# 2018-19 Lincoln-Douglas Master Case Powerhouse

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# Resolved: Plea bargaining ought to be abolished in the United States criminal justice system.

## AC – Deportation

#### [\*\*\*Pair with a rights-based framework\*\*\*](http://www.valuecriterion.com/free-framework-repository)

#### Plan: The United States federal government ought to abolish plea bargaining in instances where deportation is included as a part of the plea bargain.

#### Solvency advocate. Lee et al. 17.

Donna Lee and Klein, Susan R. and Steglich, Elissa, Immigration Defense Waivers in Federal Criminal Plea Agreements, September 22, 2017

This article focuses on DOJ’s inclusion of waivers of immigration relief in plea agreements for noncitizen federal defendants, and proposes some challenges to these waivers.Federal district and appellate judges, immigration judges, and the Board of Immigration Appeals (“BIA”) members will find below legal grounds to decline to accept these waivers. Such tools are critical to combat this new federal immigration waiver propensity – which is especially disturbing in light of AG Sessions’ April 11, 2017 Memorandum requiring federal prosecutors to substantially broaden immigration prosecutions, and that limits discretion on whom not to deport.The government seeks waivers of critical rights without giving noncitizen defendants access to the tools and knowledge to make fully informed decisions.In Part I, we review the language of immigration waivers, widely varying by jurisdiction, and include an appended chart tracking waivers from each U.S. Attorney's Office that presently requests waivers as part of their standard plea agreements. In Part II, we briefly describe howremoval orders are imposed by immigration judges (“IJs”), Department of Homeland Security (“DHS”) officers**,** and by federal district court judges**,** and describe the effect these waivers will have in those proceedings. We also include a discussion of the potential grounds of relief from removal such as asylum, withholding of removal**,** and protection under the Convention Against Torture in conjunction with challenging the grounds for the deportation. Finally, we spend some time on renewed use of a 1994 judicial removal statute, 18 U.S.C. § 1228. In Part III, we identify five methods for challenging these waivers.We first urge immigrants to demand hearings and to challenge the factual statements contained in the plea waivers. Next, we question the constitutionality of the judicial removal statute. Moving on, we suggest that defense attorneys who advise clients to sign these waivers may be providing ineffective assistance of counsel. Finally,we argue that public policy and international law obligations may prohibit enforcement of these waivers.

#### Plea-bargaining is a tool used by the Trump administration to force deportations and allow institutionalized violence against immigrants. Williams and Musgrave 17.

Brook Williams and Shawn Musgrave, “[FEDERAL PROSECUTORS ARE USING PLEA BARGAINS AS A SECRET WEAPON FOR DEPORTATIONS](https://theintercept.com/2017/11/15/deportations-plea-bargains-immigration/).” November 15, 2017.

ATTORNEY GENERAL JEFF Sessions is pushing federal prosecutors to bypass immigration courts as part of the Trump administration’s hard-line strategy on deportation. Behind closed doors, prosecutors are pressing noncitizens to sign away their rights to make a case for remaining in the country. In the most dramatic cases, immigrants charged with crimes are signing plea agreements in which they promise they have “no present fear of torture” on returning to their home country. The pleas can block them from seeking asylum or protection from persecution. While plea agreements such as these are not entirely new — and are difficult to track — some defense attorneys who specialize in immigration fear they will become commonplace under Sessions. They’re also concerned prosecutors will push them for minor crimes that previously might not have led an immigration judge to order deportation. Immigration experts question the fairness of such provisions in plea agreements and even their overall constitutionality. Some say they might violate international treaties.

#### Immigrants have and are currently deported via plea-bargaining. Williams and Musgrave 17.

Brook Williams and Shawn Musgrave, “[FEDERAL PROSECUTORS ARE USING PLEA BARGAINS AS A SECRET WEAPON FOR DEPORTATIONS](https://theintercept.com/2017/11/15/deportations-plea-bargains-immigration/).” November 15, 2017.

In May 2016, ICE agents in Philadelphia [called](https://www.documentcloud.org/documents/4117115-USA-v-Yue-Wang-Complaint-May-2017.html#document/p5/a384572) their counterparts in Boston with a tip. A student from China — named in court filings as “YY” — planned to take an English-language proficiency test on behalf of another Chinese national who was applying to colleges. After being removed from the exam room, YY admitted she was paid $100 to take the test using someone else’s passport, with the promise of an additional $800 if her score was high enough. YY pointed ICE investigators to her business school classmate, Yue Wang, 25, who also admitted to taking tests for cash. Wang took the same English exam for three other Chinese women, all of whom used their fraudulent scores to secure student visas and admission to universities in Arizona, Massachusetts, and Pennsylvania. In total, court records show, Wang [earned](https://www.documentcloud.org/documents/4117115-USA-v-Yue-Wang-Complaint-May-2017.html#document/p6/a385062) about $7,000 from the scheme. Officials [arrested](https://www.documentcloud.org/documents/4116987-USAO-of-MA-press-release-May-2017-Four-Chinese.html) Wang and the three other women in May on charges of “conspiracy to defraud the United States,” which carries a potential sentence of up to five years in prison and a fine of $250,000.

“By effectively purchasing passing scores, they violated the rules and regulations of the exam, taking spots at U.S. colleges and universities that could have gone to others,” William Weinreb, acting U.S. attorney for Massachusetts, said at the time of their arrests.

Wang signed a [plea deal](https://www.documentcloud.org/documents/4117056-USA-v-Yue-Wang-Plea-Agreement-August-2017.html) with Weinreb’s office in July that waived her right to a deportation hearing before an immigration judge. The agreement also waived her right to apply for asylum. With her signature, she swore that she had never been persecuted — and didn’t fear future persecution — in China. “Similarly, Defendant further acknowledges and states that she has not been tortured in, and has no present fear of torture in, the People’s Republic of China,” the deal stated. Two of the women who paid Wang to take the English exam — Xiaomeng Cheng, 21, and Shikun Zhang, 24 — signed agreements with identical provisions. All three were to be immediately deported back to China. Before giving her time-served and ordering her deported, the judge [noted](https://www.documentcloud.org/documents/4117055-USA-v-Xiaomeng-Cheng-Transcript-of-Plea-Hearing.html)Cheng’s young age and the fact that she had no prior criminal history. “I agree with the government that any fraud on the government, on the United States, is a serious crime, and that certainly applies here to the charge against you in this case,” the judge said during a sentencing hearing. However, she said, it was also important to consider Cheng’s motivation was to “gain access to certain educational opportunities here.”

Jane Peachy, the federal defender who represented Zhang, suggested these factors were lost in the plea-bargaining process.

Peachy said the prosecutor told her the provisions waiving immigration due process were “non-negotiable.” She recalled a “pre-Trump” case where Massachusetts prosecutors sought similar provisions, but ultimately agreed to remove the language at the bargaining table.

When The Intercept asked why the immigration waiver was non-negotiable in Zhang’s case, the U.S. Attorney’s Office for the [District of Massachusetts](https://www.justice.gov/usao-ma) declined to answer. “We cannot comment on the details of a plea negotiation,” Christina DiIorio-Sterling, a spokesperson for the office, said in an email. “There was nothing so horrible about Ms. Zhang or the crime that she committed that warranted such a rigid position on that part of the plea agreement,” Peachy said. “Someone like Ms. Zhang is not a threat — she’s a young woman who came here to come to college and cheated on a test.” The fourth woman has not signed a plea deal, according to the court docket.

Alarming Provisions The language waiving immigration rights in plea agreements varies considerably, even within a single prosecutor’s office. Federal prosecutors in Massachusetts signed [a deal](https://www.documentcloud.org/documents/4164067-USA-v-Kadyrbayev-USAO-in-MA-plea-agreement-2014.html) in 2014 with Dias Kadyrbayev, a Kazakhstani who became friends with convicted Boston marathon bomber Dzhokhar Tsarnaev while studying at the University of Massachusetts, Dartmouth.

Kadyrbayev pleaded guilty to hiding Tsarnaev’s laptop from FBI agents and obstructing the bombing investigation. A judge [sentenced](https://www.justice.gov/usao-ma/pr/dias-kadyrbayev-sentenced-six-years-impeding-boston-marathon-bombing-investigation) him to six years in prison. His plea agreement contained the same provisions regarding asylum and torture as the one Wang and her two co-defendants signed this year. But in 2015, Massachusetts prosecutors signed a [deal](https://www.documentcloud.org/documents/4159669-USA-v-Jose-Alberto-Tejeda-TURBI-2015-plea.html) with a man from Mexico who pleaded guilty to distributing heroin. Notably, his agreement did not spell out explicit waivers of protection against persecution or torture but broadly waived his rights to apply for “any relief from deportability or removability from the United States that would otherwise be available.” “We do not discuss the details of plea negotiations,” DiIorio-Sterling responded when asked about differences in wording. “Not all agreements are exactly the same.” A search of court databases found recent plea agreements with asylum waivers in a handful of districts, including the [Southern District of New York](https://www.documentcloud.org/documents/4164063-USA-v-Buryakov-SDNY-Plea-Agreement-2015.html), the [Northern District of Alabama](https://www.documentcloud.org/documents/4164103-USA-v-Kodirov-N-Dist-of-Alabama-plea-agreement.html), and the [Southern District of Florida](https://www.documentcloud.org/documents/4164114-USA-v-Mohamed-Hussein-SAID-S-Dist-of-FL-plea.html). Many of the identified cases involved terrorism-related charges. Plea agreement language also varies state by state. A Colombian man signed [an agreement](https://www.documentcloud.org/documents/4161150-USA-v-Jose-Manuel-Hurtado-DELGADO-2016-Middle.html) with prosecutors from the Middle District of Florida in 2016. He pleaded guilty to importing cocaine and heroin, and agreed to waive his “rights to any and all forms of relief from removal” and “cooperate with the Department of Homeland Security” in the deportation process. Prosecutors in the Eastern District of Tennessee [signed](https://www.documentcloud.org/documents/4164149-YSA-v-Manolo-PUCHETA-Aka-Barbon-plea-agreement-E.html) a similar deal in a cocaine distribution case in 2014. Elm, the Florida federal defender and expert in pleas, found immigration waivers in plea agreement templates from 15 of the nearly 100 federal districts around the country. Just before publishing a [research paper](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3046713) on the subject in early October, she and her co-authors, two professors at the University of Texas at Austin School of Law, discovered prosecutors in the Southern District of Alabama also used immigration waivers. After their paper was published, they found the same provisions in plea agreements in Utah. “Given the present Administration’s prioritization of immigration prosecution, it is reasonable to anticipate a greater proliferation not only of prosecutions, but also of these waivers in the near future,” they wrote. Many defenders who work at the intersection of criminal law and deportation said they were dismayed to hear about these kinds of plea agreements. James Brink, a private defense attorney in Pittsburgh, said he has represented people from Ghana, China, and elsewhere who pleaded guilty to crimes and likely were deported, but he said he has never seen a deal waiving the right to an immigration hearing. He pointed out that in many cases, ICE already is “waiting in the wings” to take defendants into custody and begin the deportation process in immigration court. “Let the DOJ take their conviction, and let ICE take theirs,” Brink said. “There could be the potential for harm at home — there could be political implications at home.” Claudia Valenzuela, who advises defense attorneys on immigration as part of her work at the National Immigrant Justice Center, called the provisions “alarming,” especially since some defendants might not realize they could qualify for relief. For example, she said, “some of our LGBT clients who don’t realize that being beaten or harmed is basis for seeking asylum.” “They’ve been harmed all their lives in different ways,” she said. “They don’t realize that this would be a claim.” Cohen said in an email that he hopes the Justice Department will not continue to insist on the waivers. “Politics,” he said, “has superseded common sense.”

#### Plea bargaining targets the innocent and the non-citizen. Eagly 17.

Ingrid Eagly, “Criminal Justice In An Era Of Mass Deportation: Reforms From California,” New Criminal Law Review, Winter 2017.

A second prominent feature of the criminal-immigration convergence is the concentration of power in the American prosecutor.34 Under current United States immigration laws, even pleas to relatively minor crimes can result in deportation.35 Deportation is thus often referred to as a ‘‘collateral consequence’’ of entering into a plea bargain with the prosecutor.36 For many noncitizen defendants, the fact of banishment from the United States is the most severe aspect of the punishment. The close nexus between deportation and conviction has made the guilty plea process particularly crucial for noncitizens. Indeed, the plea bargaining model of adjudication is how almost all criminal cases in the United States are resolved.37 A remarkable 97 percent of federal cases and 94 percent of state cases end in plea bargains.38 For noncitizens, aspects of the bargain struck with the criminal prosecutor, such as the precise conduct pled to and the resulting sentence, will often be determinative in immigration court.

In 2010, the United States Supreme Court acknowledged in Padilla v. Kentucky that deportation’s ‘‘close connection to the criminal process’’ makes it ‘‘uniquely difficult to classify as either a direct or collateral consequence.’’39 As a result, the Court concluded that the Sixth Amendment imposes an obligation on criminal defense counsel to advise noncitizens of the potential immigration consequences of a guilty plea.40 This duty extends to attempting to mitigate immigration consequences by negotiating with the prosecutor to achieve an immigration-neutral plea that will not result in deportation.

Despite the Supreme Court’s sound logic in Padilla, prosecutors have not traditionally considered immigration penalties in the plea bargaining context. A 2011 national survey of prosecutor’s offices found that the majority had no written office policy that mentioned immigration status or immigration consequences.41 As National District Attorneys Association pres ident Robert Johnson explained, this lack of guidance on how to consider deportation in plea bargaining is in part due to the fact that prosecutors do not ‘‘control the whole range of restrictions and punishment imposed on the offender.’’42 It also reflects the assumption that statutory penalties ‘‘fit the crime,’’ and therefore prosecutors should worry only about the conduct, and not about the result at sentencing and beyond.43

In sum, the centrality of plea bargaining in the criminal justice system makes criminal prosecutors what Stephen Lee has aptly termed ‘‘gatekeepers’’ of the immigration removal system.44 This gatekeeper role is further ensured by the federal government’s explicit discretionary decision to prioritize the deportations of those convicted of crimes.

#### Second is arbitrary abuse of power. Prosecutors have arbitrary power over defendants, which denies judicial checks and plays out in racialized ways. Walsh 17.

Dylan Walsh, “Why U.S. Criminal Courts Are So Dependent on Plea Bargaining.” The Atlantic. May 2, 2017.

Ninety-seven percent of [federal cases](http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/) are settled the way Church’s was, by plea bargain. [State-level data](http://www.ncsc.org/Sitecore/Content/Microsites/PopUp/Home/CSP/CSP_Intro) suggest similar numbers nationwide. Though access to a public trial is enshrined in the Sixth Amendment, taking a plea forecloses that possibility. “This constitutional right, for most, is a myth,” U.S. District Judge John Kane [wrote](https://www.themarshallproject.org/2014/12/26/plea-bargaining-and-the-innocent#.x2Vo6k55X) in 2014—one voice among a chorus of jurists, advocates, and academics all calling for reform. Some want tweaks to the regulation and oversight of pleas; others urge more ambitious overhaul of the way trials are conducted, streamlining the process to make it accessible to greater numbers of people. Plea bargains were almost unheard of prior to the Civil War. Only in its aftermath, as waves of displaced Americans and immigrants rolled into cities and crime rates climbed, did appellate courts [start documenting](http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2005&context=journal_articles) exchanges that resemble the modern practice. The plea became a release valve for mounting caseloads. Appellate courts “all condemned it as shocking and terrible” at the time, said Albert Alschuler, a retired law professor who has studied plea bargains for five decades. The courts raised a range of objections to these early encounters, from the secretiveness of the process to the likeliness of coercing innocent defendants. Pleas, wrote the Wisconsin Supreme Court in 1877, are “hardly, if at all, distinguishable in principle from a direct sale of justice.”The practice nonetheless continued, and, by the turn of the century, a minor economy had settled in its orbit. “Fixers” could be hired to arrange for alternatives to a prison sentence. Police regularly toured jails to “negotiate” with the inmates. One New York City defense attorney and friend to local magistrates loitered in front of night court hawking 10 days in jail for $300, 20 days for $200, and 30 days for $150. By the 1920s, as violations of the federal liquor prohibition flooded court dockets, 88 percent of cases in New York City and 85 percent in Chicago were settled through pleas. When the Supreme Court in 1969 finally heard a case concerning the legality of the issue, [it unanimously ruled](https://www.oyez.org/cases/1969/270) that pleas are constitutionally acceptable. They are “inherent in the criminal law and its administration,” the Court declared. A few justifications are used to explain the widespread use of pleas. In cases that involve organized crime, prosecutors can use plea bargains to advance the case, extracting information from low-level offenders and pushing further up the criminal hierarchy. Pleas can also provide genuinely good deals to people facing long prison sentences. Most fundamentally, basic economics supports their use. Trials are expensive and protracted. Two rational parties, goes the logic, can more cheaply and quickly come to an agreeable outcome through stripped-down bartering: The prosecutor offers a lenient charge if the defendant foregoes trial and admits guilt. “Even if you have an innocent client, most don’t want to take that chance. … What if things go south at trial?” This final rationale raises tough moral questions, which were perhaps best articulated by Chief Justice Warren Burger in 1971: “An affluent society ought not be miserly in support of justice, for economy is not an objective of the system,” [he wrote](http://caselaw.findlaw.com/us-supreme-court/404/189.html). The court, in other words, should prioritize its profound responsibility to sort the guilty from the innocent over the efficient dispatch of criminal defendants. (“Miserly” may be how Church would describe the state’s dealings with him in Missouri; he’s involved in a class-action lawsuit that argues its understaffed public-defender system doesn’t provide sufficient legal counsel.) But there is also a central practical concern reformers want to mitigate: that spare oversight of the process invests prosecutors with broad, opaque powers. Judges are not regularly allowed to take part when a plea deal is made, and written records of a deal are almost never required. Though jury trials demand proof of guilt beyond a reasonable doubt, pleas follow no standards of evidence or proof; the prosecutor offers a break in exchange for a guilty plea, the defendant decides whether to take it without knowing the merits of his case. Indeed, the only bargaining restriction placed on prosecutors is that they cannot use illegal threats to secure a plea. “So if a prosecutor says, ‘I’ll shoot you if you don’t plead guilty,’ then the plea is invalid,” Alschuler explained. “But if he threatens to charge someone with a crime punishable by death at trial and the defendant pleads guilty, then the plea is lawful.” Assuming they have probable cause, prosecutors can even threaten to bring charges against a defendant’s family in order to extract a plea. For instance, if a defendant’s spouse or sibling is complicit in drug trafficking—perhaps they took a call related to the case—a prosecutor can offer to reduce or dismiss charges against the family member if the defendant pleads guilty. This dynamic, combined with national trends over the last 30 years favoring lengthy mandatory sentences, gives prosecutors [inordinate leverage](http://www.nytimes.com/2011/09/26/us/tough-sentences-help-prosecutors-push-for-plea-bargains.html). If a defendant considers going to trial, a prosecutor might hang overhead some charge that carries a mandatory life sentence. A plea of guilty might instead get eight years, or 10 years, “or pick a number,” said Matt Sotorosen, a senior trial attorney at the Office of the San Francisco Public Defender. “Even if you have an innocent client, most don’t want to take that chance. They’ll just take eight years. What if things go south at trial?” The results of this lopsided calculus are evident in data from the National Registry of Exonerations: Of 2,006 recorded exonerations since the project started keeping track in 1989, [362 of those](https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View=%7BFAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7%7D&FilterField1=Group&FilterValue1=P), or 18 percent, were based on guilty pleas.

## AC – Extortion and Self-Incrimination

#### [\*\*\*Pair with a deontological framework\*\*\*](http://www.valuecriterion.com/free-framework-repository)

#### I defend the resolution as a general principle: Plea bargaining ought to be abolished in the United States Criminal Justice system.

#### First is extortion. Plea bargaining relies on extortion to get guilty pleas, resulting in self-condemnation. Fine 87.

Ralph Adam Fine. Plea Bargaining: An Unnecessary Evil, Marquette Law Review, Summer 1987

A 1967 report issued by the President's Commission on Law Enforcement put the issue squarely: "There are also real dangers that excessive rewards will be offered to induce pleas or that prosecutors will threaten to seek a harsh sentence if the defendant does not plead guilty. Such practices place unacceptable burdens on the defendant who legitimately insists upon his right to trial."zgSix years later, the National Advisory Commission of Criminal Justice agreed: Underlying many plea negotiations is the understanding - or threat - that if the defendant goes to trial and is convicted he will be dealt with more harshly than would be the case if he had pleaded guilty. An innocent defendant might be persuaded that the harsher sentence he must face if he is unable to prove his innocence at trial means that it is to his best interest to plead guilty despite his innocence. 30 The case that sanctions this type of extortion is Bordenkircher v. Hayes,3 ' where the Supreme Court permitted a prosecutor to "up the ante" in order to obtain a guilty plea on a bad check charge. This is how the prosecutor put it when he questioned Hayes about it at a later hearing: Isn't it a fact that I told you at[the initial bargaining session] that if you did not intend to plead guilty to five years for this charge and.., save the court the inconvenience and necessity of a trial and taking up this time that I intended to return to the grand jury and ask them to indict you based upon these prior felony convictions?32 An indictment as a repeater would subject Hayes, if convicted on the bad check charge, to a mandatory life term. Nevertheless, Hayes exercised his constitutional right to a jury trial and, true to his word, the prosecutor obtained the repeater indictment. Hayes was convicted and sentenced to the mandatory life term. In affirming the conviction the Supreme Court explained that there was no "punishment or retaliation so long as the accused [was] free to accept or reject the prosecution's offer."' 33

#### Second is the innocence problem. Plea bargaining is most dangerous because of the risks that innocent defendants plead guilty.

Palmer, Jeff. "Abolishing Plea Bargaining: An End to the Same Old Song and Dance," American Journal of Criminal Law vol. 26, no. 3 (Summer 1999): p. 505-536.

Critics of plea bargaining refuse to acknowledge its inevitability and instead argue its many disadvantages. One of the most central arguments against plea bargaining is that it is detrimental to the innocent defendant.' An innocent defendant may plead guilty "if convinced that the lighter treatment from a guilty plea is preferable to the possible risk of a harsher sentence following a formal trial."' Other disadvantages of plea bargaining are: 1) the problem concerning the interests and motivations of the actors in the system, 2) constitutional issues raised by allowing plea bargaining, 3) legal issues raised by plea bargaining, 4) leniency of sentencing, 5) distorts the public image, and 6) undermines the adversarial process. Critics of plea bargaining emphasize the possibility of a defendant pleading guilty despite the fact that he is really innocent.74 The Supreme Court has stated: It is critical that the moral force of the criminal law not be diluted by a standard of proof [or a procedure for conviction] that leaves people in doubt whether innocent people are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.7

#### Third is the wrongful convictions. Testimony given is tainted and untrustworthy because defendants want a better bargain. Dowden 99.

James P. Dowden, United States v. Singleton: A Warning Shot Heard 'Round the Circuits,’ 1999

In contrast, the Singleton three judge panel and dissent recognized that witness-bargained testimony is unreliable.330 Similar to coerced confessions, providing leniency for testimony has the potential for encouraging false testimony.331 Motivated by a desire to avoid punishment, co-conspirators have incentive to embellish stories about other defendants in order to gain favorable prosecutorial treatment.332 Although the Court has found the unreliability argument opposing plea bargaining unpersuasive,333 witness-bargained agreements present a different policy issue than those previously addressed by the Court. When a defendant is convicted because of testimony from a witness who has entered a plea agreement, the mutual benefits of the plea bargaining system cease to exist for that defendant. Although the witness who has received leniency receives a benefit from the bargain, the defendant does not. In fact, the defendant is confronted with the obstacle of proving his or her own innocence as well as undermining the credibility of a witness against him or her.334 The mutual benefits argument that the Court has used to justify the reliability of plea bargaining, therefore, does not apply in this context since the mutual benefits are lost.335¶ Although the judicial economy rationale for plea bargaining remains valid in the leniency for testimony context,336 the negative aspects of plea bargaining take on increased significance. Paramount among these is a loss of judicial integrity.337 First, a defendant is potentially exposed to false testimony that is cloaked with the power and majesty of the U.S. government leading many jurors to presumptively believe its validity.338 In addition, a guilty conspirator receives favorable treatment merely because the prosecutor was able to strike a better bargain with him or her than with the defendant.39 In this sense, the judicial system is reduced to a bartering system wherein whoever is willing to confess earlier and tell the better story can purchase favorable treatment. 340 Although critics maintain that providing leniency for testimony has deep historical roots dating back at least to the post-Civil War period, it is difficult to deny that the ability to purchase favorable prosecutorial treatment runs contrary to our notions of American justice as articulated in the Magna Carta.34

#### That leads to wrongful convictions. Roth 16.

Jessica A. Roth, “Informant Witnesses and the Risk of Wrongful Convictions,” 2016.

This relative lack of attention to informant testimony is disturbing for a number of reasons. To begin, according to at least one report, false informant testimony is the leading factor associated with wrongful convictions in capital cases. 39 False informant testimony is also a major factor contributing to wrongful convictions in noncapital cases. 40 Moreover, there are good reasons to believe that false informant testimony contributes to significantly more wrongful convictions than ever are discovered.4 1 That is because informant testimony is so pervasive in our criminal justice system, and it is most commonly used in the kinds of cases in which subsequent exoneration through DNA testing will be impossible because the cases do not involve biological evidence.4 2¶ Informant testimony is also the only one of the four suspect categories of evidence associated with wrongful convictions (i.e., confessions, eyewitness identification, forensic science, and informants) that is not universally subject to any judicial check. Confessions are subject to voluntariness review and compliance with Miranda v. Arizona;4 3 identifications are subject to suggestiveness and reliability review pursuant to Manson v. Brathwaite44 and, increasingly, more stringent state standards; 45 and expert forensic testimony is subject to judicial gatekeeping pursuant to Daubert v. Merrell Dow Pharmaceuticals, Inc.,46 or Frye v. United States.47 As prior innocence scholarship has demonstrated, none of these review procedures is perfect, but at least they provide some pretrial screening before evidence is presented to a jury, thereby lending some accountability and feedback to police and prosecutors. By contrast, the use of informant testimony is virtually unregulated by the courts, except in the minority of jurisdictions that recently have introduced modest reforms-and even those reforms are limited only to jailhouse informants.4 8

## NC – Plea Based Ceiling CP

#### [\*\*\*Pair with a util or other consequentialist framework\*\*\*](http://www.valuecriterion.com/free-framework-repository)

#### CP Text: The United States federal government ought to establish plea-based ceilings in the criminal justice system based on Covey’s model.

#### Plea-based ceilings establishes mandatory ceilings on trial sentences to ameliorate the flaws of plea bargaining. Covey 8.

Covey, Russell D. Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings, Tulane Law Review, Mar 2008.

This Article argues that fixed discounts offer the most promising practical solution to the plea-bargaining epidemic and that an effective fixed-discount system can be devised, but only if the traditional fixeddiscount paradigm is radically shifted.'9 Rather than try to constrain the discretion of prosecutors to make lenient plea offers (or of defendants to accept and judges to approve them), ° which is a fool's errand, this Article argues that the better strategy is to attack the other pole of the differential. Accordingly, it proposes a way to eliminate the punitive trial sentences that coerce defendants to accept the pleabargained alternative through adoption of a device referred to herein as "plea-based ceilings." As the name suggests, plea-based ceilings would establish mandatory caps or ceilings on trial sentences. Pursuant to the ceiling, no defendant could receive a punishment after trial that exceeded the sentence he could have had as a result of a plea offer by more than a modest, predetermined amount. Ceilings would thus limit the sentencing differential and enforce a fixed discount by capping the punishment that could be imposed on the defendant who pleads not guilty.

#### It’s mutually exclusive because we still allow plea-bargaining.

#### Plea-based ceilings eliminate the ability to bully defendant’s into a guilty plea. Covey 8.

Covey, Russell D. Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings, Tulane Law Review, Mar 2008.

The idea underlying plea-based ceilings is straightforward. Pleabased ceilings guarantee defendants that they will not receive a sentence following a trial conviction that is more severe than any plea offer made to them, adjusted upward by the appropriate fixed discount. To illustrate how this might function in practice, imagine a defendant charged with bank robbery. Say that the defendant's criminal history and the facts of the crime would normally result in a ten-year trial sentence and that the jurisdiction adopted a fixed discount of 33%. During bargaining, prosecutors offer the defendant a five-year deal.' ° With ceilings, the defendant could accept the offer or proceed to trial when, if convicted, he would face a maximum sentence capped by the plea-based ceiling at 7.5 years-that is, the same five-year sentence he would have received had he accepted the plea offer, adjusted upward to reflect the absence of the fixed discount.'51 The plea-based ceiling, in other words, mimics what conventional fixed discounts do (had he pled guilty, he would have received a 33% discount), except it works backwards. As a result, in a ceiling system, the defendant would know exactly what he risked in declining the plea offer, permitting him to calibrate more carefully his decision of whether to risk trial. Like fixed discounts in general, plea-based ceilings would dramatically curtail prosecutors' ability to induce defendants in weak cases to plead guilty. As noted above, because the prosecutor is bound by whatever plea offer she makes, it is very hard for her to make an offer that is sufficiently lenient to induce a defendant in a weak case to plead guilty.'52 If the prosecutor has a 10% chance of convicting the defendant on a charge that carries a ten-year term, her offer of six months might look good in a world without ceilings, but if the sixmonth offer creates a nine-month ceiling on the sentence the defendant could receive upon conviction at trial, then the inducement to plead guilty disappears. The defendant is markedly better off declining the plea offer and holding out for a trial. Although the defendant's initial ETS was one year, the defendant's ceiling-adjusted ETS falls to a mere 0.9 months, or roughly three days, after the plea offer.'53 Rational defendants should be willing to go to trial under these changed conditions. As a result, plea-based ceilings eliminate the power of lenient plea offers to induce guilty pleas in weak cases.

#### Fixed discounts offer many benefits to the criminal justice system. Covey 8.

Covey, Russell D. Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings, Tulane Law Review, Mar 2008.

Fixed-plea discounts offer four primary benefits, which will be discussed in detail below. First, where large discounts are routinely offered, all defendants have strong incentives to plead guilty, including defendants in weak cases (presumably including a disproportionately large number of innocent defendants)." Fixed discounts prevent prosecutors from offering discounts so large that innocent defendants are essentially coerced to plead guilty to avoid the risk of a dramatically harsher sentence. Second, because fixed discounts limit prosecutors' ability to dispose of weak cases through plea bargaining by changing the defendant's incentive structure, fixed discounts directly impact prosecutorial screening practices, creating strong incentives to dismiss weak cases rather than try them. Third, fixed discounts reduce prosecutorial incentives to overcharge criminal defendants by eliminating the bargaining leverage that can be obtained through strategic overcharging." Absent those incentives, a prosecutor is more likely to select charges based on the prosecutor's actual evaluation of the defendant's culpability. Fourth, precisely because the discounts are fixed and available to every defendant who decides to plead guilty rather than contest guilt at trial, fixed discounts put an end to "barter justice," an aspect of the criminal process that is highly corrosive to the system's legitimacy in the eyes of the public, professionals who work in the criminal courts, and, perhaps most importantly, criminal defendants themselves.35

## NC – Court Clog DA

#### [\*\*\*Pair with a util or other consequentialist framework\*\*\*](http://www.valuecriterion.com/free-framework-repository)

#### Currently, there is no caseload crisis. Greenhouse 17.

Linda Greenhouse, A Conservative Plan to Weaponize the Federal Courts, New York Times, 11-23-2017.

But here’s a slight problem with the argument intended to provide a neutral-sounding cover for the political project: There is no workload crisis. To validate my impression that judicial caseloads have been flat for years, I consulted Russell Wheeler, a political scientist at the Brookings Institution who is one of the country’s leading authorities on federal judicial administration. He pointed me to official charts showing that for the last decade, new appeals filed with the circuit courts have hovered in the high 50,000s to around 60,000 — sometimes a little more, sometimes a little less, but on a graph, basically a straight line. “What strikes me is how little change there has been,” Mr. Wheeler said. “If the courts are in a crisis in 2017, why weren’t they in 2011 or 2007, and where were the calls from the right for creating new judgeships?” Newsletter Sign UpContinue reading the main story Sign Up for the Opinion Today Newsletter Every weekday, get thought-provoking commentary from Op-Ed columnists, the Times editorial board and contributing writers from around the world. Enter your email address Sign Up You agree to receive occasional updates and special offers for The New York Times's products and services. SEE SAMPLE MANAGE EMAIL PREFERENCES PRIVACY POLICY OPT OUT OR CONTACT US ANYTIME Indeed, the Judicial Conference of the United States, a group of 26 judges headed by Chief Justice John G. Roberts Jr. that sets policy for the federal courts, takes a much more tempered view of the workload issue. For years, the conference has asked Congress to create new judgeships. Its latest request, last March, was modest. While asking for five new appellate judgeships, it recommended that the next vacancy on the Tenth Circuit not be filled, “based on consistently low filings.” The Judicial Conference asked for 52 new District Court positions, but recommended not filling the next vacancy on the District Court in Wyoming for the same reason. Professor Calabresi has an explanation for this outbreak of modesty. The Judicial Conference “suffers from a severe bias,” he writes. “The prestige and power associated with being an Article III federal judge goes down if a large number of new federal court judgeships are created. This causes the Judicial Conference to continuously ask for the creation of fewer new judgeships than we really need.” (Article III of the Constitution creates the federal judiciary and is the source of federal judges’ life tenure.) While the leaders of the federal judiciary hardly need me to defend their dignity, I’ll just say that it’s hard to think of a more demeaning appraisal of how these judges approach their jobs.

#### Banning plea bargains would drastically increase case load. Kim 15.

Andrew Chongseh Kim, Underestimating the Trial Penalty: An Empirical Analysis of the Federal Trial Penalty and Critique of the Abrams Study, Mississippi Law Journal, 2015,

The greatest and most obvious benefit of plea bargaining is that it allows prosecutors and courts to secure convictions without the time and expense of a full trial.31 Where trials can require days or weeks to prepare and resolve, prosecutors can often secure guilty plea convictions with a few hours, or, in routine cases, a few minutes of “negotiations” with public defenders. Without plea bargaining, federal courts would need to conduct over thirty times as many trials to secure the same number of convictions they currently do. Although such an outcome might improve employment rates among recent law school graduates, scholars universally acknowledge that it would dramatically raise the cost of criminal adjudications and, in the short term, grind the entire judicial system nearly to a halt.32

#### The drastic increase in caseload would collapse the federal judiciary. Oakley 96.

John B. Oakley, The Myth of Cost-Free Jurisdictional Reallocation, 1996

Personal effects: The hidden costs of greater workloads. The hallmark of federal justice traditionally has been the searching analysis and thoughtful opinion of a highly competent judge, endowed with the time as well as the intelligence to grasp and resolve the most nuanced issues of fact and law. Swollen dockets create assembly-line conditions, which threaten the ability of the modern federal judge to meet this high standard of quality in federal adjudication. No one expects a federal judge to function without an adequate level of available tangible resources: sufficient courtroom and chambers space, competent administrative and research staff, a good library, and a comfortable salary that relieves the judge from personal financial pressure. Although salary levels have lagged—encouraging judges to engage in the limited teaching and publication activities that are their sole means of meeting such newly pressing financial obligations as the historically high mortgage expenses and college tuitions of the present decade—in the main, federal judges have received a generous allocation of tangible resources. It is unlikely that there is any further significant gain to be realized in the productivity of individual federal judges through increased levels of tangible resources,13 other than by redressing the pressure to earn supplemental income.14 On a personal level, the most important resource available to the federal judge is time.15 Caseload pressures secondary to the indiscriminate federalization of state law are stealing time from federal judges, shrinking the increments available for each case. Federal judges have been forced to compensate by operating more like executives and less like judges. They cannot read their briefs as carefully as they would like, and they are driven to rely unduly on law clerks for research and writing that they would prefer to do themselves.16 If federal judges need more time to hear and decide each case, an obvious and easy solution is to spread the work by the appointment of more and more federal judges. Congress has been generous in the recent creation of new judgeships,17 and enlargement of the federal judiciary is likely to continue to be the default response, albeit a more grudging one, to judicial concern over the caseload consequences of jurisdictional reallocation. Systemic effects: The hidden costs of adding more judges. Increasing the size of the federal judiciary creates institutional strains that reduce and must ultimately rule out its continued acceptability as a countermeasure to caseload growth. While the dilution of workload through the addition of judges is always incrementally attractive, in the long run it will cause the present system to collapse. I am not persuaded by arguments that the problem lies in the declining quality of the pool of lawyers willing to assume the federal bench18 or in the greater risk that, as the ranks of federal judges expand, there will be more frequent lapses of judgment by the president and the Senate in seating the mediocre on the federal bench.19 In my view, the diminished desirability of federal judicial office is more than offset by the rampant dissatisfaction of modern lawyers with the excessive commercialization of the practice of law. There is no shortage of sound judicial prospects will￼ing and able to serve, and no sign that the selection process—never the perfect meritocracy—is becoming less effective in screening out the unfit or undistinguished. Far more serious are other institutional effects of continuously compounding the number of federal judges. Collegiality among judges, consistency of decision, and coherence of doctrine across courts are all imperiled by the growth of federal courts to cattle-car proportions. Yet the ability of the system to tolerate proliferation of courts proportional to the proliferation of judges is limited, and while collapse is not imminent, it cannot be postponed indefinitely. Congress could restructure the federal trial and appellate courts without imperiling the core functions, but the limiting factor is the capacity of the Supreme Court to maintain overall uniformity in the administration and application of federal law. That Court is not only the crown but the crowning jewel of a 200-year-old system of the rule of law within a constitutional democracy, and any tinkering with its size or jurisdiction would raise the most serious questions of the future course of the nation.