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A Change in the Environment of Plea Bargaining: Using the Inspiration of Administrative Procedural Safeguards Like NEPA to Add Process Protections

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A CHANGE IN THE ENVIRONMENT OF PLEA BARGAINING: USING THE INSPIRATION OF ADMINISTRATIVE PROCEDURAL SAFEGUARDS LIKE NEPA TO ADD PROCESS PROTECTIONS

I. INTRODUCTION

Plea bargaining has evolved into the most prominent way criminal justice is administered in the United States today,¹ even though it is met with general disdain in legal academic circles.² Recently, the issue of the right to effective assistance of counsel during the plea-bargaining process was raised twice before the Supreme Court of the United States, bringing the process to the forefront of national attention.³ In *Lafler v. Cooper*, the Supreme Court determined that the petitioner was prejudiced by his counsel's deficient performance in advising him to reject a plea offer and go to trial, in violation of his Sixth Amendment right to effective assistance of counsel.⁴ He was therefore entitled to be reoffered the plea

1. “[C]riminal justice today is for the most part a system of pleas, not a system of trials. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.” *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012). See also Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992) (“Most criminal prosecutions are settled without trial.”).

2. See Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652 (1981); Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43 (1988); Thomas R. McCoy & Michael J. Mirra, *Plea Bargaining as Due Process in Determining Guilt*, 32 STAN. L. REV. 887, 887–88 (1980) (“The unconstitutional conditions doctrine seems to present a serious question about the constitutional validity of the practice of plea bargaining If the right to trial without self-incrimination is a fundamental constitutional right, any state attempt to deter its exercise should violate the due process clause of the 14th amendment unless the state can demonstrate a justification sufficient to meet the stringent ‘compelling interest test.’ If the right to trial without self-incrimination is fundamental, plea bargaining should be found unconstitutional unless the state is able to show that it is the least restrictive means available to effectuate a compelling state objective.”) (footnotes omitted). See also Note, *Plea Bargaining and the Transformation of the Criminal Process*, 90 HARV. L. REV. 564, 564–65 (1977) (“Plea bargaining has provoked almost universal criticism among commentators. Some have urged its abolition, while others, recognizing the inevitability of a low-cost bargaining system, have proposed reforms to ameliorate plea bargaining’s deviations from the traditional model. Specifically, commentators have addressed such problems as the sentencing irrationalities of plea bargaining, the coercive impact of plea concessions upon the defendant, the need to regulate abuses of prosecutorial discretion, and the risk that innocent defendants will plead guilty. Commentators, however, generally have not recognized that, despite these defects, plea bargaining has several potential advantages, in addition to lower costs, over the traditional model—greater accuracy, reduction of sentencing disparities, and increased self-determination by the defendant, who is given more control over sentencing. In devising structural reforms of plea bargaining, then, it is essential not only to remedy the problems associated with plea bargaining, but also to build upon its theoretical advantages over the traditional model.”) (footnotes omitted).

3. See *Lafler*, 132 S. Ct. at 1376; *Missouri v. Frye*, 132 S. Ct. 1399 (2012).

4. *Lafler*, 132 S. Ct. at 1390–91.

deal by the state and to have the state court determine whether sentencing should be reconsidered.⁵ In *Missouri v. Frye*, the Supreme Court also found ineffective assistance of counsel based upon defense counsel's failure to report a formal plea offer to his client.⁶ In response to the holdings in these two cases, Supreme Court Justice Antonin Scalia stated in his fiery dissent:

With those words from this and the companion case, the Court today opens a whole new field of constitutionalized criminal procedure: plea-bargaining law. The ordinary criminal process has become too long, too expensive, and unpredictable, in no small part as a consequence of an intricate federal Code of Criminal Procedure imposed on the States by this Court in pursuit of perfect justice.⁷

With these two cases, the Supreme Court has reaffirmed the legitimacy of plea bargaining and cemented its place as the most important means by which criminal convictions are administered in this country.⁸ Plea bargaining can no longer be ignored as an undesirable but necessary byproduct of our criminal justice system. It includes procedural and substantive rights that will be recognized and protected by the United States Supreme Court.⁹ *Lafler* and *Frye* demonstrate that it is essential to develop an effective but cost-effective system by which to manage and provide oversight for the plea-bargaining process.

Plea bargaining involves a great deal of prosecutorial discretion. In fact, American University law professor Angela J. Davis stated that “[u]nchecked power in the hands of prosecutors is as much a threat to our democracy as it is with any other government official, if not more.”¹⁰ The prosecutor is normally able to choose the charge and recommend a

5. *Id.*

6. *Frye*, 132 S. Ct. at 1408.

7. *Lafler*, 132 S. Ct. at 1391 (Scalia, J., dissenting).

8. *Frye*, 132 S. Ct. at 1413–14 (Scalia, J., dissenting) (“The plea bargaining process is a subject worthy of regulation, since it is the means by which most criminal convictions are obtained.”).

9. See *Lafler*, 132 S. Ct. at 1384; *Frye*, 132 S. Ct. at 1386–87; see also *Hill v. Lockhart*, 474 U.S. 52, 58–59 (1985).

10. Angela J. Davis, *Prosecutors' Overreaching Goes Unchecked*, N.Y. TIMES (Aug. 19, 2012, 7:00 PM), <http://www.nytimes.com/roomfordebate/2012/08/19/do-prosecutors-have-too-much-power/federal-prosecutors-have-way-too-much-power> (“[T]he charging and plea bargaining decisions are made behind closed doors, and prosecutors are not required to justify or explain these decisions to anyone. If a prosecutor treats two similarly situated defendants differently—charging one but not the other or offering a better plea offer to one—it is almost impossible to challenge such differential treatment. The lack of transparency in the prosecution function also leads to misconduct, like the failure to turn over exculpatory evidence—a common occurrence made famous by the prosecutors in the Duke lacrosse and Senator Ted Stevens cases.”).

sentence.¹¹ This large amount of power places the prosecutor in the position of making unilateral decisions that will directly affect a criminal defendant and will ultimately direct the likely result of any future plea bargain.¹² In light of this immense power vested in a single individual, it becomes necessary to consider the implications of this pervasive and immensely powerful system and how to monitor and control it. But plea bargaining cannot be controlled through a purely adversarial model. Instead, this Note suggests that we should look to the plea-bargaining process through the lens of an administrative model.¹³

With the rise of plea bargaining, criminal justice has evolved from a purely adversarial system of trials and litigated justice in which the decisions are made by judge or jury to a system of administrative justice where the prosecutor makes the most important decisions in charging and plea bargaining.¹⁴ Because of the overloaded, criminal dockets across the country stemming from overcriminalization,¹⁵ the traditional adversarial process of trials protected by rules of evidence and zealous advocacy on both sides has given way as the criminal justice system has tried to find ways to deal with complex criminal matters as quickly and efficiently as

11. McCoy, *supra* note 2, at 896–97 (“The prosecutor’s power over sentencing lies primarily in his discretion to choose to seek conviction on multiple charges if the defendant demands trial, and to promise to drop some charges if the defendant pleads guilty to the remaining ones. The prosecutor may also offer to reduce a charge in exchange for the defendant’s guilty plea”) (footnote omitted).

12. *See id.*

13. *See generally* Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117 (1998). This Note more specifically looks in its conclusion to analogize plea bargaining to the administrative process used in the National Environmental Policy Act.

14. *See id.* at 2118 (“The purpose of this essay is twofold. First, I want to describe more realistically the theory and practice of plea bargaining in the United States, so as to defend and explain the purposes it serves. And second, I want to situate that practice with respect to the adversarial/inquisitorial distinction. I will attempt to show how the practice of plea bargaining, which in ideological terms is often used as the very symbol of the distinction between the adversarial and inquisitorial systems, in practice tends to soften the distinction between them. In fact, I will claim, the American system as it actually operates in most cases looks much more like what common lawyers would describe as a non-adversarial, administrative system of justice than like the adversarial model they idealize.”).

15. Erik Luna, *The Overcriminalization Phenomenon*, 54 *AM. U. L. REV.* 703, 713 (2005) (“A recent report concluded that the erratic body of federal law has now swelled to more than four thousand offenses that carry criminal punishment, and other works have noted similar upsurges in the number of crimes at the state level.”) (footnote omitted). Luna attributes the overcriminalization phenomenon to a large extent on the spread of the administrative state and the creation of various administrative offenses that become criminal, such as “catching lobsters with something other than a ‘conventional’ trap.” *Id.* at 716. He identifies factors to the overcriminalization phenomenon: “(1) untenable offenses; (2) superfluous statutes; (3) doctrines that overextend culpability; (4) crimes without judicial authority; (5) grossly disproportionate punishments; and (6) excessive or pretextual enforcement of petty violations.” *Id.* at 717.

possible.¹⁶ With this focus, it becomes easy for the wheels of justice to move too quickly and mistakes to be made. Heavy caseload burdens lie on both the prosecutor and defense attorney alike, as the sheer volume of criminal proceedings and overloaded criminal dockets lead attorneys who do not have the necessary time to properly consider each case to make hasty decisions. This is in part because very few of the protections one would find in a traditional adversarial trial are found in the plea-bargaining process, except for the right to effective assistance of counsel discussed above.¹⁷ If the criminal justice system and plea bargaining is viewed as an administrative system of justice, then it becomes necessary to put in place administrative-style safeguards.

Inspiration for such administrative safeguards can be taken from the National Environmental Policy Act (NEPA), which establishes a broad administrative mandate to administrative agencies to take certain environmental concerns into account when making decisions and document their analysis without interfering with the agency's discretion itself.¹⁸ This idea of ensuring procedure by documentation can be extended to the essentially administrative task of offering a plea bargain. In order to provide the necessary oversight, this Note suggests prosecutors should be required, after the formal plea offer, to provide a short document detailing the reasons why a certain deal was offered to a supervising attorney or prosecutor for review. Even if the supervising attorney merely glances at the document without providing thorough oversight, the procedure itself would force the prosecutor to carefully consider the reasons used to justify the plea offer and would subject his decision-making to scrutiny without removing his prosecutorial discretion. Undoubtedly the vast majority of prosecutors take their responsibility to serve justice seriously, and a procedure to make explicit the factors they considered in formulating a plea offer will usually be followed scrupulously, even without thorough oversight. Even if some bad-actor prosecutors are able to slip through the cracks, this proposal could significantly lessen unfairness and inconsistencies between plea offers by creating a log of past plea offers that can be consulted by the prosecutor when making decisions on future plea offers. This requirement would also create a reviewable document that could be placed under judicial scrutiny¹⁹ (in the rare event that a

16. Scott, *supra* note 1, at 1910, 1916.

17. Lafler v. Cooper, 132 S. Ct. 1376, 1393 (2012); Missouri v. Frye, 132 S. Ct. 1399, 1406 (2012).

18. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–47 (2012).

19. See Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413,

defendant/plaintiff could meet the burden of *United States v. Armstrong*),²⁰ or could be used to evaluate consistency and fairness in plea offers during job performance reports and in promotion, hiring, and firing decisions. While this would add to the amount of time the prosecutor must spend considering the offer, it would not hinder or remove any of his discretion. This system would also keep all information relating to plea-bargaining decisions in-house, preventing the disclosure of trial strategy to defense attorneys.²¹ The additional burden placed upon prosecutors to conduct this formal analysis would presumably not add significantly to caseloads, as at most it would add the fifteen minutes to a half hour it would take to consult previous offers and fill out the form. Finally, it would require no new funding for additional prosecutors or investigators, as the current prosecutors could handle it themselves.

Part II of this Note will explore the nature of the American criminal justice system today and the place of plea bargaining within that framework. The section will explore the pitfalls and criticisms of the plea-bargaining process, demonstrating the need for some kind of oversight to monitor and regulate the process. Part III will describe how plea bargaining has come to resemble more of an administrative and inquisitorial model, rather than an adversarial one. Finally, in Part IV, taking inspiration from the administrative and inquisitorial model and NEPA, this Note will examine the possibility of applying procedural oversight and guidelines to the plea-bargaining process as a possible solution, providing some necessary protections that will help to alleviate some of the problems and criticisms associated with plea bargaining.

1417–18 (2010); Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 31–32 (2002) (“This paper offers a different choice, and points to prosecutorial ‘screening’ as the principle alternative to plea bargains. . . . By prosecutorial screening we mean a far more structured and reasoned charge selection process than is typical in most prosecutors’ offices in this country. The prosecutorial screening system we describe has four interrelated features, all internal to the prosecutor’s office: early assessment, reasoned selection, barriers to bargains, and enforcement.”) (footnote omitted).

20. *United States v. Armstrong*, 517 U.S. 456 (1996) (holding that in order to gain discovery in a selective prosecution claim, the defendant must produce credible evidence that similarly situated defendants of other races could have been prosecuted but were not).

21. *See United States v. Ruiz*, 536 U.S. 622, 631 (2002) (describing worries of prosecutors of having to disclose too much information to defendants during the plea-bargaining process).

II. NEGOTIATED PLEA BARGAINING AND ITS ETHICAL ISSUES

A. *Plea Bargaining as Negotiation and Contract*

Plea bargaining has grown to resemble contract law, where the protections of the trial process are no longer afforded.²² In fact, the manner in which most criminal cases are handled would seem so casual and expedited as to shock an observer with no knowledge of how the process works.²³ The traditional criminal process involves a trial where a judge or jury adjudicates guilt or innocence. The trial involves “tough adversarial argument from attorneys for the government and defense, and fair-minded decision making from an impartial judge and jury.”²⁴ However, these protections do not exist when the focus is on the negotiation between the prosecutor and the defense attorney and the trial itself is foregone. As professor Graham Hughes of New York University put it:

[T]he trial has become no more than an occasional adornment on the vast surface of the criminal process. This fundamentally disorients the system, for our professed constitutional model depends upon the setting of a trial. . . . The trial in turn looks forward to careful review at the appellate level. But of what value are our ideals and our learning when the trial hardly ever happens?²⁵

The overwhelmingly vast swarm of criminal defendants forces the use of plea bargaining to cope with the tremendous volume of cases.²⁶ Further, the lack of a sufficient investigation of the facts and the opportunity to present evidence makes it even more difficult to fairly determine the

22. Scott, *supra* note 1, at 1910. See also Michael D. Cicchini, *Broken Government Promises: A Contract-Based Approach to Enforcing Plea Bargains*, 38 N.M. L. REV. 159 (2008) (suggesting that a possible solution to policing violations of and renegeing on plea bargains by prosecutors is to use a contract-based approach to enforcement); Jennifer Rae Taylor, *Restoring the Bargain: Examining Post-Plea Sentence Enhancement as an Unconscionable Violation of Contract Law*, 48 CAL. W. L. REV. 129 (2011).

23. Scott, *supra* note 1, at 1911–12 (“Most cases are disposed of by means that seem scandalously casual: a quick conversation in a prosecutor’s office or a courthouse hallway between attorneys familiar with only the basics of the case, with no witnesses present, leading to a proposed resolution that is then ‘sold’ to both the defendant and the judge. To a large extent, this kind of horse trading 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.”) (footnote omitted).

24. *Id.* at 1911.

25. Graham Hughes, *Pleas Without Bargains*, 33 RUTGERS L. REV. 753, 753–54 (1980–81).

26. John Kaplan, *American Merchandising and the Guilty Plea: Replacing the Bazaar With the Department Store*, 5 AM. J. CRIM. L. 215, 216 (1977). See also Luna, *supra* note 15, at 713 (describing what the author calls the “overcriminalization phenomenon,” involving a substantial increase in the number of criminal offenses in the country today).

defendant's fate at the plea-bargaining stage.²⁷ Also, the absence of the safeguards present at trial makes it easy to coerce a defendant into accepting a plea bargain "because of the threat of much harsher penalties after trial."²⁸ This calls into question whether a plea agreed to by a defendant was truly made voluntarily.²⁹ As Professor Conrad G. Brunk elucidates, if the defendant cannot refuse a plea offer, then it is coerced.³⁰ For example, someone who does not have the means to afford to go through the entire process of a prolonged and expensive trial would have no choice but to accept a plea offer.³¹ Similarly, the psychological threat of greater punishment could induce a defendant to accept a plea deal even when innocent.³² There are also risks that the government might renege on a plea bargain.³³ The interests of the criminal defendant are usually to

27. Scott, *supra* note 1, at 1912. See Kenneth Kipnis, *Criminal Justice and the Negotiated Plea*, 86 ETHICS, Jan. 1976, at 93, 105–06, and Stephen J. Schulhofer, *Effective Assistance on the Assembly Line*, 14 N.Y.U. REV. L. & SOC. CHANGE 137, 142–44 (1986).

28. Scott, *supra* note 1, at 1912. See also McCoy, *supra* note 2, at 893 ("In plea bargaining, the state attempts to induce defendants to plead guilty by threatening to impose a harsher sentence should they be convicted at trial than it would impose if they pleaded guilty. The state's only purpose for this sentencing disparity is to deter demands for trial by penalizing those defendants who demand trial and are then convicted. The state's paramount motives in seeking to avoid trial are to save money and assure conviction.") (footnotes omitted).

29. Conrad G. Brunk, *The Problem of Voluntariness and Coercion in the Negotiated Plea*, 13 LAW & SOC'Y REV. 527 (1979). See also Douglas D. Guidorizzi, Comment, *Should We Really "Ban" Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 EMORY L.J. 753, 771–72 (1998) ("The most serious concern with plea bargaining pertains to the possible coercion of innocent defendants to plead guilty. While some express this criticism as the coercion of guilty pleas based on the unequal bargaining power of the state, . . . the true concern for this criticism [is] the increased risk of innocent defendants pleading guilty. The unilateral power of the state to determine the sanctions for different offenses can provide a broad range of options for prosecutors to overcharge or threaten to pursue the most severe penalty if the defendant goes to trial. The harsh penalties associated with conviction at trial provide the prosecutor with significant leverage to persuade defendants to plead guilty. In some cases, this may result in innocent defendants being faced with a choice where the cost of pleading guilty outweighs the risks of going to trial. Risk-averse defendants will accept the state's offer and plead guilty. The incentives inherent in plea bargaining, therefore, create an increased risk of innocent defendants receiving punishment.") (footnotes omitted).

30. Brunk, *supra* note 29, at 550.

31. *Id.* at 551 ("A person who does not have the physical means to go to trial cannot refuse an alternative to trial no matter how bad the alternative is. . . . A person without access to counsel, or one for whom the costs of trial would impose severe financial or other hardship, is under such duress that he cannot refuse a poor offer.") (emphasis omitted).

32. *Id.* ("It is not totally implausible to suggest that the risk of certain types of sanctions (e.g., death) or conviction of a highly opprobrious charge (e.g., child molestation) could drive some defendants to accept a poor offer in order to avoid them.")

33. Cicchini, *supra* note 22, at 159 ("[T]he government compromises the integrity of the system when it makes promises as part of a plea bargain and then reneges on those promises, often after obtaining from the defendant the very benefit for which it bargained. This negative impact is magnified when the government when the government reneges without good cause due to its own negligence or even bad faith. When courts refuse to hold the government to its end of the bargain, the court encourage further similar behavior.")

avoid conviction or incur the smallest possible punishment.³⁴ The interests of the state are usually to accurately and cheaply discover guilty defendants and apply the appropriate punishment to them.³⁵ Thus, the whole plea-bargaining process becomes a negotiation where both sides try to come to an agreement that will maximize their individual interests. As Thomas R. McCoy and Michael J. Mirra put it, “plea bargaining is the process by which both the state’s interest in identifying and punishing criminals efficiently and the defendant’s interest in reducing punishment are maximized in an economic sense.”³⁶ Traditionally, scholars have either accepted the plea-bargaining process as necessary, or rejected it completely.³⁷ Because of the lack of trial protections in the negotiated plea-bargaining process, the threats of unfairness to criminal defendants can become very real.

According to Milton Heumann, case pressure and the adaptation of attorneys to the local criminal court has led to the gradual shift over time from a focus on trials to a focus on plea bargaining.³⁸ As time goes on, people involved in the plea-bargaining process can even evolve from having a distaste for it to being strongly in favor of it.³⁹ Thus, the very workings of the court itself and the attractiveness of efficiency become very attractive over time to prosecutor, defense attorney, and judge alike. Plea bargaining contains many advantages that make it very addictive, such as greater flexibility in dealing with caseloads.⁴⁰ This inescapable

34. McCoy, *supra* note 2, at 894.

35. *Id.*

36. *Id.* at 895.

37. Wright & Miller, *supra* note 19, at 30–31 (“Some take the system more or less as it is. They accept negotiated pleas in the ordinary course of events, either because such a system produces good results or because it is inevitable. They might identify some exceptional cases that create an intolerable risk of convicting innocent defendants, or unusual cases where there are special reasons to doubt the knowing and voluntary nature of the defendant’s plea. These special cases might call for some regulation. But the mine run of cases, in this view, must be resolved with a heavy dose of plea bargains and a sprinkling of trials. Then there are those who leave it, arguing that our system’s reliance on negotiated guilty pleas is fundamentally mistaken. Some call for a complete ban on negotiated guilty pleas. Others, doubting that an outright ban is feasible, still encourage a clear shift to more short trials to resolve criminal charges. Restoring the criminal trial to its rightful place at the center of criminal justice might require major changes in public spending, and it might take a lifetime, but these critics say the monstrosity of the current system demands such a change.”) (footnotes omitted).

38. See James E. Bond, *Book Review*, 15 WAKE FOREST L. REV. 837 (1979). See generally MILTON HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS (1978) (discussed by Bond).

39. See *id.*

40. Guidorizzi, *supra* note 29, at 765–67 (“Plea bargaining provides district attorneys with greater flexibility in disposing of the criminal caseload. District attorneys often operate with limited resources and plea bargaining provides a quick, efficient method of handling a large caseload. . . . The quick disposition of cases allows public defenders to give more time and effort to cases they consider

attractiveness makes it very easy to ignore the dangers of plea bargaining, further necessitating safeguards to ensure that plea bargaining does not become too casual, especially in the high-paced, high-pressure atmosphere of criminal adjudication.

B. Substantial Burdens on Prosecutors and Defense Attorneys

Over-burdened caseloads only add to the issues the prosecutor and the defense attorney must deal with. First of all, funding for indigent defense is woefully inadequate.⁴¹ Further, the large caseloads of prosecutors mean that they do not have the time to always offer well-thought-out plea deals to criminal defendants.⁴² Instead, they are often forced to work quickly, sometimes leading to mistakes.⁴³ Even a former Chief Justice of the Supreme Court of Missouri deplored the overworked nature of prosecutors and public defenders in his state.⁴⁴

more trial-worthy. Attorneys who are not associated with a public defender office but are representing indigent clients may also find it in their direct financial interests to dispose of cases quickly. . . . In exchange for pleading guilty and avoiding trial, defendants can receive sentence-related concessions from the prosecutor or the dismissal of some of the charges in their indictment. . . . The quick disposition of cases through plea bargaining may conserve judicial resources inasmuch as the amount of time for a guilty plea is less than a trial. . . . Plea bargains allow the victim to gain an immediate sense of closure along with the knowledge that the defendant will not go unpunished for the crime.” (footnotes omitted).

41. See Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, a National Crisis*, 57 HASTINGS L.J. 1031 (2006) (providing several enlightening anecdotes of the criminal defense system’s failing, and identifying Georgia, Virginia, Louisiana, Pennsylvania, and North Dakota as states that have failing indigent defense systems).

42. Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 Nw. U. L. REV. 261, 262–63 (2011) (“In recent decades, legal scholars have devoted enormous attention to two problems in the American criminal justice system: the appalling underfunding of indigent defense and intentional prosecutorial misconduct. Both problems are deeply troubling, and the academic literature helpfully serves to spotlight the problems and encourage reform. Remarkably, however, there is virtually no scholarship focusing on the opposite side of the coin. Scholars have failed to notice that prosecutors in large counties are often as overburdened as public defenders and appointed counsel. In some jurisdictions, individual prosecutors handle more than one thousand felony cases per year. Prosecutors often have hundreds of open felony cases at a time and multiple murder, robbery, and sexual assault cases set for trial on any given day. Prosecutors in many large cities have caseloads far in excess of the recommended guidelines that scholars often cite to criticize the caseloads of public defenders. Quite simply, many prosecutors are asked to commit malpractice on a daily basis by handling far more cases than any lawyer can competently manage.”) (footnote omitted).

43. *Id.* at 263 (“While some of these cases involve unscrupulous prosecutors, far more often the errors are inadvertent because prosecutors are too busy to properly focus on their cases or because they have not received proper guidance from senior lawyers who are terribly overburdened themselves.”) (footnote omitted).

44. Hon. William Ray Price, Jr., *Chief Justice Delivers 2010 State of the Judiciary Address*, 66 J. MO. B. 68, 69–70 (2010) (“[O]ur public defenders and prosecutors are also stressed to the point of breaking. . . . In some ways prosecutors are the most powerful individuals in the criminal justice

The nature of the job of the criminal prosecutor places heavy expectations on the individual attorney who aspires to that profession. The burden on prosecutors is further exacerbated by the very nature of a criminal prosecutor, a role that places expectations of higher standards of justice and ethical uprightness.⁴⁵ Indeed, prosecutors should be held to higher standards because of the powerful position that they are placed in our system of criminal justice which calls on them to make these judgment calls without the aid of trial or even an impartial decision-maker.⁴⁶

Similarly, defense attorneys are placed under a substantial burden by large caseloads and an inability to cope with the sheer volume. Mary Sue Backus and Paul Marcus point to the public defender systems across the country as examples of the troubles that defense counsel encounter.⁴⁷ They assert that, similar to the situation with prosecutors, the public defender system as it exists is inadequate to provide for indigent defense because funding does not keep up with heavy caseloads.⁴⁸ They cite the example of a public defender in Florida who felt it was necessary to address the problem by informing his fellow attorneys:

[P]ublic defenders are often ill-informed about their clients' cases and circumstances before advising them to take pleas offered by prosecutors at arraignment. "It's not fair to make life-altering decisions while handcuffed to a chair with fifty people standing around. . . . They meet with an attorney for sixty seconds, then they plead guilty and surrender their rights."⁴⁹

Backus and Marcus point to a lack of funding, overwhelming caseloads, and deficient salaries for public defenders as primary reasons for this problem.⁵⁰ Further, it is hard to show that the presence of counsel

system. They decide whether charges are brought. They decide what charges are brought. They decide what plea agreements are made. If we want these decisions to be made well, we need people making them who are not underpaid and overworked.").

45. Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393 (2001).

46. *Id.* at 397–99. Professor Davis worries that the current set of constitutional checks on the power of prosecutors is insufficient to prevent abuses. *Id.*

47. Backus & Marcus, *supra* note 41.

48. *Id.* at 1045–63.

49. *Id.* at 1033–34.

50. *Id.* at 1034–35, 1045–63.

Poor people account for more than 80% of the individuals prosecuted. These criminal defendants plead guilty approximately 90% of the time. In those cases, more than half the lawyers entered pleas for their clients without spending significant time on the cases, without interviewing witnesses or filing motion. Sometimes they barely spoke with their clients.

Id. at 1034 (footnote omitted).

significantly aids defendants because of all of the issues with burdensome caseloads and a lack of time.⁵¹ Although the Supreme Court has guaranteed that indigent defendants must have access to defense counsel at the state's expense,⁵² it did not provide any explanation or guidance as to how the states' indigent defense systems should be run or funded.⁵³

C. Ethical Considerations and Pitfalls

Based on this backdrop of heavy caseloads and the need to move quickly to keep up with them, a number of ethical issues involving plea bargaining become evident. First, in the plea-bargaining process, the prosecutor is an incredibly powerful entity. As Justice Robert Jackson put it, the prosecutor has “more control over life, liberty, and reputation than any other person in America.”⁵⁴ An even more colorful description of prosecutors given by Geraldine Szott Moohr is that they perform “the role of god” or have obtained “heroic status.”⁵⁵ These descriptors of the role of

51. See Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1180 (1975) (“The Supreme Court and other observers of the plea bargaining process have relied heavily on the assumption that criminal defense attorneys will, almost invariably, urge their clients to choose the course that is in the clients' best interests. Although this assumption is entirely natural and corresponds to the function that defense attorneys are intended to perform in our system of justice, it merits examination in terms of the actual workings of the criminal justice system. This article therefore explores the extent to which the presence of counsel does provide significant safeguard of fairness in guilty plea negotiation. It concludes that current conceptions of the defense attorney's role are often more romanticized than real.”). See also Sonia Y. Lee, Comment, *OC's PD's Feeling the Squeeze—The Right to Counsel: In Light of Budget Cuts, Can the Orange County Office of the Public Defender Provide Effective Assistance of Counsel?*, 29 LOY. L.A. L. REV. 1895, 1897 (1996) (“The reality is that there are too many indigent defendants and not enough public funds or attorneys. This lack of funding for public defenders is directly responsible for the perceived dumping problem: the less money supplied to the office, the less investigative and medical expert support, the fewer public defenders employed, and hence the fewer public defenders available for indigent defense. Consequently, indigent defendants receive inadequate assistance of counsel.”) (footnote omitted).

52. Roberta G. Mandel, *The Appointment of Counsel to Indigent Defendants Is Not Enough: Budget Cuts Render The Right to Counsel Virtually Meaningless*, 83 FLA. B.J. 43 (2009) (Citing the cases of *Gideon v. Wainwright*, 372 U.S. 335 (1963), and *Argersinger v. Hamlin*, 407 U.S. 25 (1972), as examples of judicial mandates to provide counsel for indigents at the state's expense), available at <https://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/Author/8455F3AA138089EE8525758A004AEA51>.

53. Mandel, *supra* note 52, at 43 (“Although the Court's mandates to provide counsel to indigents charged with felonies and misdemeanors led to a rapid increase in criminal defense work, the Court provided no guidance or models for organizing or funding states' indigent criminal defense systems. The Court gave the states broad discretion to fashion policies and laws to effectuate the overall goals of effective assistance of counsel and fair trials. Consistent with the Court's dedication to federalism, states were free to adopt whatever system they wished.”).

54. Geraldine Szott Moohr, *Prosecutorial Power in an Adversarial System: Lessons from Current White Collar Cases and the Inquisitorial Model*, 8 BUFF. CRIM. L. REV. 165, 165 (2004) (quoting Justice Robert Jackson).

55. *Id.* at 165 (internal citation and quotation marks omitted).

the prosecutor demonstrate the incredible ethical responsibility of a prosecutor and the high standard they must meet given the amount of power that they receive. It is also possible for a prosecutor to engage in misconduct, and although rare, it does sometimes happen.⁵⁶ Despite the rare case of willful misconduct, the majority of problems arise from the overburdened caseloads and overworked attorneys that have to work from within the system. This combination of factors leads to the mistakes made by prosecutors and defense attorneys alike. A second concern is that prosecutors and defense attorneys are making decisions about plea offers and negotiations based, at least in part, on their prior relationships with each other and not based solely on the disposition and facts of the case and defendant before them. The examples of lack of contact that criminal defense attorneys have with their clients suggest that there must be an alternative basis for the way plea-bargaining decisions are made.⁵⁷

The rules governing the conduct of prosecutors place lofty goals upon them that will be hard to live up to. The *ABA Standards for Criminal Justice, Prosecution and Defense Function* lay out in Rule 2.8 that the prosecutor should strive to avoid any appearance or reality that would cast doubt on the independence of the office.⁵⁸ There is concern that lawyers involved in criminal justice are not adequately supervised or disciplined,

56. See Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059, 1061 (2009) (“Much prosecutorial misconduct stems from the fact that law schools and district attorneys’ offices often provide too little training demonstrating where to draw the line between aggressive prosecution and misconduct.”). See also BENNETT L. GERSHMAN, TRIAL ERROR AND MISCONDUCT (2007); JOSEPH F. LAWLESS, PROSECUTORIAL MISCONDUCT (2003); Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713 (1999); Lara A. Bazelon, *Hard Lessons: The Role of Law Schools in Addressing Prosecutorial Misconduct*, 16 BERKELEY J. CRIM. L. 391 (2011); Maximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 225 (2006) (“The basic premise is that whenever the prosecutor’s plea proposal violates certain rights of the defendant—rights that define what the baseline is—the plea proposal is coercive and the defendant’s guilty plea is involuntary. In that situation the prosecutor acts as the sole adjudicator of the criminal case.”).

57. Backus & Marcus, *supra* note 41, at 1031–35 (“An attorney was found to have entered pleas of guilty for more than 300 defendants without ever taking a matter to trial. In one case from Mississippi, a woman accused of a minor shoplifting offense spent a year in jail, before any trial, without even speaking to her appointed counsel. In some places, one lawyer may handle more than twenty criminal cases in a single day, with a flat rate of \$50 per case. In others, some defense lawyers providing counsel to indigent defendants under a state contract system can be responsible for more than 1000 cases per year. In one major metropolitan area, San Jose, California, numerous defense attorneys failed to take simple steps to investigate and prepare their cases for trial. Some attorneys went to trial without ever meeting their clients outside the courtroom. Some neglected to interview obvious alibi witnesses. Some accepted without question reports from prosecutors’ medical and forensic experts that were ripe for challenge.”) (footnotes omitted).

58. ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION AND DEFENSE FUNCTION § 2.8 (1st ed. 1970).

but the rule does not prevent friendly relationships between lawyers on opposing sides of a criminal proceeding.⁵⁹ Prosecution Function 3-1.2 of the *2010 Proposed Revisions of Standards for Criminal Justice* describes the prosecutor as an “administrator of justice . . . advocate . . . officer of the court . . . seeker of justice . . . servant of both justice and the public interest . . . problem-solver, not merely an advocate . . . community relations assistant . . . reformer of the criminal justice system . . . ethical lawyer.”⁶⁰ These high-minded ideals, defining what it means to be a prosecutor in a plea-bargaining world, can only be achieved through internal compliance by the prosecutors themselves.⁶¹ External controls are likely to be ineffective, since the prosecutor must retain a great deal of discretion in the criminal process.⁶²

Questions of the ethical obligations of the prosecutor have long been a concern for legal scholars.⁶³ The current *ABA Standards* “describe the prosecutor as ‘an administrator of justice, an advocate and an officer of the court,’ and require that the prosecutor use ‘sound discretion,’ ‘seek justice,’ and ‘reform and improve the administration of criminal justice.’”⁶⁴ According to Susan W. Brenner and James Geoffrey Durham,

59. Lissa Griffin & Stacy Caplow, *Changes to the Culture of Adversarialness: Endorsing Candor, Cooperation, and Civility in Relationships Between Prosecutor and Defense Counsel*, 38 HASTINGS CONST. L.Q. 845, 845–50 (2011) (“Relationships between prosecutors and defense counsel are infamously rocky. . . . these relationships tend to be riddled with a level of distrust and disrespect that hardens over time.”).

60. *Id.* at 850–51.

61. *Id.* at 851 (“Of course, in carrying out all of these high principles and grave duties, the prosecutor still has enormous discretion and great advantages of power, information and resources, yet only professional pride, self-respect, and an internal moral compass can truly induce compliance.”).

62. *Id.* For an intriguing alternative to plea bargaining that involves plea mediation, see Brandon J. Lester, Note, *System Failure: The Case for Supplanting Negotiation with Mediation in Plea Bargaining*, 20 OHIO ST. J. ON DISP. RESOL. 563, 584–85 (2005) (“Mediation can ameliorate many of the problems associated with the use of negotiations in the criminal justice system through the neutral oversight offered by a trained mediator. By utilizing plea mediations instead of plea negotiations, the system could reap the benefits of enhanced communication overseen by a neutral presence employed specifically to lead the parties toward a mutually agreeable disposition. Such a mediated plea agreement system would improve the criminal justice system in numerous ways and add several benefits not currently offered.”) (footnotes omitted).

63. See Gershowitz, *supra* note 56, at 1105. The author believes that there is a need for an independent third party to publicly identify prosecutors who have committed serious misconduct in order to provide a deterrent. See also Gregory M. Gilchrist, *Plea Bargains, Convictions and Legitimacy*, 48 AM. CRIM. L. REV. 143, 159 (2011) (“Where the primary protections against wrongful convictions—the presumption of innocence and proof beyond a reasonable doubt—are systematically circumvented by plea bargaining, there is real cause for concern about public confidence in the legal system.”).

64. Griffin & Caplow, *supra* note 59, at 850 (quoting ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION § 3-1.2 (3d ed. 1993)).

there are several system conflicts that a prosecutor must confront.⁶⁵ They are politicians who must answer to an electorate, advocates who vigorously strive to convict, and administrators of justice.⁶⁶ There is also a strong possibility of past roles influencing current relationships that could raise a conflict of interest for a prosecutor.⁶⁷ The Arkansas case, *Sanders v. State*, even went so far as to address the situation of an alleged criminal relationship between a prosecutor and a defense attorney.⁶⁸ Although a criminal relationship between a prosecutor and a defense attorney is rare, any kind of inappropriate relationship between prosecutors and defense attorneys must be avoided by prosecutors at all costs. And prosecutors are not alone in their ethical obligations, as defense attorneys also must meet certain standards, including providing the effective assistance of counsel described in *Lafler* and *Frye*.⁶⁹

III. PLEA BARGAINING AS AN ADMINISTRATIVE SYSTEM

A. *Plea Bargaining's Resemblance to an Administrative System, not Adversarial Negotiation*

Plea bargaining has changed the criminal justice system from an adversarial system into something more resembling an administrative model.⁷⁰ And this change is not necessarily a bad thing. In fact, many

65. Susan W. Brenner & James Geoffrey Durham, *Towards Resolving Prosecutor Conflicts of Interest*, 6 GEO. J. LEGAL ETHICS 415, 469 (1993).

66. *Id.*

67. *Id.*

68. *Sanders v. State*, 98 S.W.3d 35, 40 (Ark. 2003) (“The offenses included attempts to extort money from criminal defendants that occurred around the time that Appellant was represented by Murphy and prosecuted by Harmon. While it is not clear whether there is any nexus between the two, the facts alleged by Appellant in his petition raise more than the mere specter of an improper relationship between the prosecutor and defense counsel that may have prejudiced Appellant in his trial.”).

69. See *Lafler v. Cooper*, 132 S. Ct. 1376, 1383 (2012); *Frye v. Missouri*, 132 S. Ct. 1399, 1404 (2012); ANDREW L. KAUFMAN & DAVID B. WILKINS, PROBLEMS IN PROFESSIONAL RESPONSIBILITY FOR A CHANGING PROFESSION (5th ed. 2009). See also Aschuler, *supra* note 51, at 1313 (“The problem of providing effective representation within the frame-work of the guilty-plea system is a problem that cannot be resolved satisfactorily. Contrary to the assumption of the Supreme Court and other observers that plea negotiation ordinarily occurs in an atmosphere of informed choice, private defense attorneys, public defenders, and appointed attorneys are all subject to bureaucratic pressures and conflicts of interest that seem unavoidable in any regime grounded on the guilty plea. Far from safeguarding the fairness of the plea-negotiation process, the defense attorney is himself a frequent source of abuse, and no mechanism of reform seems adequate to control the dangers.”).

70. Lynch, *supra* note 13, at 2118.

foreign systems follow just such an administrative or inquisitorial model.⁷¹ Although at first glance this type of criminal justice system seems to go against the common American archetype of adversarialism, it is not unreasonable.⁷² As Professor Gerard E. Lynch said in his article, *Our Administrative System of Criminal Justice*:

[I]t is hardly self-evident that a system in which a responsible government official is assigned to investigate allegations of crime, by investigative means strictly limited to protect the rights of suspects, and then to make decisions based on the results of the investigation after hearing evidence and arguments presented by the suspect, is beyond the pale of civilization.⁷³

With this in mind, the criminal justice system and its plea-bargaining process should not be analyzed in relation or contrast to our idealized adversarial model, but instead should be evaluated according to its own merits and faults as they exist within an administrative or inquisitorial model.⁷⁴

The primary criticism of the plea-bargaining process is that the adversarial judicial process has been removed from the proceedings.⁷⁵ As Lynch puts it, “[i]n most guilty plea proceedings, the judge does not have enough information to make an intelligent determination of whether the defendant’s guilt is even likely, let alone certain.”⁷⁶ If one were to only look at the judicial proceedings, then this criticism would be justified.

71. *Id.* (“In fact, I will claim, the American system as it actually operates in most cases looks much more like what common lawyers would describe as a non-adversarial, administrative system of justice than like the adversarial model they idealize.”). See also Moohr, *supra* note 54, at 168.

72. Lynch, *supra* note 13, at 2124.

73. *Id.*

74. *Id.* at 2121 (“The strengths and weaknesses of such a system should be assessed in terms more appropriate to its own implicit premises, rather than in comparison to an idealized adversarial model. What happens if we think of the American criminal justice system as one in which an administrative agency, call it the Department of Justice, administratively decides, subject to judicial review, who is worthy of criminal punishment?”). See also Luna & Wade, *supra* note 19, at 1426 (“What is of particular interest to us is the extent to which scholars like Professor Langer and Judge Lynch have revived a comparative dialogue on the prosecutorial function, looking at the European approach for similarities and contrasts, seeking insights or even potential solutions to problems like those mentioned above. Generations of American comparativists have explored European criminal law and procedure, often as a curiosity but sometimes as an inquiry into the improvement of criminal justice on this side of the Atlantic. Some comparative pieces of the early mid-twentieth century suggested that American criminal justice would benefit ‘by examining in a sympathetic spirit a system which has been worked out by the best minds of continental Europe,’ preparing for a future where the terms *adversarial* and *inquisitorial* will no longer serve to distinguish criminal processes.”) (footnotes omitted).

75. Lynch, *supra* note 13, at 2122.

76. *Id.*

However, to focus on only the judicial proceedings would be a mistake, as so much more occurs outside the formal proceedings in the courtroom.⁷⁷ The prosecutor is a member of the executive branch and his actions must be evaluated as such. There are no formal regulations for the prosecutor in his administrative role because of our adherence to the traditional adversarial model.⁷⁸ Therefore, the entire plea-bargaining process is conducted very informally. In fact, the rules of criminal procedure define the prosecutor as an autonomous party to an adversarial proceeding, so the defendant has no right to present evidence to the prosecutor.⁷⁹ In order to overcome these disadvantages, it is necessary to correct the situation by creating a new way of looking at the role of the prosecutor in an administrative role.

The prosecutor, as the controlling figure in a criminal case, is subject to its own criticisms. First, the prosecutor is supposed to be a party in an adversarial process, and having one of the parties to an adversarial system become an ultimate decision-maker seems to discredit the system.⁸⁰ This is further exacerbated by the perception of the disparity in power and resources between the state and a typical criminal defendant.⁸¹ However, these flaws would exist to the same degree in an actual trial as it would in the plea-bargaining process.⁸² The problems (frightened and powerless defendants with overworked and under-qualified defense attorneys), can also be found at all stages of the adjudicatory process.⁸³ Why should a

77. *Id.* at 2123 (“The substantive evaluation of the evidence and assessment of the defendant’s responsibility is not made in court at all, but within the executive branch, in the office of the prosecutor. The brief formal procedure in court obscures what can be an invisible, but elaborate and lengthy process of adjudication of the defendant’s guilt. This process is rarely governed by formal legal standards, other than the basic definitions of offenses, and the procedures by which it operates are not usually written down anywhere. But it is this process that our alien anthropologist would surely identify as the actual adjudication process for criminal cases.”).

78. *Id.* at 2124 (“Most commonly, in all likelihood, the prosecutor simply accepts the results of the police investigation, and any process of independent adjudication occurs at the instigation of defense counsel. Just as the trial process only comes into play when the defendant contests the prosecutor’s judgment, so the administrative process depends on the defendant’s decision to question, within the prosecutorial bureaucracy, the conclusions of the police or investigative agency.”).

79. *Id.* (“Notably, the rules of criminal procedure do not give a suspect or defendant a right to be heard by, or to present evidence to, the prosecutor. . . . Any discussion between the parties is conceived as a species of settlement negotiations, in which a party will participate only to the extent that he deems it in his interest to do so.”).

80. *Id.* at 2123.

81. *Id.*

82. *Id.* (“The poor and ill-represented may also fare badly at trial, where the lack of preparation or empathy of their lawyers, the prejudices of jurors, and the great resources of the state may equally secure an unjust conviction—just as the state may fare badly when an effective and conscientious defense lawyer is matched at trial against an inexperienced or poorly-prepared prosecutor.”).

83. *Id.* at 2123.

defendant fare any better in a trial with an incompetent and overworked attorney than in a plea bargain with that same attorney? Thus, the problems that are cited in criticism of plea bargaining are in fact extrinsic to it, and the process of plea bargaining should be evaluated separately from those criticisms.

B. Comparison to Inquisitorial Systems

In order to properly evaluate the role of the prosecutor in the plea-bargaining process, we can look at plea bargaining in light of the inquisitorial and investigative model. Generally, the inquisitorial model involves the state as a monolithic entity attempting to discover the truth through its own thorough investigation.⁸⁴ As in an inquisitorial system, the American prosecutor in plea bargaining decides whether or not someone is guilty of a crime based upon an investigation and an evaluation of the facts as he receives them.⁸⁵ A useful comparison of the American adversarial system with the French inquisitorial system is conducted by Geraldine Szott Moohr in her article, *Prosecutorial Power in an Adversarial System: Lessons from Current White Collar Cases and the Inquisitorial Model*.⁸⁶ The adversarial system we use in the United States grew out of the common law model of one individual's making accusations against another individual.⁸⁷ Therefore, judges treated both sides as equals and allowed them to make their cases to independent decision-makers⁸⁸ with the truth being ascertained by the competitive process of adversarial parties putting forth evidence against one another.⁸⁹ The inquisitorial approach, on the other hand, involved the investigation of criminal matters using the power of the state to conduct an inquiry.⁹⁰ The inquisitorial system is premised on the idea that it is possible to determine the nature of the crime and the parties involved through a thorough investigation.⁹¹

84. Moohr, *supra* note 54, at 193.

85. *See id.* at 168 ("The federal system is like an inquisitorial system in that it also resolves issues of criminality through investigation, rather than through trial. Unlike an inquisitorial system, however, the federal system operates without the benefit of institutional arrangements and procedures that provide a counter-weight to prosecutorial power.").

86. *Id.* at 165.

87. *Id.* at 192–93.

88. *Id.*

89. *Id.* at 193.

90. *Id.*

91. *Id.* ("Accordingly, the inquisitorial process centered on the tasks of assembling and screening facts. As its name implies, the investigation is the centerpiece of the inquisitorial process. The ultimate issue of guilt or innocence is determined through an official inquiry that is initiated and conducted by

Therefore, the primary difference between the two systems is the role of the prosecutor, whether as an independent investigatory arm of the state, or as an equal party with the defendant in an adversarial proceeding.⁹²

In an inquisitorial system, like the one in France, government officials are generally in charge of investigating, charging, and trying criminal defendants as a branch of the judiciary.⁹³ The prosecutor is defined differently in the European model, and focuses on his role as an objective pursuer of the truth, as opposed to one side of an adversarial process.⁹⁴ The prosecutors in that system generally report directly to supervising officials who review and correct subordinate officials.⁹⁵ Therefore, the discretion of an individual prosecutor in the inquisitorial system is very limited.⁹⁶ This contrasts markedly to the American system, where the role of the prosecutor as an “independent decision making and discretionary authority”⁹⁷ is the norm and expectation of prosecutors.

Further differences arise between the French prosecutor and the American prosecutor when one analyzes the different backgrounds and educations they receive. In the French inquisitorial model, prosecutors are selected based on merit right after they come out of law school.⁹⁸ They then have to complete two years of an educational program that includes internships as well as making a commitment to serve in the magistracy for ten years.⁹⁹ On the other hand, prosecutors in the United States do not

the state. In this system, the trial is most accurately characterized as a continuation of the official investigation. The investigation, rather than the trial, is paramount.”).

92. *Id.*

93. *Id.* at 194.

94. Luna & Wade, *supra* note 19, at 1468–69 (“[T]he inquisitorial tradition displays a vision of the prosecutorial role as nonpartisan public service. European criminal justice systems typically charge prosecutors with a duty to be completely objective in their pursuit of the truth, based on a belief in the existence of a ‘substantive’ or ‘material’ truth that can be determined by a dispassionate fact-finder. Continental prosecutors assume a high degree of independence in their activities and are frequently associated with the judicial function, thereby reinforcing the expectation to act with a degree of detachment, assisting the courts in achieving the criminal justice system’s goal of discovering the truth and reacting appropriately to it. The extent to which prosecutors live up to such expectations is uncertain and perhaps inherently opaque, and the notion of complete objectivity will sound preposterous to many scholars. Nonetheless, the basic ideal deeply affects the way in which European prosecutors view their role and work.”) (footnotes omitted).

95. Moohr, *supra* note 54, at 194.

96. *Id.*

97. *Id.* at 194–45.

98. *Id.* (“In France, all magistrates (a group that includes both prosecutorial and judicial officers) are selected to the judicial magistracy on the basis of a highly competitive national examination taken after three years of law school.”).

99. *Id.* (“In France, service as a prosecutor or magistrate is a life-long career. The prosecutor is a civil servant, working within a highly centralized national bureaucratic hierarchy that provides possibilities for advancement and job security. . . . One effect of this long-term employment prospect is that prosecutors and magistrates are more accountable and responsive to their supervisors. They do

receive this kind of specialized training, nor do they have to make the same commitment to a life of public service.¹⁰⁰ In the federal system, U.S. Attorneys are selected as part of the political process, and they might receive their positions based on political alliances rather than on an objective standard of merit.¹⁰¹ The French model can provide a guide for how the plea-bargaining process can be regarded in the future. Erik Luna and Marianne Wade suggest that the prosecutor's role can be re-envisioned as that of a career civil servant who is specially trained and advances by merit.¹⁰² These prosecutors would not be judged based on conviction rates but based on their ability to discover the truth.¹⁰³

IV. DEVELOPING AN ACCOUNTABILITY PROCEDURE TO DETER ETHICAL VIOLATIONS AND CRONYISM BY TAKING THE ADMINISTRATIVE MODEL AS A GUIDE

A. *Potential Guidelines for Plea Bargaining*

If we view plea bargaining through the lens of the administrative and quasi-inquisitorial model, then the first logical step is to consider the possibility of introducing guidelines and supervisorial oversight to the plea-bargaining process. In their article, *The Screening/Bargaining Tradeoff*, Ronald Wright and Marc Miller propose a set of internal guidelines to steer the prosecutorial process.¹⁰⁴ The authors argue that the prosecutor's office should adopt a sophisticated screening process at all

not have to be concerned with re-appointment when political administrations change, and their prospects improve if they are deemed to function effectively." (footnotes omitted).

100. *Id.*

101. *Id.* at 195–96.

102. Luna & Wade, *supra* note 19, at 1512 ("In recent years, prominent scholars have endorsed this approach, drawing on concepts from other legal traditions as a remedy for hyper-adversarialism in American criminal justice. For example, Michael Tonry has argued for the professionalization of prosecutors as career civil servants, specially trained and appointed based on merit, along the lines of the European model.") (citing MICHAEL TONRY, THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE 207 (2004)).

103. *Id.* at 1469 ("As an independent body with an affiliation with the judiciary, prosecutors of continental Europe are likely to have quite different aims and motivations than their counterparts working in truly adversarial settings. Success is not measured by convictions, and acquittals are not seen as failures. Instead, continental prosecutors are supposed to find the truth and achieve evenhanded outcomes. This expectation and the concomitant job culture affect discretionary decision-making and encourage case-ending solutions that comport with the interests of justice, whatever those interests may be. While it would be naïve to assume that prosecutors will 'get it right' every time, given enormous time pressures and typically limited information, there is no evidence that prosecutors in the study countries are led by anything other than a judicially informed vision of truth and fairness.") (footnote omitted).

104. Wright & Miller, *supra* note 19.

steps of the plea process.¹⁰⁵ Wright and Miller would use the screening process as a means to replace the system of negotiated pleas with a system of open pleas.¹⁰⁶ Their hope is to create a much more honest system where it is far less likely to have the reasons behind a plea bargain hidden behind closed doors.¹⁰⁷

The Department of Justice also has internal guidelines to help federal prosecutors make discretionary choices.¹⁰⁸ The problem with these guidelines is that the individual defendant has no recourse.¹⁰⁹ In fact, many plea bargains include a waiver of appellate rights that would go so far as to completely preclude any review of the prosecutor's decisions in accordance with the guidelines.¹¹⁰ Plus, an appeal for a guideline violation is almost never successful.¹¹¹ Internal enforcement, conducted by the Office of Professional Responsibility, cannot always cover all of the

105. *Id.* at 32 (“First, the prosecutor’s office must make an early and careful assessment of each case, and demand that police and investigators provide sufficient information before the initial charge is filed. Second, the prosecutor’s office must file only appropriate charges. Which charges are ‘appropriate’ is determined by several factors. A prosecutor should only file charges that the office would generally want to result in a criminal conviction and sanction. In addition, appropriate charges must reflect reasonably accurately what actually occurred. They are charges that the prosecutor can very likely prove in court. Third, and critically, the office must severely restrict all plea bargaining, and most especially charge bargains. Prosecutors should also recognize explicitly that the screening process is the mechanism that makes such restrictions possible. Fourth, the kind of prosecutorial screening we advocate must include sufficient training, oversight, and other internal enforcement mechanisms to ensure reasonable uniformity in charging and relatively few changes to charges after they have been filed.”) (footnotes omitted).

106. *Id.* at 33. According to the authors, the pleas would include obtaining information from judges about what a likely sentence might be, or even actually negotiate with judges.

107. *Id.* at 34. “Jurisdictions that implement the screening/bargaining tradeoff will be more honest and more accessible.” *Id.*

108. Ellen S. Podgor, *Department of Justice Guidelines: Balancing “Discretionary Justice”*, 13 CORNELL J.L. & PUB. POL’Y 167, 169 (2004) (“Internal ‘guidelines’ of the Department of Justice (DOJ) assist federal prosecutors in making the decisions that fall within their discretionary realm. These internal guidelines, usually found in the United States Attorneys’ Manual, provide government prosecutors with guidance in making decisions. Although these guidelines are policy statements and not legislative rules, they offer an element of consistency to the decision-making process, provide education for newcomers to the department, and can serve as a restraint on prosecutorial discretion.”) (footnotes omitted).

109. *Id.*

110. *Id.* at 175–76 (“[C]ases that terminated with the entry of a plea agreement would preclude review of a guideline violation, since plea agreements routinely include waivers of appellate rights.”).

111. *Id.* at 177 (“In almost all cases, the defense is unsuccessful in raising as an appellate issue a violation of the DOJ guidelines. Courts find that absent an ‘independent constitutional’ basis, there is no basis for judicial enforcement of the guidelines. A different result is seen, however, when the government admits the violation and seeks to correct its mistake. In these limited instances, the authority of the government to remedy a DOJ violation is allowed. Finally, courts will not use their supervisory power to enforce a DOJ guideline if the sole basis for the argument is that a federal prosecutor violated internal policy.”) (footnotes omitted).

violations that occur.¹¹² In addition, it is difficult to conduct supervision over offices extending throughout the country.¹¹³ These factors combine to make enforcement of the Department of Justice internal guidelines very difficult.

Michael O’Hear’s article, *Plea Bargaining and Victims: From Consultation to Guidelines*, provides another possibility by suggesting that there is a need for some kind of guidance of prosecutorial discretion in plea bargaining to take into account the opinions of victims.¹¹⁴ O’Hear argues for prosecutorial charging and plea-bargaining guidelines to protect victims’ rights.¹¹⁵ He suggests standard plea deals for commonly recurring crimes.¹¹⁶ This would involve the consideration of different variables to modify the crime and the plea bargain offered.¹¹⁷ Further, this would produce a degree of procedural justice that would assist greatly in the process.¹¹⁸ If parties are treated in a procedurally fair way, then they are more likely to accept the outcome.¹¹⁹ Further, the use of objective criteria by prosecutors is likely to engender a sense of fairness and neutrality in the proceeding in the other parties involved.¹²⁰ Thus, by using a set of guidelines, a prosecutor can negate many of the negative perceptions of his

112. *Id.* at 186–89 (“Internal discipline within the Department of Justice is conducted through its Office of Professional Responsibility. This office, which reports directly to the Attorney General, is responsible for investigating allegations that Department of Justice attorneys have engaged in misconduct in connection with their duties to investigate, represent the government in litigation, or provide legal advice. In past years, the internal enforcement process of the Office of Professional Responsibility has been criticized for inadequately handling the disciplinary process.”) (internal quotation marks omitted).

113. *Id.* at 189 (“In considering guideline adherence, it is important to note the dual structure of the Department of Justice. On one level there is the Washington, D.C. office, the location of the Office of Professional Responsibility and the Executive Office of the United States Attorney. On the second tier are the 93 offices located throughout the country, supervised by individual United States Attorneys. Although monitoring can occur at both levels, the reporting of guideline violations occurs at the main Justice Department office.”).

114. Michael M. O’Hear, *Plea Bargaining and Victims: From Consultation to Guidelines*, 91 MARQ. L. REV. 323 (2007).

115. *Id.* at 325.

116. *Id.* at 335–36.

117. *Id.* at 336–37 (“[A] set of prosecutorial guidelines designed to identify a standard offense of conviction to be sought in *ordinary* cases simply need not deal with the full range of real-world complexity.”).

118. *Id.* at 340.

119. *Id.* (“[I]f victims are treated in a way that is perceived to be procedurally just, they are more likely to accept the outcomes of their cases, feel respect for the authorities, and regard the law as something they ought to obey.”).

120. *Id.* at 340–41 (“Thus, prosecutors may further procedural justice ends by employing guidelines that are built around objective offense and offender characteristics, as in my sample robbery guideline. That way, even when a victim feels disappointed with the way his or her case was resolved, the victim may nonetheless have confidence that the outcome was nothing personal—the prosecutor was just adhering to the predetermined, general norms.”).

power brought on by the nature of the plea-bargaining process. The great trouble with these kinds of guidelines is that they are notoriously difficult to enforce as well as being few and far between.¹²¹

Another possible proposal is that it might not be necessary for the prosecutor to bargain with defense counsel at all. Although the criminal defendant does have leverage with which to bargain in stretching out the process and costing the prosecutor time and money by exercising his procedural rights,¹²² the common idea of bargaining may not be applicable in the usual case. As Gerard E. Lynch puts it,

the typical guilty plea process already bears far more indicia of an adjudication by the responsible government agency of a defendant's arguments that he should not be found guilty, or should be found culpable only to a limited degree, or should only be punished a certain amount, than of a commercial transaction.¹²³

The role of the prosecutor to try to come to the correct outcome would be the same in the administrative model.¹²⁴ Thus, the prosecutor could act according to objective norms. However our system is so firmly entrenched in the archetype of adversarialism that such a change seems very unlikely.

B. A Possibility in the Administrative Model

Following the administrative example, and the examples of the supervisory oversight provided in inquisitorial systems described above,¹²⁵ it makes sense to devise a method by which the decisions of the independent American prosecutor can be documented without sacrificing discretion. The National Environmental Policy Act (NEPA) provides an

121. Luna & Wade, *supra* note 19, at 1419–20 (“Lawmakers also have been wary to hamper prosecutors and instead have facilitated the prosecutorial function through the passage of more crimes and harsher punishments. As for internal guidelines, some prosecution offices have adopted policies on charging, plea bargaining, and other crucial decisions. These constraints are far from universal, however, and may be confidential, often employing hortatory language or pitched at a level of generality that confines little. Most importantly, they are not legally binding in court, and the lack of vigorous internal oversight and discipline has rendered such guidelines largely ineffective. In most cases, prosecutors can charge at will and preordain the ultimate resolution.”) (footnotes omitted).

122. Lynch, *supra* note 13, at 2132.

123. *Id.* at 2132–33.

124. *Id.* at 2135 (“[T]he prosecutor acts as the administrative decision-maker who determines, in the first instance, whether an accused will be subject to social sanction, and if so, how much punishment will be imposed. The prosecutor does not sit, in this process, as a neutral fact-finder adjudicating between adversarial parties, nor as the representative of one interest negotiating on an equal footing with an adversary, but as an inquisitor seeking the ‘correct’ outcome.”).

125. Moohr, *supra* note 54, at 192–93.

example of an American law that mandates an administrative policy where the procedures of decision-making are strongly enforced.¹²⁶

NEPA requires that all federal agencies must produce an Environmental Impact Statement for all major federal actions that might significantly affect the quality of the environment.¹²⁷ This, in effect, requires all government agencies to follow a particular procedure whenever they seek to take an action that could have the proscribed effects, and if they do not, they are unable to take that action until they do, subject to judicial review.¹²⁸ NEPA does not affect the ability of a federal agency to make whatever decision it believes warranted after it conducts the proper procedure,¹²⁹ it only requires that the agency must follow the prescribed procedure and consider all alternatives to the action.¹³⁰ Of course, administrative action involving a requirement to create an Environmental Impact Statement¹³¹ is different in scale from prosecutors' making a decision on charges and a plea offer. It is, however, still possible to extend the idea of a required administrative process to plea bargaining.

A prosecutor can be required, through guidelines, or, in the extreme case, a statute, to follow a certain procedure in order to be allowed to proceed with plea bargaining. This would not take away any of the prosecutor's discretion. Instead, it would merely force the prosecutor to consider all of the alternatives and the reasons for making a decision, in a similar way to NEPA and administrative agency decision-making. There would then be a record trail that could be reviewable if necessary to provide real oversight in the administrative model over the prosecutorial function,¹³² as well as allowing for a log of decisions for the prosecutor to

126. 42 U.S.C. §§ 4321–47 (2012).

127. 42 U.S.C. § 4332(2)(B) (“[A]ll agencies of the Federal Government shall . . . identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical concerns.”).

128. 42 U.S.C. §§ 4331–35.

129. *See Chevron, U.S.A., Inc., v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984) (holding that courts must respect the legitimate policy choices of federal agencies).

In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: ‘Our Constitution vests such responsibilities in the political branches.’

Id.

130. 42 U.S.C. § 4332(2)(C)(iii).

131. 42 U.S.C. § 4332.

132. *See Chevron*, 467 U.S. at 866 (“When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency’s policy, rather than on whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a

consult. The Administrative Procedure Act requires administrative agencies to follow certain procedures in their executive rule-making process.¹³³ This would be similar in that it would require prosecutors to follow a prescribed procedure and document their decision-making process in a reviewable record when they make a plea offer.

Therefore, in order to provide the necessary oversight to ensure fairness and consistency in the plea-bargaining process, prosecutors should be required, subsequent to the formal acceptance of a plea agreement, to provide detailed reasons in writing as to why a certain plea deal was offered to a supervising attorney or prosecutor.¹³⁴ It has been suggested that prosecutors' offices should do more to instill a sense of duty and fairness in their young prosecutors to work in the interests of justice.¹³⁵ But by forming a system of review by more senior and experienced attorneys who have been specially trained, they can fairly determine what a proper plea bargain should be and help in the process of instilling this ideal of fairness into the young prosecutors. Even if the supervisor would only glance at the document without giving it much scrutiny, the mere process of creating the document would force the prosecutor to really think through the reasons for why he wants to make a particular plea offer and provide a tangible record that the prosecutor could review. The system could be established either by guidelines or by the enactment of a statute. Because such a requirement would only require a few minutes of the prosecutor's time, it should not create the dreaded and onerous time, financial and human resources burdens. Further, no discretion would be taken away from prosecutors because they would still be able to make whatever decisions they deem best, as long as they followed the prescribed procedure and created the report. The procedure would, however, force prosecutors to take a more detailed look at the decisions they make, and have made, as they will be subject to review from a supervising attorney

case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: Our Constitution vests such responsibilities in the political branches.”) (internal quotation marks omitted).

133. 5 U.S.C. § 551 (2012).

134. See *Moohr*, *supra* note 54, at 197 (“Prosecutors in continental systems are supervised to a much greater extent than federal prosecutors and, in comparison, have much less discretionary authority.”).

135. Lynch, *supra* note 13, at 2148–49 (“[A] well-run district attorney’s or United States Attorney’s office must do whatever it can—as the best such offices already do—to instill a sense of fairness in the mostly young lawyers who serve on the front lines. Far more important than any rule permitting defense attorneys to be heard is the spirit in which such hearings are conducted. Prosecutors should be trained to approach their determinations of appropriate dispositions in a spirit of fairness and neutrality, as befits a governmental decision deeply adverse to a member of the community.”).

or prosecutor working from an objective perspective, perhaps incorporating suggested guidelines for what plea deals are appropriate in certain commonly recurring case types.

In such a system, the degree of increased oversight would help weed out the possibility of improper reasons driving prosecutorial decisions because the prosecutor would have to provide reasons for his decisions that could survive the scrutiny of an experienced supervising attorney, as well as reinforcing internal consistency in decisions over time. While not perfect, this process might help alleviate many of the complaints against the plea-bargaining system and goes beyond effectively unenforceable guidelines that have been proposed in the past.¹³⁶ Even if such a record would end up not being not judicially reviewable, it could still be effective in forcing prosecutors to more thoroughly consider the decisions they make in the plea-bargaining process and even possibly expose them to some external public scrutiny.¹³⁷

C. Possibility of Being Incorporated with Potential Charging Guidelines

Another possibility is to incorporate these suggested procedures into a set of charging guidelines. A valuable comparison that can be made is to the United States Sentencing Guidelines,¹³⁸ which provide guidance to the judiciary in making sentencing decisions. The goals of the Guidelines are to “enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system.”¹³⁹ The Guidelines attempt to

136. Luna & Wade, *supra* note 19, at 1499; *see generally* Wright & Miller, *supra* note 19 (suggesting a prosecutorial case-screening process that would weed out weak cases early to prevent overcharging and unfair plea bargains. However, this proposal is completely reliant upon the voluntary participation of prosecutors’ offices and provides no reviewability or assurance that such a program would every actually be followed).

137. ROBERT PERCIVAL, CHRISTOPHER H. SCHROEDER, ALAN S. MILLER & JAMES P. LEAPE, ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 932–33 (6th ed. 2009) (quoting ROBER DREHER, NEPA UNDER SEIGE (2005)).

NEPA’s most significant effect has been to deter federal agencies from bringing forward proposed projects that could not withstand public examination and debate . . . More broadly, NEPA has had pervasive effects on the conduct and thinking of federal administrative agencies . . . NEPA has succeeded in expanding public engagement in government decision-making, improving the quality of agency decisions and fulfilling principles of democratic governance that are central to our society . . . In sum, NEPA functions as a critical tool for democratic government decision-making, establishing an orderly, clear framework for involving the public in major decisions affecting their lives and communities.

Id.

138. U.S. SENTENCING COMM’N, GUIDELINES MANUAL (2011).

139. *Id.* § 1A1.3.

balance uniformity with proportionality,¹⁴⁰ meaning that they attempt to provide a guide without taking away the discretion of the judge. The guidelines for the prosecutor in plea bargaining could strive for a similar result. Although preserving the essential elements of prosecutorial discretion, the potential guidelines could still act as a guide as to what would normally be acceptable. If such guidelines were created, the procedural requirement suggested here would not be in conflict with them. The process of requiring that the prosecutor provide a rationale to a supervising attorney for why he wants to make a particular plea deal will work in tandem with any guidelines that might be developed, as it will give them the opportunity to explain their reasons for departing from the normative sentences and justify that decision. Just such a process is what is envisioned here, inspired by an administrative and inquisitorial model of the role of the prosecutor.

V. CONCLUSION

Plea bargaining has taken a prominent place in the practice of criminal law in the United States, accounting for the vast majority of convictions in criminal cases. It has correspondingly become an issue that cannot be ignored, and has been granted legitimacy by the United States Supreme Court in recent cases like *Lafler* and *Frye*.¹⁴¹ In fact, it appears to have become the predominant system of American criminal justice, and cannot be ignored or lambasted as the unfortunate by-product of our traditional

140. *Id.* (“[T]he guidelines represent an approach that begins with, and builds upon, empirical data. The guidelines will not please those who wish the commission to adopt a single philosophical theory and then work deductively to establish a simple and perfect set of categorizations and distinctions. The guidelines may prove more acceptable, however, to those who seek more modest, incremental improvements in the status quo, who believe the best is often the enemy of the good, and who recognize that these guidelines are, as the Act contemplates, but the first step in an evolutionary process. After spending considerable time and resources exploring alternative approaches, the Commission developed these guidelines as a practical effort toward the achievement of a more honest, uniform, equitable, proportional, and therefore effective sentencing system.”).

141. *Missouri v. Frye*, 132 S. Ct. 1399 (2012); *Lafler v. Cooper*, 132 S. Ct. 1376, 1397–98 (2012) (Scalia, J., dissenting) (“Today, however, the Supreme Court of the United States elevates plea bargaining from a necessary evil to a constitutional entitlement. It is no longer a somewhat embarrassing adjunct to our criminal justice system; rather, as the Court announces in the companion case to this one, ‘it is the criminal justice system.’ . . . Thus, even though there is no doubt that the respondent here is guilty of the offense with which he was charged; even though he has received the exorbitant gold standard of American justice—a full-dress criminal trial with its innumerable constitutional and statutory limitations upon the evidence that the prosecution can bring forward, and (in Michigan as in most States) the requirement of a unanimous guilty verdict by impartial jurors; the Court says that his conviction is invalid because he was deprived of his *constitutional entitlement* to plea-bargain.”).

adversarial process. Instead, it must be embraced for what it is and dealt with in a manner commensurate with its essential nature as an inherently administrative process. But such a system raises many procedural and ethical problems that need to be addressed, such as when caseloads of prosecutors and defense attorneys become overburdened and the relationships between attorneys become too casual and too close. These problems can be addressed, and it would be unwise to ignore them any longer. Only when we accept the reality of plea bargaining as it actually exists can we take steps to improve it and deal with the problems for prosecutors and defendants alike.

Thus, looking at the system of plea bargaining as something akin to an administrative or inquisitorial system of criminal justice, we can incorporate an element of administrative oversight into the process by requiring prosecutors to fill out forms describing the reasoning behind a plea deal that can be reviewed by a supervising attorney. This process can help foster a culture of accountability through more senior attorneys translating their experiences and training down the ranks to the younger and greener attorneys who have not had the same experiences. A log of prior plea offers could also be generated, helping foster consistency in future plea bargains. Further, we can supplement the review of these more senior attorneys by providing them with objective criteria, similar to the sentencing guidelines provided to the judiciary, that help guide decisions about what kind of plea bargains are appropriate in certain situations. Such a prescribed process will serve to remove the perception of unfairness out of the process without taking away the discretion of the prosecutors who ultimately need to be allowed to make decisions unique to individual situations. And this can be done by merely mandating a mentoring role for more senior attorneys that should already exist in the most effective prosecutor's offices throughout the country, and by fostering a culture of justification for all the decisions that are made in plea bargaining. The prosecutors can still make any decision that they would like, provided they follow the proper procedure. They would simply be subject to more significant levels of scrutiny. Following this proposal, the concerns surrounding plea bargaining can be somewhat alleviated without placing a new onerous burden upon an already overburdened criminal justice

system. The hope is that only a small additional obligation that a responsible prosecutor's office would undoubtedly be following regardless be placed upon prosecutors and their offices.

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