

**A PLEA FOR JUSTICE: MAKING THE CASE FOR  
INCREASED REGULATION OF VERMONT’S PLEA  
BARGAINING PROCEDURES**

*A Proposal for the Vermont Supreme Court  
Advisory Committee on Rules of Criminal Procedure*

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INTRODUCTION

The American criminal legal system incarcerates more individuals than any other country in the world. Nearly 98% of criminal convictions are the result of guilty pleas, usually brokered during plea bargain negotiations between a prosecutor, defense counsel, and the criminal defendant.<sup>1</sup> While our criminal legal system is built on an ideal of jury trials and meaningful fact-finding, the reality, as recognized by the Supreme Court, is that “the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.”<sup>2</sup> Plea bargaining serves as the backbone of our criminal legal system, yet it remains virtually unregulated. Due to overcriminalization, particularly over the past four decades, our

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1. U.S. SENT’G COMM’N, OVERVIEW OF FEDERAL CRIMINAL CASES 8 (2021), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/FY20\\_Overview\\_Federal\\_Criminal\\_Cases.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/FY20_Overview_Federal_Criminal_Cases.pdf).

2. Missouri v. Frye, 566 U.S. 134, 144 (2012).

criminal legal system relies on guilty pleas in lieu of criminal trials because the system simply could not function if every case went to trial.<sup>3</sup> As a result, guilty pleas are entered with regularity by guilty and innocent defendants alike.

Part I of this Article will briefly recount the history of plea bargaining and the factors that brought us from a system of trials to a system of pleas. Part II will describe the largely unchecked discretion of prosecutors and how that discretion can be used to take advantage of criminal defendants. Part III will look at the effects of the power imbalances inherent in the American plea bargaining structure. Part IV will address the ways by which Vermont is already addressing the structural inequalities of our criminal legal system. Finally, Part V will propose amendments to the Vermont Rules of Criminal Procedure, focused on leveling the playing field by providing supervisory checks on prosecutors and limiting their bargaining power.

#### I. A BRIEF HISTORY OF PLEA BARGAINING IN AMERICA

The right to a jury trial is one of the cornerstones of our American criminal legal system.<sup>4</sup> Even before the American Revolution, juries served as a mechanism for truth seeking, as well as an essential safeguard of liberty and a moral check on authoritarian governments. In 1735, for example, a jury in New York refused to accept the trial judge's instruction that "the truth was no defense to the charge of seditious libel" and acquitted John Peter Zenger of the charge, paving the way for freedom of the press in America.<sup>5</sup> This jury recognized and applied their collective power to effectively strike down legal injustice during a pivotal stage of our nation's history.<sup>6</sup>

During the nation's founding era, juries continued to wield their discretion to reject laws deemed unfair or prejudicial, checking the government and foreshadowing the notion of America as a nation "of the people, by the people, [and] for the people."<sup>7</sup> Thomas Jefferson recognized the important role of the American jury system when he said, "I consider trial by jury as the only anchor ever yet imagined by man, by which a government

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3. See Michelle Alexander, *Go to Trial: Crash the Justice System*, N.Y. TIMES (Mar. 10, 2012), <https://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html>.

4. Clay S. Conrad, *Trial by Jury*, CATO INST. (Dec. 19, 1998), <https://www.cato.org/commentary/trial-jury>.

5. *Id.*

6. Jon P. McClanahan, *The "True" Right to Trial by Jury: The Founders' Formulation and Its Demise*, 111 W. VA. L. REV. 791, 802 (2009).

7. Abraham Lincoln, Gettysburg Address (Nov. 19, 1863) (transcript available in the Library of Congress).

can be held to the principles of its constitution.”<sup>8</sup> John Adams agreed, acknowledging, “[i]t is not only [the juror’s] right, but his duty . . . to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court.”<sup>9</sup>

With the ratification of the Sixth Amendment in 1791, the Founders formally recognized the critical role of the jury within the American legal system by protecting the right of a criminal defendant to an impartial jury.<sup>10</sup> The jury remained a central component of the American legal system for the next century, as criminal defendants regularly exercised their Sixth Amendment right to a public trial.

Plea bargains, on the other hand, were “exceedingly rare” until the end of the Civil War, when crime rose as a result of increased immigration and widespread dislocation.<sup>11</sup> In order to keep the escalating number of criminal cases from crashing the court systems, which were unable to provide speedy trials to every criminal defendant, prosecutors began making what other countries considered “a kind of ‘devil’s pact.’”<sup>12</sup> Prosecutors agreed to dismiss more serious charges for criminal defendants willing to plead guilty to lesser charges, resulting in less prison time and expeditious resolution of criminal cases without the burden of numerous trials.<sup>13</sup>

Given the historic respect for jury trials as vessels of justice and fairness, members of the legal profession were initially wary of this new practice.<sup>14</sup> If defendants were pleading guilty to offenses a jury would consider immoral or unnecessarily harsh, then the jury’s role of protecting against government oppression could be severely undermined. Moreover, courts saw plea bargaining as creating unethical incentives for pleading guilty regardless of the facts of the case.<sup>15</sup> As a result, courts in the post-Civil War era frequently invalidated plea agreements and would have defendants stand trial instead.<sup>16</sup>

Eventually, however, as criminal prosecutions continued to rise, courts conceded to the reduction of the role of juries and judicial involvement in the

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8. Conrad, *supra* note 4.

9. *Id.* (alterations in original).

10. U.S. CONST. amend. VI.

11. Jed. S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. OF BOOKS, Nov. 20, 2014, at 16.

12. *Id.*

13. *Id.*

14. *See id.*

15. Michael Conklin, *In Defense of Plea Bargaining: Answering Critics’ Objections*, 47 W. ST. L. REV. 1, 1–2 (2020).

16. *Id.*; *see also* Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant’s Dilemma: An Innovative Empirical Study of Plea Bargaining’s Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1, 6 (2013).

interest of efficiency. By the late 1940s, over 80% of criminal cases were resolved through plea bargains.<sup>17</sup> Over the next three decades, more and more individuals were charged with criminal violations. In the 1970s and 1980s, state and federal legislatures increased criminal penalties, particularly for drug-related crimes, and mandatory minimum and maximum sentences began taking hold across the country.<sup>18</sup> Many states went as far as establishing “three strikes” laws, which mandated life sentences for any defendant convicted of a third felony offense.<sup>19</sup>

Given the potential consequences of these unprecedented harsh sentences, prosecutors were given significant bargaining power during plea negotiations. As Michelle Alexander points out in her book, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, these statutory schemes “have transferred an enormous amount of power from judges to prosecutors. Now, simply by charging someone with an offense carrying a mandatory sentence of ten to fifteen years or life, prosecutors are able to force people to plead guilty rather than risk a decade or more in prison.”<sup>20</sup> By overcharging—a common practice where prosecutors “charge people with crimes for which they technically have probable cause but which they seriously doubt they could ever win in court”—prosecutors obtained a significant advantage in plea negotiations against terrified defendants.<sup>21</sup>

Today, plea bargaining has virtually replaced the jury trial process in criminal proceedings. Federal criminal convictions resulting from jury trials dropped from 8.2% in 1962 to 3.6% in 2013.<sup>22</sup> More recently, in fiscal year 2020 (October 1, 2019–September 30, 2020), guilty pleas accounted for 97.8% of federal criminal convictions,<sup>23</sup> with no data available on the percentage of convictions resulting from criminal trials.<sup>24</sup> Plea bargaining is so common that Justice Kennedy has referred to our modern criminal justice system as “a system of pleas, not a system of trials”<sup>25</sup> and acknowledged that

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17. Rakoff, *supra* note 11, at 16.

18. *Id.*

19. *Three Strikes*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/three\\_strikes](https://www.law.cornell.edu/wex/three_strikes) (last visited Dec. 1, 2023).

20. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 88 (rev. ed. 2012).

21. *Id.*; *see also* ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 31 (2007).

22. Shari Seidman Diamond & Jessica M. Salerno, *The Disappearing Jury Trial and Potential Reasons for the Decline*, 81 LA. L. REV. 122, 122 (2020).

23. U.S. SENT’G COMM’N, *supra* note 1, at 8.

24. The report does point out that “[i]n general, offenders charged with more serious crimes pleaded guilty less often; those who were convicted of kidnaping, murder, arson, manslaughter and sexual abuse went to trial in more than 10 percent of those cases.” *Id.*

25. *Lafler v. Cooper*, 566 U.S. 156, 170 (2012).

plea bargaining is “not some adjunct to the criminal justice system; it *is* the criminal justice system.”<sup>26</sup>

## II. HOW PLEA BARGAINING FAVORS PROSECUTORS

If Justice Kennedy is correct that plea bargaining *is* the criminal justice system, shouldn't we be concerned that the practice lacks any meaningful transparency or supervisory review? Indeed, many legal scholars consider plea bargaining as operating “beyond the shadow of the law” due to the insufficient statutory regulation of prosecutorial power.<sup>27</sup> Even the constitutional law of criminal procedure, designed to regulate the criminal legal system federally and on a state level, “imposes virtually no constraints on prosecutors’ plea bargaining practices at all,”<sup>28</sup> leaving prosecutors free to use their mighty discretion as they see fit. This dynamic is particularly concerning in highly adversarial jurisdictions, where prosecutors are rewarded for high conviction rates and defense attorneys learn to counsel their clients to take any deal to avoid prosecutorial retribution.

There are three main tactics prosecutors can use to manipulate charges and amplify their plea bargaining power: overcharging, piling on, and sliding down.<sup>29</sup> “Overcharging,” or “overreaching,” takes place when a prosecutor charges a defendant with a more serious charge than the evidence or law may support, in order to intimidate a defendant into taking a plea for a lesser—and likely more accurate—charge.<sup>30</sup> The main protection against this kind of manipulation is bringing the case to trial and allowing the jury to acquit a defendant charged with an offense that does not fit the evidence before it.<sup>31</sup> By taking a deal and pleading guilty, that protection disappears and no adjudication on the merits of the prosecutor’s exaggerated charge can be made, shielding the prosecutor from the negative consequences of this ethically questionable practice and assuring a conviction almost every time.

“Piling on” occurs most often in jurisdictions with virtually unlimited joinder rules, maximizing prosecutorial power to file and join numerous

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26. *Missouri v. Frye*, 566 U.S. 134, 144 (2012) (alteration in original) (citation omitted).

27. Andrew M. Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1303 (2018) (citation omitted).

28. *Id.* at 1305 (citing Adriaan Lanni & Carol Steiker, *A Thematic Approach to Teaching Criminal Adjudication*, 60 ST. LOUIS U. L.J. 463, 469 (2016)).

29. *See id.* at 1313–14.

30. *See id.* at 1338; *see also* DAVIS, *supra* note 21, at 31 (describing the practice as “involv[ing] ‘tacking on’ additional charges that they know they cannot prove beyond a reasonable doubt or that they can technically prove but are inconsistent with the legislative intent or otherwise inappropriate”).

31. Rakoff, *supra* note 11, at 18.

charges against a single criminal defendant.<sup>32</sup> Most states permit joinder “even for factually unrelated offenses, so long as those offenses are similar in kind,” allowing any prosecutor who can make a convincing argument connecting separate offenses to pile on charges and increase the defendant’s maximum sentence.<sup>33</sup> The ability to pile on charges, much like the ability to overcharge, allows prosecutors to intimidate defendants with the potential of a lengthy prison sentence and multiple fines, enhancing their bargaining power and making the choice to stand trial less appealing for fear of multiple convictions. In *Arbitrary Justice: The Power of the American Prosecutor*, Angela Davis explains how this practice gives the prosecutor more “bang for the buck”<sup>34</sup> during plea negotiations:

If the prosecutor charges five offenses instead of two, he may get the defendant to agree to plead guilty to three charges in exchange for his agreement to dismiss two, even if he would have a difficult time proving the two charges before a judge or jury. On the other hand, if the prosecutor only charges the three offenses for which he has solid proof beyond a reasonable doubt, he will have less with which to bargain and will probably secure a guilty plea to only one offense in exchange for his promise to dismiss two.<sup>35</sup>

Some states, like Texas, restrain this prosecutorial power by requiring a single charge per criminal offense and generally prohibiting joinder for factually unrelated events.<sup>36</sup> While prosecutors in these states may still threaten to bring the charges in separate cases, they are unlikely to do so given the court’s extensive dockets and their objective to move cases along as quickly as possible.

Finally, prosecutors rely on their discretionary power to “slide down” on the higher charges at trial by amending the charges or asking for a lesser included offense jury instruction.<sup>37</sup> This tactic often goes hand-in-hand with piling on, as the practice allows prosecutors to use additional, lesser charges as a backup option should the case go to trial, while maintaining their bargaining power over the defendant during pretrial plea negotiations.

It is important to note that while these three tactics are being employed, prosecutors remain largely unchecked and unregulated throughout the plea

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32. See Crespo, *supra* note 27, at 1316–18.

33. *Id.* at 1321.

34. DAVIS, *supra* note 21 at 31.

35. *Id.*

36. Crespo, *supra* note 27, at 1322.

37. *Id.* at 1361, 1364.

bargaining process. In response, groups like the American Civil Liberties Union (ACLU) have proposed statewide legislation that would set “transparency standards for all prosecutors” and require prosecutorial data to be made available to their constituents.<sup>38</sup> Ideally, more transparency regarding the plea bargaining process would promote fair dealings by prosecutors and reduce the risk of misconduct.

Despite the requirement that judges confirm that the defendant understands their rights and is voluntarily entering their plea without coercion—which, as an ACLU staff attorney put it, “is [a] bit like asking the hostage if the kidnapper played fair while the hostage still has a gun to their head”<sup>39</sup>—the vast majority of guilty pleas are accepted with minimal inquiry.<sup>40</sup> Many legal scholars and attorneys believe that our system has created a form of “conveyor-belt plea bargaining”<sup>41</sup> or, commenting on the speed by which cases are sent through the system, “McJustice,”<sup>42</sup> where prosecutors can “have it their way” at the expense of meaningful adjudication on the merits.

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38. See ACLU, UNLOCKING THE BLACK BOX: HOW THE PROSECUTORIAL TRANSPARENCY ACT WILL EMPOWER COMMUNITIES AND HELP END MASS INCARCERATION 17 (2019), [https://www.aclu.org/sites/default/files/field\\_document/pros\\_transparency\\_final\\_draft-opt2.pdf](https://www.aclu.org/sites/default/files/field_document/pros_transparency_final_draft-opt2.pdf).

39. Somil Trivedi, *Coercive Plea Bargaining Has Poisoned the Criminal Justice System. It's Time to Suck the Venom Out.*, ACLU (Jan. 13, 2020), <https://www.aclu.org/news/criminal-law-reform/coercive-plea-bargaining-has-poisoned-the-criminal-justice-system-its-time-to-suck-the-venom-out/>.

40. See Rakoff, *supra* note 11, at 16.

41. Trivedi, *supra* note 39.

42. See Robert M. Bohm, “McJustice”: *On the McDonaldization of Criminal Justice*, 23 JUST. Q. 127, 127–28 (2006) (describing criminal case processing as akin to institutions like McDonalds that place high value on control, predictability, and efficiency to handle demand).

## III. NEGATIVE EFFECTS OF PLEA BARGAINING

Our system's focus on efficiency and embrace of "conveyor-belt justice" inevitably enhances the likelihood that innocent criminal defendants will feel pressured to plead guilty. Indeed, retired New York judge Joseph Bellacosa has criticized the criminal legal system's emphasis on efficiency as creating "[a] system of 'meet 'em, greet 'em, and plead 'em' . . . where overworked defense attorneys actually don't even meet clients before disposition hearings" resulting in "a recipe for wrongful convictions."<sup>43</sup> Likewise, the "CEO of the Association of Prosecuting Attorneys has [described] the [criminal] misdemeanor plea system" as a "dysfunctional" and "significant systemic malfunction . . . which causes an inordinate amount of guilty pleas and threatens individuals, communities, [and] public trust in the judicial system."<sup>44</sup> University of Chicago Law School Professor Albert Alschuler has gone so far as calling our plea bargaining process, focused on moving cases along as quickly as possible, "A Nearly Perfect System for Convicting the Innocent."<sup>45</sup> The following factual examples illustrate this point and highlight the enduring consequences of accepting a plea for defendants who felt they had no other options.

Erma Faye Stewart is a Black single mother from Texas who, in 2000, was arrested along with 26 others as part of a drug sweep.<sup>46</sup> Erma was not involved in any drug activity and proclaimed her innocence to her court-appointed defense attorney.<sup>47</sup> After spending a week in jail worrying about her young children at home, Erma's attorney urged her to take the prosecution's offer of probation if she pled guilty to drug distribution.<sup>48</sup> Erma refused and reaffirmed her innocence; but, after almost a month in jail, Erma couldn't stand being apart from her children any longer and agreed to the deal.<sup>49</sup> She was sentenced to ten years probation and ordered to pay almost \$2,000 in fines and court costs.<sup>50</sup> She returned home to her children a

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43. ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 213 (2018) (second alteration in original) (citation omitted).

44. *Id.* at 212 (last alteration in original).

45. Albert W. Alschuler, *A Nearly Perfect System for Convicting the Innocent*, 79 ALB. L. R. 919, 919 (2017).

46. *Erma Faye Stewart and Regina Kelly*, PBS: FRONTLINE (June 17, 2004), <https://www.pbs.org/wgbh/pages/frontline/shows/plea/four/stewart.html>; see also Alexander, *supra* note 3.

47. *Erma Faye Stewart and Regina Kelly*, *supra* note 46.

48. *Id.*

49. *Id.*

50. *Id.*



convicted drug felon.<sup>51</sup> She lost her food-stamp eligibility as well as her ability to vote for at least 12 years.<sup>52</sup> Employers were free to discriminate against her because of her criminal record, and she was evicted from her public housing shortly thereafter because she couldn't afford her rent.<sup>53</sup>

Five months later, a judge dismissed all charges against the 20 defendants who held out and did not plead guilty, finding that the sweep was based on a lying informant.<sup>54</sup> Meanwhile, Erma, who could afford neither bail nor to leave her children behind for five months, faced the lifelong consequences of a crime she didn't commit.<sup>55</sup>

Unfortunately, Erma's situation is not as rare as it may sound. In fact, studies indicate that defendants who are detained prior to trial are "more likely to accept a plea and are less likely to have their charges dropped" regardless of their circumstances or the evidence against them.<sup>56</sup>

To understand the realities for those who choose to exercise their Sixth Amendment right to go to trial, let's look at Angel Cardona. In 2013, Angel, a high school student, was arrested and given a noncriminal violation ticket for possession of a small amount of marijuana.<sup>57</sup> When Angel arrived with his mother for his arraignment, he learned that he had been falsely accused of smoking the marijuana in public, a misdemeanor with possible jail time.<sup>58</sup> Angel and his mother, furious at this misrepresentation and the potential lifelong consequences for the young man, decided to fight the wrongful charge and take the case to trial.<sup>59</sup> They attended four hearings over the next ten months, requiring Angel to miss school and his afterschool job, while his mother used vacation days to stand by her son and lend support.<sup>60</sup> A year after his arrest, with no trial date in sight, Angel felt compelled to accept the prosecutor's offer and entered a guilty plea for disorderly conduct.<sup>61</sup> His mother had used up all her vacation days, and the two could not afford to spend any more unpaid days in court.<sup>62</sup>

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51. Alexander, *supra* note 3.

52. Erma Faye Stewart and Regina Kelly, *supra* note 46.

53. *Id.*

54. *Id.*

55. *Id.*

56. LINDSEY DEVERS, U.S. DEP'T OF JUST., PLEA AND CHARGE BARGAINING 2 (2011), <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/PleaBargainingResearchSummary.pdf> (citing Gail Kellough & Scot Wortley, *Remand for Plea: Bail Decisions and Plea Bargaining as Commensurate Decisions*, 42 BRIT. J. CRIMINOLOGY 186 (2002)).

57. See NATAPOFF, *supra* note 43, at 109.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

Angel's story demonstrates the disproportionate effects the decision to go to trial often has on criminal defendants without the financial means required to attend court proceedings over numerous months, or even years. It also reveals the pressures that ultimately force criminal defendants to accept a prosecutor's plea offer, even when they know they are innocent of the charge and will likely win at trial. The unfortunate reality is that "[b]ecause the pressures to plead guilty are omnipresent and the petty-offense process is huge, wrongful convictions probably occur hundreds of thousands of times a year."<sup>63</sup>

In addition to the influence of prosecutors and responsibilities of the outside world, these pressures can come from the court itself, in the form of what legal scholars have termed a "trial penalty."<sup>64</sup> To gain insight into this concerning phenomenon, ACLU staff attorneys partnered with the National Association of Criminal Defense Lawyers (NACDL) to investigate the realities of trial penalties in South Carolina.<sup>65</sup> During their observations, the attorneys heard judges advise criminal defendants that "if they wanted either a lawyer or a jury trial, their case would be delayed for some unknown period of time."<sup>66</sup> As one attorney put it, "[o]ver and over again, we watched people make the coerced choice to give up their Sixth Amendment rights so they could get out of jail or avoid taking another unpaid day off work to come back to court."<sup>67</sup> Prosecutors can use these trial penalties as yet another bargaining chip against a defendant intent on exercising their right to trial, but who struggles to afford it.

Even more alarming is that data continues to confirm significant racial biases in the plea bargaining process, resulting in the criminalization of poor and minority communities at staggering rates.<sup>68</sup> The majority of individuals in these communities cannot afford private defense attorneys with time to review and discuss their case prior to arraignment and plea negotiations. Rather, many require court-appointed defense attorneys who are often severely overloaded with cases and typically paid the same rate if the defendant pleads guilty or goes to trial. This arrangement frequently incentivizes public defenders to work with the prosecution to negotiate plea

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63. *Id.* at 5.

64. See *The Trial Penalty*, NAT'L ASS'N OF CRIM. DEF. LAWS., <https://www.nacdl.org/Landing/TheTrialPenalty> (last visited Dec. 1, 2023).

65. Emma Andersson & Jeffery Robinson, *The Insidious Injustice of the Trial Penalty: "It Is Not the Intensity but the Duration of Pain That Breaks the Will to Resist."*, 31 FED. SENT'G REP. 222, 223 (2019).

66. *Id.*

67. *Id.*

68. Carols Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187, 1215 (2018).

deals quickly, counsel their client to take the deal, and move on to the next case in the interest of time and money.

Implicit racial bias may also play a critical role in the recognized racial disparities. Even when similarly situated white defendants are represented by court-appointed counsel, they are generally offered better plea deals than their nonwhite peers.<sup>69</sup> A 1991 study by the *San Jose Mercury News* looked at 700,000 criminal cases that “were matched by crime and criminal history for the defendant” and “revealed that similarly situated whites were far more successful than African Americans and Latinos in the plea bargaining process.”<sup>70</sup> The study concluded that “at virtually every stage of pretrial negotiation, whites are more successful than nonwhites.”<sup>71</sup>

More recently, a 2018 empirical study confirmed that “white defendants are over twenty-five percent more likely than black defendants to see their top charge dropped or reduced” when taking all criminal charges (including felonies and misdemeanors) into account.<sup>72</sup> The racial inequality is even more stark when one focuses exclusively on misdemeanors. The study found that “white defendants are 74.72% more likely than black defendants to see all misdemeanor charges carrying a potential imprisonment sentence dropped, dismissed or amended to lesser charges.”<sup>73</sup> These studies illustrate that when addressing systemic racial injustices embedded in our criminal legal system, plea bargaining may be the best place to start.

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69. See ALEXANDER, *supra* note 20, at 117 (describing the 1991 *San Jose Mercury News* study).

70. *Id.*

71. *Id.* (quoting Christopher Schmitt, *Plea Bargaining Favors Whites, as Blacks, Hispanics Pay Price*, SAN JOSE MERCURY NEWS, Dec. 8, 1991, at 1A).

72. Berdejó, *supra* note 68.

73. *Id.* at 1216.

## IV. PLEA BARGAINING IN VERMONT

Vermont's reliance on plea bargaining is consistent with the rest of the United States. According to the FY19 Vermont Judiciary Annual Report, "[n]early all criminal cases in Vermont resolve either by plea bargain or by dismissal."<sup>74</sup> Indeed, of the 5,885 misdemeanor charges not dismissed (46% are dismissed), 5,717 defendants resolved their cases by pleading guilty (97.15%).<sup>75</sup> These numbers are only slightly improved for felony charges, as the data shows that of the 2,258 felony charges not dismissed (26.74% are dismissed), 2,142 defendants resolved their case by pleading guilty (94.86%), whereas 2.97% were resolved by jury trial.<sup>76</sup>

The racial disparities discussed above also exist in Vermont. As of 2016, Vermont had the highest racial disparity of incarceration in the nation, with 1 in 14 of all Black male Vermonters over the age of 18 in state prison.<sup>77</sup> Meanwhile, white individuals remain underrepresented in Vermont prisons and jails, despite making up approximately 94% of the state's population.<sup>78</sup>

That said, Vermont does have some statewide and county-specific policies intended to even the plea bargaining playing field and—hopefully—address these disparities. Pursuant to 13 V.S.A. § 8004, the State has compiled all potential collateral consequences of a criminal conviction into a searchable database, giving criminal defendants more information about how a guilty plea may or may not affect their lives in the long run.<sup>79</sup> The site is maintained by the Office of the Vermont Attorney General and informed by the Collateral Consequences Resource Center (CCRC).<sup>80</sup> In addition to informing defendants about the potential long-term effects of accepting a plea deal, this resource helps mitigate the risk of prosecutorial misconduct such as failing to disclose relevant collateral consequences during plea negotiations.<sup>81</sup>

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74. VT. JUDICIARY, ANNUAL STATISTICAL REPORT FOR FY19, at 41 (2019), <https://www.vermontjudiciary.org/sites/default/files/documents/FY19%20Statistics%20Report%20-%20FINAL.pdf>.

75. *Id.*

76. *Id.*

77. Mark Hughes & Ashley Nellis, Ph.D., *Racial Disparities in Vermont Prisons*, JUSTICE FOR ALL (Feb. 6, 2017), <https://justiceforallvt.org/2017/02/06/788/>.

78. *Vermont Profile*, PRISON POL'Y INITIATIVE, <https://www.prisonpolicy.org/profiles/VT.html> (last visited Dec. 1, 2023).

79. *Vermont Restoration of Rights & Record Relief*, COLLATERAL CONSEQUENCES RES. CTR. : RESTORATION RTS. PROJECT (Aug. 31, 2021), <https://ccresourcecenter.org/state-restoration-profiles/vermontrestoration-of-rights-pardon-expungement-sealing/>.

80. *Id.*

81. *Id.*

Additionally, certain Vermont counties have implemented policies to address the power imbalance between prosecutors and criminal defendants. In September 2020, Chittenden County State's Attorney Sarah George announced that her jurisdiction would no longer seek cash bail for defendants, reserving the right to seek detention without bail for limited violent offenses if the defendant poses a risk of flight.<sup>82</sup> Recognizing that the cash bail system allows more opportunities for wealthier defendants, George declared, "[w]e will no longer be a part of putting a price tag on freedom and criminalizing poverty."<sup>83</sup> As a result, more criminal defendants in Chittenden County are released pre-trial, which allows them more time to meet with legal counsel to discuss the case and their options. Because non-detained defendants should be less desperate to take a plea in exchange for their release, the hope is that fewer innocent defendants in the county will plead guilty as a result of this new policy.

The Chittenden County State's Attorney's Office is also unique because its internal policies require prosecutors to base their charges on whether the available evidence suggests guilt beyond a reasonable doubt, instead of the significantly lower bar of probable cause embraced by most prosecutors' offices across the country.<sup>84</sup> This heightened burden of proof requires more careful analysis of the facts and evidence available to the prosecution before charging an individual with a criminal offense, discouraging overcharging and piling on charges.<sup>85</sup>

These policies are important first steps, but even more can be done at the state level to ensure more fairness and eliminate coercive plea bargaining. The following Part proposes additional reforms that can be incorporated into the Vermont Rules of Criminal Procedure to facilitate the move towards a new age of criminal justice.<sup>86</sup>

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82. Devin Bates, *Chittenden County State's Attorney Eliminates Cash Bail Requirement; Urges Statewide Action*, MYCHAMPLAINVALLEY.COM (Sept. 17, 2020), <https://www.mychamplainvalley.com/news/chittenden-county-states-attorney-eliminates-cash-bail/>.

83. *Id.*

84. CHITTENDEN CNTY. STATE'S ATT'Y'S OFF., CHITTENDEN COUNTY BILL OF VALUES (2022), [https://www.acluvt.org/sites/default/files/chittenden\\_county\\_sa\\_values\\_statement.pdf](https://www.acluvt.org/sites/default/files/chittenden_county_sa_values_statement.pdf).

85. Compare the two standards of proof: "probable cause" is defined as "[a] reasonable ground to suspect that a person has committed or is committing a crime or that a place contains specific items connected with a crime," whereas "reasonable doubt" is defined as "[t]he doubt that prevents one from being firmly convinced of a defendant's guilt, or the belief that there is a real possibility that a defendant is not guilty." *Probable Cause*, BLACK'S LAW DICTIONARY (11th ed. 2019); *Reasonable Doubt*, BLACK'S LAW DICTIONARY (11th ed. 2019).

86. It is important to note that these are only a few of *many* potential ways we can begin reforming our criminal legal system. Other approaches include eliminating cash bail, consecutive sentencing, and mandatory minimum sentences, as well as expanding expungement statutes for innocent

V. PROPOSED AMENDMENT TO VERMONT RULE OF CRIMINAL  
PROCEDURE 11

As discussed, one of the most concerning aspects of our criminal legal system's reliance on plea bargaining to resolve cases is that the process is largely unregulated and lacks virtually any transparency. In response, the Vermont Judiciary should create a plea bargaining portal, which would be used by prosecutors and defense attorneys to propose and respond to plea offers. A new provision requiring criminal attorneys to use this portal for all plea negotiations would be added to Vermont Rule of Criminal Procedure 11. The portal entries would detail each offer presented to criminal defendants by the prosecution and the defendants' responses, promoting full and accurate transparency. The provision would also grant access to judges presiding over criminal cases in each county. After the resolution of a case, the details of the case's plea negotiations would become public information, subject to constituent and media scrutiny.

The portal would allow for supervisory review without relying on the prosecutor to approach their superior directly, giving State's Attorneys insight into the negotiations and allowing them to step in when appropriate. The portal would also give more progressive State's Attorneys an opportunity to ensure their deputy attorneys are complying with internal policies around plea bargaining and to track negotiation strategies and effects over time.

An additional provision requiring judicial review of certain plea negotiations should accompany the implementation of this plea portal. Specifically, if a criminal defendant rejects the prosecutor's best offer and pleads "not guilty," the judge would review the plea negotiations to prevent the prosecution from seeking a higher charge, multiple other charges, or a sentence longer than those proposed to the defendant without sufficient justification. The Rule would require any prosecutor charging a more serious offense or seeking a harsher sentence than their best plea offer to defend their choice on the record. A "harsher sentence" would be defined as any additional time in prison, as well as any change in the form of supervision (i.e. probation or parole compared to incarceration).

The objective of this new provision is to reduce some of the prosecution's discretion to pile on multiple charges and charge defendants with offenses disproportionate to the nature of the crime as a strategy for attaining guilty pleas during plea negotiations. The provision would give

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individuals who felt compelled to take a plea deal. Such reforms would also have a critical impact on plea bargaining and its effects and should be considered separately as viable avenues to criminal justice reform.

judges the discretion to reject additional charges or more serious charges if they find the prosecution's arguments unconvincing. Judges and supervisory prosecutors would also be more aware of prosecutors who appear to be abusing their discretion to get convictions, regardless of the nature and circumstances of the individual defendant's criminal and personal history. While a convicted defendant's final sentence is ultimately a judicial determination, this new provision will give additional context to sentencing hearings, as judges will be able to question prosecutors about amended sentencing requests and why they were willing to agree to a lesser sentence structure before the case went to trial.

The ultimate hope is that by making a prosecutor's plea offers "stickier," as Andrew Crespo puts it, they "will be forced to screen away excessively inflated charges up front."<sup>87</sup> While there is a risk that this provision may result in slightly less favorable plea offers for criminal defendants, the fact remains that prosecutors will typically remain incentivized to resolve cases as quickly as possible, which inevitably invites a plea negotiation rather than a trial. Over time, the court and State's Attorneys' Offices can analyze the available data to see if a shift in the plea negotiation process emerges and can reassess plea bargaining policies as needed. Consistent and continuous data analysis is crucial for measuring the success of these reforms and identifying other means of achieving the same goal.

This reform should be relatively inexpensive to implement, as the principal cost would be for the design and implementation of the plea portal. Prosecutorial and court staff would be largely responsible for maintaining the systems, minimizing large out-of-pocket expenses. Further, recent Vermont polling data suggests that Vermonters will support these reforms in the interest of justice and prosecutorial accountability.<sup>88</sup> With these considerations in mind, I urge the Advisory Committee on the Rules of Criminal Procedure to adopt these or similar proposed reforms to Vermont Rule of Criminal Procedure 11 so Vermont can lead the way in addressing any abusive plea bargaining tactics and set a new course for criminal justice across the country.

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87. Crespo, *supra* note 27, at 1361.

88. A 2018 poll found that Vermont voters largely support increased prosecutorial accountability: "77% said they were more likely to support a candidate who would hold police and prosecutors accountable for misconduct" and "72% said they would be more likely to support a candidate who committed to making prosecutors' decisions more transparent by sharing data with the public." *Holding Prosecutors Accountable*, ACLU VT., <https://www.acluvt.org/en/holding-prosecutors-accountable> (last visited Dec. 1, 2023).