right to due process, and in the duties of fairness and good faith of the prosecution. The right would be enshrined in statute or case law and enforced through the legal mechanisms proposed below. Here, I focus on the content of the right.

The defendant's right is that the prosecution treat him equally with defendants charged with a similar offense under materially similar circumstances and offer him a plea-bargain under the same conditions. A plea-bargain offer should not be a question of prosecutorial benevolence but should become, at least as a practical matter, the key right of defendants, given that the vast majority of them are convicted based on a plea bargain.

Without such a right, most rights of the defendants are hollowed out because most criminal proceedings end up in a plea bargain rather than a full trial, where defendants' rights are supposed to be upheld. Unless we recognize the right to a fair plea-bargain offer as part of due process, the right to a fair trial applies only to 3% of criminal proceedings in the US federal system and 6% in the states systems; for all other criminal proceedings, the US Constitution becomes irrelevant.⁵⁵

A fair offer does not necessarily mean a lenient one, or any offer at all, for that matter: if, for example, the standard practice in espionage cases is that the prosecution offers no plea bargain but instead asks the court to hear witnesses and examine the evidence, under the principle of equality, the defendant will receive no offer.

The prosecution is prohibited from inflating the indictment by including offenses, charges, or "facts" whose purpose is to pressure the defendant during plea negotiations. Such artificial inflation amounts to extortion using threats.⁵⁶ The degree to which the offer of the prosecution conforms to standard practice should be assessed in relation to a realistic and fair indictment, not an inflated one. The prosecution is also forbidden to

request pre-trial detention, or its extension, for the purpose of pressuring the defendant to plead guilty as part of a plea bargain. Such detention also amounts to extortion using force.

In the agreed-upon indictment, reached after amendment of the original charges, the prosecution may not include “facts” that the defendant expressly denies. Under current practice, in exchange for leniency, defendants are forced to admit to “facts” that are untrue. This degrades the defendants and taints the judicial process.⁵⁷

2. Theoretical, normative, and moral foundations of the proposed right

I propose establishing the right to a fair offer on four cumulative foundations: the principle of equality; the principle of proportionality; the right to due process; and the heightened duties of fairness and good faith of the prosecution.

The *constitutional*⁵⁸ *principle of equality* requires identical, or at least similar, treatment of defendants who committed similar offenses under materially similar circumstances. Its violation results in impermissible discrimination. If, for example, the prosecution generally offers defendants charged with negligent vehicular manslaughter, who have no prior traffic offenses, a plea agreement calling for a one-year term of imprisonment, it would be unjust to offer a harsher penalty to a defendant whose case does not materially differ from those cases.

The principle of equality is commonly violated today for a variety of reasons:⁵⁹ the prosecution does not establish detailed policies regarding plea-offer practices and does not make such policies public. There is no formality, structure, documentation, or transparency. Defendants and defense counsels who do not negotiate effectively are at a disadvantage, possibly without knowing it. The prosecution may discriminate against defendants based on group affiliation. The quality of the relationship between the prosecutor and the defense counsel may also play a role, including collegiality⁶⁰ or the dynamics of “repeat players,” who may reach understandings based not only on the circumstances of the case at hand but also on the presence of other cases in which they seek agreement. A particularly strict prosecutorial philosophy regarding appropriate punishment may likewise lead to harsher outcomes for defendants who happen to fall under that prosecutor’s authority.

The balance of power between the parties is inherently unequal: the prosecution, supported by the police, is far stronger than the defendant, even when the latter is represented. For example, the prosecution sets the opening position in the negotiation by drafting the indictment; and whereas the prosecution can take a long time between the conclusion of the investigation and the filing of an indictment, the defendant must prepare for trial immediately after the indictment is filed. In the worst case, this power imbalance results in false confessions by innocent defendants; in the less harmful case, it results in an unduly severe punishment. And yet, the case law is concerned only with the possibility, however real, of sentences that are too lenient,⁶¹ and shows no concern at all for the possibility of sentences resulting from plea bargains that are too severe. Finally, a prosecutor who arbitrarily refuses to negotiate with a certain defendant or defense attorney violates the principle of equality.⁶²

The *principle of proportionality*, an overarching principle in nearly all areas of life,⁶³ and one of the foundational principles of penal law,⁶⁴ assumes tremendous importance in criminal sentencing. But the Israeli Penal Code, whose offenses section is essentially a Hebrew translation of the Criminal Code Ordinance of 1936 from the British Mandate period, augmented by subsequent patches, does not accomplish it, although it formally embraces the principle of proportionality. For the most part, the penalties it prescribes are excessive and lack adequate internal relativity. A key amendment to the Penal Code (Amendment No. 113, “Structuring Judicial Sentencing Discretion”, 2012) was an attempt by the Israeli parliament (*Knesset*) to guide judges in imposing punishment. Yet most sentences are imposed outside that regulated judicial domain, in the unregulated realm of plea bargaining.

For many offenses, American statutory penalties are also excessive, and they shape plea negotiations in ways that produce sentences disproportionate to the seriousness of the offense.⁶⁵ So long as the plea-bargaining mill continues, the proposed right to a fair offer is not recognized, and judicial review of plea agreements by the judiciary remains lax, the principle of proportionality will continue to be violated.

Given the dominance of plea bargaining and the absence of the right proposed here, the *constitutional⁶⁶ right to due process* largely disappears from the overwhelming majority of criminal proceedings. The procedural protections afforded to defendants, which are intended to serve as guarantees of justice and together comprise the right to

due process, include, among others, the right to remain silent, cross-examine the prosecution witnesses, bring defense witnesses, and present evidence before a court of law. The plea-bargaining mill neutralizes these rights.

The *heightened duties of fairness and good faith of the prosecution* derive from the fact that it serves as an arm of the elected government, which should act as an agent of the public. It is therefore obligated to represent us properly, which includes treating defendants fairly. As part of the social contract, citizens consent to grant the state the authority to prosecute them criminally, but that consent presupposes that the prosecution will act fairly. A prosecution that inflates an indictment to coerce a confession does not act fairly. A prosecution that “sets up” defendants and sells them a poor plea deal that disadvantages them relative to similarly situated defendants, presenting it all along as a favorable agreement, acts deceitfully, not fairly.

Finally, although the proposed right is presented here as resting on four *cumulative* foundations, equality, proportionality, due process, and the heightened duties of fairness and good faith of the prosecution, these foundations, which constitute core pillars of both constitutional law and criminal law, may also be viewed as *alternative* ones, where any one of them would suffice to ground the proposed right.⁶⁷

III. Practical Ways to Recognize and Enforce the Proposed Right

Several possible paths are proposed here. They partly overlap, and therefore need not all be adopted simultaneously.

1. Establishing the right by statute

This is the preferred course. The plea-bargaining procedure should be regulated by statute, and the defendant’s right defined as part of it. Corresponding to the right, an obligation is imposed on the prosecution. Below is a possible formulation for a statutory provision:

Section X: The right of the defendant and the duty of prosecution in plea bargaining

A. The Attorney General shall determine and publish the prosecutorial policy regarding plea bargains annually. The policy shall address both general principles and specific policies for typical categories of offenses, distinguishing between offenses based on the

protected interests involved (human life, bodily integrity, liberty, autonomy, freedom of choice, privacy, property, state security, etc.). For common offenses, a given policy shall be determined and published.

B. The following details shall be published on the website of each prosecuting authority, in a way that ensures transparency regarding the exercise of discretion in making a plea bargain decision, but does not identify the defendant or the victim:

- (1) The substance of the offense and its circumstances; a description of the facts to which the defendant admitted; and the statutory provisions cited in the plea agreement.
- (2) The content of the plea agreement, together with the original indictment, the amended indictment (if any), the plea-bargain agreement, and the reasons for entering into the agreement.

C. The Attorney General shall collect from all prosecuting authorities the data on plea bargains concluded and publish the data in an annual report, distinguishing between different types of offenses and paying specific attention to each offense defined by law and frequently enforced.

D. A defendant is entitled to receive from the prosecution a fair plea-bargain offer in accordance with the accepted practice for the offense attributed to him, committed under substantially similar circumstances.

E. The prosecution shall treat defendants equally, fairly, and in good faith, including in its decisions whether to offer a plea bargain in a given case and what agreement to offer.

F. When approving a plea bargain, the court shall verify the following:

- (1) The defendant is represented, understands the agreement, and admits voluntarily (to this end, the court shall interview the defendant scrupulously);
- (2) Significant evidence exists aside from the confession, based on the complete investigative file, that the defendant indeed committed the offense;
- (3) The agreement is fair (for this purpose, the court shall receive from the prosecution and review the documentation of all stages of the negotiation, as specified above in subsection B);

- (4) The agreed sentencing range upholds the principles of equality and proportionality, compared with the policy published by the Attorney General regarding plea bargains (pursuant to subsection A) and compared with the data on plea bargains concluded in the past year (pursuant to subsection C).

2. Recognizing the right in case law as part of the constitutional right to due process

If ever enacted, legislation may take many years; therefore, I propose that the courts immediately recognize, in their rulings, the defendant's right to receive a fair plea-bargain offer from the prosecution. This can be accomplished both through a general declaration and by scrutiny of each plea agreement presented for judicial approval, exercising real and substantive judicial review.

Why should the courts formulate such a right in case law rather than leave the matter to the legislature? First, it is the courts that made possible, indeed, encouraged the formation of the plea-bargaining mill. Therefore, they bear special responsibility for the problematic current situation. Second, if the courts are committed to a due process and not merely to crime control⁶⁸ (or even "war on crime") the way to restore the due process that has vanished from approximately 90% of criminal trials is to recognize the proposed right as an integral component of the defendant's constitutional right to due process, together with the important changes flowing from it.

3. The effect on sentencing of violating the right

A distinction must be made between two possible paths, each one requiring an appropriate remedy.

The first path applies when, despite having received an unfair plea offer from the prosecution, the defendant nevertheless accepted a plea deal, presumably an unfair one. In this case, if the proposal advanced in this article is accepted and the defendant's right to receive a fair plea offer is enshrined in legislation or recognized in case law, the court will conduct a proper judicial review before approving the plea bargain and align the

punishment with the level commonly accepted in plea bargains for similar offenses committed under comparable core circumstances.

The second path concerns a situation in which the defendant received an unfair offer that he could not reasonably accept, or the prosecution, contrary to the common practice for similar offenses under comparable core circumstances, made no plea offer at all, and a full evidentiary trial was being conducted. I propose that if the defendant raises this claim at the beginning of the trial, substantiates it, and expresses a willingness to plead guilty if the sentence is set at the level commonly applied in plea bargains for similar offenses under comparable core circumstances, and if the court accepts the claim, it should stop the evidentiary trial and impose the customary sentence. By doing so, the court would impose on the prosecution the standard conditions of a plea bargain and prevent discriminatory treatment of the defendant.

How can the defendant substantiate such a claim, and how can the court determine whether to accept it? If the present proposal is adopted and the prosecution is required to publish details of every plea bargain, and the Attorney General is required to publish a detailed plea-bargaining policy and summaries of plea-bargain data from the preceding year, the determination will not be difficult. Transparency will cast a bright light on the shadowy world of plea bargains.⁶⁹

Minor deviations from the customary sentence should not be regarded as a breach of the duty owed by the prosecution to act fairly and in good faith in accordance with the principles of equality and proportionality. At the same time, discrimination is not necessarily intentional and can result from negligence or an error in prosecutorial discretion; even if the error was made in good faith, without improper motive on the part of the prosecution, it still remains discriminatory.

I further propose that even if a full evidentiary trial has been conducted and the defendant has been convicted, the defendant may still raise the claim of discriminatory treatment at the sentencing stage, and the court, in determining the sentence, should take into account the fact that the prosecution failed to offer the defendant a fair and customary plea bargain. In such a case, the court should impose a sentence similar to the customary sentence in plea-bargain cases. This would do justice for the defendant and guide the prosecution in fulfilling its duty toward future defendants.

IV. Possible Objections to the Proposed Right

1. Harm to deterrence due to less severe sentences

One possible objection is that recognizing the defendant's right to receive a *fair* plea offer from the prosecution will cause plea-bargained sentences to become less severe, diminishing deterrence. I emphasized the word *fair* because it is central to the response: if the agreement is fair, the prosecution must offer it to the defendant; as a moral society, we must not impose unfair punishments that the prosecution extracted by unfair plea bargains, even if such punishments produce greater deterrence.

Moreover, empirical studies show that harsh punishments, primarily long terms of imprisonment, do not produce greater deterrence than moderate punishments of shorter terms. This was demonstrated in a report by the US National Academy of Sciences (2014),⁷⁰ by the British Academy (2014),⁷¹ and in Israel, in the report of an expert committee chaired by Justice Dorner (2015).⁷²

2. Harm to deterrence, as fewer plea bargains will cause the system to collapse

A second possible objection argues that recognizing a defendant's right to receive a fair plea offer and imposing a corresponding prosecutorial duty will make plea bargains less attractive to the prosecution. As a result, the prosecution will be forced to conduct more evidentiary trials, and the court system may collapse under the increased load. Indeed, in certain jurisdictions the demands placed on judges are already enormous, even with the current level of plea bargaining.

The fear of the collapse of the system is not new and does not depend on this proposal. It is raised whenever someone suggests abandoning the plea-bargaining mill and returning to a genuine fact-finding process, in which witnesses are heard and evidence examined. The claim is that, given the current level of resources invested in the courts, the system cannot afford to give every defendant the opportunity for a full trial. If every defendant insisted on a full trial, the judicial system would need vast additional resources: more judges, staff, and administrative support.⁷³ Without these resources and without plea bargaining, the system is said to be headed for collapse.

Such warnings are regularly invoked, but in my view, there is no reason for concern. Plea bargaining, which makes possible many quick and easy convictions,⁷⁴ has contributed to over-criminalization. As Dervan has observed, the relationship between plea bargaining and overcriminalization is reciprocal.⁷⁵ On the one hand, plea bargaining has enabled the system to process an ever-increasing volume of cases; on the other hand, the proliferation of criminal proceedings has rendered the system incapable of adjudicating guilt through trials alone, absent plea agreements. Criminal law has thus expanded to monstrous proportions, permeating vast domains of social life. The erroneous prevailing assumption is that virtually every sphere of human activity can be regulated through criminal law, notwithstanding its original and far more limited purpose of addressing only the most serious antisocial conduct. As criminal liability becomes ubiquitous, the stigma and moral condemnation traditionally associated with a criminal conviction inevitably erode, as an ever-growing segment of the population is labeled criminal.⁷⁶

In the US, UK, and Israel, there has been growing recognition that increasing the number of convictions and imposing lengthy prison terms does not meaningfully reduce crime.⁷⁷ Even if the plea-bargaining mill were abolished, not merely reduced, no collapse is expected. The prosecution would focus on serious offenses supported by solid evidence, and would not target citizens for trivial infractions or seek convictions through plea bargains when it lacks sufficient proof.

3. Accepting the proposal would increase the rate of plea bargains

Another possible objection is that if the present proposal is adopted, the offers to defendants by the prosecution will become more favorable, more defendants will enter plea bargains, and therefore, the rate of plea bargaining will *increase*, which is the opposite of what this article seeks. These last two arguments (2 and 3) attack the proposal from opposite directions. They cannot both be correct because the rate of plea bargaining cannot simultaneously decrease and increase.

Nevertheless, let us assume for a moment that the present objection has merit. If such an argument had been raised in the 20th century, when plea bargain rates were low, it may have been taken seriously. But in the 21st century, when over 90% of criminal cases end in convictions following plea bargains, the fear that fair prosecutorial offers

will cause a significant *increase* in plea bargaining rates is unrealistic. And even if it were realistic, if the offers are fair, and as a result the bargains and sentences are reasonable, this should be seen as an advantage rather than a drawback.

4. Accepting the Proposal May Lead to Harsher Sentencing

Another possible counterargument is that adopting the proposal would result in harsher sentencing, due to the interaction between prosecutorial policy and the principle of equality. The prosecution, reluctant to commit to lenient penalties, may adopt and publish stricter policies; the principle of equality would then operate to elevate sentencing across the board, whereas under the current system some defendants benefit from more lenient sentences.

First, this counterargument plainly contradicts the first claim discussed above, such that at most one of them can be correct. *Second*, even if the argument holds, a prosecutorial shift toward greater severity would likely reduce defendants' willingness to enter guilty pleas, thereby compelling the prosecution to moderate its positions. *Third*, given the limited capacity of correctional facilities, both prosecutors and courts would, in any event, be required to align sentencing levels with the practical capacity for incarceration. This practical constraint constitutes, and will continue to constitute, an upper bound on the use of custodial sentences.

5. Accepting the proposal would undermine negotiation

The claim is that if the prosecution is required to offer each defendant a fair plea bargain, there will be no room left for negotiation. Offers would become "take-it-or-leave-it," and agreements would mirror the offers. In my view, there is nothing wrong with such a situation. On the contrary, traditional haggling will be replaced by fair and transparent pricing, in accordance with appropriate regulations.

Similarly, when discussing the possibility of abolishing plea bargaining altogether, Schulhofer distinguished between two possibilities: first, eliminating the incentives currently offered to defendants in exchange for their guilty pleas; and second, eliminating the negotiation process, so that incentives would be set by legislation or by

judicial rulings and would not be subject to bargaining.⁷⁸ Indeed, if the plea-bargaining mill cannot be rolled back entirely, not because the system would collapse, but because too many actors support it, at least the negotiation component should be abolished. “Justice and liberty are not the subject of bargaining and barter.”⁷⁹

6. The proposal is unnecessary: Under the “shadow of trial” theory, plea-bargain sentences already mirror trial outcomes

As noted, the central argument advanced in support of plea bargaining is efficiency. The claim is that the state saves the substantial resources required for a full evidentiary trial, and that defendants may benefit by rationally comparing the expected sentence after a trial to the expected sentence in a plea bargain. A common assumption of supporters of plea bargaining is that bargains are struck “in the shadow of trial” and are based on an accurate assessment of the likely outcome of an evidentiary trial.⁸⁰

First, there is an opposing view: in reality, it is the few evidentiary trials that are conducted in the shadow of the many plea bargains.⁸¹ *Second*, as noted, when the defendant waives the right to a full trial, he waives the requirement of proof beyond a reasonable doubt, which is the central mechanism today for preventing wrongful convictions.⁸² *Third*, conflicts of interest and “principal-agent” problems may arise.⁸³ for defense counsel, convenience and maximizing income often create incentives to persuade the defendant to accept a plea bargain. This may result, in the worst case, in the conviction of an innocent person, or in the less harmful case, in persuading a guilty defendant to accept a punishment harsher than the norm. *Fourth*, prosecutors may also have personal incentives to seek a plea bargain, in particular, career advancement.⁸⁴ Just as numerous easy convictions appear attractive, obtaining harsh sentences in plea bargains might also be viewed as an achievement. *Fifth*, it is unclear why we should rely on the “shadow of trial” theory and forgo meaningful judicial review when citizens’ liberty is at stake. *Sixth*, even if the sentence offered in a plea bargain is favorable to the defendant compared with the expected sentence after trial, the sentence may still be excessively harsh for a plea bargain and inconsistent with the principles of equality and proportionality, with the right to due process, and with the duties of fairness and good faith of the prosecution.

Conclusion

This article proposed a theoretical, moral, and normative foundation for recognizing a defendant's right to receive a fair plea offer from the prosecution, accompanied by a corresponding prosecutorial duty. The article also outlined practical mechanisms for recognizing and enforcing this right. Even proponents of the plea-bargaining system may support recognition of such a right, as it may improve and legitimize prevailing practices. I call on legislators to enshrine the proposed right in statute, alongside a comprehensive framework for regulating plea bargaining. But legislation is a lengthy process, therefore, I expect judges, who have encouraged the plea-bargaining mill, to temper it by recognizing the proposed right in case law. The principles of equality and proportionality, the right to due process, and the duties of fairness and good faith of the prosecution demand no less.

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¹ *Missouri v. Frye*, 566 U.S. 143 (2012); *Lafler v. Cooper*, 566 U.S. 170 (2012) (“the reality that criminal justice today is for the most part a system of pleas, not a system of trials”).

² The Israeli criminal justice system is grounded in the common law tradition. It is adversarial in nature, with primary responsibility for the conduct of the trial resting with the parties. Within such a framework, plea bargaining has flourished. Nevertheless, significant differences distinguish the American and the Israeli systems. Israel does not employ juries, and all decisions are formally rendered by professional judges (“formally,” because in the context of plea bargaining, decisive power in practice lies with prosecutors). Moreover, unlike their American counterparts, Israeli prosecutors are authorized to appeal acquittals. Despite these differences, Israeli criminal procedure has been substantially influenced by American law, particularly through the adoption of an extensive plea-bargaining regime. It is therefore striking that in both systems, notwithstanding their heavy reliance on plea agreements, prosecutorial discretion remains largely unfettered, while defendants enjoy no recognized right to receive either a fair plea offer or, indeed, any plea offer at all.

³ About 90% percent of convictions are obtained through plea bargains. Only about 5% of criminal proceedings conclude with a verdict after evidentiary hearings, although not all the remaining cases end in plea bargains. For similar estimates see the following studies: Walter, “*Judicial Review of Plea*,” 405 (n. 6); Mann, “*Administrative Criminal Procedure*,” 219, 237, 265; Gazal, Galon & Wintschel-Margel, “CONVICTION ACQUITTAL RATES,”; Gazal & Tor, “*Effect Innocence Plea Bargains*,” 116.

⁴ I find it important to preserve the original expression, “plea bargain,” rather than using the term “arrangement,” which hides its true meaning; if the bargain contains any arrangement, it pertains to confession, conviction, and sentencing, not to the plea itself. Cf., Orwell’s *Newspeak* in 1984.

⁵ *Lafler v. Cooper*, 566 U.S. 170 (2012); *Missouri v. Frye*, 566 U.S. 143 (2012); Under current law, the prosecution is “under no obligation” to engage in any type of bargaining. See Bradley, *United States*, in “CRIMINAL PROCEDURE WORLDWIDE,” 543. For a suggestion of relevant considerations that a prosecutor should consider, see Juneja, “*Responsible Plea-Bargaining Prosecutors*,” 600. See also Alkon, “*Hard Bargaining*,” 406-413 (2017).

⁶ On the wide discretion that the Israel Supreme Court leaves to the prosecution in matters of plea bargains, see, for example, the following reviews: Kremnitzer & Levanon, “*Judicial Review Plea Arrangements*,” 291-301; Mann, *supra* note 2, pp. 242-256; and Walter, *supra* note 2, pp. 407-413.

⁷ Sangero, “*Safety Plea Bargain's Hazards*,” 301; SANGERO, “SAFETY FALSE CONVICTIONS,” 207-221 (2016).

⁸ Kitai, “*Protecting the Guilty*,” 1163.

⁹ McDonald, “*Plea Negotiation Coercive Justice*,” 385 (discussing different definitions of “plea bargains”).

¹⁰ See *supra* notes 1 (the American criminal law) and 3 (the Israeli criminal law).

¹¹ KANT, “GROUNDWORK METAPHYSICS OF MORALS.”

¹² Colquitt, “*Ad Hoc Plea Bargaining*,” 704-705. See also: Landes, “*Economic Analysis of Courts*,” 164.

¹³ Gifford, “*Control of Prosecutorial Discretion*,” 44.

¹⁴ *Brady v. United States*, 397 U.S. 752.

¹⁵ Bar-Gill & Ben-Shahar, “*Prisoners' (Plea Bargain) Dilemma*,” 737; Gazal-Ayal, “*Partial Ban Plea Bargains*,” 2349.

¹⁶ *Brady v. U. S.*, *supra* note 13.

¹⁷ *Id.*

¹⁸ FEELEY, “THE PROCESS IS PUNISHMENT.”

¹⁹ Douglass, “*Brady and Plea Bargaining*,” 490.

²⁰ Kitai-Sangero, “*Plea Bargaining as Dialogue*,” 63.

²¹ Covey, “*Reforming Plea Bargaining*,” 1239; Gazal-Ayal, *supra* note 15, at 2295.

- ²² Schulhofer, *"Plea Bargaining as Disaster,"* 1979; Dervan, *"Plea Bargaining and Overcriminalization,"* 645; Alschuler, *"Prosecutor's Role Plea Bargaining,"* 50; Alschuler, *"Alternatives to Plea Bargaining,"* 952.
- ²³ Etienne & Robbennolt, *Apologies and Plea Bargaining,* 311.
- ²⁴ Langbein, *"Torture and Plea-Bargaining,"* 3; Alschuler, *"Defense Attorney's Bargaining Role,"* 1191–1192; Lindstone, *"Human Rights Criminal Trial,"* 83–84; Gifford, *supra* note 12, at 49–50; Klein, *"Due Process - Plea Bargaining,"* 1401–1402.
- ²⁵ See The Innocence Project website <https://innocenceproject.org/>; see research based on its findings and data, e.g.: Garrett, *"Judging Innocence,"* 74; see other research, e.g. ROMAN, WALSH, LACHMAN & YAHNER, *"POST-CONVICTION DNA TESTING,"* Prosser, *"Reforming Criminal Discovery,"* 557–558. For a description of exposed cases of wrongful convictions obtained through plea-bargains, especially in the United States but also in other countries, including Israel, see: Sangero, *supra* note 6, at 313–318.
- ²⁶ Scott & Stuntz, *"Plea Bargaining as Contract,"* 1909.
- ²⁷ Easterbrook, *"Plea Bargaining as Compromise,"* 1969.
- ²⁸ Langbein, *supra* note 23.
- ²⁹ Schulhofer, *supra* note 21.
- ³⁰ Empiric studies based on the Innocence Project's findings, point to a very high false-conviction rate. According to Michael Risinger's research, the rate of false convictions is 5 percent for the most serious crimes – rape and murder: Risinger, *Empirically Wrongful Conviction Rate,* 761. Other studies reveal a notable rate of convictions of innocent, estimated to range between 5% and 10%. See: SANGERO, *"SAFETY FROM FALSE CONVICTIONS,"* 2–14; Sangero, *"Safe Convictions,"* 379 – 381 (2019).
- ³¹ Sangero (Safety Plea-Bargain's Hazards), *supra* note 7, at 312 – 321 ("To illustrate, in cases of widespread police corruption, such as the Los Angeles Police Department Rampart scandal and Tulia scandal, in which scores of innocent defendants were charged and brought to trial, the majority of the defendants pleaded guilty." – *id.* at 317).
- ³² Scott & Stuntz, *supra* note 25, at 1909–10 ("Most legal scholars oppose plea bargaining, finding it both inefficient and unjust. Nevertheless, most participants in the plea-bargaining process, including (perhaps especially) the courts, seem remarkably untroubled by it").
- ³³ Sangero, *supra* note 6 (especially the table at the end of the article, arranged in the format of the advanced STAMP safety model).
- ³⁴ See Gifford, *supra* note 13; Bibas, *"World of Guilty Pleas,"* 1168.
- ³⁵ THOMAS, *"JUSTICE SYSTEM SACRIFICES INNOCENTS,"* 12; Crombag, *"Adversarial or Inquisitorial?"* 23.
- ³⁶ Gifford, *supra* note 13; Simmons, *"Private Plea Bargains,"* 1184–1185. see also THOMAS, *supra* note 35, at 204–05.
- ³⁷ Alschuler, *"Changing Plea Bargaining Debate,"* 662.
- ³⁸ Arenella, *"Rethinking Functions Criminal Procedure,"* 219; Acevedo, *"Ban on Plea Bargaining,"* 993 (1995); Simmons, *supra* note 36, at 1166–1167; Gifford, *supra* note 13, at 71.
- ³⁹ Gifford, *supra* note 13, at 72; Salzmann, *"People's Perceptions of Pleas,"* 124; Palmer, *Note, "Abolishing Plea Bargaining,"* 518.
- ⁴⁰ Gazal-Ayal & Tor, *"The Innocence Effect,"* 395; *Missouri v. Frye*, 566 U.S. 144 (2012) (quoting Barkow, *"Separation Powers - Criminal Law,"* 1034).
- ⁴¹ THOMAS, *supra* note 35; Pizzi, *"Vanishing Trial - incarceration Rate,"* 13. They say: "Half a loaf is better than none" – see Alschuler, *supra* note 22, at 60; Alschuler, *"Plea Bargaining and History,"* 31.
- ⁴² Mann, *supra* note 2, at 263. The author refers to this phenomenon, already in the title of his article, as 'the wrongful convictions of the guilty.' One can observe an excellent illustration of this phenomenon in the documentary film by Ofra Bikel, *The Plea* (Frontline T.V.) (the case of Charlie Gamparo).
- ⁴³ Dervan, *"Bargained Justice,"* 28.
- ⁴⁴ *Id.* at 29 (Shelton v. U.S.).
- ⁴⁵ Crim. App. 532/71 *Bachmuzki* 554, 559.
- ⁴⁶ Kipnis, *"Justice and Negotiated Plea,"* 102.

⁴⁷ Mueller, *"Make Him an Offer,"* 1041.

⁴⁸ Schulhofer, *supra* note 21, at 1994.

⁴⁹ Stith, *"Judges, Prosecutors, Discretion,"* 1422-25; Gifford, *supra* note 12; *see also* Thomas, *supra* note 32, at 204-05.

⁵⁰ Kipnis, *supra* note 43, at 106.

⁵¹ Gazal-Ayal, *supra* note 14, at 2349; Bradley, *supra* note 4, at 540-41.

⁵² Thomas, *supra* note 32, at 30, 172, 202-04.

⁵³ Seemingly, there can be potential benefits of prosecutorial discretion, such as the ability to offer a more lenient plea to a defendant who, in the informed judgment of a defense attorney trusted by the prosecutor, is highly unlikely to reoffend. But the cost-benefit calculus of relying on such individualized and informal assessments may look quite different once the relevant institutional considerations are considered. Prosecutorial discretion is exercised by an executive actor whose primary role is adversarial and whose decision-making processes are largely opaque and insulated from meaningful procedural safeguards. Judicial discretion, by contrast, is embedded within a framework structured by the separation of powers and constrained by due process requirements, including reason-giving, transparency, and the opportunity for review. For these reasons, judicial discretion is generally more institutionally reliable and normatively defensible than prosecutorial discretion.

⁵⁴ Alschuler, *supra* note 21, at 58-59; Cassell, *"Miranda's Social Costs,"* 441.

⁵⁵ Adopting my proposal should also resolve the anomaly created by the majority opinion, which Justice Scalia noted in *Lafler* and *Frye*. *See Lafler*, 566 U.S. at 175 (Scalia, J., dissenting); *Frye*, 566 U.S. at 151 (Scalia, J., dissenting). The majority justices assumed that the defendant did not have a right to receive any sort of plea-bargain offer from the prosecution, but at the same time, they held that the Sixth Amendment right to counsel extended also to the negotiations leading up to the plea deal (*Lafler*, at 156; *Frye* at 134). If this right is infringed because of ineffective counsel (as in *Lafler*), and the case goes to a full trial, on appeal, the verdict may be vacated, and the court may order the prosecution to make a new plea offer. If the right to counsel was infringed because of ineffective counsel (as in *Frye*), and the defendant is not informed of a lenient plea offer by the prosecution and later agrees to a harsher deal, on appeal, the court may vacate the verdict that gives force to the harsher plea bargain.

⁵⁶ Gifford, *supra* note 12, at 47-49; *see also* Alkon, *supra* note 4, at 406-413 (2017); Alschuler, *supra* note 21, at 85-105; Vorenberg, *"Decent Restraint Prosecutorial Power,"* 1535; Birke, *"Loss Aversion - Guilty Pleas,"* 227; Covey, *supra* note 20, at 1254-1255; Boyne, *"Procedural Economy,"* 334; Tarkington, *"Lost in the Compromise,"* 1910; LIPPKE, "TAMING PRESUMPTION OF INNOCENCE," 125; Goldstein, *"Human Dignity - Plea Bargain,"* 699.

⁵⁷ *See supra* note 39.

⁵⁸ U.S. Constitution, Amendment 14.

⁵⁹ Bibas, *"Plea Bargaining,"* 2474 - 2475.

⁶⁰ Gifford, *supra* note 13, at 62-63; Bibas, *supra* note 34, at 1168.

⁶¹ A frequent critique of plea bargains concerns that phenomenon: that prosecutors sometimes offer overly lenient deals that allow guilty defendants to avoid proportionate punishment and evade justice. I note this critique but do not engage with it here because my analysis concerns a different normative question: whether a legal system that chooses to use plea bargains must ensure that defendants are not coerced or discriminated against by unfair offers.

⁶² In the American Bar Association's Criminal Justice Standards (the ABA Criminal Justice Standards), it is established that the prosecutor may not refuse to engage in negotiations with the defendant—*see*: Mueller, *supra* note 44, at 1066. In addition, if one attempts to identify a positive aspect of plea bargaining, such as highlighting the constructive dialogue it creates between the prosecution and the defense, the Israeli prosecutor's authority to refuse to engage in a fair dialogue with the defendant becomes strikingly and disturbingly apparent. *See*: Kitai, *supra* note 19.

⁶³ Except, perhaps, in the realm of love.

⁶⁴ SANGERO, "CRITIQUE ISRAELI CRIMINAL LAW," 74 - 80.

⁶⁵ In its *Frye* decision, the U.S. Supreme Court noted this phenomenon, citing Barkow: "[Defendants] who do take their case to trial and lose receive longer sentences than even

Congress or the prosecutor might think appropriate, because the longer sentences exist on the books largely for bargaining purposes.” See *Missouri v. Frye*, 566 U.S. 134, 144 (2012) (quoting Barkow, “*Separation Powers - Criminal Law*,” 1034).

⁶⁶ U.S. Constitution, Amendments 5 and 14.

⁶⁷ There are, of course, areas of overlap between the four foundations, but each one has a unique domain.

⁶⁸ On the distinction between the two models, see: PACKER, “LIMITS OF CRIMINAL SANCTION,” 73–149 (1968).

⁶⁹ Once an adequate level of transparency has been achieved, pursuant to the foregoing legislative proposal (Sections A, B, and C), artificial intelligence could be employed by all parties - the prosecution, the defense, and the court - to process and analyze data relating to plea bargaining practices, thereby informing the determination of what constitutes an appropriate plea offer in a given case.

⁷⁰ N.A.S., GROWTH INCARCERATION UNITED STATES.”

⁷¹ BRITISH ACADEMY, “A PRESUMPTION AGAINST IMPRISONMENT.”

⁷² COMMITTEE FOR SENTENCING POLICY.”

⁷³ *Santobello v. New York*, 404 U.S. 260 (1971).

⁷⁴ Overcriminalization is frequently accompanied by law enforcement practices that prioritize what is often described as “picking the low-hanging fruit” - that is, the pursuit of many arrests involving individuals who are comparatively easy to apprehend, such as low-level drug offenders. As a result, certain groups are at times - and in some jurisdictions, routinely - subjected to heightened law enforcement scrutiny, while members of other groups engage in similar, or even more serious offenses without attracting comparable attention and thus remain outside law enforcement’s effective “radar”.

It may be argued that reducing reliance on plea bargaining would incentivize prosecutors to focus even more heavily on such “low-hanging fruit”. Yet it is reasonable to assume that public scrutiny and political accountability would not permit a prosecutorial office to systematically refrain from pursuing serious crimes, such as murder, rape, or robbery, without significant institutional consequences.

75. Dervan, *supra* note 22.

76. Kadish, “*The Crisis of Overcriminalization*,” 21; SIMON, “GOVERNING THROUGH CRIME;” HUSAK, “OVERCRIMINALIZATION;” Healy ed., “GO DIRECTLY TO JAIL.”

⁷⁷ See *supra* notes 70, 71, and 72 (respectively).

⁷⁸ Schulhofer, *supra* note 21, at 2003–2009.

⁷⁹ *Shelton v. U.S.*, *supra* note 41.

⁸⁰ Bibas, *supra* note 54.

⁸¹ Bibas, *id.* See also: Zohar, “*Trial in Shadow of Bargaining*,” 635; Zohar & Michaeli, “*Feedback Loop - Plea Bargains*,” 153.

⁸² For research and for real-world examples see Sangero, *supra* note 6; SANGERO, *supra* note 6.

⁸³ Schulhofer, *supra* note 21, at 1987–1991.

⁸⁴ Bandes, “*Protecting the Innocent*,” 437.