

# THE UNNECESSARY EVIL OF PLEA BARGAINING: AN UNCONSTITUTIONAL CONDITIONS PROBLEM AND A NOT-SO-LEAST RESTRICTIVE ALTERNATIVE

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## I. INTRODUCTION

The Bill of Rights protects some of our most fundamental liberties, including our Fifth Amendment privilege against self-incrimination and our Sixth Amendment rights to jury trial, to confront adverse witnesses and to compulsory process for obtaining favorable witnesses.<sup>1</sup> As Justice Brennan once wrote, the Framers did not intend to “create” rights; “[r]ather, they designed the Bill of Rights to prohibit our Government from infringing rights and liberties presumed to be pre-existing.”<sup>2</sup> Because many of these rights and liberties have each been deemed to be “a fundamental, intrinsic aspect of ‘due process,’ ” they have been “incorporated” into the Fourteenth Amendment to apply to the states as well.<sup>3</sup> However, despite such supposed protections, most of those charged with crimes do not get to exercise these rights.<sup>4</sup> Almost every year, more than 95% of those charged

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<sup>1</sup> U.S. CONST. amends. V, VI.

<sup>2</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 288 (1990) (Brennan, J., dissenting).

<sup>3</sup> CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS* 2 (4th ed. 2000); *see* *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968).

<sup>4</sup> Malvina Halberstam, *Towards Neutral Principles in the Administration of Criminal Justice: A Critique of Supreme Court Decisions Sanctioning the Plea Bargaining Process*, 73 J. CRIM. L. & CRIMINOLOGY 1, 2 (1982).

plead guilty and waive away their rights,<sup>5</sup> with most defendants doing so through the process of plea bargaining.<sup>6</sup> As some commentators have noted, “We now have not only an administrative criminal justice system, but one so dominant that trials take place in the shadow of guilty pleas.”<sup>7</sup>

Under the unconstitutional conditions doctrine, the government cannot condition a benefit on the recipient giving up a constitutional right, even if the government is not required to provide that benefit in the first place.<sup>8</sup> A benefit conditioned on surrendering a constitutional right creates an impermissible burden on that right, “even though the burden may be characterized as being only indirect.”<sup>9</sup> Viewed in this light, the process of plea bargaining poses an unconstitutional conditions problem.<sup>10</sup> During the plea bargaining process, prosecutors generally offer charging or sentencing concessions to induce defendants to plead guilty and waive their right to a jury trial or threaten defendants with increased charges or more severe sentences if they do choose to go to trial.<sup>11</sup> In such situations, the state is essentially penalizing those defendants who choose to exercise their constitutional rights and rewarding those who refrain from doing so. This burden on the right to jury trial effectively violates a defendant’s due process rights and would normally entail strict scrutiny review.<sup>12</sup>

The Supreme Court, however, has consistently upheld the constitutionality of plea bargaining in a number of cases<sup>13</sup> and has never viewed plea bargaining as presenting an unconstitutional conditions problem.<sup>14</sup>

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<sup>5</sup> U.S. SENTENCING COMM’N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, fig.C (2006), available at <http://www.ussc.gov/ANNRPT/2006/SBTOC06.htm> [hereinafter SOURCEBOOK]; GEORGE FISHER, PLEA BARGAINING’S TRIUMPH 223 tbl.9.1 (2003).

<sup>6</sup> Dawn Reddy, *Guilty Pleas and Practice*, 30 AM. CRIM. L. REV. 1117, 1117 (1993).

<sup>7</sup> Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409, 1415 (2003).

<sup>8</sup> Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989).

<sup>9</sup> *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (citation omitted).

<sup>10</sup> Thomas R. McCoy & Michael J. Mirra, *Plea Bargaining as Due Process in Determining Guilt*, 32 STAN. L. REV. 887, 887 (1980); Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387, 1398 (1970) [hereinafter *Unconstitutionality*]; see also Comment, *Constitutional Alternatives to Plea Bargaining: A New Waive*, 132 U. PA. L. REV. 327, 327 (1984) [hereinafter *A New Waive*].

<sup>11</sup> McCoy & Mirra, *supra* note 10, at 887.

<sup>12</sup> See *id.* at 888; *A New Waive*, *supra* note 10, at 330–31; see also Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 799–801 (2006) (providing an overview of strict scrutiny analysis, including how it developed, when it should be used and what steps make up the analysis).

<sup>13</sup> See, e.g., *United States v. Mezzanatto*, 513 U.S. 196 (1995); *Alabama v. Smith*, 490 U.S. 794 (1989); *United States v. Goodwin*, 457 U.S. 368 (1982); *Corbitt v. New Jersey*, 439 U.S. 212 (1978); *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); *Santobello v. New York*, 404 U.S. 257 (1971); *North Carolina v. Alford*, 400 U.S. 25 (1970); *Brady v. United States*, 397 U.S. 742 (1970).

<sup>14</sup> See, e.g., McCoy & Mirra, *supra* note 10, at 888; Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 832 (2003).

Some commentators suggest that the Court likely sees plea bargaining as a constitutional condition.<sup>15</sup> The Court often justifies the use of plea bargains, noting that “[plea bargaining] is an essential component of the administration of justice,” and that “[i]t leads to [the] prompt and largely final disposition of most criminal cases.”<sup>16</sup>

Many commentators, including both those who support and those who oppose plea bargaining, agree that plea bargaining is a permanent and inevitable fixture in our criminal justice system.<sup>17</sup> Some commentators have even said, “[Plea bargaining] is not some adjunct to the criminal justice system; it is the criminal justice system.”<sup>18</sup> Supporters of plea bargaining often argue that it is necessary for handling the enormous criminal caseload because it allows prosecutors to allocate limited resources efficiently, and that without plea bargaining, the legal system would cease to function.<sup>19</sup> Thus, if it came down to evaluating plea bargaining under strict scrutiny, it is highly likely that the Supreme Court would find the continued function and efficiency of the legal system to be a compelling state interest.

Yet, the Court has never seriously considered any alternatives to plea bargaining other than providing “a full-scale [jury] trial” for every defendant.<sup>20</sup> A jury waiver system, wherein a defendant waives his or her right to a jury trial and receives instead a bench trial, is a less restrictive alternative that is arguably just as efficient as plea bargaining.<sup>21</sup> A bench trial replaces the jury with a judge, but preserves the defendant’s various other constitutional liberties, among others, the privilege against self-incrimination, the right to confront adverse witnesses and the right to compulsory process for obtaining favorable witnesses.<sup>22</sup> Thus, unlike plea bargaining, a bench trial still allows the defendant “an unfettered opportunity

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<sup>15</sup> See Mazzone, *supra* note 14, at 832–33.

<sup>16</sup> *Santobello*, 404 U.S. at 260–61.

<sup>17</sup> Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1037, 1039 (1984) [hereinafter Schulhofer, *Inevitable*].

<sup>18</sup> Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992).

<sup>19</sup> See Halberstam, *supra* note 4, at 35; Mazzone, *supra* note 14, at 837–38; McCoy & Mirra, *supra* note 10, at 905 n.92; Schulhofer, *Inevitable*, *supra* note 17, at 1039–40; Douglas D. Guidorizzi, Comment, *Should We Really “Ban” Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 EMORY L.J. 753, 765 (1998); Jeff Palmer, Note, *Abolishing Plea Bargaining: An End to the Same Old Song and Dance*, 26 AM. J. CRIM. L. 505, 512–13 (1999).

<sup>20</sup> See, e.g., *Santobello*, 404 U.S. at 260.

<sup>21</sup> See Albert W. Alschuler, *Implementing the Criminal Defendant’s Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 1024–48 (1983); Schulhofer, *Inevitable*, *supra* note 17, at 1082–86; *A New Waive*, *supra* note 10, at 345–52.

<sup>22</sup> Schulhofer, *Inevitable*, *supra* note 17, at 1083; *A New Waive*, *supra* note 10, at 347.

to present a defense” and a chance to be heard.<sup>23</sup> A jury waiver system also conforms more closely to due process than plea bargaining, in that it is a better process to determine guilt, because it allows for “formal proof in open court.”<sup>24</sup> Furthermore, as will be discussed in greater detail below, bench trials require little more time and resources than plea bargaining, thus providing the same “efficiency benefits.”<sup>25</sup> For instance, bench trials utilize much of the same resources currently used in plea bargaining,<sup>26</sup> and since there is no jury, time and money are saved from not having to perform *voir dire*, opening statements and other “time-consuming” features of jury trials.<sup>27</sup>

This Note will thus argue that plea bargaining is an unconstitutional practice because it conditions giving benefits to defendants surrendering their constitutional rights and that it is an unnecessary evil because it fails to be the least restrictive alternative. Part II will provide a general overview of plea bargaining, a discussion of the plea bargaining debate and the Supreme Court’s treatment of plea bargaining. Part III will briefly discuss the unconstitutional conditions doctrine, including the rationale behind the doctrine and the Supreme Court’s treatment of the doctrine. Part IV will explain why plea bargaining presents an unconstitutional conditions problem and thus imposes an impermissible burden on a defendant’s constitutional rights. Part V will analyze plea bargaining under strict scrutiny analysis and find that a jury waiver system is a less restrictive alternative than plea bargaining. Finally, Part VI will conclude that because plea bargaining fails to be the least restrictive alternative, it should be banned and held unconstitutional.

## II. PLEA BARGAINING

Plea bargaining is the process by which the prosecution and the defense negotiate charging and sentencing concessions in exchange for the defendant’s guilty plea and waiver of rights.<sup>28</sup> Guilty pleas and plea bargaining are governed by Rule 11 of the Federal Rules of Criminal Procedure, which states that, in order to be constitutionally valid, a guilty plea must be voluntary and intelligent, have a factual basis and be given by the

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<sup>23</sup> Alschuler, *supra* note 21, at 1035.

<sup>24</sup> Schulhofer, *Inevitable*, *supra* note 17, at 1092.

<sup>25</sup> Guidorizzi, *supra* note 19, at 780; *see also* Schulhofer, *Inevitable*, *supra* note 17, at 1084–86.

<sup>26</sup> Schulhofer, *Inevitable*, *supra* note 17, at 1084–86.

<sup>27</sup> Alschuler, *supra* note 21, at 1037–38; Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 2005 (1992) [hereinafter Schulhofer, *Disaster*]; Guidorizzi, *supra* note 19, at 780.

<sup>28</sup> *See* Reddy, *supra* note 6, at 1117.

defendant with the effective assistance of counsel.<sup>29</sup> Upon entering a guilty plea, the defendant waives the privilege against self-incrimination, the right to a jury trial, the right to confront one's accusers and the right to compulsory attendance of favorable witnesses.<sup>30</sup>

#### A. PLEA BARGAINING UNDER THE FEDERAL SENTENCING GUIDELINES

Traditionally, there were two types of plea bargaining: charge bargaining and sentence bargaining.<sup>31</sup> Charge bargaining occurred when the government agreed to dismiss charges or reduce the severity of charges on the condition that the defendant plead guilty to certain other charges.<sup>32</sup> Sentencing bargaining referred to the situation in which the government agreed to recommend a more lenient sentence to the judge in exchange for the defendant's guilty plea.<sup>33</sup> But the implementation of the Federal Sentencing Guidelines<sup>34</sup> soon changed the dynamics of plea bargaining by substantially limiting the sentencing discretion of judges<sup>35</sup> with detailed and narrow ranges of sentences based on the offenses charged.<sup>36</sup> As a result, prosecutors have almost unlimited discretion in determining the sentences of defendants since only they have the power to choose which charges to bring, providing them with that much more leverage in plea bargaining.<sup>37</sup>

Although one of the main purposes behind the Federal Sentencing Guidelines was to reduce "unjustifiable sentencing disparities" for those who have committed the same crimes,<sup>38</sup> prosecutors easily thwart this purpose by bringing, or threatening to bring, different charges against similar

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<sup>29</sup> FED. R. CRIM. P. 11; Reddy, *supra* note 6, at 1117, 1118.

<sup>30</sup> FED. R. CRIM. P. 11(b)(1)(C), (E), (F); *Boykin v. Alabama*, 395 U.S. 238, 243 (1969).

<sup>31</sup> See Reddy, *supra* note 6, at 1133–37.

<sup>32</sup> *Id.* at 1133.

<sup>33</sup> *Id.* at 1135.

<sup>34</sup> When the Federal Sentencing Guidelines were implemented, they were mandatory on all courts. In 2005, however, the Supreme Court struck down two sections of the Sentencing Reform Act, leaving the Guidelines "effectively advisory." *United States v. Booker*, 543 U.S. 220, 245 (2005). Yet, commentators still believe that courts will be adhering to the Guidelines since *United States v. Booker* left almost all of the Guidelines intact and because it now gives appellate courts the power to evaluate the reasonableness of any sentencing departures. See Frank O. Bowman III, *Beyond Band Aids: A Proposal for Reconfiguring Federal Sentencing After Booker*, 2005 U. CHI. LEGAL F. 149, 181–86 (2005); see also SOURCEBOOK, *supra* note 5, at fig.C (illustrating the recent guilty plea level to be as high as the level right before *Booker* was decided).

<sup>35</sup> Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471, 1472 (1993).

<sup>36</sup> Bowman, *supra* note 34, at 155.

<sup>37</sup> FISHER, *supra* note 5, at 210; Standen, *supra* note 35, at 1472, 1475.

<sup>38</sup> Bowman, *supra* note 34, at 152; see also FISHER, *supra* note 5, at 210; Standen, *supra* note 35, at 1515.

offenders.<sup>39</sup> A study of ten jurisdictions showed that guideline circumvention occurred in all ten areas and concluded that such circumvention likely existed in every jurisdiction in the country.<sup>40</sup> Congress itself recognized this problem, noting that such unchecked prosecutorial discretion “could effectively determine the range of sentence to be imposed and could well reduce the benefits otherwise to be expected from the bill’s guideline sentencing system.”<sup>41</sup> Although Congress attempted to address this problem with a provision designed to allow judges to take into consideration any of the defendant’s relevant conduct,<sup>42</sup> few judges depart from the sentences for fear of reversal on appeal or criticism for violating the Guidelines’ policies.<sup>43</sup> Thus, the prosecutor’s discretion is effectively left unchecked.<sup>44</sup>

The Federal Sentencing Guidelines also allow for downward departures for “acceptance of responsibility,”<sup>45</sup> further providing prosecutors with ammunition in their plea bargains with defendants. One commentator notes that this provision is “nothing more nor less than an institutionalized incentive for guilty pleas.”<sup>46</sup> Prosecutors are permitted to bargain with defendants for a reduction of two offense levels if the defendant “clearly demonstrates acceptance of responsibility” and three offense levels under certain circumstances if the defendant “assist[s] authorities in the investigation or prosecution of his own misconduct.”<sup>47</sup>

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<sup>39</sup> Standen, *supra* note 35, at 1513–16.

<sup>40</sup> Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post-Mistretta Period*, 91 NW. U. L. REV. 1284, 1292 (1997).

<sup>41</sup> U.S. SENTENCING COMM’N, *THE FEDERAL SENTENCING GUIDELINES: A REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM AND SHORT-TERM IMPACTS ON DISPARITY IN SENTENCING, USE OF INCARCERATION, AND PROSECUTORIAL DISCRETION AND PLEA BARGAINING* 65 (1991) (quoting S. REP. NO. 98-225, at 167 (1983)).

<sup>42</sup> Bowman, *supra* note 34, at 159; Schulhofer & Nagel, *supra* note 40, at 1303–04.

<sup>43</sup> Schulhofer & Nagel, *supra* note 40, at 1299; *see* FISHER, *supra* note 5, at 217–18.

<sup>44</sup> Standen, *supra* note 35, at 1510.

<sup>45</sup> Bowman, *supra* note 34, at 158.

<sup>46</sup> *Id.* at 158–59 & n.62.

<sup>47</sup> U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2006), available at <http://www.ussc.gov/2006guid/TABCON06.htm>; *see also* FISHER, *supra* note 5, at 215; Bowman, *supra* note 34, at 158 n.62; Reddy, *supra* note 6, at 1136; Palmer, *supra* note 19, at 517; Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1045 n.302 (2006) (noting that prosecutors can allow up to a four-level deduction for defendants who plead guilty in fast-track jurisdictions).

## B. THE PLEA BARGAINING DEBATE

## 1. Justifications for Plea Bargaining

The main justification for plea bargaining is that it is necessary for the continued function and efficiency of the criminal justice system.<sup>48</sup> Many believe that if plea bargaining were abolished, the legal system would simply collapse from the burden of handling ever-increasing criminal caseloads with severely limited resources.<sup>49</sup> Supporters of plea bargaining contend that while criminal caseloads tend to double every ten years, the resources that deal with them only increase a minimal amount.<sup>50</sup> They argue that plea bargaining is thus needed for the efficient allocation of resources.<sup>51</sup> Supporters further argue that the additional increase of costs due to carrying out trials for every defendant would serve to burden a system that is already barely standing.<sup>52</sup>

Some of these concerns, however, are based on faulty assumptions. First, there is no indication that a prohibition on plea bargaining would mean that defendants would no longer plead guilty.<sup>53</sup> Second, supporters fail to take into consideration the fact that plea bargaining also uses many judicial resources commonly thought to be used only in trials.<sup>54</sup> Many people, for example, do not realize that guilty pleas also require the time and presence of judges and the use of courtrooms in order to formally enter the plea.<sup>55</sup>

Another justification for plea bargaining is that it provides more flexibility in the legal system.<sup>56</sup> Supporters argue that plea bargaining allows the prosecutor to take into account equitable factors in a particular case,<sup>57</sup> so that he or she can “tailor punishment to the crime” and to the per-

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<sup>48</sup> See Halberstam, *supra* note 4, at 35; Mazzone, *supra* note 14, at 837–38; McCoy & Mirra, *supra* note 10, at 905 n.92; Schulhofer, *Inevitable*, *supra* note 17, at 1039–40; Palmer, *supra* note 19, at 512–13.

<sup>49</sup> Schulhofer, *Inevitable*, *supra* note 17, at 1039–40; Guidorizzi, *supra* note 19, at 765; Palmer, *supra* note 19, at 512–13.

<sup>50</sup> Palmer, *supra* note 19, at 513.

<sup>51</sup> *Id.* at 514; Guidorizzi, *supra* note 19, at 765.

<sup>52</sup> See Schulhofer, *Inevitable*, *supra* note 17, at 1040; Palmer, *supra* note 19, at 513.

<sup>53</sup> Schulhofer, *Inevitable*, *supra* note 17, at 1040; Palmer, *supra* note 19, at 513–14 (explaining that “defendants may still plead guilty to avoid longer sentences, avoid the ‘process costs’ of trial, because of lack of defenses, or due to remorse”).

<sup>54</sup> Schulhofer, *Inevitable*, *supra* note 17, at 1040, 1084.

<sup>55</sup> *Id.* at 1084.

<sup>56</sup> Guidorizzi, *supra* note 19, at 765; Palmer, *supra* note 19, at 515.

<sup>57</sup> Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121, 1137 (1998).

son.<sup>58</sup> It also allows the prosecutor to reward defendants who cooperate and to convict defendants where there is insufficient evidence.<sup>59</sup> Yet, it is this very flexibility that supplies the prosecutor with his or her unlimited discretion, giving rise to potential abuses and injustices.

A further justification for plea bargaining is that it allows defendants to admit their guilt and to assume responsibility for their conduct.<sup>60</sup> Supporters contend that in pleading guilty, defendants can forgo “the anxieties and uncertainties of a trial.”<sup>61</sup> However, in most situations, it is more likely that the defendant pleads guilty to avoid harsh punishment and to obtain a more lenient sentence.<sup>62</sup>

Finally, another justification for plea bargaining is that it allows victims “to be shielded from the emotional stress and sensationalism of trial.”<sup>63</sup> Supporters further argue that plea bargaining provides victims with the closure that they need and with the understanding that the defendant will be punished for his or her crime.<sup>64</sup> However, it is much more likely that victims will be disappointed with the justice system upon the knowledge that instead of being dealt with under the full rigors of justice, defendants have received a bargained-for sentence.<sup>65</sup>

## 2. Criticisms of Plea Bargaining

The most important criticism of plea bargaining is that plea bargaining can coerce innocent defendants into pleading guilty.<sup>66</sup> The prosecutor’s unlimited discretion to pick and choose which charges to bring against defendants and ability to create significant sentencing differentials between similar defendants can lead to the practice of overcharging and the use of threats to seek the harshest sentence to keep defendants from going to trial.<sup>67</sup> Innocent, risk-averse defendants may not be willing to risk going to trial to receive an exceedingly severe sentence, and instead, will choose to plead guilty to ensure a more lenient sentence.<sup>68</sup>

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<sup>58</sup> Palmer, *supra* note 19, at 515–16.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 516–17.

<sup>61</sup> Guidorizzi, *supra* note 19, at 766 (quoting *Blackledge v. Allison*, 431 U.S. 63, 71 (1977)).

<sup>62</sup> Palmer, *supra* note 19, at 517–18.

<sup>63</sup> *Id.* at 518.

<sup>64</sup> Guidorizzi, *supra* note 19, at 767.

<sup>65</sup> Palmer, *supra* note 19, at 518.

<sup>66</sup> Guidorizzi, *supra* note 19, at 771.

<sup>67</sup> *Id.*; Palmer, *supra* note 19, at 519.

<sup>68</sup> Guidorizzi, *supra* note 19, at 771–72.

Critics also argue that plea bargaining “undermines the integrity of the criminal justice system.”<sup>69</sup> They contend that plea bargaining allows the government to evade the “rigorous standards of due process and proof imposed during trials.”<sup>70</sup> Instead of establishing a defendant’s guilt and sentence through an impartial process with a complete investigation and an opportunity for the defense to present its case, prosecutors take on the role of judge and jury, making all determinations based on the probability of whether they will win or lose at trial.<sup>71</sup> The end result is a decision that has little to do with the primary objectives of the criminal justice system.<sup>72</sup>

Another criticism of plea bargaining is that it allows defendants to escape full punishment by providing them with more lenient sentences.<sup>73</sup> This sends a message to other offenders that justice can be bought and sold<sup>74</sup> and that they can easily “beat the system,”<sup>75</sup> leading critics to believe that plea bargaining can weaken the deterrent effect of punishment.<sup>76</sup> Critics further contend that the lenient sentences given to those defendants who plea bargain, and the harsh sentences doled out to similar defendants who refuse and are convicted at trial, lead to large sentencing disparities among those convicted for similar offenses, which “undermine the entire criminal system.”<sup>77</sup>

### C. THE SUPREME COURT’S TREATMENT OF PLEA BARGAINING

The Supreme Court has generally held that plea bargaining is a constitutional practice.<sup>78</sup> But the Court *has* found state action to be unconstitutional when it impermissibly hinders a defendant from exercising his or her constitutional rights. In *United States v. Jackson*, the Court struck down a provision of the Federal Kidnapping Act that limited the imposition of the death penalty only after a jury trial, finding that such a provision “impose[d] an impermissible burden upon the exercise of a constitutional

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<sup>69</sup> *Id.* at 767; see also *Unconstitutionality*, *supra* note 10, at 1397–98.

<sup>70</sup> Guidorizzi, *supra* note 19, at 768 (quoting Alissa Pollitz Worden, *Policymaking by Prosecutors: The Uses of Discretion in Regulating Plea Bargaining*, 73 JUDICATURE 335, 336 (1990)).

<sup>71</sup> *Id.* at 768–69.

<sup>72</sup> *Id.* at 769; Palmer, *supra* note 19, at 527.

<sup>73</sup> Guidorizzi, *supra* note 19, at 770; Palmer, *supra* note 19, at 525.

<sup>74</sup> See Guidorizzi, *supra* note 19, at 770.

<sup>75</sup> *Id.* at 771.

<sup>76</sup> *Id.*

<sup>77</sup> Palmer, *supra* note 19, at 525.

<sup>78</sup> See, e.g., *United States v. Mezzanatto*, 513 U.S. 196 (1995); *Alabama v. Smith*, 490 U.S. 794 (1989); *United States v. Goodwin*, 457 U.S. 368 (1982); *Corbitt v. New Jersey*, 439 U.S. 212 (1978); *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); *Santobello v. New York*, 404 U.S. 257 (1971); *North Carolina v. Alford*, 400 U.S. 25 (1970); *Brady v. United States*, 397 U.S. 742 (1970).

right.”<sup>79</sup> Specifically, the Court found that the provision discouraged defendants from exercising their Fifth Amendment right not to plead guilty and their Sixth Amendment right to a jury trial.<sup>80</sup> The Court further declared that if a provision’s purpose or effect was “to chill the assertion of constitutional rights by penalizing those who choose to exercise them,” then such a provision was “patently unconstitutional.”<sup>81</sup> The Court went on to note that the “evil” of the provision was not that it coerced guilty pleas and jury waivers, but that “it needlessly encourage[d] them.”<sup>82</sup> The Court found that the state’s interest in limiting the death penalty to only those cases so determined by the jury was “entirely legitimate,” but that there were other less restrictive alternatives to achieve the same purpose.<sup>83</sup>

Soon after, in *Brady v. United States*, the Court appeared to disregard its holding in *Jackson*, and in another capital punishment context, explicitly refused to find plea bargaining unconstitutional.<sup>84</sup> The *Brady* Court stated that not every guilty plea made to avoid the death penalty was necessarily invalid and found that the *Jackson* holding merely required that valid guilty pleas be “voluntary” and “intelligent.”<sup>85</sup> But the *Brady* Court’s interpretation of *Jackson* misses the point: *Jackson* focused on state action burdening constitutional rights, not on whether a defendant’s choice was voluntary or intelligent. Whether a defendant’s choice was voluntary or intelligent does not cure the fact that there is still an unconstitutional burden. However, the *Brady* Court went on to find that a guilty plea was not necessarily “compelled and invalid” just because a defendant knew that pleading guilty would ensure a more lenient sentence.<sup>86</sup> The Court further stated, “[W]e cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State.”<sup>87</sup> Further justifying plea bargaining, the Court found that it allowed defendants to acknowledge their guilt and provided a “hope for success in rehabilitation.”<sup>88</sup>

Later that year, in *North Carolina v. Alford*, the Court upheld a defendant’s guilty plea despite his numerous claims of innocence, finding that

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<sup>79</sup> 390 U.S. 570, 572 (1968).

<sup>80</sup> *Id.* at 581.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 583.

<sup>83</sup> *Id.* at 582–83.

<sup>84</sup> 397 U.S. 742 (1970).

<sup>85</sup> *Id.* at 747 (citations omitted).

<sup>86</sup> *Id.* at 751.

<sup>87</sup> *Id.* at 753.

<sup>88</sup> *Id.*

there was a “strong factual basis” for the plea.<sup>89</sup> The Court dismissed the defendant’s argument that he had pled guilty to avoid a harsher punishment with a finding that his plea was voluntary and intelligent.<sup>90</sup> The Court even went on to conclude that the defendant’s choice was a reasonable one, given that he was able to limit his maximum penalty.<sup>91</sup>

A year later, in *Santobello v. New York*, the Court fully embraced the practice of plea bargaining and sung its praises.<sup>92</sup> Specifically, the Court stated:

The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called “plea bargaining,” is an essential component to the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.<sup>93</sup>

The Court further found that plea bargaining was “not only an essential part of the process but a highly desirable part.”<sup>94</sup>

Addressing a due process violation claim in *Bordenkircher v. Hayes*, the Court rejected the argument that the prosecutor was punishing the defendant for exercising his right to trial when the prosecutor added more charges after the defendant refused to plead guilty.<sup>95</sup> Although it acknowledged the enormous amount of discretion wielded by prosecutors and the potential for abuse, the Court found that “openly present[ing] the defendant with the unpleasant alternatives of forgoing trial or facing charges” did not violate due process.<sup>96</sup> The Court distinguished plea bargaining cases from the vindictiveness cases involving the right to appeal, noting that the “unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right to attack his original conviction” was “very different from the give-and-take negotiation common in plea bargaining,” in which the prosecutor and defense “arguably possess relatively equal bargaining power.”<sup>97</sup> The Court further found that retaliation by the prosecutor did not

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<sup>89</sup> 400 U.S. 25 (1970).

<sup>90</sup> *Id.* at 31.

<sup>91</sup> *Id.* at 37.

<sup>92</sup> 404 U.S. 257 (1971).

<sup>93</sup> *Id.* at 260.

<sup>94</sup> *Id.* at 261.

<sup>95</sup> 434 U.S. 357 (1978).

<sup>96</sup> *Id.* at 365.

<sup>97</sup> *Id.* at 362–63 (citations omitted).

exist in plea bargaining “so long as the accused is free to accept or reject the prosecution’s offer.”<sup>98</sup>

In *Corbitt v. New Jersey*, the Court considered a state sentencing scheme that provided a possibility for a more lenient sentence upon a plea of *non vult*,<sup>99</sup> a possibility that did not exist if the defendant were instead convicted by a jury.<sup>100</sup> The Court dismissed the defendant’s argument that the statute imposed an unconstitutional burden on his rights, finding that “it is not forbidden to extend a proper degree of leniency in return for guilty pleas.”<sup>101</sup> The Court refused to find any retaliation or vindictiveness against the defendant for going to trial, explaining that as long as plea bargaining was valid, giving more leniency to those who plead *non vult* “cannot be equated with impermissible punishment.”<sup>102</sup>

In *United States v. Goodwin*, the Court held that a prosecutor could bring additional charges against a defendant who requested a jury trial after failing to reach a plea bargain with the prosecutor.<sup>103</sup> The Court found that a presumption of vindictiveness was “not warranted,” reasoning that due process is not necessarily violated whenever there is increased punishment, but only in those situations “that pose a realistic likelihood of ‘vindictiveness.’”<sup>104</sup> The Court found that the idea that a prosecutor would bring additional charges against a defendant who requested a trial solely for punishing the defendant to be “so *unlikely*.”<sup>105</sup>

In subsequent cases, the Court continued to uphold the practice of plea bargaining and to reiterate its previous holdings. In *Alabama v. Smith*, the Court stated that it “upheld the prosecutorial practice of threatening a defendant with increased charges if he does not plead guilty, and following through on that threat if the defendant insists on his right to stand trial.”<sup>106</sup> Similarly, in *United States v. Mezzanatto*, the Court noted that “[t]he plea bargaining process necessarily exerts pressure on defendants to plead guilty and to abandon a series of fundamental rights, but we have repeatedly held

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<sup>98</sup> *Id.* at 363.

<sup>99</sup> A plea of *non vult* is when a defendant pleads no contest, or where the defendant does not admit or deny the charge. While a plea of *non vult* is an alternative to a guilty plea, it has the same effect as the guilty plea in that the defendant will be punished as if he or she pled guilty. A plea of *non vult* is the same as a plea of *nolo contendere*, which is used more commonly than a plea of *non vult*.

<sup>100</sup> 439 U.S. 212 (1978).

<sup>101</sup> *Id.* at 223.

<sup>102</sup> *Id.*

<sup>103</sup> 457 U.S. 368 (1982).

<sup>104</sup> *Id.* at 384 (quoting *Blackledge v. Perry*, 417 U.S. 21, 27 (1974)).

<sup>105</sup> *Id.*

<sup>106</sup> 490 U.S. 794, 802 (1989).

that the government ‘may encourage a guilty plea by offering substantial benefits in return.’<sup>107</sup>

### III. THE UNCONSTITUTIONAL CONDITIONS DOCTRINE

The unconstitutional conditions doctrine holds that the government cannot provide a benefit on the condition that the recipient gives up his or her constitutional rights, even if the government is not required to provide that benefit in the first place.<sup>108</sup> The doctrine represents the view that “the government may not do indirectly what it may not do directly.”<sup>109</sup> Since an unconstitutional condition imposes a burden on a fundamental constitutional right, such a condition is subject to strict scrutiny review.<sup>110</sup> Thus, the government cannot compel the recipient to give up his or her right without a compelling state interest.<sup>111</sup>

The government benefit in question must be one that the government is allowed, but not required, to provide.<sup>112</sup> However, it matters not whether the benefit is a right or a privilege.<sup>113</sup> Also, the constitutional right involved must be a fundamental right in which the individual is able to make a choice of whether or not to exercise the right.<sup>114</sup>

Initially, it was believed that the government’s power to grant a benefit included the lesser power of imposing a condition on receiving the benefit.<sup>115</sup> The dangers of this thought soon became clear when states began conditioning benefits on recipients relinquishing their rights.<sup>116</sup> Shortly after, the Supreme Court held in several cases that it was unconstitutional for states to condition the granting of benefits if the condition prevented the exercise of certain federal rights established by the Commerce Clause or by Article III’s creation of federal judicial power.<sup>117</sup> These early cases generally involved the state providing benefits to out-of-state corporations for conducting business within the state in exchange for the corporations’ re-

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<sup>107</sup> 513 U.S. 196, 209–10 (1995) (quoting *Corbitt v. New Jersey*, 439 U.S. 212, 219 (1978)).

<sup>108</sup> Sullivan, *supra* note 8, at 1415.

<sup>109</sup> *Id.*; see also Kevin J. O’Brien, *Plea Bargaining and the Supreme Court: The Limits of Due Process and Substantive Justice*, 9 HASTINGS CONST. L.Q. 109, 144 (1981).

<sup>110</sup> Sullivan, *supra* note 8, at 1422.

<sup>111</sup> See *id.* at 1427.

<sup>112</sup> *Id.* at 1422.

<sup>113</sup> *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); Mazzone, *supra* note 14, at 807.

<sup>114</sup> See Sullivan, *supra* note 8, at 1426.

<sup>115</sup> McCoy & Mirra, *supra* note 10, at 889–90; see also Mazzone, *supra* note 14, at 806; Sullivan, *supra* note 8, at 1415.

<sup>116</sup> Mazzone, *supra* note 14, at 808–09; McCoy & Mirra, *supra* note 10, at 890.

<sup>117</sup> McCoy & Mirra, *supra* note 10, at 890.

linquishment of their federal rights.<sup>118</sup> The Court limited its holdings, however, and did not include the rights listed in the Bill of Rights.<sup>119</sup> Finding that such rights only had value to the individual, the Court reasoned that because such rights were waived voluntarily and resulted in many benefits, they did not need protection from the state.<sup>120</sup>

The Court soon realized its mistake, and in *Frost & Frost Trucking Co. v. Railroad Commission*, it found that a voluntary waiver of rights by the individual in exchange for government benefits conditioned on such a waiver was really not much of a choice, “except a choice between the rock and the whirlpool—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden.”<sup>121</sup> The Court further declared:

If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.<sup>122</sup>

Similarly, in *Speiser v. Randall*, the Court stated that “[t]o deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech.”<sup>123</sup>

In *Sherbert v. Verner*, the Court again reaffirmed the principle that conditioning benefits on not exercising a constitutional right effectively penalized the exercise of that right.<sup>124</sup> The Court held that a benefit conditioned on surrendering a constitutional right created an impermissible burden on that right, “even though the burden may be characterized as being only indirect.”<sup>125</sup>

In *Garrity v. New Jersey*, in which police officers being investigated for conspiracy to obstruct justice were given a choice to either incriminate themselves or lose their jobs, the Court appeared to apply the unconstitu-

<sup>118</sup> See, e.g., *Terral v. Burke Constr. Co.*, 257 U.S. 529 (1922) (finding it unconstitutional for the state to condition a license for a foreign corporation to do business in the state by requiring a waiver of the corporation’s right to remove cause to federal court); *Looney v. Crane Co.*, 245 U.S. 178 (1917) (finding it unconstitutional for the state to condition a permit for a foreign corporation to do business in the state by requiring the corporation to pay state taxes on its property held out-of-state).

<sup>119</sup> *McCoy & Mirra*, *supra* note 10, at 890–91.

<sup>120</sup> *Id.* at 891; see also *Pierce Oil Corp. v. Phoenix Ref. Co.*, 259 U.S. 125, 128–29 (1922).

<sup>121</sup> 271 U.S. 583, 593 (1926).

<sup>122</sup> *Id.* at 594.

<sup>123</sup> 357 U.S. 513, 518 (1958).

<sup>124</sup> 374 U.S. 398 (1963).

<sup>125</sup> *Id.* at 404 (citations omitted). The specific ruling in *Sherbert* regarding the free exercise clause is questionable when viewed in light of the Court’s decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

tional conditions doctrine in the criminal context.<sup>126</sup> The Court held that the police officers' confessions were not voluntary, finding that "[w]here the choice is 'between the rock and the whirlpool,' duress is inherent in deciding to 'waive' one or the other."<sup>127</sup> The Court reasoned:

[A]s conduct under duress involves a choice, it always would be possible for a State to impose an unconstitutional burden by the threat of penalties worse than it in case of failure to accept it, and then to declare the acceptance voluntary.<sup>128</sup>

While *Garrity* has never been overruled, the Supreme Court has generally not applied the unconstitutional conditions doctrine to any other rights in the criminal context,<sup>129</sup> with the possible exception of the right to appeal, discussed in the next section. One might even argue that the Court did not intend to apply the doctrine in *Garrity*. While the Court discusses impermissible conditions at length, the Court's analysis mainly hinges on the defendants' choices as being involuntary. Justice Harlan noted this problem in his dissent, stating that the majority had "employ[ed] a curious mixture of doctrines," jumbling its analysis of impermissible conditions and involuntary statements.<sup>130</sup>

Further, the Court has not extended application of the unconstitutional conditions doctrine to many other constitutional rights. Generally, the doctrine only applies when conditions are attached to the First Amendment rights of speech, religion and association and to the Fifth Amendment right against the taking of private property for public use without just compensation.<sup>131</sup> Even with such limited application, the Court has been notoriously inconsistent in deciding which conditions are permissible or impermissible when attached to these rights.<sup>132</sup> Conditions attached to benefits relating to public employment, grants and licenses are usually struck down,<sup>133</sup> whereas conditions attached to benefits involving programs in which the state is spending money "to promote a social goal" are generally deemed permissible.<sup>134</sup> However, the reason for this likely is because all state-funded programs inevitably further some goals instead of others, and if

<sup>126</sup> 385 U.S. 493 (1967).

<sup>127</sup> *Id.* at 498.

<sup>128</sup> *Id.* (quoting *Union Pac. R.R. Co. v. Pub. Serv. Comm.*, 248 U.S. 67, 70 (1918)).

<sup>129</sup> See Mazzone, *supra* note 14, at 832.

<sup>130</sup> *Garrity*, 385 U.S. at 501; see also Halberstam, *supra* note 4, at 11.

<sup>131</sup> See Mazzone, *supra* note 14, at 810–24.

<sup>132</sup> Howard E. Abrams, *Systematic Coercion: Unconstitutional Conditions in the Criminal Law*, 72 J. CRIM. L. & CRIMINOLOGY 128, 132 (1981); Sullivan, *supra* note 8, at 1416.

<sup>133</sup> See Mazzone, *supra* note 14, at 810–19, 822–24.

<sup>134</sup> See *id.* at 819–22. Examples include abortion or childcare funding, education benefits and arts funding.

every program presented an unconstitutional conditions problem, the state would not be able to operate any programs.<sup>135</sup> Moreover, the state's refusal to fund a program to aid the exercise of a certain constitutional right is quite different from placing a condition or a burden on the exercise of such a right.<sup>136</sup>

#### IV. PLEA BARGAINING AS AN UNCONSTITUTIONAL CONDITIONS PROBLEM

The Supreme Court has never considered plea bargaining as raising an unconstitutional conditions problem.<sup>137</sup> It is difficult to see why this is the case, considering that plea bargaining is basically the process in which the government conditions reduced charges or a lenient sentence on the defendant waiving his or her constitutional rights, among them, the privilege against self-incrimination, the right to jury trial, the right to confront one's accusers and the right to compulsory process for obtaining favorable witnesses. However, the Court has acknowledged that such "bargaining" does discourage the exercise of fundamental rights even if the Court will not explicitly hold so. One can recall such an example in *Mezzanatto*, in which the Court noted that "[t]he plea bargaining process necessarily exerts pressure on defendants to plead guilty and to abandon a series of fundamental rights, but we have repeatedly held that the government 'may encourage a guilty plea by offering substantial benefits in return.'"<sup>138</sup>

Plea bargaining clearly satisfies the criteria for an unconstitutional conditions problem.<sup>139</sup> The benefit of reduced charges or a more lenient sentence is one which the government is allowed, but not required, to provide, and the Fifth and Sixth Amendment rights listed above are all fundamental rights,<sup>140</sup> which the defendant has a choice of whether to exercise.

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<sup>135</sup> *Id.* at 822.

<sup>136</sup> *Id.* (quoting *Planned Parenthood Fed'n of Am. v. Agency for Int'l Dev.*, 915 F.2d 59, 63 (2d Cir. 1990)).

<sup>137</sup> *Id.* at 832; see also *Abrams*, *supra* note 132, at 128; *Barkow*, *supra* note 47, at 1045–46; *McCoy & Mirra*, *supra* note 10, at 888; *A New Waive*, *supra* note 10, at 328.

<sup>138</sup> 513 U.S. 196, 209–10 (1995) (quoting *Corbitt v. New Jersey*, 439 U.S. 212, 219 (1978)).

<sup>139</sup> See *supra* notes 112–114 and accompanying text.

<sup>140</sup> The Fifth and Sixth Amendment rights, including the privilege against self-incrimination, the right to jury trial, the right to confront one's accusers and the right to compel the attendance of favorable witnesses, are fundamental rights guaranteed by the Constitution. U.S. CONST. amends. V, VI. According to the Court:

The test for determining whether a right extended by the Fifth and Sixth Amendments with respect to federal criminal proceedings is also protected against state action by the Fourteenth Amendment has been phrased in a variety of ways in the opinions of this Court. The question has been asked whether a right is among those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," whether it is "basic in our system of jurisprudence," and whether it is "a fundamental right, essential to a fair trial."

Moreover, illustrating the principle that the government may not do indirectly what it may not do directly, these Fifth and Sixth Amendment rights that are waived during plea bargaining are rights that the government generally may not burden or force defendants to waive without a compelling state interest.

Instead, the Supreme Court has repeatedly upheld plea bargaining on the grounds that it is a “give-and-take negotiation” where both the prosecution and the defense have “relatively equal bargaining power.”<sup>141</sup> It has endorsed plea bargaining, despite the fact that it allows prosecutors to condition concessions on waiving trial rights and threaten defendants with harsher punishment should they exercise these very rights.<sup>142</sup> All the Court requires for a guilty plea and a simultaneous waiver of rights is that the plea is voluntary, intelligent and has a factual basis.<sup>143</sup>

One commentator, Jason Mazzone, has called the contradiction of these two irreconcilable doctrines “the waiver paradox” and explains that the opposite approaches of each doctrine to basically the same problem are due to the fact that each one developed independently of the other.<sup>144</sup> Mazzone suggests that the reason these doctrines have never been reconciled is because “it wrongly appear[s] that there [are] two [different] problems.”<sup>145</sup>

Another commentator, Loftus E. Becker, Jr., views plea bargaining as *sui generis*, “a black hole” that is “disassociated with the remainder of the constitutional universe,” and notes that the Court has never really given an explanation as to why plea bargaining cases are “a law unto themselves.”<sup>146</sup> It may well be because the Court views plea bargaining as a crucial process

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*Duncan v. Louisiana*, 391 U.S. 145, 148–49 (1968) (citations omitted). The Supreme Court has stated that “[o]nce it is decided that a particular Bill of Rights guarantee is ‘fundamental to the American scheme of justice,’ the same constitutional standards apply against both the State and Federal Governments.” *Benton v. Maryland*, 395 U.S. 784, 795 (1969) (quoting *Duncan*, 391 U.S. at 149). The Court has held that “the Fifth Amendment’s exception from compulsory self-incrimination is . . . protected by the Fourteenth Amendment against abridgment by the States.” *Malloy v. Hogan*, 378 U.S. 1, 6 (1964). The Court has also held that the right to jury trial is guaranteed to defendants in state criminal cases through the Fourteenth Amendment. *Duncan*, 391 U.S. at 149. The Court has further held that the right to confront one’s accusers and the right to have compulsory process for obtaining favorable witnesses are applicable to the states through the Fourteenth Amendment. See *Pointer v. Texas*, 380 U.S. 400, 401 (1965); *Washington v. Texas*, 388 U.S. 14, 18–19 (1967).

<sup>141</sup> *Bordenkircher v. Hayes*, 434 U.S. 357, 362 (1978) (citations omitted).

<sup>142</sup> *Barkow*, *supra* note 47, at 1045–46.

<sup>143</sup> See *supra* note 29 and accompanying text; see also, e.g., *North Carolina v. Alford*, 400 U.S. 25 (1970).

<sup>144</sup> Mazzone, *supra* note 14, at 843–45.

<sup>145</sup> *Id.* at 844.

<sup>146</sup> Loftus E. Becker, Jr., *Plea Bargaining and the Supreme Court*, 21 LOY. L.A. L. REV. 757, 829–30 (1988).

in the criminal justice system, and if plea bargaining was indeed *sui generis*, no other constitutional theories could knock it to the ground.

Some commentators speculate that the reason plea bargaining does not present an unconstitutional conditions problem is because the trial rights that are waived are “individual” rights, unlike the “public” rights of free speech, religion and association.<sup>147</sup> Constitutional trial rights only serve to protect the individual, so the argument goes, whereas free speech rights serve “important public functions.”<sup>148</sup> However, this argument is unpersuasive. If one recalls, the Court had initially limited its application of the unconstitutional conditions doctrine, although not for this reason, and had failed to include *any* of the rights in the Bill of Rights under the doctrine because it had found that all these rights were only valuable to the individual.<sup>149</sup> The Court later corrected this mistake. Furthermore, some cases to which the Court has apparently applied the doctrine arguably involve so-called “individual” rights, such as in *Garrity*’s ruling concerning the privilege against self-incrimination.<sup>150</sup> Moreover, constitutional trial rights *do* serve certain public values. These rights protect our liberty, serve as a check on government power and ensure due process in criminal procedure.<sup>151</sup> One can argue that these “individual” rights serve important public functions specifically because they *do* protect our individual rights.

In addition, plea bargaining cases are indistinguishable from a line of cases consistent with the unconstitutional conditions doctrine that involve “vindictiveness” and the right to appeal.<sup>152</sup> In *North Carolina v. Pearce*, the Court held that it was unconstitutional for a judge to impose a harsher sentence after a retrial for the purpose of punishing the defendant for exercising his constitutional right to appeal.<sup>153</sup> The Court found that such “vindictiveness” violated due process by penalizing those who chose to exercise a constitutional right.<sup>154</sup> The Court further stated, “[S]ince the fear of such vindictiveness may unconstitutionally deter a defendant’s exercise of the right to appeal . . . , due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.”<sup>155</sup>

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<sup>147</sup> See Mazzone, *supra* note 14, at 849–50; McCoy & Mirra, *supra* note 10, at 904 n.89.

<sup>148</sup> Mazzone, *supra* note 14, at 849; see also McCoy & Mirra, *supra* note 10, at 904 n.89.

<sup>149</sup> See *supra* notes 119–120 and accompanying text.

<sup>150</sup> See *supra* notes 126–128 and accompanying text.

<sup>151</sup> Mazzone, *supra* note 14, at 850–55.

<sup>152</sup> See Halberstam, *supra* note 4, at 5–18; McCoy & Mirra, *supra* note 10, at 906–10; *A New Waive*, *supra* note 10, at 343–45; see also *North Carolina v. Pearce*, 395 U.S. 711, 724 n.19 (1969).

<sup>153</sup> 395 U.S. 711 (1969).

<sup>154</sup> *Id.* at 724.

<sup>155</sup> *Id.* at 725.

In *Blackledge v. Perry*, the Court extended its *Pearce* holding to include prosecutorial vindictiveness.<sup>156</sup> In *Perry*, the Court held that it was unconstitutional for a prosecutor to bring more serious charges against the defendant for exercising his right to a trial *de novo*.<sup>157</sup> While acknowledging that the prosecutor “has a considerable stake in discouraging convicted misdemeanants from appealing and thus obtaining a trial *de novo* . . . , since such an appeal will clearly require increased expenditures of prosecutorial resources,” the Court found that a defendant is “entitled” to exercise his or her right to a trial *de novo* without fear that the government will punish him or her for doing so.<sup>158</sup>

Based on the reasoning in the Court’s vindictiveness cases, which are clearly analogous to plea bargaining cases, it is difficult to see why the Court has not considered plea bargaining as presenting an unconstitutional conditions problem and as violating due process. The Court found in *Perry* and *Pearce* that punishing defendants for exercising their right to appeal by giving them harsher sentences or increasing the number of charges violated due process and was unconstitutional. Yet, prosecutors during plea bargaining routinely penalize defendants for exercising their right to trial by giving them more severe sentences or increasing the number of charges. As one commentator noted, “To paraphrase the Court in *Perry*, ‘the prosecution clearly has a considerable stake in discouraging [persons charged with crime from asserting their right to trial], since [demand for trial] will clearly require increased expenditures of prosecutorial resources.’ ”<sup>159</sup> Despite all this, the Court has repeatedly refused to declare plea bargaining unconstitutional.

One possible reason for this apparent contradiction may be due to the fact that a ban on plea bargaining would have a substantially larger impact on the criminal justice system than that of allowing appeals to go forward. In 2006, there were 72,510 guilty pleas and trials in all of the circuits and districts of the United States.<sup>160</sup> Over 95% of these dispositions, or 69,403, were guilty pleas.<sup>161</sup> The remaining 3107 were disposed of through trial.<sup>162</sup> In comparison, there were 9908 appeals in all of the cir-

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<sup>156</sup> 417 U.S. 21 (1974).

<sup>157</sup> *Id.* at 28–29.

<sup>158</sup> *Id.*

<sup>159</sup> Halberstam, *supra* note 4, at 7–8 (alterations in original).

<sup>160</sup> SOURCEBOOK, *supra* note 5, at tbl.10.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

cuits and districts the same year.<sup>163</sup> Thus, a ban on plea bargaining would certainly have a much larger effect than disallowing appeals.

However, if one views the statistics in a different light, one can see that more than three times the appeals were tried than were trials: 9908 appeals versus 3107 trials.<sup>164</sup> Yet, one cannot legitimately describe the right to appeal as being more important than the trial rights waived as a result of plea bargaining, including the privilege against self-incrimination, the right to confront one's accusers and the right to compulsory process of obtaining favorable witnesses.<sup>165</sup> These rights are specifically mentioned in the Bill of Rights and are no less crucial than the right to appeal, which was so protected in the vindictiveness cases. In fact, "the Constitution does not provide for a right to appeal," nor has the Court ever held that states need provide appellate review.<sup>166</sup> Moreover, without a trial and without a record, there is less of a chance of prevailing on appeal.<sup>167</sup> Yet, the Court has found that the state cannot punish a defendant for exercising his or her right to appeal, but can implement such punishment against a defendant for exercising his or her right to trial.

The Court, however, has attempted to distinguish the plea bargaining cases from the vindictiveness cases, although the attempt has been mostly unpersuasive. In *Bordenkircher*, the Court found that the "unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right to attack his original conviction" was "very different from the give-and-take negotiation common in plea bargaining," in which the prosecutor and defense "arguably possess relatively equal bargaining power."<sup>168</sup> This is puzzling, considering that the prosecutor had admitted that he sought the additional indictment to punish the defendant for choosing to go to trial.<sup>169</sup> Apparently Justice Blackmun noticed as much when he stated in his *Bordenkircher* dissent:

I perceive little difference between vindictiveness after what the Court describes as the exercise of a "legal right to attack his original conviction," and vindictiveness in the "give-and-take negotiation common in plea bargaining." Prosecutorial vindictiveness in any context is still prosecutorial vindictiveness.<sup>170</sup>

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<sup>163</sup> *Id.* at tbl.55.

<sup>164</sup> *Id.* at tbl.10, tbl.55.

<sup>165</sup> FED. R. CRIM. P. 11(b)(1)(C), (E); *Boykin v. Alabama*, 395 U.S. 238, 243 (1969).

<sup>166</sup> Halberstam, *supra* note 4, at 5 n.28.

<sup>167</sup> See *infra* note 198 and accompanying text.

<sup>168</sup> 434 U.S. 357, 362-63 (1978) (citations omitted).

<sup>169</sup> *Id.* at 358-59, 367 (Blackmun, J., dissenting), 372-73 (Powell, J., dissenting).

<sup>170</sup> *Id.* at 367-68 (Blackmun, J., dissenting); see also *United States v. Goodwin*, 457 U.S. 368, 385 (1982) (Blackmun, J., dissenting) (reiterating his own statement in *Bordenkircher*).

Justice Powell, also in dissent, duly noted a due process violation, finding that the “[i]mplementation of a strategy calculated solely to deter the exercise of constitutional rights is not a constitutionally permissible exercise of discretion.”<sup>171</sup>

Thus, while the Court today may not be willing to acknowledge it, plea bargaining clearly presents, at the threshold, an unconstitutional conditions problem and, thus, impermissibly burdens a defendant’s Fifth and Sixth Amendment rights. Consequently, the standard of scrutiny must be strict, as discussed in the next section.

## V. PLEA BARGAINING UNDER STRICT SCRUTINY

The Supreme Court has held that the Due Process Clause “provides heightened protection against government interference with certain fundamental rights and liberty interests.”<sup>172</sup> Such “liberty” includes the “specific freedoms protected by the Bill of Rights.”<sup>173</sup> When the government impermissibly burdens such fundamental rights, that burden is to be evaluated under strict scrutiny analysis.<sup>174</sup> The government burden will be upheld only if it is *necessary* to achieve a “compelling state interest.”<sup>175</sup> The Court, however, has never explained how to determine whether a state interest is compelling.<sup>176</sup> But it appears that the government’s purpose must be so imperative as to justify the infringement on fundamental rights. If the government successfully advances a compelling state interest, it must then show that its means were “narrowly tailored” to serve that interest.<sup>177</sup> In a strict scrutiny setting, this requires that the state demonstrate that the means used was the “least restrictive alternative.”<sup>178</sup> Although the Court has never explicitly defined a process for determining whether a certain means is or is not narrowly tailored, the burden is on the state to show that there was no less burdensome way to achieve the state’s purpose.<sup>179</sup> In short, a

<sup>171</sup> *Bordenkircher*, 434 U.S. at 373 (Powell, J., dissenting).

<sup>172</sup> *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citations omitted).

<sup>173</sup> *Id.* (citations omitted).

<sup>174</sup> See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 519–20, 764–68 (2d ed. 2002); Winkler, *supra* note 12, at 798–801; see also *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting that “more searching judicial inquiry” may be required for government acts or laws that burden fundamental rights).

<sup>175</sup> CHEMERINSKY, *supra* note 174, at 519; Winkler, *supra* note 12, at 800; see also, e.g., *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

<sup>176</sup> CHEMERINSKY, *supra* note 174, at 767.

<sup>177</sup> *Glucksberg*, 521 U.S. at 721; Winkler, *supra* note 12, at 800.

<sup>178</sup> CHEMERINSKY, *supra* note 174, at 520; Winkler, *supra* note 12, at 800–01; see also, e.g., *United States v. Jackson*, 390 U.S. 570, 582–83 (1968).

<sup>179</sup> CHEMERINSKY, *supra* note 174, at 767. The traditional formulation for strict scrutiny requires that the least restrictive analysis be equally effective as the state means at issue. However, some com-

state-imposed burden on a fundamental right will be justified only when the state can show that its means were narrowly tailored, or that there was no less restrictive alternative, to advance a compelling state interest.

A. THE CONTINUED FUNCTION AND EFFICIENCY OF THE CRIMINAL JUSTICE SYSTEM AS A COMPELLING STATE INTEREST

With numerous cases declaring plea bargaining's necessity in the legal system and praising its efficiency, the Court would almost certainly find the continued function and efficiency of the criminal justice system to be a compelling state interest. Generally, however, in other contexts, efficiency or "public fisc" arguments usually do not qualify as compelling state interests.<sup>180</sup> But in the current context, the Court has clearly indicated that it would likely consider the efficiency of the criminal system due to plea bargaining to be a compelling state interest. As one may recall, in *Santobello*, the Court pronounced that plea bargaining was "an essential component of the administration of justice" and that it was to be "encouraged."<sup>181</sup> The Court reasoned, "If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities."<sup>182</sup> Chief Justice Burger echoed this concern in a speech to the American Bar Association:

The consequence of what might seem on its face a small percentage change in the rate of guilty pleas can be tremendous. A reduction from 90 per cent to 80 per cent in guilty pleas requires the assignment of twice the judicial manpower and facilities—judges, court reporters, bailiffs, clerks, jurors and courtrooms. A reduction to 70 per cent trebles this demand.<sup>183</sup>

Reiterating its support for plea bargaining in *Bordenkircher*, the Court accepted the process as "constitutionally legitimate."<sup>184</sup> Similarly, in *Corbitt*, the Court stated that it had "unequivocally recognized the State's le-

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mentators believe that the Court does not require this in every case and that some less restrictive alternatives should be used even if they are not equally effective, particularly if the state means at issue infringes on constitutional rights.

<sup>180</sup> See, e.g., *Ake v. Oklahoma*, 470 U.S. 68 (1985) (finding "where the potential accuracy of the jury's determination is so dramatically enhanced, and where the interests of the individual and the State in an accurate proceeding are substantial, the State's interest in its fisc must yield"); see also *Mazzone*, *supra* note 14, at 837 (stating that "efficiency does not justify the waiver of rights of free speech or the right to just compensation for property takings").

<sup>181</sup> 404 U.S. 257, 260 (1971).

<sup>182</sup> *Id.*

<sup>183</sup> Chief Justice Burger, *The State of the Judiciary—1970*, 56 A.B.A. J. 929, 931 (1970).

<sup>184</sup> 434 U.S. 357, 364 (1978).

gitimate interest in encouraging the entry of guilty pleas and in facilitating plea bargaining.”<sup>185</sup>

These past cases, plus the reality that over 95% of defendants charged with crimes plead guilty<sup>186</sup> and the fact that criminal caseloads tend to double every ten years at the same time judicial resources increase only minimally,<sup>187</sup> further lend support to the argument that the state’s interest in keeping the legal system functioning will be considered compelling by the Court, despite the “under-theorized” status of this conclusion.

#### B. A JURY WAIVER SYSTEM AS THE LEAST RESTRICTIVE ALTERNATIVE

The Court has never seriously considered any alternatives to plea bargaining other than providing “a full-scale [jury] trial” for every defendant.<sup>188</sup> In its opinions discussing the efficiency of plea bargains, the Court often makes comparisons to jury trials and appears to treat plea bargaining as if it were the least restrictive alternative to continue the operation and maintain the efficiency of the criminal justice system. The Court calls the process of plea bargaining “an essential component” of the legal system<sup>189</sup> and further notes that “[w]hatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country’s criminal justice system.”<sup>190</sup>

The fact is, however, that plea bargaining is *not* the least restrictive alternative. Like the overbroad statute in *Jackson*, the “evil” of plea bargaining is that it “needlessly encourages” the waiver of several fundamental constitutional liberties.<sup>191</sup> A jury waiver system, wherein a defendant waives his or her right to a jury trial and receives, instead, a bench trial, is a less restrictive alternative than plea bargaining.<sup>192</sup> While a jury waiver still necessarily burdens a defendant’s right to jury trial, unlike plea bargaining, the defendant is still able to preserve, for use in a trial setting, various other constitutional liberties, among them, the privilege against self-incrimination, the right to confront adverse witnesses and the right to com-

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<sup>185</sup> 439 U.S. 212, 222 (1978).

<sup>186</sup> SOURCEBOOK, *supra* note 5, at fig.C.

<sup>187</sup> Palmer, *supra* note 19, at 513.

<sup>188</sup> *A New Waive*, *supra* note 10, at 342; *see also, e.g., Santobello v. New York*, 404 U.S. 257, 260 (1971).

<sup>189</sup> *Santobello*, 404 U.S. at 260.

<sup>190</sup> *Corbitt v. New Jersey*, 439 U.S. 212, 223 n.12 (1978) (quoting *Blackledge v. Allison*, 431 U.S. 63, 71 (1977)).

<sup>191</sup> *See supra* note 82 and accompanying text.

<sup>192</sup> *See Alschuler, supra* note 21, at 1024–48; Schulhofer, *Inevitable, supra* note 17, at 1082–86; *A New Waive, supra* note 10, at 345–52.

pulsory process for obtaining favorable witnesses.<sup>193</sup> The criminal justice system is still, foremost, a *justice* system in which the primary function is to establish a defendant's guilt beyond a reasonable doubt through an impartial process. Thus, a bench trial in a jury waiver system still allows the defendant "an unfettered opportunity to present a defense" and a chance to be heard.<sup>194</sup> Justice Stevens recognized as much in his dissent in *Corbitt*.<sup>195</sup> In comparing the differences between a jury trial and a bench trial, Justice Stevens noted that a guilty plea compelled a "waiver not only of the right to a jury but also the right to put the government to its proof, to confront one's accusers, and to present a defense."<sup>196</sup> As Albert W. Alschuler has stated, "[I]t is important to hear what someone may be able to say in his defense before convicting him of [a] crime" and "it is wrong to punish a person, not for what he did, but for asking that the evidence be heard."<sup>197</sup>

Additionally, since bench trials are trials, a court record would exist of the proceeding, providing defendants with a chance to appeal their convictions on grounds that would be hard to establish with a guilty plea.<sup>198</sup> A jury waiver system thus conforms more closely to due process than plea bargaining, in that it is a better process to determine guilt since it allows for "formal proof in open court"<sup>199</sup> and enables cases to be decided on the merits rather than through compromise.<sup>200</sup> Such a system thereby upholds the integrity of the criminal justice system.<sup>201</sup>

A number of studies have been conducted in jurisdictions that have jury waiver systems (in addition to plea bargaining practice).<sup>202</sup> According to one study conducted by Stephen J. Schulhofer in Philadelphia during the 1980s, in which he and several student researchers spent eight weeks observing and collecting data on various court proceedings, including guilty pleas, bench trials and jury trials,<sup>203</sup> the criminal justice system could operate just as efficiently with a jury waiver system as with plea bargaining,

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<sup>193</sup> Schulhofer, *Inevitable*, *supra* note 17, at 1083; *A New Waive*, *supra* note 10, at 347.

<sup>194</sup> Alschuler, *supra* note 21, at 1035.

<sup>195</sup> 439 U.S. 212, 231 n.6 (1978) (Stevens, J., dissenting).

<sup>196</sup> *Id.* (citing *Boykin v. Alabama*, 395 U.S. 238, 243 (1969)).

<sup>197</sup> Alschuler, *supra* note 21, at 1049.

<sup>198</sup> Guidorizzi, *supra* note 19, at 780.

<sup>199</sup> Schulhofer, *Inevitable*, *supra* note 17, at 1092.

<sup>200</sup> Alschuler, *supra* note 21, at 1048.

<sup>201</sup> See *supra* notes 69–72 and accompanying text.

<sup>202</sup> *A New Waive*, *supra* note 10, at 349–50 & n.168; see also Alschuler, *supra* note 21; Schulhofer, *Inevitable*, *supra* note 17.

<sup>203</sup> Schulhofer, *Inevitable*, *supra* note 17.

and the inclusion of a jury waiver system would require only a slight increase in judicial resources.<sup>204</sup>

There are many reasons why this is possible. First, those concerned that a ban on plea bargaining would cause a collapse of the legal system often forget to take into account two important factors. One, there is no indication that a prohibition on plea bargaining would mean that defendants would no longer plead guilty.<sup>205</sup> There will always be some defendants who will plead guilty on their own accord for a number of reasons, such as the futility of going to trial, the costs of going to trial or remorse.<sup>206</sup> Two, supporters of plea bargaining fail to take into consideration the fact that plea bargaining also uses many judicial resources commonly thought to be used only in trials.<sup>207</sup> In plea bargaining, time and costs are associated not only with the negotiation between the prosecution and the defense, but with preliminary investigations and preparation, presentence reports and the process of actually entering the plea in court, which includes presenting a guilty plea colloquy, reading the factual basis for the plea and waiting time.<sup>208</sup>

Second, bench trials require substantially less time and resources than jury trials, and consequently, their disposition time is only slightly longer than the courtroom time needed for entering a guilty plea in court. Since there is no jury, time and money are saved from not having to perform jury selection, *voir dire*, opening statements, jury instructions and other “time-consuming” features of jury trials.<sup>209</sup> Further, according to Schulhofer’s Philadelphia<sup>210</sup> study, bench trials were generally quick proceedings that required little more resources than those used for guilty pleas.<sup>211</sup> The study indicated that bench trials began with a jury waiver colloquy, to ensure that waiver was knowing and voluntary, and then proceeded immediately to the state’s case and its witnesses, without opening statements from either side.<sup>212</sup> The defense was given an opportunity to cross-examine the state’s

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<sup>204</sup> *Id.* at 1084–86; see also Guidorizzi, *supra* note 19, at 780.

<sup>205</sup> Schulhofer, *Inevitable*, *supra* note 17, at 1040.

<sup>206</sup> Palmer, *supra* note 19, at 513–14.

<sup>207</sup> Schulhofer, *Inevitable*, *supra* note 17, at 1040, 1084.

<sup>208</sup> *Id.*; Schulhofer, *Disaster*, *supra* note 27, at 2005.

<sup>209</sup> Alschuler, *supra* note 21, at 1038; Schulhofer, *Disaster*, *supra* note 27, at 2005; Guidorizzi, *supra* note 19, at 780.

<sup>210</sup> In Philadelphia, at least during the 1960s through the 1980s, the most common way to dispose of a case was through a bench trial. Guilty pleas were also used, but were not as common as bench trials. The city’s preference for bench trials appeared to have developed independently from other jurisdictions. See Alschuler, *supra* note 21, at 1024–43; Schulhofer, *Inevitable*, *supra* note 17, at 1050–53.

<sup>211</sup> See Schulhofer, *Inevitable*, *supra* note 17, at 1084–86.

<sup>212</sup> *Id.* at 1065.

witnesses and generally presented its case right after the close of the state's case.<sup>213</sup> Short closing statements, often limited to a few issues by the judge, concluded the trial, and the judge then rendered his or her decision.<sup>214</sup> In many cases, sentencing immediately followed trial.<sup>215</sup> With waiting time taken into consideration, the study demonstrated that court time for guilty pleas generally took fifty-five minutes, while bench trials typically took eighty minutes.<sup>216</sup> Using these numbers, decreasing a 90% guilty plea rate to 80% would call for a 4% increase in judicial resources, and a decrease to 70% would entail a 9% increase.<sup>217</sup> These numbers are a far cry from the figures advanced by Chief Justice Burger, who had declared that a 10% decrease in guilty pleas would require an increase of twice the amount of current judicial resources.<sup>218</sup> Moreover, the numbers provided by the study do not take into account resources used in the pre-trial or post-trial stages, which, if considered, would reduce even more the increase in resources needed for bench trials.<sup>219</sup> Since plea bargaining requires time and costs associated with the negotiation between the prosecution and the defense, preliminary investigations and preparation and presentence reports, among others, these same resources would then be transferred for use under a jury waiver system, reducing the necessary increase of resources for bench trials.

A jury waiver system would also address some of the criticisms aimed at plea bargaining. First, innocent defendants would benefit from a jury waiver system, as opposed to plea bargaining, since prosecutors would no longer be able to coerce them into pleading guilty by threatening them with harsher sentences or increased charges.<sup>220</sup> Also, because prosecutors would have to bring all cases to trial, except when the defendant pleads guilty on his or her own volition, they would become more selective about what kinds of charges to bring, including whether to bring any charges at all.<sup>221</sup> Since judges or juries would be hearing all the cases, prosecutors would thus bring only those charges for which they felt they had a high

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<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 1066.

<sup>216</sup> *Id.* at 1085.

<sup>217</sup> *Id.*

<sup>218</sup> See *supra* note 183 and accompanying text.

<sup>219</sup> Schulhofer, *Inevitable*, *supra* note 17, at 1086. On a similar note, since bench trials take substantially less time than jury trials, a slight increase in resources for jury trials would mean a substantial increase in the amount of resources for bench trials. Schulhofer, *Disaster*, *supra* note 27, at 2005.

<sup>220</sup> See Schulhofer, *Inevitable*, *supra* note 17, at 1093.

<sup>221</sup> Schulhofer, *Disaster*, *supra* note 27, at 2007.

chance of winning.<sup>222</sup> Thus, innocent defendants would generally be spared because it is most likely that the cases against them would be weak.

Second, since prosecutors will be more careful in screening which cases to bring to court, it is likely that the sentencing disparity between bench trials and jury trials would shrink. Prosecutors would likely charge similar defendants with similar charges since they would know which charges would allow them to prevail in court. Further, the sentencing disparity would also diminish because the prosecutor would not provide the same charging or sentencing concessions as he or she did under plea bargaining because now defendants have a possibility of being acquitted.<sup>223</sup>

There is, however, a possibility that a jury waiver system could pose some difficulties. Some scholars and practitioners believe that a bench trial is just a “slow plea” and view the trial as “the functional equivalent of the guilty plea.”<sup>224</sup> These commentators believe that bench trials are essentially non-adversarial mock trials, in which the court goes through the motions of an actual trial, but normally concludes with a finding of guilt.<sup>225</sup> Other commentators argue that such conclusions are based on “subjective impressions” from observing certain bench trials<sup>226</sup> and that the “slow plea” label is a “misnomer.”<sup>227</sup> A study on bench trials and guilty pleas conducted in Philadelphia and Pittsburgh by Alschuler showed that judges generally considered all the presented evidence and were not afraid to acquit when guilt was not established beyond a reasonable doubt.<sup>228</sup> Furthermore, at the time of the study, Philadelphia bench trials exhibited higher rates of acquittal than the acquittal rate for jury trials in the city and the acquittal rate for all trials generally in the United States.<sup>229</sup> Nor were bench trials “slow” in any sense of the word—prosecutors and judges often acknowledged that bench trials frequently required less resources than plea bargaining.<sup>230</sup>

A jury waiver system also raises the question of sentencing discounts or concessions. Bench trials may be less restrictive than guilty pleas, but they are still restrictive in the sense that they encourage a waiver of jury

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<sup>222</sup> See *id.*

<sup>223</sup> Guidorizzi, *supra* note 19, at 780.

<sup>224</sup> Schulhofer, *Inevitable*, *supra* note 17, at 1049–50.

<sup>225</sup> See Alschuler, *supra* note 21, at 1033–34; Schulhofer, *Inevitable*, *supra* note 17, at 1049.

<sup>226</sup> Schulhofer, *Inevitable*, *supra* note 17, at 1050.

<sup>227</sup> Alschuler, *supra* note 21, at 1034.

<sup>228</sup> *Id.* at 1034–35.

<sup>229</sup> *Id.* at 1028, 1035. Between mid-1968 and mid-1974, Philadelphia had a 40.2% acquittal rate for bench trials and a 34.2% acquittal rate for jury trials. The acquittal rate for felony trials in general throughout the United States was 25%. *Id.* at 1028–29.

<sup>230</sup> *Id.* at 1035.

trials. Thus, for a jury waiver system to effectively replace plea bargaining as an equally efficient alternative, it must provide defendants with sentencing discounts to encourage them to waive their right to a jury trial.<sup>231</sup>

Conceptually, a sentencing discount in exchange for a jury waiver raises the same problem as dropped charges or a sentencing discount in exchange for a guilty plea. Just as plea bargaining burdens all of a defendant's trial rights, a jury waiver places a specific burden on a defendant's right to jury trial. However, since it advances the state's compelling interest and is the least restrictive alternative at this point, the Court should not have a problem finding a jury waiver system constitutional. As one commentator noted:

[T]o hold that plea bargaining is constitutional while jury waiver is not is to adhere to the ironic proposition that one may not bargain away one's right to a jury unless one simultaneously bargains away all of one's other trial rights . . . .<sup>232</sup>

As for implementing sentencing discounts, one possibility is for the United States Sentencing Commission, which sets forth the Federal Sentencing Guidelines, to delineate a proper discount for those who use jury waivers.<sup>233</sup> The Commission can determine the size of this discount after conducting extensive research, but the discount will likely be less than the concession given for plea bargaining because the defendant maintains a chance for acquittal. It is important, however, to maintain a "set" discount since this allows the legislature and courts to watch over the process.<sup>234</sup> The Commission would likely encounter problems during the course of trying to "standardize" discounts, but a comprehensive evaluation of sentencing issues is beyond the scope of this Note.<sup>235</sup>

It is important to keep in mind that a jury waiver system, while a less restrictive alternative than plea bargaining, is still *not* the perfect alternative.<sup>236</sup> But unlike plea bargaining, such a system preserves the defendant's other constitutional liberties, adheres more closely to due process and affords the defendant an opportunity to be heard. Since jury waivers are narrowly tailored to achieve a compelling state interest, their use will be constitutional until we find an even less restrictive alternative.

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<sup>231</sup> Schulhofer, *Inevitable*, *supra* note 17, at 1087.

<sup>232</sup> *A New Waive*, *supra* note 10, at 347.

<sup>233</sup> See Schulhofer, *Inevitable*, *supra* note 17, at 1089.

<sup>234</sup> Nancy J. King et al., *When Process Affects Punishment: Differences in Sentencing After Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States*, 105 COLUM. L. REV. 959, 992 (2005).

<sup>235</sup> For more information on sentencing issues, see *id.* at 989–94.

<sup>236</sup> See Alschuler, *supra* note 21, at 1047–48.

## VI. CONCLUSION: THE ABOLITION OF PLEA BARGAINING

As this Note has shown, plea bargaining presents an unconstitutional conditions problem and places an impermissible burden on several fundamental constitutional liberties. Although the government has advanced a compelling state interest—the continued function and efficiency of the criminal justice system—plea bargaining is not a means narrowly tailored to serve that interest and is *not* the least restrictive alternative. But a jury waiver system is. While such a system still necessarily entrenches on the right to a jury trial, it is a less intrusive way of preserving the function and the efficiency of the legal system. A jury waiver system further conforms more closely to due process and provides the defendant with an opportunity to be heard. Therefore, since plea bargaining is not the least restrictive alternative, it is an unnecessary evil and should be banned and held unconstitutional.

Studies conducted in jurisdictions where bench trials have been a predominant form of convictions demonstrate that a replacement of plea bargaining with a jury waiver system is a feasible solution.<sup>237</sup> Contrary to popular belief, an abolition of plea bargaining would not cause the legal system to collapse or cease to function, nor would it cause a substantial impairment to the system.

Our criminal justice system's attachment to plea bargaining is likely due to more than just its belief in plea bargaining's necessity and efficiency; in part, it is the fear of change.<sup>238</sup> In comparing plea bargaining to torture, John Langbein noted that "a legal system will do almost anything, tolerate almost anything, before it will admit the need for reform in its system of proof and trial."<sup>239</sup> But it sure is a sad state when we have a criminal justice system that purports to uphold the constitutional liberties of its defendants, but surreptitiously forces most of them to waive away these rights because "we do not have the time and money to listen."<sup>240</sup>

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<sup>237</sup> *Id.* at 1041–42, 1048; Schulhofer, *Inevitable*, *supra* note 17, at 1093–94.

<sup>238</sup> Alschuler, *supra* note 21, at 1043 n.501.

<sup>239</sup> John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 19 (1978).

<sup>240</sup> Alschuler, *supra* note 21, at 1049.