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Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System

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Cover Page Footnote

Professor, Pepperdine University School of Law. He thanks Pepperdine University School of Law's Summer Research Grant Fund, and his research assistants: Natalia Bronchuk, Lauren Wilson Castles, Chalak Richards, and Zach Ulrich, as well as Reference Librarian Jennifer Allison.

COERCIVE PLEA BARGAINING: THE UNRECOGNIZED SCOURGE OF THE JUSTICE SYSTEM

H. Mitchell Caldwell⁺

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While walking down their street one evening, Marcus and Alfred, both eighteen, passed a boy they recognized from school. Marcus approached the boy, and in a low, menacing voice, he demanded the boy’s backpack. After rummaging through the pack, Marcus pulled out forty dollars, shoved the boy down, and walked off. Alfred, surprised as he stood by watching, pulled the boy to his feet and then walked away in the same direction as Marcus.

The police later arrested both Marcus and Alfred, and the prosecutor charged them with robbery¹ and street terrorism.² Although Alfred did not actively participate in this event, the prosecutor charged him under the accomplice

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1. CAL. PENAL CODE § 211 (West 2008) (“Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.”).

2. The California Street Terrorism Enforcement and Prevention Act provides, in part, that [A]ny person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further or assist in any criminal conduct by gang members . . . shall be punished by imprisonment

CAL. PENAL CODE § 186.22(b)(1) (West Supp. 2011).

theory of criminal liability, for which he could face up to sixteen years in prison.³

Days later, dressed in a jail-issued, orange jumpsuit and seated in the secure “custody box,” Alfred watched as his court-appointed attorney discussed his case with the prosecutor. When the attorneys finished, Alfred’s counsel relayed to him the prosecutor’s so-called one-time offer: “If you plead to the robbery charge, the street terrorism charge will be dropped, and you will serve two years in state prison.”

Counseling him on this offer, Alfred’s attorney adamantly urged Alfred to reject this deal and take his case to trial. His attorney promptly expressed his belief that if the case did go to trial, Alfred would be acquitted. He maintained that Alfred was only in the wrong place, at the wrong time, with the wrong person.

Thus, Alfred faced a tragically difficult choice: either plead to the felony and take the two years in prison for a crime he did not commit, or risk spending the next decade and a half of his life in state prison.

Alfred’s Kafkaesque choice is not uncommon;⁴ such nightmarish scenarios play out every day in courts across the country.⁵ The vast discrepancy between the offered disposition and the potential punishment for a conviction at trial can often lead to coerced pleas.⁶ Those vulnerable to coerced pleas include the innocent and the guilty, if the guilty face charges beyond their actual criminal conduct.⁷

The criminal charging process is, of course, an essential component of the criminal justice system.⁸ As the Supreme Court stated, plea-bargaining is “inherent in the criminal law and its administration.”⁹ Some American justice-system scholars maintain that court systems would buckle under weighty caseloads if attorneys were unable to reach agreements in the vast

3. *Id.* § 213(a)(1)(B) (providing for up to six years of imprisonment for first-degree robbery); *see also id.* § 186.22(1)(C) (adding ten years to the sentence of a gang member convicted of a violent felony, including robbery, under certain circumstances).

4. *See generally* FRANZ KAFKA, *THE TRIAL* (Breon Mitchell trans., Schocken Books 1998) (1925) (telling the story of a man who was arrested and ultimately executed for a crime he did not commit).

5. Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1239 (2008) (noting the rising number of innocent defendants entering guilty pleas to avoid risky trials).

6. *See infra* note 80 and accompanying text.

7. *See* Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 863 (1995) (discussing how prosecutors regularly use their discretion in the charging process to influence defendants to plead guilty).

8. *Santobello v. New York*, 404 U.S. 257, 260 (1971).

9. *Brady v. United States*, 397 U.S. 742, 751 (1970).

majority of their cases.¹⁰ Consequently, negotiating dispositions has become the norm.¹¹ However, for the plea-bargaining process to serve the public fairly, it must be implemented with careful discretion, particularly when evaluating who should be charged and what should be charged, to fairly and accurately reflect the criminal conduct involved.¹² If compromised, the potential for injustice and the specter of coercive plea bargaining move front and center.¹³

In implementing the plea-bargaining process, the state, as the prosecutor of crimes, has a powerful incentive to begin the inevitable negotiating process from a position of strength, which often results in overcharging.¹⁴ Yet

10. See, e.g., George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 865 (2000) ("Prosecutors of the nineteenth century, like prosecutors today, plea bargained to ease their crushing workloads, made heavier in the nineteenth century both by their part-time status and utter lack of staff and by a caseload explosion perhaps set off by newly founded police forces and massive immigration."); see also *Santobello*, 404 U.S. at 264 (Douglas, J., concurring) (stating that plea bargains "serve an important role in the disposition of today's heavy calendars"). But see Kirk Makin, *Top Jurist Urges Review of 'Coercive' Plea Bargaining System*, GLOBE & MAIL, Mar. 8, 2011, at A14, available at 2011 WLNR 4491398 ("[O]ne U.S. jurisdiction—New Orleans—banned plea bargaining several years ago, yet many people continued to plead guilty and there was no sharp increase in trials.").

11. See Univ. of Albany, *Table 5.22.2010: Criminal Defendants Disposed of in U.S. District Courts*, SOURCEBOOK CRIM. JUST., <http://www.albany.edu/sourcebook/pdf/t5222010.pdf> (last visited Oct. 22, 2011) [hereinafter SOURCEBOOK] (providing the total number of criminal defendants, convicted defendants, and defendants convicted by a plea of guilty or nolo contendere). Of the 98,311 total criminal defendants disposed of by U.S. district courts in 2010, 89,741 were convicted, and 87,418 (or ninety-seven percent) of those convictions were obtained through a plea. *Id.*; see also 1A CHARLES ALLAN WRIGHT & ANDREW D. LEIPOLD, FEDERAL PRACTICE & PROCEDURE § 180 (4th ed. 2008) ("In a typical year roughly 85% of the federal criminal cases filed end in a guilty plea.").

12. See Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 32 (2002).

13. See Meares, *supra* note 7, at 866 (noting that "vast prosecutorial discretion at the charging stage" can impinge on a defendant's free will to choose whether or not to plead guilty to the proposed charges). This discretion can be attributed to the "natural gap" between the proof required to bring a charge and the proof required to obtain a conviction at trial. *Id.* at 865. A prosecutor may bring a charge so long as there is probable cause, which also may be based on evidence otherwise inadmissible at trial, whereas a conviction at trial would require proof beyond a reasonable doubt in strict compliance with the rules of evidence. *Id.* at 865–66.

14. See Wright & Miller, *supra* note 12, at 33. Any attempt to ascertain how widespread overcharging has become is destined to be only the roughest of estimates. Prosecutorial agencies still fail to acknowledge that such practices even exist, and even in a candid moment, they would not have an incentive to report such practices. See *id.* at 34 (describing the plea-bargaining process as "not open for review or evaluation"). As a result, efforts to quantify the negotiated-disposition practice are relegated to review of the prevailing opinions given by American justice-system scholars, which, in most instances, draw on largely anecdotal evidence. See, e.g., Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2547 (2004) ("[P]lea bargaining hides within a low-visibility process A few researchers have been able to observe bargaining or to review prosecutor's files, but by and large attorneys are reluctant to let outsiders into the plea-bargaining process."); Rebecca Hollander-Blumoff, Note, *Getting to "Guilty": Plea Bargaining as Negotiation*, 2 HARV. NEGOT. L. REV.

whenever a prosecutorial agency files charges that are disproportionate or misrepresentative of the defendant's actions, that agency runs afoul of the ethical guidelines governing prosecutors,¹⁵ abuses its prosecutorial power,¹⁶ and compromises the justice system as a whole.

However, identifying the shortcomings of the plea-bargaining power is less problematic than actually discovering sensible and workable solutions to those problems. Most would agree that coercive plea or sentencing bargaining is wrong. The rub, of course, is fixing the problem. With that ambitious and perhaps elusive goal in mind, this Article offers an approach to reduce, if not eradicate, coercive plea and sentence bargaining.

Part I of this Article briefly sets forth the ethical and professional duties of prosecutors. Part II examines the game-theory concepts at play in plea- and sentence-bargaining negotiations. For perspective, Part III explores the evolution of plea bargaining from common law and elucidates the problem of coercive plea bargaining. Part VI analyzes how other scholars' approaches fail to address the problem adequately and hence have not been implemented. Finally, in Part V, the Article concludes by offering a viable approach for limiting prosecutorial abuse in the charging process—an approach that governments, both state and federal, can implement without disrupting the justice system and without significant costs.

I. ETHICAL AND PROFESSIONAL DUTIES OF PROSECUTORS

The prosecutor, a representative of the state,¹⁷ serves as the public's "minister of justice," thereby distinguishing the prosecutorial role from that of simple advocacy.¹⁸ The Supreme Court once described the prosecutor as "in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. . . . It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."¹⁹

Thus, although governed by the same ethical rules as other attorneys, prosecutors are also subject to additional ethical standards. For example,

115, 116 n.5 (1997) (noting that the author's data was gathered "from personal interviews with prosecutors and defense attorneys" and that the author had to "maintain interview subjects' anonymity so that they could speak freely").

15. See *infra* Part I.

16. See Bibas, *supra* note 14, at 2470 ("Apart from [certain deterrence considerations], plea bargains should depend only on the severity of the crime, the strength of the evidence, and the defendant's record and need for punishment. This ideal asks prosecutors to be perfectly selfless, perfectly faithful agents of the public interest."); see also Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1991 (1992) ("[A]gency problems . . . pose massive obstacles to efficient, welfare-enhancing transactions. Prosecutors have few incentives to pursue an optimal deterrence strategy . . .").

17. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13 (1980).

18. See MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2009).

19. *Berger v. United States*, 295 U.S. 78, 88 (1935).

Model Rule of Professional Conduct 3.8, which specifically addresses the “special responsibilities” of prosecutors, instructs prosecutors to bring only those charges supported by probable cause,²⁰ which is commonly defined as a “reasonable ground to suspect that a person has committed . . . a crime.”²¹ In other words, if the case proceeds to trial, then the evidence must reasonably support the number and degree of the filed charges.²² This fundamental prosecutorial obligation is rooted in the underlying goal of the criminal justice system—to convict and punish only the guilty and to avoid a wrongful conviction or punishment of the innocent.²³

II. PLEA BARGAINING THROUGH THE LENS OF GAME THEORY

Recognizing that a prosecutor’s professional and ethical responsibilities extend to both the filing of charges and the case-disposition process, this Article examines these interrelated functions under the lens of game theory. As the phrase itself suggests, plea bargaining is a negotiation between opposing parties, with each attempting to “win” the negotiating battle.²⁴ However, “winning” in this context is not entirely a function of whether the prosecutor obtained a plea to the crimes charged or a lengthy sentence, or whether the defense obtained a plea to a significantly lesser charge or a minimal sentence. Rather, winning and losing in the serious business of plea bargaining is often defined by the parties’ respective motivations and expectations.²⁵

Game theory, an analytical tool often used in the field of economics to analyze the motivations of individual actors in various situations,²⁶ may help

20. *Id.*; see also Mari Bryne, Note, *Baseless Pleas: A Mockery of Justice*, 78 FORDHAM L. REV. 1962, 2976–77 (2010) (noting that this standard is the requisite minimum and describing arguments made in favor of a higher standard).

21. BLACK’S LAW DICTIONARY 1321 (9th ed. 2009).

22. Byrne, *supra* note 20, at 2975 (citing ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION Standard 3-3.9(f) (3d ed. 1993)).

23. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION Standard 3-1.2 cmt. (3d ed. 1993) (“Although the prosecutor operates within the adversary system, it is fundamental that the prosecutor’s obligation is to protect the innocent as well as to convict the guilty, to guard the rights of the accused as well as to enforce the rights of the public.”).

24. See Rudolph J. Gerber, *A System in Collapse: Appearance vs. Reality in Criminal Justice*, 12 ST. LOUIS U. PUB. L. REV. 225, 226 (1993) (“For sophisticated defense attorneys and defendants, this culture of overcharging means that the charges don’t really mean what they say but merely constitute a first bargaining position. Experienced defense counsel recognize bargaining as a poker game of bluff and intimidation.”).

25. Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121, 1132 (1998) (“The prosecutor is charged with achieving a result that satisfies society’s sometimes conflicting desires for vengeance, deterrence, and fairness. The defendant seeks to minimized incarceration, loss of reputation, and damage to his personal affairs.” (footnote omitted)).

26. COLIN F. CRAMERER, BEHAVIORAL GAME THEORY 2–3 (2003).

elucidate the delicate intricacies of plea and sentence bargaining.²⁷ In this context, game theory identifies the incentives and motivations of prosecutors and defendants throughout the stages of the plea-bargaining process, ranging from the filing of charges to acceptance or referral of prosecutors' final offers.²⁸ The following analysis synthesizes past explorations of plea bargaining using the game theory, thereby demonstrating a prosecutor's individual and institutional motivations to overcharge defendants.

The prosecutor's and defendant's behavior throughout any given plea-bargaining process are, in many ways, mutually dependent.²⁹ When deciding which charges to file and which plea offers to make, the prosecutor considers how the defendant will respond to his or her decisions; the defendant's response is therefore a crucial factor in the prosecutor's decision-making process.³⁰ Similarly, when deciding whether to accept or reject a plea offer, the defendant also considers the crucial factor of how the prosecutor will react to his or her response.³¹ Because each party's actions are substantially dependent upon the anticipated actions of the other, their motivations are fundamentally related. Furthermore, because these mutually exclusive motivations can be quantified, one can generally approximate the actions of prosecutors and defendants on a greater scale.³²

27. Cf. Charles F. Manski, *Economic Analysis of Social Interactions*, J. ECON. PERSP., Summer 2000, at 115, 116 ("Game theory encouraged economists to see all interactions as games, with markets as special cases. As a result, economic theorists have in recent years studied phenomena as far from traditional economic concerns as the evolution of social norms.").

28. See *infra* notes 29–40 and accompanying text.

29. See Stephen F. Ross, Note, *Bordenkircher v. Hayes: Ignoring Prosecutorial Abuses in Plea Bargaining*, 66 CAL. L. REV. 875, 883 (describing this mutual dependence as a "mutuality of advantage"). Stephen Ross states:

Since plea bargaining derives its constitutional legitimacy from the "mutuality of advantage" enjoyed by the prosecutor and the defendant, only a plea bargain that involves a real benefit in the form of lenient treatment to the defendant as well as administrative convenience to the government keeps the element of coercion within constitutional limits.

Id.

30. See CRAMERER, *supra* note 26, at 2 ("In [game theory] situations, a person (or firm) must anticipate what others will do and what others will infer from the person's own actions."); Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 60 (1968) ("When a prosecutor has a dead-bang case, he is likely to come up with an impossible offer like thirty to fifty years. When the case has a hole in it, however, the prosecutor may scale the offer all the way down to probation. The prosecutors' [sic] goal is to get something from every defendant . . ." (internal quotation marks omitted)).

31. Scott A. Baker, *Essays in Game Theory and the Law 2* (2001) (unpublished Ph.D. dissertation, University of North Carolina at Chapel Hill), available at <http://proquest.umi.com>.

32. See Zacharias, *supra* note 25, at 1132 (comparing the factors motivating prosecutors and defendants); *infra* notes 33–40; see also Bibas, *supra* note 14, at 2470–77 (discussing the various incentives of prosecutors and defense counsel). Professor Stephanos Bibas discusses prosecutors' incentives, stating:

The strength of the prosecution's case is the most important factor, but other considerations come into play. Trials are much more time consuming than plea

To illustrate, a defendant will accept a plea offer only if the utility (or value) of the known consequences of such an acceptance outweighs the risk (or cost) associated with going to trial.³³ In using this equation, one must first assess the many variables involved in the plea-bargaining process.³⁴ One such variable is the defendant's wealth.³⁵ Particularly, this variable measures the defendant's ability to retain private counsel, rather than being forced to rely on court-appointed counsel for financial reasons.³⁶ Although retaining private counsel certainly increases costs, it simultaneously lessens the overall risk of going to trial, because a more capable and willing advocate increases the likelihood of a favorable outcome.³⁷ Notwithstanding this potential advantage, defendants who opt to go to trial must still incur the heightened transaction costs associated with this option.³⁸

Another variable involved in the equation is the minimum sentence that the prosecutor is willing to offer. Monetary losses, such as lost income, lost work experience, and lost job seniority while imprisoned, are compounded by non-monetary losses, such as time away from family and friends, association

bargains, so prosecutors have incentives to negotiate deals instead of trying cases. Prosecutors have personal incentives to reduce their workloads so that they can leave work early enough to dine with their families. Additionally, prosecutors are paid salaries, not by case or by outcome, so they have no direct financial stake in the outcome.

Id. (footnotes omitted). Bibas also explains that busy district attorney's offices are likely to offer more favorable pleas to defendants than offices with lighter caseloads. *Id.* at 2474. Similarly, defendants and their counsel have individual motivations. *See id.* at 2477. Bibas explains that:

Though not all lawyers are slaves to their pocketbooks, financial incentives influence many to varying degrees. A lawyer who receives a fixed salary or a flat fee per case has no financial incentive to try cases. On the contrary, flat fees create financial incentives to plead cases out quickly in order to handle larger volumes. . . . To put it bluntly, appointed or flat-fee defense lawyers can make more money with less time and effort by pushing clients to plead.

Id. (footnotes omitted).

33. *See* Douglas D. Guldorizzi, Comment, *Should We Really "Ban" Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 EMORY L.J. 753, 771–72 (1998) ("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 risk of going to trial. Risk-averse defendants will accept the state's offer and plead guilty.").

34. *See supra* notes 30–32 and accompanying text.

35. *See* Bibas, *supra* note 14, at 2476 (identifying a defendant's wealth as a variable).

36. *See id.*

37. *See id.* at 2476–77 (discussing the financial pressures and incentives associated with different types of defense attorneys). Bibas suggests that a defense attorney is more likely to litigate, rather than aim for a quick plea bargain, when there is a promise of continued hourly payment. *See id.*

38. *See* Jennifer F. Reinganum & Louis L. Wilde, *Settlement, Litigation, and the Allocation of Litigation Costs*, 17 RAND J. ECON. 557, 558 (1986) ("Using the court to resolve the dispute is costly for both the defendant and the plaintiff (in terms of time, legal fees, etc.) and may be subject to error.").

with other incarcerated individuals, and the stigma of jail or prison time.³⁹ Of course, a defendant who chooses to go to trial may well face the same losses, or worse, should he not prevail.

In sum, the equation reads: A plea bargain occurs if the value of the plea, less the costs associated with transacting the plea bargain and serving the offered sentence, is worth more to the defendant than what he or she might gain at trial.⁴⁰ This equation is not intended to provide a definitive guide to each party's motivations during plea bargaining; rather, it is intended to provide an example of ways in which party motivations may be quantified and analyzed, thereby serving as the basis of policy recommendations.

One of the equation's obvious limitations is its assumption that both parties know every fact involved and every piece of information that the other party has, including the verdict should the case proceed to trial.⁴¹ Absent this assumed omniscience, both parties face increased risk in any decision they make.⁴² For example, a defendant may not be able to ascertain whether the prosecutor will actually take his or her case to trial without making any further offers. If the defendant believes that the prosecutor is bluffing in making a "final offer," then the defendant might be motivated to reject the offer, which he or she otherwise might have accepted if the offer was truly thought to be final. However, the defendant takes on significant risk when rejecting an offer, given his or her inability to predict the prosecutor's future conduct with any certainty. This asymmetry of information—where one or both sides have information that the other cannot—makes the "game" of plea bargaining a gamble for both sides.⁴³

The asymmetry of information inherent in plea bargaining significantly increases the chance of sub-optimal outcomes when compared to cases

39. See Zacharias, *supra* note 25, at 1132 (discussing the factors considered by defendants facing potential imprisonment). Former Professor Fred Zacharias also recognizes that most defendants "seek[] to minimize incarceration, loss of reputation, and damage to his personal affairs." *Id.*

40. See Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1118 (2008) (recognizing that "the costs of proceeding to trial often swamp the costs of pleading to lenient bargains").

41. Cf. Zacharias, *supra* note 25, at 1130–31 (explaining the inaccessibility of information in the criminal-negotiation context).

42. Cf. Urs Schweizer, *Litigation and Settlement Under Two-Sided Incomplete Information*, 56 REV. ECON. STUD. 163, 163 (1989) ("It seems to be a basic tenet of the economic analysis of law that voluntary exchange and transaction enhance efficiency."). Dr. Urs Schweizer further explains that "decisions based on unqualified judgement [sic] and faulty views can lead to litigation and, in fact, may actually do so quite frequently in real life." *Id.* at 164; see also Lucian Arye Bebchuk, *Litigation and Settlement Under Imperfect Information*, 15 RAND J. ECON. 404, 404 (1984) ("[I]nformational asymmetry influences parties' decisions, and . . . might lead to parties' failure to settle.").

43. Gene M. Grossman & Michael L. Katz, *Plea Bargaining and Social Welfare*, 73 AM. ECON. REV. 749, 749–50 (1983).

involving omniscient parties.⁴⁴ For instance, it is valuable for a prosecutor to know that a defendant will agree to a plea bargain for a three-year prison term but not a four-year prison term. If the prosecutor knows this information, he or she can more precisely calibrate the plea offer to balance his or her own competing interests of allocating limited resources to trial only when necessary and seeking justice for the public by only offering plea bargains when appropriate.⁴⁵ If a prosecutor is able to anticipate the maximum number of years obtainable in a given plea bargain, then he or she can more efficiently balance these competing needs.

Past game-theory analyses of plea bargaining view the “game” as merely a balancing of economic resources by the prosecutor and the defendant,⁴⁶ but later analyses extend such previous works to include the game’s efficiency as a socially beneficial vetting tool.⁴⁷ Previous analyses suggest that plea bargaining may not necessarily lead to the optimal, just outcomes that it seeks to achieve.⁴⁸ For instance, game theory shows that prosecutors need to be credible when threatening to pursue trial for defendants to fear conviction and thus take plea offers.⁴⁹ On the other hand, game theory also shows that prosecutors would violate their ethical duty of seeking justice for the public if they pursue trial when they know a given defendant is innocent.⁵⁰ Prosecutors, as agents of the state, seek to promote judicial economy by only trying those cases they are likely to win;⁵¹ however, short of open admissions of guilt, prosecutors may not ever truly know whether a given defendant is guilty or innocent.

44. See, e.g., *id.* at 752–56. Professors Gene Grossman and Michael Katz created an analytical model of the plea-bargaining process and concluded that the process loses utility when a prosecutor is not certain of the defendant’s guilt or innocence and defendants are not equally risk averse. *Id.* They compare this result to a hypothetical model, assuming all defendants are guilty, in which plea bargaining would “achieve a level of social welfare greater than that attainable through trial.” See *id.*

45. See Bibas, *supra* note 14, at 2470–71, 2479.

46. See Grossman & Katz, *supra* note 43, at 749; see, e.g., William Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61, 63–67 (1971) (analyzing plea bargaining almost exclusively as a balancing of parties’ marginal utility against the resources available to them).

47. See, e.g., Grossman & Katz, *supra* note 43, at 749–50.

48. See *supra* note 44 and accompanying text; see also Guldorizzi, *supra* note 33, at 771 (“The most serious concern with plea bargaining pertains to the possible coercion of innocent defendants to plead guilty.”).

49. See Joseph W. Vanover, Comment, *Utilitarian Analysis of the Objectives of Criminal Plea Negotiation and Negotiation Strategy Choice*, 1998 J. DISP. RESOL. 183, 192 (“If a prosecutor makes a habit of overcharging and always dismissing charges to reach plea agreements then word will get out. Once it becomes known that the prosecutor always overcharges, defense lawyers will treat the originally filed charges lightly and thus undermine the prosecutor’s negotiating position.”).

50. Grossman & Katz, *supra* note 43, at 753 (noting that the interests of defendants and the State should align when the defendants are innocent).

51. See Bibas, *supra* note 14, at 2470.

Because prosecutors must make credible threats to prosecute defendants effectively,⁵² and because prosecutors may not always know whether defendants are guilty, they cannot always be certain whether they are able to go to trial, especially before discovery, without violating their heightened ethical obligations as prosecutors.⁵³ Therefore, prosecutors' threats, in practice, may not always be credible. Thus, defendants are incentivized to turn down plea offers, especially the initial offer, and particularly if they are innocent.⁵⁴

Game theory also sheds light on prosecutors' incentives and motivations in charging, or potentially overcharging, defendants to gain leverage in the plea-bargaining process. Prosecutors are inherently motivated to have as many guilty defendants convicted as possible and to have convicted defendants serve lengthy sentences.⁵⁵ To illustrate, when a defendant commits a crime, society can be thought of as charging him the price of committing that crime.⁵⁶ Because prosecutors have limited time and monetary resources, they seek to utilize their time and resources to maximize the price paid by defendants overall.⁵⁷ Using this logic, a prosecutor who is confident in a defendant's guilt would go forward with a plea deal, as opposed to bringing the defendant to trial, only when confronted with limited availability of resources and the need to use such resources efficiently.⁵⁸ Therefore, when it would be inefficient to go to trial, prosecutors have an incentive to overcharge initially to ensure that justice is served through the plea-bargaining process.⁵⁹ Extending this line of reasoning even further, it makes sense for prosecutors to overcharge because it allows the prosecutor to gain leverage at the outset and control the parameters of the bargaining process.⁶⁰ Failure to control the bargaining process could result in a prosecutor being forced into an undesirable trial, potentially consuming resources better expended on a multitude of other cases. Thus, the

52. See *supra* note 49 and accompanying text.

53. See *supra* Part I (discussing the heightened ethical obligations incumbent on prosecutors).

54. See Vanover, *supra* note 49, at 192.

55. See Bibas, *supra* note 14, at 2470–71; see also Landes, *supra* note 46, at 63 (using these motivations as a “prosecutor’s decisional rule” in the author’s theoretical model of the plea-bargaining process).

56. See Landes, *supra* note 46, at 63.

57. See *id.* at 64; see also Zacharias, *supra* note 25, at 1138 (discussing the justification that plea-bargaining allows for efficient resource management).

58. See Landes, *supra* note 46, at 64.

59. See Meares, *supra* note 7, at 863–67 & n.52 (discussing the reasons for prosecutorial discretion, including limited resources and individualized justice, and explaining the function of overcharging to obtain pleas).

60. See *id.* at 863 (“The prosecutor’s vast charging discretion necessarily translates into power in the plea bargaining context. . . . Once a prosecution is initiated, the prosecutor can manipulate the offenses on which to charge the accused to control the defendant’s exposure to punishment.”).

scarcity of prosecutorial resources, and the corresponding inability to prosecute all cases, creates an inherent motivation to overcharge defendants during plea negotiations.

Even though both sides in a criminal plea deal are gambling, in the sense that each side balances the value and cost of a deal, defendants face inherent costs that prosecutors do not. Because defendants stand to lose significantly more than prosecutors by not settling, negotiations are fundamentally skewed in ways that may lead to innocent defendants pleading guilty and to guilty defendants serving sentences disproportionate to their crimes.⁶¹ Among the impediments that generate unfavorable equilibrium points (outcomes) for defendants vis-à-vis the prosecution, is their lack of experience playing the plea-negotiation game.⁶² In a negotiation predicated on an asymmetry of information, defendants must grapple with often-complex facts and procedures that they do not understand, and as a result, they are much more likely than prosecutors to make sub-optimal decisions.⁶³ Court-appointed attorneys may minimize this shortcoming, but the extent of mitigation varies widely depending on the quality of counsel available.⁶⁴ Exacerbating this point is the perception that prosecutors gain from having a reputation of toughness,⁶⁵ which may inspire them to utilize their superior bargaining position and experiences to further that reputation at the expense of just outcomes.⁶⁶ Additionally, trial often costs the defendant more, in terms of higher fees and increased risk, than it does the prosecutor.⁶⁷ In most game-theory models, prosecutors must balance the State's resources—of the public enterprise and well-being—but never their own out-of-pocket expenses.⁶⁸ Finally, defendants' risks are, of course, more personally motivated and, therefore, more likely to induce risk-averse behavior than the risks faced by

61. See *infra* notes 63–71 and accompanying text.

62. Grossman & Katz, *supra* note 43, at 751–52.

63. Alexandra Natapoff, *Deregulating Guilt: The Information Culture of the Criminal System*, 30 CARDOZO L. REV. 965, 987–88 (2008).

64. Cf. Guldorizzi, *supra* note 33, at 765–66 (observing the financial disincentives that may compromise the utility of court-appointed counsel); see also Bibas, *supra* note 14, at 2475 (“In plea bargaining, it is easier for inexperienced lawyers to fall afoul of unwritten norms by pushing too hard, not hard enough, or not in the right way.”).

65. See Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CALIF. L. REV. 1471, 1501 (1993).

66. Grossman & Katz, *supra* note 43, at 751.

67. Compare Bibas, *supra* note 14, at 2471 (noting that prosecutors have no financial stake in the outcome of any particular case), with *id.* at 2476 (discussing the limitations defendants have in affording counsel to defend them at trial), and Meares, *supra* note 7, at 867 (discussing the “trial penalty” defendants face when choosing to go to trial, where the stakes are higher in terms of potential punishment); see also Zacharias, *supra* note 25, at 1133–35 (contrasting civil bargaining with criminal bargaining, because criminal defendants do not have an ability equivalent to that of civil defendants to inflict costs, monetary and otherwise, on the opposing party).

68. Landes, *supra* note 46, at 63–69.

prosecutors.⁶⁹ Given identical facts, defendants must necessarily be more risk averse, even if innocent, than a prosecutor.⁷⁰ If defendants do not settle, they face the potential loss of entire years of freedom, connections with loved ones, and earning capacity, among other potential costs—prosecutors do not face any such losses.⁷¹ Game-theory models show that prosecutors only stand to lose time and resources spent going to trial, which they could have spent pursuing other defendants.⁷²

One could argue that if a prosecutor fails to broker an optimal settlement, then the value of public justice will be diminished, whereas the judicial economy is preserved.⁷³ However, the value of a “just result” obtained through a plea bargain—although theoretically valuable to prosecutors as agents of society at large⁷⁴—is rarely cognizable as a personal loss to the prosecutor if the bargain fails. For instance, assume the theoretically “just result” in a given scenario is for a defendant to serve two years in prison. Due to the incentive to overcharge,⁷⁵ the prosecutor seeks a three-year sentence, but the plea bargaining fails, and the case is forced to trial. If the defendant receives the two-year sentence after being convicted at trial, the prosecutor will only feel the loss of judicial waste (lost time and money at trial) if he or she could have avoided incurring such losses by not overcharging. However, it is very rare for prosecutors to be reprimanded for either overcharging or for inefficient settlement negotiations.⁷⁶

69. Zacharias, *supra* note 25, at 1132 (juxtaposing the prosecutor’s concern about meeting society’s demand for vengeance, deterrence, and fairness with the defendant’s concern about loss of freedom, reputation, and other damage to his personal well-being).

70. See Wright & Miller, *supra* note 12, at 85 (“The prosecutor can hope that a defendant will be risk averse and will accept a plea to charges greater than the case’s true value simply to avoid the remote chance of a conviction on far more serious charges.”); see also Bowers, *supra* note 40, at 1158 (“In the usual case, a prosecutor or judge may readily intimidate the defendant with the threat of an excessive posttrial sentence on overcharged counts—as long as the prosecutor or judge is careful with her words. Unsurprisingly, defendants choose to plea bargain, not because they necessarily want to do so in high-stakes cases, but because it is the sole sensible course.”); Covey, *supra* note 5, at 1245 (discussing how his proposed limitations on charge or sentence “discounts” during the plea-bargaining process would “prevent prosecutors from offering discounts so large that innocent defendants are essentially coerced to plead guilty to avoid the risk of a dramatically harsher sentence”).

71. See Zacharias, *supra* note 25, at 1132.

72. Landes, *supra* note 46, at 63–64.

73. See Ric Simmons, *Private Plea Bargains*, 89 N.C. L. REV. 1125, 1178 (2011).

74. See Zacharias, *supra* note 25, at 1138. Justice is served for the public through plea bargaining because it frees up resources to maximize deterrence overall, rather than tying up those resources in expensive trials. See *id.*

75. See *supra* text accompanying notes 55–58.

76. In general, prosecutors who commit misconduct rarely face serious consequences, such as criminal or civil liability, or discipline from a state ethics board. Geoffrey S. Corn & Adam M. Gershowitz, *Imputed Liability for Supervising Prosecutors: Applying the Military Doctrine of Command Responsibility to Reduce Prosecutorial Misconduct*, 14 BERKELEY J. CRIM. L. 395, 405–08 (2009). Furthermore, because criminal convictions are nearly always affirmed on appeal,

Game theory reveals these shortcomings of plea bargaining and demonstrates that new policies need to be implemented to re-equilibrate the game of plea bargaining.⁷⁷ The asymmetry of information inherent to plea bargaining overwhelmingly favors prosecutors because they have less to lose. For the defendant, the very threat of trial, including the potential personal risks involved with turning down a settlement, equates to a significant potential loss that many seek to avoid even if the result is fundamentally unfair.

III. THE PROBLEM OF COERCIVE BARGAINING

A. *Plea Bargaining Is Not the Problem*

By itself, plea bargaining is not the problem. Quite the contrary, it is essential to our judicial process.⁷⁸ According to one commentator, it defines “contemporary criminal prosecution.”⁷⁹ Plea and sentence bargaining are only problematic, as previously set forth, when an accused is coerced into a so-called bargain for fear of punishment disproportionate to his or her actual criminal conduct, if any.⁸⁰ Yet, some persist in painting the entire practice of plea bargaining as the problem. Detractors maintain that plea bargaining is a product of “laziness, bureaucratization, overcriminalization, and economic pressure.”⁸¹ Although elements of each may, and do, foster dependence on plea bargaining, it is ultimately a function of a burgeoning population,⁸²

the threat of having a conviction overturned due to prosecutorial misconduct may serve as a minimal deterrent for improper overcharging. *Id.* at 408.

77. See Covey, *supra* note 5, at 1240–41 (highlighting the need for changes in plea bargaining and noting a variety of proposed methods for addressing the shortcomings).

78. Santobello v. New York, 404 U.S. 257, 260 (1971).

79. Ana Maria Gutiérrez, Comment, *The Sixth Amendment: The Operation of Plea Bargaining in Contemporary Criminal Procedure*, 87 DENV. U. L. REV. 695, 708 (2010) (citing Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)). Ana Maria Gutiérrez explains that of the approximately 83,391 federal criminal cases in the fiscal year 2004, ninety-five percent of convictions “were disposed of without a trial through the entry of guilty pleas.” *Id.* at 708–09 (citing SOURCEBOOK, *supra* note 11); accord Edward L. Wilkinson, *Ethical Plea Bargaining Under the Texas Disciplinary Rules of Professional Conduct*, 39 ST. MARY’S L.J. 717, 718 (2008) (noting that ninety-five percent of all felony criminal cases in the United States are resolved through plea bargaining).

80. See Ross, *supra* note 29, at 880; see also Wilkinson, *supra* note 79, at 722 (recognizing that defendants’ choice of whether to plead guilty is affected greatly by the defendants’ assessment of the case against them, and by a desire to receive leniency in return for cooperation with the State).

81. See Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 1 (1979). Professor Albert Alschuler also notes that although plea bargaining was rare throughout the history of common law, practices such as “nullifying harsh penalties through unilateral exercises of discretion and bargaining for information . . . have far more venerable histories.” *Id.* at 4.

82. Historically, as the U.S. population has grown, the percentage of its citizens who are incarcerated has held steady. Stephen B. Bright, *Legal Representation for the Poor: Can Society Afford This Much Injustice?*, 75 MO. L. REV. 683, 683 (2010). However, in the past four decades,

poverty,⁸³ urbanization,⁸⁴ the prevalence of drugs,⁸⁵ and the nature of the adversarial process.⁸⁶ The contemporary criminal-justice infrastructure simply cannot accommodate each criminal defendant with a trial.⁸⁷

Furthermore, even critics of plea bargaining must acknowledge that some form of bargaining is the norm, even in the most mundane types

the prison population has increased from 200,000 in the 1970s to 2.3 million in 2008—an 800 percent increase. *Id.* This explosion of criminal cases has placed tremendous pressure on public defenders, whose caseloads are generally so large that they usually only have time to encourage their clients to take plea offers, rather than assess their clients' cases and formulate defenses. *See id.* at 691 (describing the norm as “meet ‘em and plead ‘em”). Prosecutors, of course, also recognize the value of plea bargaining when dealing with the massive number of criminal cases they are expected to prosecute. Tara Harrison, *The Pendulum of Justice: Analyzing the Indigent Defendant's Right to the Effective Assistance of Counsel*, 2006 UTAH L. REV. 1185, 1195 (citing WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE WHEN PLEADING NOT GUILTY AT THE PLEA BARGAINING STAGE* § 21.1(c) (4th ed. 2004)). For example, in 2002, over ninety percent of all felony convictions resulted from the procurement of guilty pleas from criminal defendants. *Id.* at 1194.

83. *See* Shiv Narayan Persaud, *Conceptualizations of Legalese in the Course of Due Process, from Arrest to Plea Bargain: The Perspectives of Disadvantaged Offenders*, 31 N.C. CENT. L. REV. 107, 146 (2009) (“The [plea-bargaining process] . . . affects the lives of a vast number of suspects, the majority of whom are poor, typically minorities, who possess little formal education.”); *see also* Jacqueline Ross, *The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 AM. J. COMP. L. 717, 728 (2006) (“Defense counsel for poor defendants benefit from resolving their cases quickly.”); *cf.* Bowers, *supra* note 40, at 1132–34 (discussing how defendants may be motivated to accept a plea offer in order to avoid the costs of defending against criminal charges, which include legal fees, lost wages, and “higher process costs” associated with “put[ting] forward positive defenses; these substantive defenses generally require more preparation time than procedural claims”).

84. One viable explanation for how urbanization results in increased plea-bargaining is that criminal defendants in large urban areas may experience significant difficulties in obtaining pre-plea discovery beyond a police report. Russell D. Covey, *Signaling and Plea Bargaining's Innocence Problem*, 66 WASH. & LEE L. REV. 73, 88–89 (2009). Urbanization may also contribute to the increased use of plea bargaining in less obvious ways. For example, beginning in the 1970s, the nation's criminal-justice infrastructure began seeking indirect ways to combat urban violence, including increased prosecution of drug offenses, which are often associated with violence. William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1997 (2008). In these cases, federal sentencing rules encouraged local prosecutors to frequently seek favorable plea bargains, which resulted in widespread criminal punishment in urban areas. *Id.*

85. *See* Stuntz, *supra* note 84, at 1997. Another way in which the prevalence of drugs increases plea bargaining relates to the use of criminal informants. In cases involving drugs, prosecutors must often rely on the testimony of criminal informants to win convictions. *See* Alexandra Natapoff, *Deregulating Guilt: The Information Culture of the Criminal System*, 30 CARDOZO L. REV. 965, 993 (2008). Because these informants are criminal offenders looking to reduce their own punishments, prosecutors must frequently resort to the use of plea bargaining in order to encourage them to cooperate. *Id.*

86. *See* Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1104–05 (1988).

87. *See* Ross, *supra* note 83, at 726 (“Without plea bargains, the legal system would have to reduce procedural and evidentiary safeguards on trials to accommodate the dramatic increase in the number of trials . . .”).

of cases.⁸⁸ Sentence bargaining is one such example. Before defendants agree to plead to the precise charge filed, they typically strike a bargain with the prosecutor about the actual length of sentence they must serve.⁸⁹ To reach this settlement, prosecutors and defendants have open discussions about the consequences of the bargain, thereby allowing defendants to be informed when entering their pleas and thereafter receiving their sentences.⁹⁰ This arrangement is called sentence bargaining because the charge filed is not in dispute; rather, the defendant pleads to the filed charge, and the only point in question is the sentence to be imposed.⁹¹

Plea bargaining, in contrast to sentence bargaining, typically involves negotiations about several charges.⁹² These negotiations conclude with either the dismissal of some charges in exchange for a guilty plea to one or more other charges, or a downgrade of the original charge in exchange for a guilty plea to this lesser charge.⁹³ Typically, even this basic plea-bargain arrangement involves some degree of sentence bargaining.⁹⁴ In most cases, by pleading guilty to a lesser charge, the defendant subjects himself to a shorter sentence range of which the judiciary could approve.⁹⁵ Thus, plea bargaining, as an integral component of the criminal justice system, is here to stay.⁹⁶ Rather than complete abolition, it is the unethical abuse of the unique bargaining positions that needs to be eradicated.⁹⁷

88. See, e.g., Corn & Gershowitz, *supra* note 76, at 399–400 (“[A]s every criminal defendant knows, refusing to plea bargain carries a trial penalty whereby prosecutors seek (and frequently attain) longer sentences for defendants who gamble on trial and lose.”); Michael M. O’Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 409 (2008) (“Plea bargaining now dominates the day-to-day operation of the American criminal justice system; about ninety-five percent of convictions are obtained by way of a guilty plea. . . . Increasingly, scholars are turning their attention from abolition to reform, seeking ways to improve an institution that seems unlikely to disappear any time soon.” (footnotes omitted)).

89. See Nancy Amoury Combs, *Copping a Plea to Genocide: The Plea Bargaining of International Crimes*, 181 U. PA. L. REV. 1, 10 (2002).

90. See *id.*

91. See *id.*

92. *Id.*

93. *Id.*

94. See *id.* at 10 n.27.

95. See *id.*

96. See *Santobello v. New York*, 404 U.S. 257, 260 (1971); Bibas, *supra* note 14, at 252–58 (calling “the abolition of plea bargaining as the only way to eradicate all of [its] flaws[,]” an “impractical” solution”); Wilkinson, *supra* note 79, at 718 (characterizing the Supreme Court’s acceptance of the plea-bargaining process as essential to the judicial process).

97. Wilkinson, *supra* note 79, at 719 (asserting that abolition is not feasible and proposing an alternative approach aimed at eliminating the prosecutors’ ability to coerce pleas).

B. A Short History of Plea Bargaining

Although plea bargaining now accounts for an overwhelming majority of case dispositions,⁹⁸ the process was almost unheard of throughout most of the history of the common law.⁹⁹ As late as the eighteenth century, judges, rather than lawyers, dominated trials in English courts.¹⁰⁰ Trials were completed so quickly that there was no need for bargaining.¹⁰¹ This efficiency typically now occurs with non-judicial resolution.¹⁰² In fact, the Old Bailey court “tried between twelve and twenty felony cases per day.”¹⁰³ The primary reason trials were disposed of so quickly was the lack of attorneys involved, which kept jury trials short because there were no motions, legal maneuvers, or speeches from lawyers.¹⁰⁴ At the Old Bailey, only two juries of twelve men were used

98. See Robert L. Segar, *Plea Bargaining Techniques*, 25 AM. JUR. TRIALS 69, 74 (1978).

99. See Fisher, *supra* note 10, at 1017 (“[P]lea bargaining appeared only recently on the penal landscape. . . . [I]n the late eighteenth century, . . . guilty pleas probably were not plea bargains in the sense that the defendant won some understood concession in exchange for his plea, but rather gestures of remorse or hopelessness or unsecured bids for judicial mercy.” (footnote omitted)).

100. John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 LAW & SOC’Y REV. 261, 261 (1979). Professor George Fisher explains:

Except in state trials such as treason, no public prosecutor took part in eighteenth-century criminal cases. Not until 1879 did Parliament institute public prosecutors to manage other felony cases. In the eighteenth century, no matter how serious the case, the crime victim or her survivors managed the prosecution. And not until the very end of the century did any substantial proportion of crime victims even hire private lawyers to manage the proceedings in court.

Fisher, *supra* note 10, at 1018.

101. Langbein, *supra* note 100, at 261–62 (noting that “well into the eighteenth century[,] . . . [one court] tried between twelve and twenty felony cases per day”); accord Alschuler, *supra* note 81, at 8 (noting that Professor John Langbein discovered that “jury trials were extremely rapid in an era when neither party was represented by counsel, when an informally selected jury might hear several cases before retiring, and when the law of evidence was almost entirely undeveloped”).

102. *Id.* (“[C]ommon law trial procedure exhibited a degree of efficiency that we now expect only of our nontrial procedure. *Jury trial was a summary proceeding.*” (emphasis in original)); see Fisher, *supra* note 10, at 1018 (arguing that “the very unmodern brevity of eighteenth-century trials, a handful of which fit into the average court day, removed modern temptations to shortcut trial procedures with rough-and-ready plea bargains”). Additionally, Fisher points to evidence that “the length of the average trial . . . more than doubled in the late nineteenth century just as substantial numbers of criminal cases began to end in guilty pleas.” *Id.*

103. Langbein, *supra* note 100, at 262. The first common law trial to last longer than one day did not occur until 1794, at which point the court had to determine whether it had the power to adjourn for the day. Langbein, *supra* note 100, at 262 (quoting F.D. MacKinnon, *The Law and the Lawyers*, in 2 JOHNSON’S ENGLAND: AN ACCOUNT OF THE LIFE AND MANNERS OF HIS AGE 287, 307 (A.S. Tuberville ed., 1933)); see also Alschuler, *supra* note 81, at 8.

104. Langbein, *supra* note 100, at 263. Langbein points out that, “Neither prosecution nor defense was represented in ordinary criminal trials. . . . The victim or other complaining witness, sometimes aided by the lay constable and the lay justice of the peace, performed the role we now assign to the public prosecutor, gathering evidence and presenting it at trial.” *Id.* at 263 (footnote omitted). Other reasons for the brevity of trials included: the lack of voir dire; the role of the

to resolve “as many as a hundred felony trials in a few days.”¹⁰⁵

Interestingly enough, Anglo-American courts actually discouraged guilty pleas¹⁰⁶ well into the nineteenth century.¹⁰⁷ The first reported American case that addressed a guilty plea, as opposed to a verdict, occurred in Massachusetts in 1804.¹⁰⁸ The prosecution charged a man with raping and murdering a thirteen-year-old girl.¹⁰⁹ The defendant pleaded guilty to both charges.¹¹⁰ The court warned the defendant of “the consequence of his plea, and that he was under no legal or moral obligation to plead guilty[,]” but he refused to retract his plea.¹¹¹ In response, the court sent him back to jail to give him a reasonable period of time to consider these warnings, and the court instructed its clerk not to record any guilty plea at that time.¹¹² When the defendant reappeared before the court, he again refused to retract his plea, and the court sentenced him to death for the charge of rape.¹¹³ Only one other proceeding involving a guilty plea was reported in American courts before the Civil War.¹¹⁴ In that case, the court’s warnings persuaded the defendant to withdraw his guilty plea and stand trial.¹¹⁵

These attempts to dissuade guilty pleas proved critical when defendants began challenging the plea process as violating their due-process rights under the Fourteenth Amendment.¹¹⁶ In 1892, the U.S. Supreme Court addressed the issue in the case of *Hallinger v. Davis*.¹¹⁷ The Court upheld the guilty plea where “the [trial] court refrained from at once accepting [the defendant’s] plea

accused as witness without any privilege against self-incrimination; less structured presentations of evidence as witness examinations; much less complex rules of evidence; lack of controls for abuse of police power, such as the exclusionary rule; and the virtual absence of any opportunity for appeal. *Id.* at 268–69.

105. *Id.* at 263. Furthermore, these juries would hear several unrelated cases before making a decision in any of the cases. *Id.*

106. The modern legal term “guilty plea” has only been used for about one century, despite the existence of the practice for over eight hundred years; rather, they used to be called “confessions.” See Alschuler, *supra* note 81, at 13.

107. See *id.* at 5 (“The judicial practice of discouraging guilty pleas persisted into the second half of the nineteenth century, but at about this time prosecutorial plea bargaining emerged.”).

108. *Id.* at 9 (citing *Commonwealth v. Battis*, 1 Mass. (1 Will.) 95, 95–96 (1804)).

109. *Battis*, 1 Mass. (1 Will.) at 95.

110. *Id.*

111. *Id.* at 95–96 (warning *Battis*, further, “that he had a right to deny the several charges and put the government to the proof of them”).

112. *Id.*

113. *Id.* at 96.

114. *Id.* The clerk entered the plea only after “a very full enquiry” into the defendant’s sanity and the possibility of tampering. *Id.*

115. Alschuler, *supra* note 81, at 9–10 (citing *United States v. Dixon*, 1 D.C. (1 Cranch) 414, 414 (1807)).

116. See *Dixon*, 1 D.C. (1 Cranch) at 414–15. The defendant was charged with burglary and faced death as punishment. *Id.*

117. Alschuler, *supra* note 81, at 10 (citing *Hallinger v. Davis*, 146 U.S. 314, 324 (1892)).

of guilty, assigned him counsel, and twice adjourned, for a period of several days, in order that he might be fully advised of the truth, force and effect of his plea of guilty,” before finally accepting the plea.¹¹⁸ According to the Court, these procedural safeguards ensure the protection of the defendant’s due-process rights.¹¹⁹

With the emergence of plea bargaining in the second half of the nineteenth century,¹²⁰ neither legislatures nor courts sanctioned the practice, and “[t]hey were arrived at and carried out without the official stamp of judicial approval.”¹²¹ At that time, when a defendant entered a guilty plea, it was well understood by those involved that the plea was likely obtained in exchange for a reduction of charges.¹²² Reports of these bargains spawned widespread public disapproval.¹²³ Some critics thought plea bargaining threatened criminal defendants’ rights.¹²⁴ The concern was that this practice of plea bargaining “shifted the focus of criminal proceedings from courtrooms to corridors.”¹²⁵

Despite its detractors, the plea-bargaining practice retained its position as the principal process of criminal case disposition up through the early twentieth

118. *Hallinger*, 146 U.S. at 329.

119. *See id.*

120. *See* Alschuler, *supra* note 81, at 5 (“The conclusion . . . that plea bargaining did not occur with any frequency until well into the nineteenth century raises the difficulties associated with ‘proving a negative.’ . . . [T]he claim that plea bargaining did not occur during any specified historical period cannot be established conclusively. Nevertheless, other extra-legal practices—such as ‘compounding,’ the practice of making payment to the victim of a crime for his agreement not to prosecute—have left rich histories, and it appears probable that an established practice of plea bargaining would have left a significant trace.” (footnote omitted)).

121. Segar, *supra* note 98, at 75.

122. *Id.* at 74.

123. Alschuler, *supra* note 81, at 5–6. Although no case regarding the legality of plea bargains reached the U.S. Supreme Court during the early years of the practice, Alschuler argues that there were indications at that time that the Court would have struck down the practice. *Id.* at 6.

124. *See id.* at 30 (citing Justin Miller, *The Compromise of Criminal Cases*, 1 S. CAL. L. REV. 1, 21–22 (1927)); Julian A. Cook, III, *All Aboard! The Supreme Court, Guilty Pleas, and the Railroad of Criminal Defendants*, 75 U. COLO. L. REV. 863, 866 (2004) (“[S]ome vigorously insist that the bargaining process is so skewed against a defendant’s interests that it should be abandoned altogether.”). Professor Julian Cook details such arguments:

[Critics] maintain that defendants are at such a bargaining disadvantage that the notion that the subsequently negotiated plea agreement was the product of a fair exchange between interested participants is illusory. Employing contractual principles, they argue that such plea arrangements should be voided on account of, *inter alia*, duress and unconscionability.

Cook, *supra*, at 866–87.

125. Alschuler, *supra* note 81, at 31 (“The usual case is now decided, not by the court, but by the commonwealth’s attorney [who is] often young, often rather inexperienced. . . .” (quoting HUGH N. FULLER, *CRIMINAL JUSTICE IN VIRGINIA 155–56* (1931))).

century.¹²⁶ Amid this growing dependence, plea bargaining continued to be viewed in a negative light.¹²⁷ One court labeled the plea-bargaining arrangement between prosecutor and defendant as a “corrupt proposition.”¹²⁸ Another court described an attorney’s promise to plea bargain as “essentially immoral” and against public policy.¹²⁹ As late as the 1920s, the president of the Chicago Crime Commission criticized plea bargaining as “paltering with crime” and called for the removal of three judges simply because each allowed prosecutors to reduce felony charges to misdemeanors when the defendant was willing to plead guilty.¹³⁰

Plea bargaining did not gain “an aura of respectability in the criminal justice system” until the latter part of the twentieth century.¹³¹ In the late 1950s, speculation remained that the Supreme Court would find the practice unconstitutional.¹³² Yet such speculation never came to fruition,¹³³ and in

126. *Id.* at 6. After several crime commissions in the 1920s acknowledged the growing prevalence of plea bargaining in previous decades, the practice was again subject to general disapproval from academics, the press, and the commissions. *Id.*

127. *See id.* at 6, 29; *see also* Mary E. Vogel, *The Special Origins of Plea Bargaining: Conflict and the Law in the Process of State Formation, 1830–1860*, 33 LAW & SOC’Y REV. 161, 162–63 (1999) (“Understanding these beginnings [of plea bargaining] lends insight into the problems the practice presents today. . . . The significance of plea bargaining lies in the fact that, by the late 19th century, most cases in the criminal courts were being resolved through this process. Although the popular image is one of jury trials with a presumption of innocence, a very different process has anchored the American courts.”). To keep the Supreme Court from finding plea bargaining unconstitutional,

[T]he Department of Justice took dubious steps to prevent the Court from deciding the issue. The Supreme Court then ignored this central facet of the criminal justice system during the period of its “due process revolution.” At the same time, many of its decisions exacerbated the pressures for plea-bargaining by increasing the complexity, length, and cost of criminal trials.

Alschuler, *supra* note 81, at 6. Alschuler explains that “[a]lthough plea bargaining had become a central feature of the administration of justice by the 1920’s, it had few apologists and many critics.” *Id.* at 29.

128. *Golden v. State*, 49 Ind. 424, 425–27 (1875).

129. *Wight v. Rindskopf*, 43 Wis. 344, 361 (1877).

130. Alschuler, *supra* note 81, at 29.

131. *See Segar, supra* note 98, at 74 (citing James Meriwether Smith & William Parry Dale, *The Legitimation of Plea Bargaining: Remedies for Broken Promises*, 11 AM. CRIM. L. REV. 771, 771–72 (1973)).

132. Alschuler, *supra* note 81, at 6. In *Shelton v. United States*, the U.S. Court of Appeals for the Fifth Circuit reviewed the conviction of Paul Shelton, a pro se defendant who challenged his conviction on the grounds that his guilty plea was involuntary “because it had been induced by prosecutorial promises.” 242 F.2d 101, 101 (5th Cir.), *rev’d on reh’g en banc*, 246 F.2d 571 (5th Cir. 1957), *rev’d on confession of error*, 356 U.S. 26 (1958) (per curiam). Initially reversing the conviction, the court said that “[j]ustice and liberty are not the subjects of bargaining and barter.” *Id.* at 113. Upon on a motion for rehearing en banc, the court changed direction and affirmed the trial court’s conviction, asserting that the trial record contained sufficient facts to permit the trial court’s finding of voluntariness. *Shelton*, 246 F.2d at 573. The U.S. Supreme Court reversed the conviction based on the Solicitor General’s confession of error that the guilty plea “may have been improperly obtained.” *Shelton*, 356 U.S. at 26. The confession of error

1970, the Supreme Court decided two cases that made clear that it is not per se unconstitutional to offer inducements to a defendant to obtain a guilty plea.¹³⁴

The Court's endorsement of plea bargaining, in part, reflects a recognition of the increased volume of cases,¹³⁵ coupled with the Court's "due process revolution" in the 1960s and 1970s.¹³⁶ The complexity of cases and resulting consumption of court and prosecutorial resources necessitated this more expeditious mode of case disposition.¹³⁷ Prosecutors found themselves spending more time and resources defending both convictions on appeal and pretrial motions.¹³⁸ Constitutional rights became bargaining chips that defense attorneys could use as leverage to negotiate favorable dispositions.¹³⁹ The increased protection of the accused's constitutional rights stemming from the "due process revolution" provided defendants with added leverage, which led to more intense plea bargaining.¹⁴⁰

C. A Paucity of Reliable Data

Although one can approximate the number of cases resolved through some manner of plea bargaining, there is no reliable data approximating the percentage of dispositions that were products of coercive tactics.¹⁴¹ Plea bargaining is often undertaken in the shadows—in phone calls and e-mails

disclosed that "the trial court failed to conduct an adequate inquiry when it accepted the defendant's plea of guilty . . ." Alschuler, *supra* note 81, at 36.

133. *Id.* at 6. In fact, the Supreme Court had opportunities to decide the plea-bargaining issue in the 1960s, but it declined to hear a case. *Id.* at 37.

134. *Brady v. United States*, 397 U.S. 742, 751 (1970); *Parker v. North Carolina*, 397 U.S. 790, 794–95 (1970); *see also Santobello v. New York*, 404 U.S. 257, 261 (1971) ("[Plea bargaining] is not only an essential part of the [criminal] process but a highly desirable part for many reasons."); Alschuler, *supra* note 81, at 6.

135. *See* Jennifer L. Mnookin, *Uncertain Bargains: The Rise of Plea Bargaining in America*, 57 STAN. L. REV. 1721, 1728 (2005) (book review) (noting that analysts emphasized dramatically increased caseloads, both civil and criminal, as the cause of increased plea bargaining and the courts' eventual embrace of such process); *see also* Alschuler, *supra* note 81, at 34–35 ("The volume of criminal cases commonly doubled from one decade to the next, while judicial resources increased only slightly." (footnote omitted)).

136. The Court's decisions in *Gideon v. Wainwright*, *Miranda v. Arizona*, and *Katz v. United States* were emblematic of the criminal justice revolution. *See* *Katz v. United States*, 389 U.S. 347, 351, 359 (1967) (holding that the Fourteenth Amendment protects people, not pleas, and, therefore electronic surveillance of what the defendant sought to keep private was considered an unreasonable search and seizure); *Miranda v. Arizona*, 384 U.S. 436, 498–99 (1966) (holding that in custodial interrogations, defendants must be affirmatively apprised of their rights to safeguard their privileges against self-incrimination); *Gideon v. Wainwright*, 372 U.S. 335, 343–44 (1963) (holding that there is a fundamental right to counsel in a criminal prosecution, which is protected by the Fourteenth Amendment).

137. Alschuler, *supra* note 81, at 38.

138. *Id.*

139. *Id.*

140. *Id.*

141. *See infra* text accompanying notes 142–46.

between lawyers or in the corridors outside the courtroom.¹⁴² Little or no evidence documents the give and take of this bargaining on the record. At best, records will serve as a testament to the original charges, disclose that a defendant pled to one count, and document that the prosecutor dismissed remaining counts;¹⁴³ however, the record would be devoid of any particulars as to what took place between these events.¹⁴⁴ Such a bargain could have been a coerced plea, but there would be no trail to reveal its true nature.¹⁴⁵ Coercive plea bargaining must necessarily take place out of view, as prosecutors cannot have such misconduct brought to light by disclosure.¹⁴⁶

D. Overcharging: The Precursor to Coercive Pleas

Some commentators suggest that prosecutors do not overcharge to obtain harsher sentences than the accused's conduct merits, but rather to gain bargaining leverage.¹⁴⁷ Such naiveté provokes two responses: (1) regardless of

142. See Alschuler, *supra* note 81, at 31; *supra* note 125 and accompanying text.

143. See Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 233 (2006) (“The record commonly includes only the result of the negotiations—typically, the sentence that the defendant may expect in return for a confession.”); see also Jennifer Blassur et al., *New Perspectives on Brady and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 CARDOZO L. REV. 1961, 1994 (2010) (recognizing that plea negotiations, often undocumented, “can fall through the cracks”).

144. Turner, *supra* note 143, at 233 (“The open-court announcement [of the plea bargain record] would not mention potentially unlawful promises or threats that might have influenced the defense to accept the bargain.”).

145. See *id.*; Cf. Monré D. Carodine, *Keeping It Real: Reforming the “Untried Conviction” Impeachment Rule*, 69 MD. L. REV. 501, 545 (2010) (noting the lack of a transcript in the plea-bargaining process, which essentially hides the prosecutor’s decision either “to prosecute or coerce a plea” from anyone not involved in the plea negotiation).

146. See *supra* Part I (detailing prosecutors’ ethical obligations).

147. See, e.g., Covey, *supra* note 75, at 1254 (noting that prosecutors generally overcharge simply because they desire bargaining leverage, not in an effort to impose harsher sentences); Meares, *supra* note 7, at 853 (“Prosecutors sometimes ‘overcharge’ defendants to control the dynamics of plea bargaining.”); Stephanos Bibas, *Pleas’ Progress*, 102 MICH. L. REV. 1024, 1039 (2004) (book review) (“Prosecutors can overcharge to gain leverage for harsh sentences, and judges have little power to check prosecutorial harshness.”); see also 2 CRIM. PRAC. MANUAL § 45:15 (West 2010) (“[T]he common practice of overcharging gives the prosecutor a stack of false chips with which to bargain, hoping to induce a plea to the only makeable charge by benevolently getting rid of charges that should never have been brought in the first place.”); Gerber, *supra* note 24, at 225–26 (“In most jurisdictions prosecutors overcharge to get negotiating leverage for the anticipated guilty plea.”); Wilkinson, *supra* note 79, at 721–23 (noting that there is “fear that the prosecutor will ‘overcharge’ a defendant with additional weak or baseless charges or unnecessary sentencing enhancements in an effort to gain leverage in subsequent plea negotiations”); Tung Yin, *Not a Rotten Carrot: Using Charges Dismissed Pursuant to A Plea Agreement in Sentencing Under the Federal Guidelines*, 83 CAL. L. REV. 419, 463 (1995) (“The prosecutor might overcharge the defendant merely to gain leverage to force the defendant to plead guilty.”); Ty Alper, Note, *The Danger of Winning: Contract Law Ramifications of Successful Bailey Challenges for Plea-Convicted Defendants*, 72 N.Y.U. L. REV. 841, 874 (1997) (“The prosecutor uses these ‘overcharged’ offenses as leverage to induce the defendant to plead

motivating factors, overcharging violates prosecutorial ethics in and of itself;¹⁴⁸ (2) overcharging sets the stage for coercive pleas by virtue of the very leverage unduly obtained.¹⁴⁹

If our criminal justice system were trial-centered, prosecutors would only have reason to file charges on which they would likely secure a conviction.¹⁵⁰ However, because most criminal convictions are secured through plea negotiations, prosecutors have an incentive to file more serious charges than those supported by the evidence with the “hope that a defendant will be risk averse.”¹⁵¹ Furthermore, prosecutors lack any political incentive to refrain from overcharging because most communities want the state to be tough on crime.¹⁵²

Because prosecutors have an incentive to encourage pretrial dispositions, many include all possible charges in an indictment, including those with very little support.¹⁵³ To meet minimal ethical standards, prosecutors need only show that they have probable cause to “believe that the accused committed an offense defined by statute.”¹⁵⁴ Although there are persuasive arguments in

guilty.”); Rand N. White & Tom E. Wilson, Note, *The Preliminary Hearing in California: Adaptive Procedures in a Plea Bargain System of Criminal Justice*, 28 STAN. L. REV. 1207, 1211 (1976) (“Substantial evidence suggests that many prosecutors ‘overcharge,’ i.e., file a more serious charge than the complaint warrants, to increase their plea bargaining leverage.”).

148. See *infra* notes 153–56 and accompanying text.

149. See Gerber, *supra* note 24, at 226 (“[F]rom the very start prosecutors wish to create negotiating leverage to coerce a plea.”).

150. Wright & Miller, *supra* note 12, at 85; see also Yin, *supra* note 147, at 463 (“The burden of proving beyond a reasonable doubt that the defendant committed the crime limits the prosecutor’s ability to overcharge.”).

151. Wright & Miller, *supra* note 12, at 85; see also Bibas, *supra* note 14, at 2495 (“Prosecutorial bluffing is likely to work particularly well against innocent defendants, who are on average more risk averse than guilty defendants.”); cf. Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 CARDOZO L. REV. 2295, 2342 (2006) (arguing that the plea-bargaining system should be eliminated entirely because “[t]he practice motivates prosecutors to overcharge defendants in order to improve their negotiating positions”).

152. Cf. Máximo Langer, *Rethinking Plea Bargaining: The Practical Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 241 (2006) (“[I]n an environment in which crime has become a very important political issue, it is a safer strategy for legislators to criminalize more conduct than simply that which they and the public would like to see prosecuted.”).

153. Wright & Miller, *supra* note 12, at 107. Prosecutors, however, claim that this practice is not overcharging because they expect to be able to support these charges with further investigation and discovery, which will reveal additional evidence. *Id.* Prosecutors prefer to limit the term overcharging “to the filing of charges when there is not likely to be sufficient proof to convict a defendant of the charges by the time of trial.” *Id.*

154. See *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978); Meares, *supra* note 7, at 865. In *Bordenkircher v. Hayes*, the Supreme Court upheld the prosecutor’s overcharging of the defendant, reasoning that threatening harsher punishment to induce a guilty plea is “inevitable and permissible” so long as the defendant plainly could have been prosecuted on the harsher charges, despite the discouraging effect such a practice clearly might have on the defendant’s desire to exercise his trial rights. See 434 U.S. at 364–65 (quoting *Chaffin v. Stynchcombe*, 412

favor of flexible charging discretion,¹⁵⁵ broad prosecutorial discretion diminishes a defendant's ability to knowingly and voluntarily enter into a guilty plea.¹⁵⁶ Exacerbating the problem, "often it takes nothing more than a fertile imagination to spin several crimes out of a single transaction."¹⁵⁷

Scholars suggest that there are two basic types of overcharging.¹⁵⁸ Prosecutors can engage in either horizontal overcharging by filing charges for distinct crimes resulting from similar offensive conduct,¹⁵⁹ or vertical overcharging by charging harsh variations of the same crime when the evidence only supports lesser variations.¹⁶⁰ Usually, prosecutors can choose from a number of potential charges.¹⁶¹ For instance, in the Marcus-Alfred hypothetical scenario that began this Article, the street terrorism charge is a classic illustration of horizontal overcharging; the hypothetical prosecutor brought this additional charge when one—robbery—would have sufficed. An example of vertical overcharging, on the other hand, would be filing a first-degree murder charge when only a second-degree murder is appropriate.¹⁶²

U.S. 17, 31 (1973)) (internal quotation marks omitted). *But cf.* Gazal-Ayal, *supra* note 151, at 2342–43 ("The main problem facing weak case defendants today is that prosecutors can induce them to plead guilty while also totally conforming to the existing legal rules.").

155. *See, e.g.,* Wayte v. United States, 470 U.S. 1524, 1530–31 (1984) ("Th[e] [prosecutor's] broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. . . . Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy.").

156. Meares, *supra* note 7, at 866.

157. *Irby v. United States*, 390 F.2d 432, 439 (D.C. Cir. 1967) (Bazelon, C.J., dissenting) (citing *Munson v. McClaughry*, 198 F. 72, 74 (8th Cir. 1912)).

158. Covey, *supra* note 75, at 1254–55 ("Prosecutors can overcharge cases in at least two ways. . . . Both types of overcharging make it easier for prosecutors to induce defendants to plead guilty by increasing defendants' sentencing exposure at trial.").

159. Gutiérrez, *supra* note 79, at 715–16 ("Notwithstanding the fact that the illicit conduct sought to be punished is adequately penalized by a single count, prosecutors will engage in horizontal overcharging by charging 'nonoverlapping counts of a similar offense, type, or multiple counts of the same offense type.'" (quoting Covey, *supra* note 75, at 1254)). For an example of horizontal overcharging, see *Leopard v. United States*, 141 F. Supp. 2d 1326, 1332–33 (E.D. Okla. 2001) (permitting the charging of a defendant with two counts arising out of the same conduct because each count required proof of unique elements).

160. *See* Covey, *supra* note 75, at 1254; Gutiérrez, *supra* note 79, at 716. The more severe charge will likely withstand judicial scrutiny if the prosecutor is able to articulate an argument in support of the potential for conviction at trial. Gutiérrez, *supra* note 79, at 716–17.

161. *See* Ross, *supra* note 83, at 728 ("[O]verbreadth of criminal statutes . . . makes it possible to charge one course of conduct under a multiplicity of overlapping legal descriptions."). Prosecutors can abuse their discretion to select from the many available charges to "induce a guilty plea to a prison term well above the realistic 'market price' for the crime." *See id.*

162. *See, e.g.,* Yin, *supra* note 147, at 462–63 ("[T]he prosecutor often can choose from a variety of charges, each carrying a different base-offense level. For example, in an assault case, a

V. PREVIOUSLY SUGGESTED SOLUTIONS TO OVERCHARGING

Through the years, scholars have proposed various solutions to the serious problem of prosecutorial overcharging.¹⁶³ Although thoughtfully developed, these proposals have not been adopted, and even if adopted they would have proven ineffective in reducing overcharging. Scholars who offer such solutions share the belief that modifying the charges, or perhaps the charging system, will reduce prosecutorial overcharging by removing the very tool used by the prosecutors to accomplish the task.

In 1976, for instance, Professor Albert Alschuler suggested using “sentence bargaining” instead of “charge bargaining,” a tactic that would require prosecutors to file only the most appropriate charge and reserve any bargaining for sentencing recommendations, thus reducing any incentive a prosecutor might have to overcharge.¹⁶⁴ He reasoned that if the ultimate sentence is not necessarily determined by the charges, but by the evidence, then the resulting sentence will be free of any coercion.¹⁶⁵ Although a seemingly positive suggestion, it merely places another name on the same problem. Prosecutors would continue to have the power to offer disparate bargains and manipulate defendants. They would be simply exercising that power with sentence recommendations instead of charges.

Professor Stephanos Bibas suggests increased and open discovery during plea negotiations, reasoning that with full discovery, defense counsel will be in an optimum position to evaluate the state’s case and recognize if his or her case has been overcharged.¹⁶⁶ This approach suggests that counsel and defendant, armed with information, will fall prey to coercive tactics, but will recognize the worth of his or her case and undertake case disposition on an equal plane with the prosecutor, as opposed to being cowed into a disadvantageous bargain.¹⁶⁷ Nonetheless, even with increased disclosure to facilitate the defendant’s understanding of the potentially weak evidentiary support for certain charges against him or her, the risk of testing that evidence at trial remains a threat to the defendant.¹⁶⁸ Consequently, risk-averse defendants, confronted with the significant downside of an unfavorable trial

prosecutor conceivably could charge a defendant with Assault with Intent to Commit Murder . . . Aggravated Assault . . . or Minor Assault . . .” (footnotes omitted)).

163. Solutions to this problem were proposed as early as 1976—a time when this problem was not nearly as prevalent as it is in today’s criminal landscape. *See, e.g.*, Albert W. Alschuler, *The Trial Judge’s Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1136–38 (1976) (proposing abolition of charge bargaining).

164. Alschuler, *supra* note 163, at 143–44.

165. *See id.* at 1144.

166. *See* Bibas, *supra* note 14, at 2531 (“The obvious remedy is to liberalize discovery. Discovery rules designed for plea bargaining would provide more information earlier.”).

167. *See id.* (“[W]ide disparities or variations in each party’s information threaten equity and fairness.”).

168. *See* Schulhofer, *supra* note 16, at 2008.

verdict, may be motivated to plead to the lesser charge or sentence, fully aware of the weak nature of the state's case.

Another scholar, Professor Darryl Brown, views the criminal codes themselves as the problem.¹⁶⁹ After finding that the expansive, and often unnecessary, litany of crimes allows prosecutors to “stack charges,” he acknowledges that reducing the codes by removing “outdated, marginal, or unnecessarily duplicative code provisions” would have little effect on the prosecutors pre-bargaining power.¹⁷⁰ As Brown correctly points out, plea bargaining was in practice before the growth of criminal codes,¹⁷¹ and the majority of prosecutions occur under a limited number of statutes, even though other options are available.¹⁷² For example, he notes that approximately eighty-five percent of drug crimes constitute drug sale, delivery, possession with intent to distribute, or simple possession, but that a multitude of other charges exist, each carrying distinct grading and sentencing variations available to prosecutors.¹⁷³ With the variations of grading available, prosecutors can charge the same crime at various levels and be squarely within the criminal codes of many jurisdictions.¹⁷⁴ These provisions provide varied offense definitions and permit the prosecutor to choose from among them.¹⁷⁵ Furthermore, Brown recognizes that it is not the number of charges, but rather the sentencing implications of those charges that make plea bargaining such a powerful prosecutorial tool.¹⁷⁶ Removing the duplicative code provisions would not remove the incentive to plea bargain, nor the prosecutors' power to offer charges with higher sentences.¹⁷⁷

Professor Daniel Medwed has recommended altering the charging threshold, believing that elevating the charging standard above probable cause will force prosecutors to file more meaningful charges.¹⁷⁸ As the Supreme Court stated, “It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being

169. See Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 223–24 (2007).

170. *Id.* at 273, 276.

171. *Id.* at 272–73.

172. *Id.* at 271–72.

173. *Id.* at 272–73. Similarly, the majority of property crimes fall under burglary, larceny, auto theft, arson, forgery, and embezzlement. *Id.* at 272.

174. *See id.*

175. *Id.*

176. *See id.* at 273.

177. *See id.* at 274 (“Leaner, more coherent substantive codes would likely have only modest effects on prosecutorial bargaining power and practice . . .”).

178. See Daniel S. Medwed, *What Really Works?: Emotionally Charged: The Prosecutorial Charging Decision and the Innocence Revolution*, 31 CARDOZO L. REV. 2187, 2197 (2010).

condemned.”¹⁷⁹ An enhanced standard may be one solution; however, the concern remains whether prosecutors would comply.

Another general approach focuses on prosecutorial oversight, suggesting that regulating prosecutors themselves is the solution to overcharging.¹⁸⁰ Scholars who advocate this approach suggest various measures to provide oversight of prosecutors both during and after the charging process. For example, Professor Richard Birke recommended creating a notation on the case file indicating that the original charges were dropped pursuant to a plea bargain.¹⁸¹ This would allow the judge to make an inquiry into the original offense and determine if the plea bargain was coercive.¹⁸²

Similarly, Bibas suggests that prosecutorial agencies should promulgate policies requiring supervisory review and approval for charging and plea bargains.¹⁸³ Noting the problem of prosecutorial self-interest, which motivates many attorneys “to safeguard their reputations, win-loss records, and egos by not risking losses at trial,” Bibas advocates that supervisory review of written plea agreements would force prosecutors to justify their offers without relying on self-interested reasons.¹⁸⁴ Bibas further speculates as to the role judges could play in reviewing plea bargaining, through increased judicial oversight to assess the strength of prosecution’s case and determine a proper sentence.¹⁸⁵ Although acknowledging the fear that judicial involvement in plea bargains could result in judicial bias if the case proceeds to trial, Bibas counters that courts could automatically reassign cases to different judges if a defendant rejects a judge’s advice to plead.¹⁸⁶ Alternatively, “[i]f judicial involvement is too radical or not feasible, nonjudicial mediators could give advice and try to debias the parties.”¹⁸⁷

Bibas also focuses on internal regulation, suggesting a reward and promotion system that would permit feedback from a range of sources.¹⁸⁸ This feedback would be compiled and used by supervising prosecutors to evaluate the performance of their peers.¹⁸⁹ Supervising prosecutors would use these

179. *In re Winship*, 397 U.S. 358, 364 (1970) (referring to the reasonable doubt standard used in criminal trials).

180. *See, e.g.*, Bibas, *supra* note 14, at 2541; Richard Birke, *Reconciling Loss Aversion and Guilty Pleas*, 1999 UTAH L. REV. 205, 223–24.

181. Birke, *supra* note 180, at 223.

182. *Id.*

183. Bibas, *supra* note 14, at 2541.

184. *Id.*

185. *Id.* at 2542 (“More thorough judicial oversight could catch the most blatant types of poor lawyering. By digging into the evidence, judges might gain a sense of how strong the government’s case is and thus how large a discount to award at sentencing.”).

186. *Id.* at 2543.

187. *Id.*

188. Stephanos Bibas, *Rewarding Prosecutors for Performance*, 6 OHIO ST. CRIM. L. 441, 444, 448 (2009).

189. *Id.* at 444–45.

performance reviews to assess “zeal, investigation, research, rhetorical skill, professionalism, ethics, diligence, courtesy, respect, and satisfaction” when making promotional decisions.¹⁹⁰ When collecting this data, supervising prosecutors would survey defense lawyers and judges who regularly interact with the junior prosecutors, as well as the victims and defendants involved in their cases.¹⁹¹ Theoretically, the defense lawyers and judges would provide information regarding overcharging, and prosecutors who routinely overcharge would be censured by not receiving promotions.¹⁹² Bibas’s approaches suffer from the general concerns that afflict any internal-oversight system, specifically that policing one’s peers is generally ineffective.¹⁹³

Each of these proposed solutions is thoughtful and provides blocks to build upon. It is with appreciation of these proposals that the remedy ventured hereafter is constructed.

VI. A NEW APPROACH: SYSTEMATIC AUDITS FROM AN OVERSIGHT TEAM

A. Internal Oversight

Any approach that might curb, if not end, the practice of coercive prosecutorial overcharging to gain the negotiating leverage must start with greater oversight of charging decisions.¹⁹⁴ Oversight can come from within or from outside an organization.¹⁹⁵ Internal oversight, as the term so often implies, can be a non sequitur. Nonetheless, internal oversight has the advantages of familiarity and even expertise with the very problems investigated, facilitating swift reaction to identified problems.¹⁹⁶ The concern,

190. *Id.* at 444.

191. *Id.* at 445–47.

192. *See id.* at 446 (“When judges or bar authorities find misconduct but refuse to suspend or disbar, supervisors can still use this information in deciding whom to reward and promote.”).

193. *See supra* Part V.A.

194. *See, e.g.,* Bibas, *supra* note 14, at 2541; Bibas, *supra* note 147, at 1042; Bibas, *supra* note 188, at 447–48; Birke, *supra* note 182, at 223. Birke recognizes:

The prosecutor has every incentive to overcharge in anticipation of the reduction. Therefore, a notation on the case file will alert the judge to the crime as originally charged If then, a judge were to hear a plea . . . it would follow that there would (or at least should) be an inquiry into the real offense for which the defendant was to be sentenced.

Id. (footnotes omitted). *But see* Gutiérrez, *supra* note 79, at 717 (recognizing the necessary limits of judicial oversight arising out of institutional competency and separation-of-powers concerns).

195. *See* Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 128–29 (2008).

196. For example, internal oversight of prosecutorial decision making can be valuable in helping to expose and eliminate prosecutorial bias. *See, e.g., id.* at 163–65. In their comprehensive review of several internal oversight programs, Professors Marc L. Miller and Ronald F. Wright analyze the Milwaukee District Attorney’s office’s data-management program, which exposed significant discrepancies in how individual prosecutors were charging and prosecuting defendants involved in marijuana-possession cases. *Id.* The District Attorney

of course, is that internal oversight may not provide the level of objectivity, scrutiny, and rigor essential to identify problems or take the necessary corrective action.¹⁹⁷ Lack of objectivity in reviewing the conduct of others within the same organization is an obvious and inherent concern,¹⁹⁸ and even when partisan or protective concerns may be overcome, that very scrutiny could be a destructive force within the organization.¹⁹⁹

The efficacy of internal oversight is further diminished because the examiners are generally subject to the same culture and norms as those overseen.²⁰⁰ Overcharging may well be the accepted norm in a given prosecutor's office, and the efforts to break such norms are particularly troublesome. As previously suggested, an elected prosecutor has little incentive to change how cases are filed.²⁰¹ Requiring closer scrutiny and more rigid screening criteria may be met with public disdain, as the public may interpret these safeguards as interfering with criminal justice. Furthermore, internal oversight will have detractors simply because it is not subject to

analyzed this data and discovered evidence of systematic racial bias in the charging of these cases, which, in his view, caused this unacceptable outcome. *Id.* at 169. Accordingly, he implemented an office-wide training program, tailored specifically to prosecutors' various experience levels and the office's political climate, to rectify this problem. *Id.*

197. *See id.* at 168–69. Miller and Wright describe a situation involving the U.S. Attorney for the District of Maine, Jay McCloskey that demonstrates the dangers of such a subjective viewpoint. At a conference, McCloskey reported that his office “rarely deviate[d]” from the federal sentencing guidelines. *Id.* (quoting Jay P. McCloskey, Panel Remarks, *Sentencing Guidelines: Where We Are and How We Got Here*, 44 ST. LOUIS U. L.J. 391, 391 (2000)). Unfortunately for McCloskey, national data on departures from the guidelines by federal prosecutors did not support his statement; in fact, the District of Maine deviated from the guidelines frequently enough to “put the district in the middle of the national pack.” *Id.* Confronted with this data, McCloskey then explained that the U.S. Attorney's Office found the prosecutorial and judicial departures that occurred in the state's numerous gun control and immigration cases to be “reasonable,” which rendered these cases, at least in his subjective viewpoint, non-departures. *Id.*

198. *See id.* at 171.

199. Little is known about the internal sanctioning and disciplinary practices that are employed in prosecutors' offices. Corn & Gershowitz, *supra* note 76, at 410. Therefore, it is unclear if the organizational culture could support a sufficiently rigorous disciplinary system, in which prosecutorial actions are objectively analyzed to determine whether or not actual misconduct has taken place, and where sufficient sanctions are imposed when such misconduct is discovered. *See id.* at 411–12; *see also* Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1102 (1952) (“A society that holds, as we do, to belief in law cannot regard with unconcern the fact that prosecuting agencies can exercise so large an influence on dispositions that involve the penal sanction, without reference to any norms but those that they may create for themselves.”); *cf.* Miller & Wright, *supra* note 195, at 128 (“Scholars' responses to a criminal justice world where what counts as law means so little have featured a call for greater external legal regulation.” (emphasis in original)).

200. Miller & Wright, *supra* note 195, at 130–31 (noting how prosecutors' pattered reasons for their decisions show how they adopt “social norms” and “liv[e] up to group expectations about what it means to be a prosecutor in that particular office” (emphasis in original)).

201. *See* Corn & Gershowitz, *supra* note 76, at 398.

further scrutiny, which gives critics reason to question the effectiveness of any such oversight.²⁰²

B. External Oversight

The drawbacks to internal oversight suggest that, to be effective, any oversight must come from outside of the charging authority, and this outside entity must be able to enforce its findings. Fortunately, a number of state constitutions provide a structural basis for statewide oversight of the counties or parishes that constitute the filing authorities in each state.²⁰³ For example, California's Constitution specifically provides that the State Attorney General has a duty to "see that the laws of the State are uniformly and adequately enforced."²⁰⁴ Furthermore, this provision grants the Attorney General the power of supervision

over every district attorney . . . in all matters pertaining to the duties of their respective offices, and may require any of said officers to make reports concerning the investigation, detection, prosecution, and punishment of crime in their respective jurisdictions as to the Attorney General may seem advisable. . . . When required by the public interest or directed by the Governor, the Attorney General shall assist any district attorney in the discharge of the duties of that office.²⁰⁵

The office of the California Attorney General was established in 1850 and was essential in a time of unstructured law enforcement.²⁰⁶ It has evolved to serve the state's changing needs to fulfill its purpose as the "chief law officer."²⁰⁷

202. See *supra* notes 197–99 and accompanying text.

203. Each state generally designates the Attorney General as its primary legal officer, either in its constitution or by statute. William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2452 (2006); see also, e.g., FLA. CONST. art. IV, § 4 ("The attorney general shall be the chief state legal officer."); ILL. CONST. art. V, § 15 ("The Attorney General shall be the legal officer of the State . . ."); LA. CONST. art. IV, § 8 ("[T]he attorney general . . . shall be the chief legal officer of the state."); S.C. CONST. art. V, § 24 ("The Attorney General shall be the chief prosecuting officer of the State with authority to supervise the prosecution of all criminal cases in the courts of record."); ARIZ. REV. STAT. ANN. § 41-192(a) (2009 & Supp. 2010) ("The attorney general shall . . . serve as chief legal officer of the state."). In addition, many state courts have recognized that a state's attorney general serves as the state's "chief legal officer." See, e.g., *Perdue v. Baker*, 586 S.E.2d 606, 614 (Ga. 2003); *Amemiya v. Sapienza*, 629 P.2d 1126, 1128 (Haw. 1981); *State ex rel. Allain v. Miss. Pub. Serv. Comm'n*, 418 So. 2d 779, 784 (Miss. 1982); *State ex rel. McGraw v. Burton*, 569 S.E.2d 99, 107 (W.Va. 2002).

204. CAL. CONST. art. V, § 13.

205. *Id.*

206. *History of the Office of the Attorney General*, ST. CAL. DEPARTMENT JUST., <http://oag.ca.gov/history> (last visited Aug. 8, 2011).

207. CAL. CONST. art. V, § 13.

Much like the office, the powers of the Attorney General have also evolved over the years. The Attorney General has consistently maintained the power to supervise, and where necessary, assist district attorneys,²⁰⁸ even with their essential power of prosecutorial oversight.²⁰⁹ Indeed, the California statute provides that the Attorney General maintains direct supervision over the district attorneys and “may, *where he deems it necessary*, take full charge of any investigation or prosecution.”²¹⁰ The Supreme Court of California interpreted this clause, based in the constitutional provisions of section 13, to mean that the Attorney General may assume principal control and direction over business conducted by district attorneys.²¹¹ Although California courts have indicated that the Attorney General does not have absolute control over law-enforcement officials,²¹² the Attorney General has consistently maintained the power of prosecutorial supervision and oversight.²¹³

C. A New Approach

Drawing upon the various, thoughtful approaches set forth in Part IV and grounded by the structural support provided by many state constitutions, this Article proposes a workable, affordable approach to the problem of prosecutorial overcharging, from which coercive plea bargaining arises. California’s Constitution serves as the model of this proposed approach, as the language of this constitution is typical,²¹⁴ which makes this proposal portable to other states. California’s Attorney General, as the state’s top law-enforcement official, is vested with the constitutional authority to supervise the conduct of California’s various county prosecutors,²¹⁵ which necessarily includes oversight of how the various counties conduct the charging process. However, this oversight authority exists today primarily in word only; in reality, each county’s elected district attorney operates autonomously.²¹⁶ For the office of the State Attorney General to exercise its oversight authority would not be a drastic invasion of county district attorneys’ perogatives because the office already supports county prosecutors in numerous ways. When county prosecutors are recused from prosecuting a case due to a local conflict, the State Attorney General provides its own prosecutors

208. *Id.*

209. *Id.*

210. CAL. GOV’T CODE § 12550 (West 2011) (emphasis added).

211. *Cnty. of Sacramento v. Cent. Pac. R.R. Co.*, 61 Cal. 250, 254 (Cal. 1882).

212. *See, e.g., People v. Brophy*, 120 P.2d 946, 953–54 (Cal. Ct. App. 1942).

213. CAL. CONST. art. V, § 13.

214. *See supra* note 203.

215. CAL. CONST. art. V, § 13.

216. *See Miller & Wright, supra* note 195, at 177–78.

to assume those cases.²¹⁷ Other statewide functions include direction of the State's Department of Justice, supervision of county sheriffs and other law-enforcement officers, convening grand juries, employment of special agents and investigators, criminal-record dissemination, and controlled-substances regulation.²¹⁸

However, and somewhat surprisingly, with such an important concern as intrastate consistency in charging crimes, there is a paucity of statewide oversight.²¹⁹ By way of illustration, a case that would be filed as a capital case in San Diego County may well be filed differently in Los Angeles County, even when the cases share identical facts. What was filed as a three-count felony in Riverside County might only draw one count in Sacramento County. Some will argue that such local decision making is appropriate, as it best reflects the constituency of each county.²²⁰ Furthermore, each county elects its own district attorney, and should that district attorney not represent his or her constituency properly, the people can remove him or her from office. Ensuring proper representation, however, is beyond the scope of this Article. The discussion here focuses on three concerns.

First, as a theoretical maxim, should a statewide agency have some authority to provide input or oversight of county prosecutors to ensure integrity in charging crimes? Second, is it even possible to identify overcharging, let alone to identify overcharging as a mechanism to gain negotiating leverage? And finally, assuming it is proper for statewide oversight and also possible to identify overcharged cases, how should that oversight be administered?

Any proposal that introduces oversight into each county's charging process faces significant hurdles. The greatest will most likely be pushback from county prosecutors, who have historically enjoyed a culture of autonomy.²²¹ Another hurdle is the cost associated with a state-run "audit team" organized

217. See, e.g., *Genzler v. Longanbach*, 410 F.3d 630, 634 (9th Cir. 2005) ("The San Diego District Attorney's office recused itself from Genzler's second trial, and Genzler was prosecuted by the State Attorney General's Office.").

218. 4 B.E. WITKIN & NORMAL L. EPSTEIN, CALIFORNIA CRIMINAL LAW ch. 10, § 14 (3d ed. 2000).

219. See *Miller & Wright*, *supra* note 195, at 128–29 (noting the complete absence of legislative will to enact oversight reforms). *Miller and Wright* state that:

For those who see discretion as the opposite of law, its dominance in the prosecutor's office has ripple effects throughout the criminal justice system . . .

. . . [S]cholars have called for judges to review prosecutorial charging and plea-bargaining decisions, in the hope that judges can limit and legitimize the choices that prosecutors make. The judicial-oversight project, however, has failed, even for the subset of prosecutor decisions that are based on improper bias.

Id. at 128 (footnotes omitted).

220. Cf. *Blassur et al.*, *supra* note 143, at 1999 (describing the effects of election on local prosecutors).

221. See *Miller & Wright*, *supra* note 195, at 129 (discussing the "lack of external regulation" of district attorney offices).

by the State Attorney General.²²² A third criticism relates to the instances of overcharging that lead to coercive dispositions, which would most likely only be discussed post-plea negotiations, raising serious questions as to how coerced pleas would be remedied.²²³ This Article's proposal addresses each of these concerns.

Regardless of the propriety of statewide oversight, if such heinous practices do occur, there certainly should be some mechanism beyond the charging entity's internal scrutiny to raise the issue. As set forth earlier, self-policing is generally inadequate and may prove divisive within the policed offices.²²⁴ Furthermore, given that overcharging to obtain leverage is an abominable practice, those prosecutors engaged in such practices should be exposed and held accountable. In any calculus, the cost of reining in a practice that sets the stage for coercive pleas and sentences pales against the human tragedy of pleas and their consequences, which are often disproportionate to the accused's conduct.

Regarding the possibility of identifying overcharging, such identification must come from an entity apart from the charging prosecutor. To undertake a post-plea analysis, the reviewing authority must have access to the charging prosecutor's entire file, including all police reports, witness statements, forensic results, any documentation that the defense supplied, and transcripts of all court appearances leading up to the negotiated disposition.²²⁵ Armed with such information, a reviewer versed in the criminal justice system likely would be able to determine if a case was overcharged. If the reviewer made such a determination, then the investigation would expand to interviews of the parties involved in the negotiated disposition to determine if the prosecutor used overcharging as leverage to obtain a plea or sentence unduly favorable to the state.

As for the implementation of such a scheme, there do not appear to be any unrealistic barriers proscribing experienced and knowledgeable criminal-law practitioners from identifying when a case was overcharged and if that overcharging resulted in a coercive plea or sentence. Implementation would

222. Cf. Blassur et al., *supra* note 143, at 2029 (commenting on the resource constraint that prosecutors' offices face, which make funding audits or oversight difficult).

223. Cf. *id.* at 2008.

224. See *supra* Part V.A. Prosecutors can be fiercely protective of any system in which they enjoy discretionary control. For example, prosecutors in South Carolina have historically controlled the criminal court-docketing system, which has allowed them to schedule criminal trials for times that would maximize the likelihood that defense attorneys would be unprepared. Andrew M. Siegel, *When Prosecutors Control Criminal Dockets: Dispatches on History and Policy from a Land Time Forgot*, 32 AM. J. CRIM. L. 325, 351–52 (2005). This practice frequently has the effect of encouraging defendants to be more receptive to plea offers. See *id.* at 362–63. Many of the historical attempts to allow judges to exercise more control over the docketing system have been met with fierce resistance by prosecutors, who undoubtedly wish to continue to enjoy the advantages of the current regime. See *id.* at 346.

225. See Blassur et al., *supra* note 143, at 2008–09.

involve charging deputies in the Attorney General's office with oversight authority in accordance with the office's constitutional powers.²²⁶ Realistically, this audit team would be in a position to review only a small number of files from each prosecutorial office.²²⁷ Any review of such a small sampling will not provide definitive findings; however, much like the audits conducted by the Internal Revenue Service, the mere fact that any given file could be pulled and reviewed would serve as deterrence.²²⁸ The Attorney General's audit team would have access to any files they select within each county. Those prosecutorial offices found to have abused their authority by overcharging and coercing pleas would be identified and exposed, motivating them to comply with their prosecutorial responsibilities in the future. Those individual prosecutors found to have abused their authority would be subject to state-bar discipline.

The remedies for defendants victimized by coercive plea and sentence bargaining are not so clear-cut. The audits must necessarily occur well after the negotiation and most likely well after the defendants have begun serving their respective sentences. Although pleas can be modified upon a finding of prosecutorial misconduct,²²⁹ sentences being served or already served cannot be undone. Such concerns, however, should not detract from the larger goal of deterrence. An independent, outside watchdog's potential finding of abuse, coupled with the ethical and professional responsibilities under which

226. See *supra* notes 201–11.

227. See Blassur et al., *supra* note 143, at 2007.

228. Of course, being subjected to an IRS audit, with the potential of paying large fines for tax evasion, is a singularly unpleasant prospect for most people. In fact, for risk-averse people, even the remotest possibility of an audit can increase the likelihood that they will comply with tax laws. See Arthur Snow & Ronald S. Warren, Jr., *Ambiguity About Audit Probability, Tax Compliance, and Taxpayer Welfare*, 43 *ECON. INQUIRY* 865, 870 (2005). However, any unpleasantness experienced by being subjected to an actual audit can be exacerbated by other potential consequences. Some states elect to “shame” people who cheat on their taxes by publishing their personal information in a public forum. Brian Netter, *Avoiding the Shameful Backlash: Social Repercussions for the Increased Use of Alternative Sanctions*, 96 *J. CRIM. L. & CRIMINOLOGY* 187, 206–07 (2005). Because of certain distinctly American social norms, deliberate tax evasion is viewed as strongly antisocial and anti-community behavior. See *id.* at 209; see also Eric A. Posner, *Law and Social Norms: The Case of Tax Compliance*, 86 *VA. L. REV.* 1781 (2000). Therefore, shaming works to cast these wrongdoers in a sufficiently negative light so that the general population will be even less inclined to cheat on their taxes, despite a very low likelihood that any single individual will actually be subjected to an audit. Netter, *supra*, at 206–07. However, whether this type of shaming would be equally effective in combating prosecutorial overcharging is an open question, and the answer to this question largely hinges on the development of social norms among prosecutors if the proposed oversight program were to be implemented.

229. See Ellen S. Podgor & Jeffrey S. Weiner, *Prosecutorial Misconduct: Alive and Well, and Living in Indiana?*, 3 *GEO. J. LEGAL ETHICS* 657, 663 (1990) (“[A] showing of ‘actual’ vindictiveness is necessary when there is a pre-trial decision to modify charges against a defendant.” (citing *United States v. Goodwin*, 457 U.S. 368, 384 (1982))).

prosecutors are compelled to act, should render the practice of overcharging to gain negotiating leverage—as in Alfred’s opening case—a relic of the past.