

WHY PROSECUTORS RULE THE CRIMINAL JUSTICE SYSTEM—AND WHAT CAN BE DONE ABOUT IT

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ABSTRACT—Most recognize that federal and state laws imposing high sentences and reducing judicial sentencing discretion have created America’s current plague of mass incarceration. Fewer realize that these draconian laws shift sentencing power to prosecutors: defendants fear the immense sentences they face if convicted at trial, and therefore actively engage in the plea bargaining process. This allows prosecutors, rather than judges, to effectively determine the sentences imposed in most cases, which creates significant sentencing discrepancies that most often are unrecorded and cannot be measured. This Essay proposes a solution that would not require legislative change to be put into effect: to have prosecutors occasionally serve as defense counsel for indigent defendants so prosecutors realize the great power they possess. Unfortunately, I recognize that such change is unlikely to happen in the near future, leaving prosecutors in power in the criminal justice system.

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Most prosecutors in the United States are dedicated public servants whose primary aim and satisfaction is to bring criminals to justice. Within the adversary system, however, they represent only one point of view, and under our system of justice, we leave it to neutral players—judges—to resolve competing points of view. Where, instead, when the advocates for one side are given near-total power over the resolution of such disputes, balance is lost and abuses are inevitable. This is what has happened over the past few decades in the United States, with prosecutors increasingly being thrust into the role, not of advocates, but of rulers—with very unfortunate results.

The plea bargain is the ultimate source of this ever-increasing prosecutorial power. It lacks both constitutional and historical grounding; indeed, it barely existed before the Civil War. But thereafter, a combination of circumstances—such as the dislocations following that tragic conflict, the flood of destitute immigrants arriving in the United States in the late nineteenth century, and the increase in effective U.S. police techniques modeled on the “Bobbies” of England—led to prosecutors charging far more persons with criminal offenses than U.S. judges and juries could possibly handle. To deal with this overload, prosecutors increasingly offered criminal defendants the opportunity to plead to lesser charges, and the “plea bargain” was born.¹

After a while, plea bargaining took on a life of its own. While the Supreme Court initially regarded the practice with some skepticism, by the middle of the twentieth century it had become an accepted feature of the U.S. criminal justice system.² In the 1970 case of *North Carolina v. Alford*, the Supreme Court even went so far as to accept as constitutional a defendant’s guilty plea to second-degree murder, even when he asserted he was innocent of any murder but was pleading guilty to avoid the likelihood of a conviction of the capital offense of first-degree murder.³

Nonetheless, for most of the twentieth century until the 1970s, roughly 15% to 20% of those charged with federal criminal offenses whose cases were not dismissed by the prosecutor still went to trial;⁴ and, although the statistics for state jurisdictions are less readily available, they appear to be similar overall.⁵ This had a salutary effect: with prosecutors unsure of

¹ See, e.g., Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 10, 19, 25, 34–35 (1979).

² *Id.* at 6, 26.

³ 400 U.S. 25, 37 (1970).

⁴ Andrew D. Leipold, *Why Are Federal Judges So Acquittal Prone?*, 83 WASH. U. L. REV. 151, 155 & fig.1, 196–97 (2005).

⁵ See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 460 (2004).

whether a case might go to trial after all, they not only had to be prepared to prove the defendant's guilt beyond a reasonable doubt, but also had to be cognizant that their conduct and the conduct of the police agents might be scrutinized by a court of law in pretrial suppression hearings or during trial itself.

Moreover, throughout most of the twentieth century, the plea bargain served to place a maximum "cap" on the sentence that might be imposed, but otherwise sentencing discretion was left to the judge. For example, when I was a federal prosecutor in the Southern District of New York in the 1970s, the office policy was never to recommend a sentence, but rather to leave the judge unfettered discretion to sentence the defendant anywhere in the typically very broad range between zero and the statutory maximum without any input from the prosecution. In nearby state court, the practice was nominally different—prosecutors would seek advanced judicial approval for a defendant to plead guilty to an offense for which he would be guaranteed a sentence within a specified range. However, the range was typically so broad (e.g., "five to fifteen years") as to still give the judge substantial sentencing discretion.

Material changes to the plea bargaining system occurred after crime rates began to rise dramatically, beginning in the mid-1960s and peaking in 1995.⁶ In response to these increased crime rates, Congress and the state legislatures enacted laws that for most crimes imposed much higher sentences and greatly reduced judicial sentencing discretion. These included laws imposing lengthy mandatory minimum sentences (such as five, ten, and twenty years in the case of many drug offenses), laws requiring life sentences and the like for "career offenders" (such as the "three strikes" law in California), and sentencing "guidelines" that in practice dictated severe sentences in most cases (such as the Federal Sentencing Guidelines, which were mandatory before 2005).⁷

The most prominent effect of these laws has been the terrible mass incarceration that continues to plague this country. Currently, 2.2 million people, mostly young men of color, are in jail or prison—far more than in any other country in the world.⁸ Another effect has been to cause innocent people to plead guilty in order to avoid the risk that, if they go to trial and

⁶ See Gary LaFree, Book Review, *Explaining the Crime Bust of the 1990s*, 91 J. CRIM. L. & CRIMINOLOGY 269, 270 (2000).

⁷ See, e.g., Nathan Greenblatt, *How Mandatory Are Mandatory Minimums? How Judges Can Avoid Imposing Mandatory Minimum Sentences*, 36 AM. J. CRIM. L. 1, 3 (2008); Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 199–200, 208, 222 (1993).

⁸ *Criminal Justice Facts*, SENTENCING PROJECT (2016), <http://www.sentencingproject.org/criminal-justice-facts/> [https://perma.cc/6CAK-GNMN].

are convicted on the heavy and multiple charges that prosecutors now typically include in indictments (in part to promote plea bargaining),⁹ they will face huge sentences that most judges will have little power or incentive to mitigate. For instance, of the more than 340 convicted felons who, through the work of the Innocence Project, were subsequently exonerated and freed, a full 10% had pleaded guilty to crimes that they were later proved to have never committed.¹⁰

But a less-noticed effect of these draconian laws has been to shift sentencing power to the prosecutors. Now, under intense pressure to find ways to avoid the immense sentences they will face if they go to trial and are convicted, virtually all defendants—whether innocent or guilty—beg prosecutors to let them plead to reduced charges. The statistics bear witness to this shift. For decades, as noted, 15% to 20% of federal defendants went to trial.¹¹ But as soon as mandatory minimums and mandatory guidelines took effect in the late 1970s and early 1980s, the percentage began to rapidly decrease: by 2000 only 5% of all federal defendants (reportedly even a smaller percentage of state defendants) went to trial.¹² In 2015, only 2.9% of federal defendants went to trial, and, although the state statistics are still being gathered, it may be as low as less than 2%.¹³ These tiny percentages have remained relatively constant in the 2000s even though crime rates have steadily and dramatically declined since 1996, so that the system can no longer claim to be “overloaded.”

The net result is that prosecutors, rather than judges, now effectively determine the sentences to be imposed in most cases. They do this in plea bargains hammered out in the prosecutors’ offices in unrecorded conversations with defense counsel—sessions in which, because of the pressure on defendants to reduce their sentencing exposure, the prosecutors effectively hold most of the cards. Furthermore, not only are these sessions secret, one-sided, and lacking judicial oversight, but also the results vary materially from prosecutor to prosecutor. Thus, the sentencing

⁹ Kyle Graham, *Overcharging*, 11 OHIO ST. J. CRIM. L. 701, 701 (2014).

¹⁰ *DNA Exonerations in the United States*, INNOCENCE PROJECT (2016), <http://www.innocenceproject.org/dna-exonerations-in-the-united-states/> [https://perma.cc/R8XL-H2JL].

¹¹ See *supra* note 4 and accompanying text.

¹² BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF BUREAU OF JUSTICE STATISTICS, 2000, at 53 (2002), <https://www.bjs.gov/content/pub/pdf/cfjs00.pdf> [https://perma.cc/5MC8-FP7J]; see MATTHEW R. DUROSE & PATRICK A. LANGAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2000, at 9 tbl.10, 10 (2003), <https://www.bjs.gov/content/pub/pdf/fssc00.pdf> [https://perma.cc/W9NR-GV2E]. The corresponding 5% trial rate for state defendants only included defendants charged with a felony.

¹³ U.S. SENTENCING COMM’N, OVERVIEW OF FEDERAL CRIMINAL CASES—FISCAL YEAR 2015, at 4 (2016), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/FY15_Overview_Federal_Criminal_Cases.pdf [https://perma.cc/279K-YXHM].

discrepancies (i.e., substantially different sentences for the same crime) that the statutory sentencing guidelines were intended to reduce still occur. Even more troubling is that without oversight, no one can even begin to measure the extent of such discrepancy.

What can be done about this unfortunate shift of power from judges to prosecutors, that is, from neutrals to advocates? The most obvious, and best, solution would be a repeal of mandatory minimum and career offender laws (something the federal judiciary has requested for several decades) and a considerable reduction in the sentences “recommended” by sentencing guidelines. But although a growing recognition of the costs and evils of mass incarceration has fostered some bipartisan efforts in this direction, it appears unlikely to command the support of the new federal administration or of the many state legislatures whose members know that it is still good politics to be “tough on crime.” Moreover, even if U.S. sentences were made considerably less draconian than current laws require them to be, it is unlikely that prosecutors, having now realized the power that plea bargaining gives them to effectively determine sentences, would voluntarily relinquish that power in circumstances where the sentences were less severe.

So, what about doing away with plea bargaining altogether? This, in fact, is the status quo in many European countries. In Germany, for example, where plea bargains are officially not recognized (though they do occur, *sub rosa*, in a few cases), roughly 50% of all criminal cases go to trial, and most of the remaining cases are resolved through *de facto* pleas to the initial charges.¹⁴ Unfortunately, the plea bargain system is now so embedded in the American criminal justice system that, notwithstanding the great decrease in crime since 1995 mitigating the practical need for plea bargaining, there does not appear to be any vocal support for doing away with plea bargains altogether.

Some more modest, halfway measures have been suggested. Years ago, the late Professor James Vorenberg of Harvard Law School suggested that the Department of Justice promulgate binding regulations, similar to those enacted by administrative agencies, that would govern plea

¹⁴ Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413, 1532 (2010); Cornelius Nestler, *Sentencing in Germany*, 7 Buff. Crim. L. Rev. 109, 116 (2003) (“[I]n roughly 50% of all cases the prosecution acts on the basis of the assumption that there is sufficient reason to believe that a crime was committed; in these cases, the prosecutors then decide either to bring about an indictment in court, to apply in writing for a penal order, or to conclude the cases according to sections 153 and 153a of the Procedural Code that allow for a termination of the proceedings by the prosecutor.”).

bargaining in the federal government.¹⁵ Yet, when Vorenberg himself became Director of the Justice Department's Office of Criminal Justice in the Kennedy Administration—a position in which he was supposed to promulgate major policy initiatives—he was unable to get anyone to back his proposal. Aside from the fact that most of the criminal justice system is administered by the states, Vorenberg's proposal encountered opposition based on the concern that administrative oversight of federal plea bargaining would create satellite litigation that would hamper the speed with which criminal defendants were brought to trial—always a key aim of any criminal justice system that aspires to meaningful deterrence.¹⁶ That same objection could rightly be made today.

In a more recent variation on Vorenberg's proposal, Professor Stephanos Bibas has proposed that various prosecutorial agencies, state and federal, each adopt some internal guidelines that, while not enforceable by outside parties, would nevertheless bring some order to prosecutors' exercise of discretion in the plea bargaining process.¹⁷ Although I admire Professor Bibas, I am skeptical that this would have much effect. When I was a young prosecutor, there stood on my bookshelf a multi-volume work of the then-existing internal rules for federal prosecutors entitled the "U.S. Attorneys Manual." I never opened it, and I don't think any of my colleagues did either. We learned what the "rules" were from our more senior colleagues; and if what they told us was wrong or misguided, there was no one—individual or agency—to correct them. I suspect this is still the case. Moreover, only the prosecutor assigned to a case really knows the evidence in the case; and if the prosecutor wanted to apply any putative internal plea bargain guidelines so as to fit the result she desired (whether harsh or lenient, depending on her personality and ideology), she could easily interpret the evidence so as to fit her disposition, and no chief would know enough to say her nay. When not put to the test of the adversary system, evidence is almost always "flexible" in this way.

Two years ago, in an essay in the *New York Review of Books*, I proposed a variation on what is sometimes referred to as a "preliminary hearing."¹⁸ Specifically, in my formulation, the prosecutor and defense

¹⁵ See James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1562–65 (1981).

¹⁶ See, e.g., Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 912 (2009).

¹⁷ See, e.g., Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 957 (2006).

¹⁸ Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (2014), <http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/> [https://perma.cc/8DRB-2GWA].

counsel would be required to appear shortly after indictment before a judicial officer, who would separately question them, in camera and under seal, as to what their evidence was, what discovery they would likely have, and what disposition they were seeking. The judicial officer, without revealing any of this information to the other side or to the judge who would be assigned to the case for all other purposes, would then recommend to the parties what leads still needed to be explored, what disclosures needed to be made, and, where appropriate, what the judicial officer thought would be a fair disposition of the case. In other words, the judicial officer would, in effect, oversee the plea bargaining process and, while not having the power to force either side to his view, could use her persuasive powers to assure a fairer, more neutral process.

A variation on this proposal is currently in practice in the State of Connecticut and has achieved good reviews from prosecutors and defense counsel alike.¹⁹ Nevertheless, it is currently forbidden by the Federal Rules of Criminal Procedure. Moreover, when I tried to persuade my immediate colleagues to try a pilot variation that could be done, on consent of all involved, even under the prevailing rules, I was met with strong resistance—the primary objection being that such an early involvement in the criminal process would compromise judicial neutrality. This objection ignores the fact that the bulk of action in the current federal criminal process occurs during the plea bargaining stage. For a judge to not get involved at that stage is to guarantee, in effect, no meaningful judicial involvement in the process at all. Nevertheless, I accept that this proposal is not proving to be attractive.

Finally, I come back to a very modest proposal that I first made in 1976—only to have it immediately shot down by the country’s most prominent prosecutor. The occasion was the visit of then-Attorney General of the United States, Edward H. Levi, to the U.S. Attorney’s Office in Manhattan, following his single-handed restoration of order and neutrality to the Department of Justice in the wake of Watergate. After an inspiring speech, Levi entertained questions, and I asked him whether, in order to make prosecutors more conscious of their obligation to do justice rather than just secure convictions, it might be a good idea to have prosecutors occasionally serve as defense counsel—a practice permitted in the United Kingdom. Showing that he was still a “Paper Chase” law professor at heart, Levi responded: “That’s not a wholly bad idea, not *wholly* bad!” I slunk away in shame.

¹⁹ See Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 247–56 (2006).

Nevertheless, I am now shameless enough to think it is a good idea. Under my plan, state and federal prosecutors would be required to spend six months out of every three years of their term (three years is the minimum term required of most federal prosecutors) serving as defense counsel for indigent defendants, with the defendants' consent and subject to the supervision of the local legal aid supervisor. In some cases, to avoid conflicts, the prosecutor in one locale might serve his time as defense counsel in another locale. I can think of no other step more likely to make prosecutors aware of the great power they possess or the need to temper it with other considerations.

I do not believe that this last proposal would require any legislative change to be put into effect, though it would, of course, require the consent of both prosecutorial and legal aid offices. (Many legal aid offices, for reasons that will not bear scrutiny, will never hire former prosecutors as legal aid lawyers, even though the reverse is not true.) Unfortunately, I am also quite confident that the idea is too great a departure from existing U.S. practice to meet with quick approval.

So I end with the not very optimistic conclusion that, for the immediate future at least, prosecutors, rather than judges, will be the real rulers of the American criminal justice system. And I ask you: is that fair?