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Keeping It Real: Reforming the “Untried
Conviction” Impeachment Rule

Montré D. Carodine

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KEEPING IT REAL: REFORMING THE “UNTRIED CONVICTION” IMPEACHMENT RULE

MONTRÉ D. CARODINE*

ABSTRACT

There is a growing call for a “New Legal Realism,” that, among other things, takes a “bottom-up” approach to studying the effects of rules of law on the people to whom they actually apply on a day-to-day basis. The New Legal Realism movement spans across various fields and disciplines related to law. The movement is particularly evident in the area of criminal law where there is an increasing effort to ensure reliability and accuracy in the system’s results. The recent move of some states to require racial impact statements for pending legislation as well as the advocacy and findings of the innocence movement exemplify this effort. Even more compelling are the recent lawsuits filed by public defenders in several states, citing their inability to represent their clients in a constitutionally effective manner and demanding to have their caseloads reduced until they can be adequately funded. This Article aids in the effort to improve our justice system’s reliability, taking a New Legal Realist approach to the area of evidence law as applied in the criminal setting.

I explore the interrelationship between plea bargaining and the use of prior convictions to impeach criminal defendants at trial, two

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of the most controversial practices in the criminal justice system. The prior conviction impeachment rule is a classic and deeply entrenched evidentiary rule. In this Article, I rename the Rule, dubbing it the “untried conviction” impeachment rule, to reflect the reality of its application. Indeed, the reality—overlooked by evidence and criminal law scholars—is that prior convictions used in later proceedings to “impeach” criminal defendants are most often untried convictions, having resulted from the plea bargaining system. I propose a fundamental shift in the application of Rule 609 to reflect this reality. Plea bargaining has rightly come under much scrutiny of late and is considered a prominent feature of our current system that processes defendants in an assembly-line fashion. I propose that, as long as we continue to impeach defendants with their untried convictions, Congress and state legislatures should act to exclude from Rule 609’s applicability the use of untried convictions. Alternatively, until lawmakers act, courts, who are charged with protecting the fundamental rights of criminal defendants, must vigilantly scrutinize the practice of impeaching criminal defendants with untried convictions, thus utilizing Rule 609 as an additional check on plea bargaining instead of as a rubber stamp.

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INTRODUCTION

This Article will take a New Legal Realist approach to evidence law as applied in the criminal setting by addressing the very real operation of a classic and deeply entrenched rule—the prior conviction impeachment rule. There is a growing call for—indeed, a movement toward—a New Legal Realism that, among other things, values a “bottom-up” approach to studying the effects of rules of law on the people to whom they actually apply “on the ground” on a day-to-day basis.¹

1. See Howard Erlanger et al., *Foreword: Is It Time for a New Legal Realism?*, 2005 WIS. L. REV. 335, 339–40 (noting that New Legal Realism takes a “bottom-up” approach to legal scholarship by examining the impact of law on the lives of ordinary people); Edward Lee, *Warming Up to User-Generated Content*, 2008 U. ILL. L. REV. 1459, 1460–65 (discussing the New Legal Realist approach in copyright law and noting that many legal issues within the field can be resolved from the “bottom up” by copyright users rather than formal legal institutions); Stewart Macaulay, *The New Versus the Old Legal Realism: “Things Ain’t What They Used to Be,”* 2005 WIS. L. REV. 365, 385–86 (explaining that New Legal Realism will focus on the gap between formal law and the actual practices of the legal system and the public in resolving disputes); Elizabeth Mertz, *Inside the Law School Classroom: Toward a New Legal Realist Pedagogy*, 60 VAND. L. REV. 483, 484–85, 512–13 (2007) (examining the impact of social science and language on legal education and looking to empirical research to determine the best methods for studying law “on the ground”); Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 834 (2008) (explaining that New Legal Realism focuses on closely examining reported cases in order to understand how

The New Legal Realism movement spans across various fields and disciplines related to law.² The movement is particularly evident in the area of criminal law where there is an increasing effort to ensure reliability and accuracy in the system's results. The recent move of some jurisdictions to require racial impact statements for proposed legislation,³ as well as the advocacy and findings of the innocence movement, exemplifies this effort.⁴ And perhaps the most recent and compelling move to overhaul our justice system has come from some of the major players within the system itself—public defenders. The *New York Times* recently reported on our criminal justice system's current crisis, particularly with respect to indigent defense.⁵ In at least seven states, public defenders' offices, fed up with the plea bargaining "assembly line" style of justice, are refusing to defend any new clients or have filed lawsuits to limit their caseloads.⁶ Instead of the idealized system that many would like to think we have, in which those charged

"judicial personality" influences legal outcomes); Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61, 69–70 (2009) (discussing three variants of New Legal Realism and explaining that one variant, the contextual approach, engages in a "bottom-up" form of empiricism); Eric A. Posner, *Does Political Bias in the Judiciary Matter?: Implications of Judicial Bias Studies for Legal and Constitutional Reform*, 75 U. CHI. L. REV. 853, 853–56 (2008) (proposing a theoretical framework for New Legal Realism, particularly as it relates to biases of judges and how those biases influence judicial voting patterns and actual case outcomes); Daniel A. Farber, *Toward a New Legal Realism*, 68 U. CHI. L. REV. 279, 302–03 (2001) (reviewing *BEHAVIORAL LAW AND ECONOMICS* (Cass R. Sunstein ed., 2000)) (discussing how behavioral law and economics may comprise one of the "pillars" of legal realism).

2. See, e.g., Lee, *supra* note 1, at 1460–65 (discussing New Legal Realism in the context of copyright law); Mertz, *supra* note 1, at 484–85 (examining legal realism in the context of legal education).

3. See Marc Mauer, *Racial Impact Statements: Changing Policies to Address Disparities*, 23 CRIM. JUST. 16, 17–18 (2008) (describing recent racial impact executive orders and legislation adopted in Wisconsin, Iowa, Connecticut, and Minnesota).

4. See, e.g., Richard A. Rosen, *Reflections on Innocence*, 2006 WIS. L. REV. 237, 237 ("[W]e are at the beginning of an exciting new period of American criminal justice, one directly related to the acknowledgment that we convict innocent people."); Margaret M. Russell, *Cleansing Moments and Retrospective Justice*, 101 MICH. L. REV. 1225, 1226 (2003) ("If innocent people have been and continue to be incarcerated and even executed, upon what claims of legitimacy does our criminal justice system rely?").

5. Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. TIMES, Nov. 9, 2008, at A1.

6. See *id.* (internal quotation marks omitted) (discussing as an example the situation in Miami-Dade County, where a judge ruled that the public defenders' office could refuse to represent many defendants arrested on lesser felony charges in order to provide a better defense for other clients facing felony charges).

with a crime are innocent until *proven* guilty beyond a reasonable doubt, we have what has become known as the “McJustice” system.⁷

This Article will explore the interrelationship between plea bargaining, which most often is doled out in McJustice fashion, and the use of prior convictions to impeach criminal defendants at trial. Plea bargaining and prior conviction impeachment are two of the most controversial practices in the criminal justice system.⁸ Both practices have been separately criticized by scholars.⁹ But scholars have not yet given serious, in-depth consideration to how the prior conviction impeachment rule, found in Rule 609 of the Federal Rules of Evidence and various state versions of the federal rule, both promotes and legitimizes plea bargaining, and conversely, to how plea bargaining diminishes the evidentiary value of prior convictions.

The desirability of plea bargaining in the criminal process has been the subject of much debate,¹⁰ which will likely continue. Cur-

7. See *id.* (describing how one public defender, who is currently handling 155 clients, often does not have time to visit the crime scenes, do legal research, or even meet his clients before handling their plea bargains).

8. See Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1119 (2008) (“Much has been made of an ‘innocence problem’ in plea bargaining.”); Alan D. Hornstein, *Between Rock and a Hard Place: The Right to Testify and Impeachment by Prior Conviction*, 42 VILL. L. REV. 1, 6 (1997) (“The issue [of impeachment by prior conviction] is perhaps one of the most controversial in the law of evidence.”).

9. See Margaret Meriwether Cordray, *Evidence Rule 806 and the Problem of Impeaching the Nontestifying Declarant*, 56 OHIO ST. L.J. 495, 498 (1995) (describing the prior conviction impeachment rule as “one of the most potent, and potentially prejudicial, methods of impeachment”); Susan R. Klein, *Enhancing the Judicial Role in Criminal Plea and Sentence Bargaining*, 84 TEX. L. REV. 2023, 2028 (2006) (noting that the plea bargaining system is “biased and coercive”).

10. See Stephanos Bibas, *Bringing Moral Values into a Flawed Plea-Bargaining System*, 88 CORNELL L. REV. 1425, 1425 (2003) [hereinafter Bibas, *Moral Values*] (describing plea bargaining agreements as “flawed substitutes” for jury trials); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2467–68 (2004) [hereinafter Bibas, *Plea Bargaining Outside*] (explaining that structural influences, such as lawyer quality, and other factors, such as lawyer self-interest and caseloads, often cause the plea bargaining process to “skew the fair allocation of punishment”); Bowers, *supra* note 8, at 1119 (portraying plea bargaining as a “categorical good for many innocent defendants” because inaccurate guilty pleas suggest errors during arrest, charge, and trial—not during plea bargaining); Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1239–41 (2008) (describing the use of plea bargaining to convict innocent defendants as an “epidemic” and proposing a fixed-discount system, which would induce innocent defendants not to relinquish their right to trial, to aid in stemming this trend); Klein, *supra* note 9, at 2028 (noting that the current plea bargaining system is “biased and coercive” because it does not permit defendants to obtain discovery prior to negotiating a plea, does not provide impartial arbitration, and results in defendants waiving many constitutional rights); William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 HARV. L. REV. 2548, 2548–50 (2004) (explaining that the terms of plea bargains are often decided based on prosecutors’ preferences, voter preferences, and budget constraints, rather than on the law itself).

rently, over two million people in this country are incarcerated, accounting for approximately one fourth of the *world's* prison population.¹¹ Those critical of plea bargaining point to more than ample evidence that, across the country, the system is nothing more than an assembly line in which hundreds of thousands of poor and mostly minority defendants are processed, criminalized, and incarcerated.¹² Others see the system as an efficient and necessary means by which to deal with crime and keep an overburdened judiciary from collapsing.¹³ While efficiency should be an important goal of our system, it pales in comparison to the more crucial goal of ensuring that innocent defendants are not convicted. And it is difficult to have any confidence that our system currently pursues this goal of vindicating the innocent.

On the one hand, we have attorneys like Arthur J. Jones—one of the public defenders taking what he sees as an ethical stand against the McJustice system—who have found themselves on “a treadmill of frustration.”¹⁴ Mr. Jones described one morning when he looked at a computer printout listing 155 clients.¹⁵ He then went to court to handle arraignments and plea bargains for twenty-three clients, most of whom he had never met.¹⁶ Mr. Jones has lamented his inability to represent his clients in the constitutionally required manner and has said that he would like more time to investigate cases and more opportunity to go to trial, rather than accepting the law enforcement version of events and, after only a brief discussion, helping his clients to make a life-altering decision.¹⁷

On the other hand, we have prominent and influential jurists, like Justice Scalia and Judge Easterbrook, who seem wholly disconnected from the reality of plea bargaining in this country. Justice Scalia has commented that he does not think the system *ever* encourages innocent people to plead guilty,¹⁸ while Judge Easterbrook has said that plea bargaining is not the problem—if innocent people plead guilty and forgo trial, it is simply because they “*appear* to be

11. *Life After Prison Can Be Deadly, a Study Finds*, N.Y. TIMES, Jan. 11, 2007, at A29.

12. See, e.g., Bibas, *Plea Bargaining Outside*, *supra* note 10, at 2529–30 (noting disparities in plea bargaining based on demographics, including minority and socio-economic status).

13. See George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 1043 (2000) (noting that plea bargaining has succeeded as a technique in criminal law because it “protects the reputation of the [criminal justice] system as a whole”).

14. Eckholm, *supra* note 5.

15. *Id.*

16. *Id.*

17. *Id.*

18. Transcript of Oral Argument at 26, *United States v. Ruiz*, 536 U.S. 622 (2002) (No. 01-595).

guilty.”¹⁹ I am sure that Mr. Jones would beg to differ with both of these assertions.

In this Article, I will begin with a critique of plea bargaining, and will reveal that it is not the ideal process that Justice Scalia and Judge Easterbrook claim it to be. In Part I, I will set up the New Legal Realist framework required to address the interrelationship between plea bargaining and Rule 609.²⁰ I will briefly discuss the development of the criminal procedure reform movement as well as some of its common themes and goals. Then I will discuss how this Article advances the goals of New Legal Realism.

In Part II, I will discuss the policy to promote plea bargaining in the rules of evidence. I will demonstrate the express policy of promoting this regime in the Federal Rules of Evidence by discussing Rule 410, which protects statements made during plea negotiations to encourage defendants to speak candidly to prosecutors.²¹ I then will discuss Rule 609 with respect to its general operation and with respect to plea bargaining in particular.²² Rule 609, though it does not expressly adopt the policy of promoting plea bargaining, effectively furthers that policy. Prosecutors perceive defendants’ prior records as strengthening their cases and have much more bargaining power as a result of Rule 609. Moreover, courts equate untried convictions with trial convictions, and thus eschew any notion that plea bargaining is an inferior method for seeking the truth in criminal cases, as some scholars have argued and as some studies have suggested.

In Part III, I initially will establish that the safeguards of the trial process are central to Rule 609’s legitimacy.²³ The Rule authorizes the admissibility of judgments of conviction, which would ordinarily be inadmissible hearsay.²⁴ Rule 609 operates as an exception to the rule against hearsay by justifying the admissibility of convictions from other courts because of the purported reliability of the criminal process that produces those convictions.²⁵ The process ideally includes a trial by jury applying the beyond a reasonable doubt standard.²⁶ I will examine in depth the plea bargaining process in the United States to determine whether it is indeed a viable substitute for the trial process

19. Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1970 (1992); see *infra* Part III.A.1.

20. See *infra* Part I.

21. See *infra* Part II.A.

22. See *infra* Part II.B.

23. See *infra* Part III.A.

24. See *infra* Part III.A.1.

25. See *infra* Part III.A.1.

26. See *infra* Part III.A.1.

for Rule 609 purposes.²⁷ I will consider the available data from various reliable sources regarding the day-to-day “on the ground” reality of plea bargaining.²⁸ In my evaluation of the system’s credibility, I will explore various aspects of the plea bargaining regime, including the roles of the law, prosecutors, defense attorneys, indigent defense programs, and judges.²⁹ These major components of the system work together to sustain and perpetuate a phenomenon in which plea bargaining has virtually displaced the trial as the means of truth-seeking. The result is a system that, in many jurisdictions, is deeply flawed. Instead of trials, which are quite rare, we now have an assembly-line “processing” of defendants, the majority of whom are poor. I will conclude in Part III that the fundamental problems with the plea bargaining system render the system woefully unreliable as a source of Rule 609 evidence.³⁰ Moreover, the use of evidence resulting from the current plea bargaining regime is antithetical to the goals of the evidentiary rules.

In Part IV, I will offer solutions for reform. The most ideal solution would be to eliminate the use of prior convictions altogether for impeachment purposes. To the extent that Congress and state legislatures continue to feel the need to hold fast to Rule 609’s tradition, they should prohibit the use of prior *untried* convictions to impeach criminal defendants.³¹ Until legislators take such action, courts should allow criminal defendants to raise objections to the reliability of their convictions obtained via the plea bargaining process.³² Once the defendant makes a colorable claim of unreliability, the prosecution should carry the ultimate burden of persuasion that these convictions are reliable enough to be admitted into evidence.³³

In outlining the approach that judges should take in assessing the reliability of untried convictions, I will draw from the same due process fundamental fairness principles that courts currently use to determine the weight of judgments from foreign countries, both civil and criminal.³⁴ I will propose an analysis of untried convictions that is analogous to the approach used in the foreign judgment context, but that is also specifically tailored to the untried conviction impeachment practice. I then will address the argument that my proposal might

27. See *infra* Part III.A.2–3.

28. See *infra* Part III.A.2–3.

29. See *infra* Part III.A.2.

30. See *infra* Part III.B.

31. See *infra* Part IV.A.

32. See *infra* Part IV.B.

33. See *infra* Part IV.B.

34. See *infra* text accompanying notes 570–88.

lead to inefficiency by allowing challenges to Rule 609 evidence and that my proposal might clog the system by decreasing the number of plea bargains.³⁵ My approach to assessing the reliability of proffered evidence in the Rule 609 context is no different from other evidentiary approaches in analogous areas, such as *Daubert* hearings for the admissibility of expert testimony. Moreover, my proposal will improve the overall accuracy of the system, which is a more cost-effective strategy in the long run than perpetuating assembly-line justice. Any concern about further burdening the system must be addressed by properly funding the system, which a handful of jurisdictions are attempting to do.

I. REAL CHANGE: A NEW LEGAL REALIST FRAMEWORK FOR EXAMINING RULE 609

While there are differences in the approaches to New Legal Realism, there are common basic tenets and themes.³⁶ In this Article, I focus on some of the common themes of New Legal Realism, while also shaping a framework for New Legal Realism in the field of evidence. I will briefly outline my New Legal Realist approach to analyzing Rule 609 in this Part.

A. *Bottom-Up Analysis*

In critiquing the use of untried convictions, I am concerned in this Article with what actually happens on the ground on a day-to-day basis in the criminal process. For example, it is particularly important to consider the day-to-day struggles faced by lawyers like Amy Weber, a public defender in Miami, who maintains about fifty serious felony cases at the same time.³⁷ In a single day, Ms. Weber had thirteen cases set for trial and had to seek delays for all but one case.³⁸ That same day, one of her clients was in jail on felony charges, and the prosecutors offered him a plea deal of one year in prison.³⁹ Ms. Weber admitted that she had no time to discuss the plea deal with her client.⁴⁰ When the prosecutors did not hear from her, they withdrew the one year offer and her client later accepted a five year sentence.⁴¹ Ms.

35. See *infra* text accompanying notes 612–17.

36. Erlanger et al., *supra* note 1, at 339.

37. Eckholm, *supra* note 5.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

Weber lamented, “‘My client suffered and it makes me feel terrible.’”⁴²

A client of Ms. Weber’s colleague also suffered from the current plea bargaining process.⁴³ During what might be loosely referred to as “negotiations,” prosecutors categorized her colleague’s client as a “‘habitual offender’” because of his prior convictions and calculated their offer based on that classification.⁴⁴ The client was going to accept the offer, which was based on the prosecutors’ miscalculation of the minimum sentence, because his overburdened attorney had no time to check the prosecutors’ math.⁴⁵ The *prosecutors*, fortunately, caught their own mistake.⁴⁶ One has to wonder how many mistakes have not been caught or how many prosecutors have been unwilling to admit such mistakes. Indeed, the attorney noted rhetorically, “‘You see how easily accidents can happen? . . . He easily could have gotten three years instead of one.’”⁴⁷ These two examples illustrate that focusing on those at the bottom provides important information about the effects of the system, whereas examination of those at the top only would not necessarily show the same effects.⁴⁸

An important tenet of New Legal Realism is the necessity of a “bottom-up” approach to ascertain the real effects of legal rules “at the ground level.”⁴⁹ As Professor Stewart Macaulay remarked, “If we are interested in the likely consequences of any rule, or system created by law, or if we are interested in living social problems, we must add a view of law in its full context.”⁵⁰

This is not to say that there is not value in studying those at the “top.”⁵¹ Indeed, in one of the varieties of New Legal Realism, scholars study elite institutions, such as the judiciary⁵² and corporate law

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. See Erlanger et al., *supra* note 1, at 339–41 (explaining the importance of “bottom-up” empirical research in New Legal Realist scholarship).

49. *Id.* at 339 (internal quotation marks omitted); see also Macaulay, *supra* note 1, at 391 (noting that understanding the consequences of law requires analysis in all of its contexts).

50. Macaulay, *supra* note 1, at 391.

51. Erlanger et al., *supra* note 1, at 340 (internal quotation marks omitted) (observing that it is “important to continue research on the institutions and decision-makers at the ‘top’”).

52. See, e.g., Miles & Sunstein, *supra* note 1, at 831, 833–34 (“We believe that much of the emerging empirical work on judicial behavior is best understood as a new generation of legal realism.”); Max M. Schanzenbach & Emerson H. Tiller, *Reviewing the Sentencing Guidelines: Judicial Politics, Empirical Evidence, and Reform*, 75 U. CHI. L. REV. 715, 740–43

firms.⁵³ Moreover, much of traditional legal scholarship has taken a “top down” approach.⁵⁴ So, a core value of the New Legal Realist movement must be an unremitting commitment to remember those at the bottom who are affected by the policies made by those at the top.⁵⁵

Indeed, there was much talk in the 2008 presidential campaign about a “bottom up” approach to governing.⁵⁶ President Barack Obama’s campaign, which even his critics have admitted was groundbreaking and innovative, was largely a grass-roots, on-the-ground movement.⁵⁷ Then-candidate Obama similarly remarked, “One of my fundamental beliefs from my days as a community organizer is that *real change* comes from the bottom up.”⁵⁸

Just as future campaigns will surely be shaped by Obama’s remarkable grass-roots success, legal scholarship can learn from his campaign’s example. To make legal rules effective, we must address how they work on the ground and understand the people actually affected by the rules.⁵⁹ As Karl Llewellyn, the quintessential “old” legal realist, recognized, “‘Law’ without effect approaches zero in its meaning.”⁶⁰ Indeed, “[b]eyond rules . . . lie effects: beyond decisions stand people whom rules and decisions directly or indirectly touch.”⁶¹ Taking a bottom-up approach to legal scholarship “requires us to be sensitive to the realities of power arrangements and hierarchies in studying law.”⁶²

(2008) (discussing the importance of transparency in sentencing data, specifically the identity of sentencing judges, to identify sources of judicial sentencing disparity that need reformation); Gregory C. Sisk et al., *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491 (2004) (discussing the importance of religion in judicial decisionmaking); Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1761–62 (2005) (discussing the indirect effects of gender on judicial decisionmaking).

53. See, e.g., David B. Wilkins, “*If You Can’t Join ‘Em, Beat ‘Em!*” *The Rise and Fall of the Black Corporate Law Firm*, 60 STAN. L. REV. 1733, 1737 (2008) (examining the issues faced by large black corporate law firms); see also Erlanger et al., *supra* note 1, at 350–56 (quoting a transcript of Professor David B. Wilkins, in which he discusses his “‘ground level’” research on black lawyers in elite law firms at the Wisconsin Law Review’s 2005 New Legal Realism Symposium).

54. See Erlanger et al., *supra* note 1, at 340.

55. *Id.*

56. See *The Facebooker Who Friendened Obama*, N.Y. TIMES, July 7, 2008, at C1 (internal quotation marks omitted) (discussing then-candidate Obama’s innovative, grass-roots approach to political campaigning).

57. *Id.*

58. *Id.* (emphasis added) (internal quotation marks omitted).

59. Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1248–49 (1931).

60. *Id.* at 1249.

61. *Id.* at 1222.

62. Erlanger et al., *supra* note 1, at 340.

This means that we focus on the most vulnerable in our society—persons who have no power and no voice.⁶³ Considering perspectives of marginalized groups furthers this goal.⁶⁴

I have previously critiqued prior conviction impeachment from a critical race perspective while incorporating empirical data into my analysis.⁶⁵ In my consideration of the race perspective in the application of the classic prior conviction impeachment rule, I encountered a serious process problem and theoretical incongruity that the Rule perpetuates⁶⁶ and which I address in this Article. As I have argued, race becomes character evidence under Rule 609 because of the mischaracterization of blacks in the criminal justice system.⁶⁷ However, working alongside and in furtherance of racial injustice is the separate but related problem of procedural injustice, which I address in this Article. With fewer cases going to trial, plea bargaining has replaced the criminal trial process—a process that incarcerates a staggering proportion of the African-American and Latino communities.⁶⁸ In Part III of this Article, for example, I discuss a study that analyzed hundreds of thousands of felony cases and found that African-American defendants were much less likely than white defendants to receive favorable plea deals that included in their terms, among other things, the later expungement of the defendant's record.⁶⁹

Rather than simply evaluating Rule 609 in isolation, a New Legal Realist approach would consider how the effect of the Rule and manner in which it operates informs the theoretical analysis of it.⁷⁰ Admittedly, this approach will make some uneasy. Failing to focus on this segment of our society and the operation of our laws with respect to those individuals leads to “institutionalized blindness.”⁷¹ But “includ-

63. *Id.* at 340–41.

64. *Id.*

65. See Montré D. Carodine, “*The Mis-Characterization of the Negro*”: A Race Critique of the Prior Conviction Impeachment Rule, 84 *IND. L.J.* 521 (2009) (arguing that the prior impeachment rule is unreliable hearsay because it gives evidentiary value to race through its reliance on a criminal justice system that unjustifiably disadvantages blacks).

66. *Id.* at 555–58.

67. *Id.* at 528–37.

68. See Mauer, *supra* note 3, at 17 (discussing the racial disparity within the criminal justice system, specifically highlighting the high incarceration rate for African-American and Hispanic males).

69. See *infra* text accompanying notes 383–86.

70. See Erlanger et al., *supra* note 1, at 339 (“A bottom-up approach takes an expansive and open-minded view of the impact of law, and also includes within its purview a wide range of socio-economic classes and interests.”); Macaulay, *supra* note 1, at 391 (“If we are interested in the likely consequences of any rule, or system created by law, or if we are interested in living social problems, we must add a view of law in its full context.”).

71. Erlanger et al., *supra* note 1, at 341.

ing the ‘bottom’ of the social hierarchy in our analyses of law is not always easy; the less powerful people in society are often more invisible and silenced.”⁷² Also, taking a bottom-up approach is not easy because it requires challenging long-held assumptions—often the most basic assumptions about our rules of law—which is exactly what this Article does.⁷³

B. *Challenging Assumptions*

The consideration of the effects of laws from the bottom-up requires “an expansive and open-minded view of the impact of law.”⁷⁴ We must be willing to break out of the formal categories that currently restrain our analyses.⁷⁵ When we rely and build upon “unexamined assumptions,” we perpetuate the institutionalized blindness previously mentioned.⁷⁶ The assumptions are most often those held by influential actors at the top, and therefore the New Legal Realist approach must also address the decisionmakers at top.⁷⁷ This Article, in addition to focusing on the bottom, considers the perspectives of judges in shaping the view of untried convictions, which contribute to the current blind spot in legal scholarship and the system generally with regard to the use of such convictions to impeach defendants under Rule 609.⁷⁸

Justice Scalia, for example, has openly exposed institutional blindness when it comes to plea bargaining. During oral arguments in *United States v. Ruiz*,⁷⁹ he “reacted vehemently” to the notion that the American plea bargaining regime coerces or even encourages innocent defendants to plead guilty.⁸⁰ Responding to defense counsel, he stated the following:

No. I—I object to that. I—I don’t think our system *ever* encourages or, indeed, even permits an innocent person to plead guilty. Our rules require the judge to—to interrogate the person pleading guilty to make sure that, indeed, the person is guilty. There is nothing in our system that encour-

72. *Id.* at 340–41.

73. *See infra* Part I.B.

74. Erlanger et al., *supra* note 1, at 339.

75. *Id.*

76. *Id.* at 340; *see also supra* text accompanying note 71.

77. *See supra* notes 48–55 and accompanying text.

78. *See infra* Part III.A.2.d.

79. Transcript of Oral Argument, *supra* note 18, at 26.

80. Rodney Uphoff, *Convicting the Innocent: Aberration or Systemic Problem?*, 2006 Wis. L. REV. 739, 797.

ages or even allows an innocent person to—to plead guilty. *And I would be horrified if—if there were something like that.*⁸¹

There is ample evidence, which I discuss extensively in this Article, that directly contradicts Justice Scalia's unrealistic view of the system.⁸² Likewise, there is also ample evidence refuting Judge Easterbrook's argument, addressed more fully below,⁸³ that plea bargaining is actually superior to the trial process.⁸⁴ There is, in fact, hard data that challenges and refutes both of these jurists' assumptions.⁸⁵

The type of institutional blindness evidenced by Justice Scalia's comments and Judge Easterbrook's analysis is perpetuated in the application of Rule 609.⁸⁶ If we look at readily available empirical data on the criminal justice system generally and plea bargaining in particular, which a New Legal Realist would do (or would collect on her own), the following question emerges: Why, as an evidentiary matter, do we presume the reliability of prior convictions when there is available data suggesting that the system has serious flaws and often produces unreliable results?⁸⁷ Evidence law is concerned with, among other things, the presentation of reliable information at trial.⁸⁸

This Article argues, relying on available data, that there are enough serious flaws in the system as a whole that we should not compound the criminal justice system's mistakes by using convictions as evidence in subsequent cases, or we should at least view prior convictions offered into evidence with much more skepticism.⁸⁹

C. "Legal Optimism"⁹⁰

My approach to critiquing and offering solutions for reform in this Article incorporates the "core 'trilectic,'" which lies "at the heart of" New Legal Realism, in that it "combine[s] empirical research, legal theory, and policy."⁹¹ While the New Legal Realist approach will

81. Transcript of Oral Argument, *supra* note 18, at 26 (emphasis added).

82. *See infra* Part III.A.3.

83. *See infra* text accompanying notes 230–37; *see also infra* Part III.A.

84. Easterbrook, *supra* note 19, at 1972 ("[P]lea bargaining [is] at least as effective as trial at separating the guilty from the innocent. To the extent there is a difference, negotiation between sophisticated persons unencumbered by the rules of evidence is superior.").

85. *See infra* Part III.A.2–3.

86. *See infra* Part III.B.

87. *See infra* Part III.A.2.

88. *See infra* notes 216–27 and accompanying text.

89. *See infra* Parts III–IV.

90. *See Erlanger et al.*, *supra* note 1, at 345 (proposing the "concept of 'legal optimism' as an integral feature of New Legal Realism").

91. *Id.*

undoubtedly be skeptical about the operation and effect of rules of law, it “need not imply a nihilist surrender to pure critique.”⁹² The New Legal Realist will search for means by which to operate within the existing system to eliminate as much as possible the problems that her skepticism helped to uncover. Indeed, one group of New Legal Realists has posited the following:

[N]ew legal realist research will certainly critically examine the law’s failures, but it will not neglect examination of spaces for positive social change in and around the law. This charts a path between idealism and skepticism, by both remaining cognizant of hierarchies of power and the paradoxes they create for law, and also asking what can be done to work toward justice within the existing structures.⁹³

While I am skeptical of both plea bargaining as the dominant process in the criminal system as well as Rule 609 convictions as a means by which to assess character for truthfulness at trial, I understand, realistically, that both are deeply entrenched aspects of the system that are not likely to completely disappear from the legal landscape anytime soon. I do, however, believe that my critique can both add to the existing critiques that separately address plea bargaining and Rule 609,⁹⁴ and also give concerned advocates and judges a way to work within the existing framework in addressing the issues that I raise.⁹⁵ Indeed, by focusing on the reliability of prior convictions as an evidentiary matter, I extract a core principle from the existing structure and foundation of the evidence rules, particularly as applied in the criminal process.⁹⁶ I believe that it is important that the New Legal Realist expose to institutions their failure to adhere to their own ideals and that she work within the existing system to urge them to do so.

Having outlined my New Legal Realist agenda for this Article, I turn specifically to Rule 609 and its interrelationship with the plea bargaining process.

II. RULE 609: FURTHERING THE POLICY FAVORING PLEA BARGAINING

Rule 609 and plea bargaining are highly controversial aspects of our criminal justice system.⁹⁷ Both plea bargaining and Rule 609 are

92. *Id.*

93. *Id.*

94. *See infra* Parts II–III.

95. *See infra* Part IV.

96. *See infra* Part III.A.

97. *See infra* Part II.B.

mechanisms that, working together, help to perpetuate a vicious cycle of criminalization, incarceration, recidivism, and re-incarceration.⁹⁸ Plea bargaining mass-produces convictions;⁹⁹ hence, my focus in this Article is on untried convictions only as opposed to convictions generally.¹⁰⁰ Indeed, untried convictions are a major source of Rule 609 evidence. As I discuss later in this Article, the vast majority of convictions are obtained through plea bargaining.¹⁰¹ These convictions can be used as evidence in subsequent prosecutions under Rule 609(a).¹⁰² This weakens the defendant's chances of acquittal, thus making subsequent plea bargains more likely.¹⁰³

While the major goal of this Article is to demonstrate how plea bargaining undermines Rule 609's legitimacy, in this Part, I consider another important aspect of the relationship between plea bargaining and the prior conviction rule—the degree to which Rule 609 perpetuates the policy of plea bargaining by actually *facilitating* plea deals when a defendant already has a criminal record and realizes (often having been reminded by the prosecutor or his own attorney) that should she choose to go to trial and testify, a conviction will weigh heavily against her.¹⁰⁴ Indeed, there is, as a general matter, a decided policy in both United States Supreme Court jurisprudence and the evidentiary rules of promoting plea bargaining.¹⁰⁵ Rule 609 furthers that policy.

A. *The Decided Policy of Promoting Plea Bargains*

According to the U.S. Department of Justice Bureau of Justice Statistics, in the seventy-five “most populous counties” in the United States, ninety-seven percent of felony convictions resulted from guilty pleas in 2004.¹⁰⁶ In federal court, which represents only five percent of convictions in the country,¹⁰⁷ over ninety-five percent of felony con-

98. See *infra* Part II.B.

99. See *infra* notes 106–09 and accompanying text.

100. See *infra* Part III.A.

101. See *infra* Part III.A.

102. FED. R. EVID. 609(a).

103. See *infra* Part II.B.2.

104. See *infra* Part II.B.

105. See *infra* Part III.B.

106. TRACEY KYCKELHAHN & THOMAS H. COHEN, BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2004 3 (2008), <http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc04.pdf>.

107. CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, DEFENSE COUNSEL IN CRIMINAL CASES 4 (2000), <http://bjs.ojp.usdoj.gov/content/pub/pdf/dccc.pdf>.

victions resulted from guilty pleas in 2005.¹⁰⁸ Other recent data gathered by the Department of Justice indicate that over ninety-five percent of state felony convictions resulted from guilty pleas.¹⁰⁹

The Supreme Court has said that plea bargaining “is an essential component of the administration of justice” and “[i]f every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.”¹¹⁰ Touting the laudable attributes that purportedly make plea bargaining “highly desirable,” the Court noted that plea bargaining promotes efficiency by fostering a “prompt and largely final disposition of most criminal cases.”¹¹¹ Additionally, the process is good for defendants because “it avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those who are denied release pending trial.”¹¹² Society benefits from plea bargaining because “it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.”¹¹³

There is also an express policy in the Federal Rules of Evidence that promotes and supports the current plea bargaining regime.¹¹⁴ Specifically, under Rule 410 of the Federal Rules of Evidence, evidence of statements made by the defendant during plea negotiations that ultimately, for whatever reason, fail to produce a guilty plea are not admissible against the defendant in any subsequent criminal or civil proceedings.¹¹⁵ It has been widely recognized that the purpose

108. See LEONIDAS RALPH MECHAM, ADMIN. OFFICE OF THE U.S. COURTS, 2005 ANNUAL REPORT OF THE DIRECTOR 245 tbl.D-4 (2006), <http://www.uscourts.gov/judbus2005/appendices/d4.pdf> (reporting 77,339 convictions, with 74,024 resulting from guilty pleas).

109. See MATTHEW R. DUROSE & PATRICK A. LANGAN, BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURT, 2002 1 (2004), <http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc02.pdf> (“Guilty pleas accounted for 95% of felony convictions in State courts in 2002.”); see also Covey, *supra* note 10, at 1238 & n.2 (noting the Justice Department’s statistics and observing that “[u]pwards of 95% of all state and federal felony convictions are obtained by guilty plea”).

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

111. *Id.* at 261.

112. *Id.*

113. *Id.*

114. See FED. R. EVID. 410 advisory committee’s note (“Exclusion of offers to plead guilty or *nolo* has as its purpose the promotion of disposition of criminal cases by compromise. . . . ‘Effective criminal law administration in many localities would hardly be possible if a large proportion of the charges were not disposed of by such compromises.’” (citation omitted)).

115. FED. R. EVID. 410.

of Rule 410 is to promote the plea bargaining process, without which the criminal justice system as it stands today would purportedly completely collapse.¹¹⁶

The Advisory Committee's note following Rule 410 states that the purpose of the Rule is "the promotion of disposition of criminal cases by compromise."¹¹⁷ The Committee further observes that "[e]ffective criminal law administration in many localities would hardly be possible if a large proportion of the charges were not disposed of by such compromises."¹¹⁸ The theory underlying the Rule is that a defendant would be discouraged from speaking freely with prosecutors if he thought that his statements could be used against him should plea negotiations break down and the case proceed to trial.¹¹⁹ The Rule "protects" the defendant only to the extent that this protection is consistent with the overarching goal of promoting the plea bargaining regime. In reality, the Rule, as it has been interpreted by the Supreme Court, does not really protect defendants at all.¹²⁰ It does, however, nicely operate to protect the plea bargaining machine. Prosecutors can, and routinely do, include a waiver of the defendant's rights under Rule 410 within plea agreements.¹²¹

Rule 410 falls in the same category as some other specialized evidentiary rules that exclude evidence as a matter of social policy, such as the rule excluding the admissibility of liability insurance to prove negligent or wrongful action.¹²² I will again turn my attention to Rule

116. See *Blackledge v. Allison*, 431 U.S. 63, 71 (1977) (explaining that "the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system").

117. FED. R. EVID. 410 advisory committee's note.

118. *Id.* (citation and internal quotation marks omitted).

119. See Eric Rasmusen, Mezzanatto and the Economics of Self-Incrimination, 19 CARDOZO L. REV. 1541, 1550 (1998) (discussing the arguments against Rule 410 waivers, specifically that "candid and effective plea bargaining could be severely injured" (quoting *United States v. Mezzanatto*, 998 F.2d 1452, 1455 (9th Cir. 1993), *rev'd*, 513 U.S. 196 (1995))).

120. See *infra* Part III.B.

121. See *United States v. Stevens*, 935 F.2d 1380, 1396 (3d Cir. 1991) (noting that plea bargains "commonly contain a provision stating that proffer information that is disclosed during the course of plea negotiations is inadmissible as substantive evidence of guilt, but is admissible for purposes of impeachment"); Joseph S. Hall, *Rule 11(e)(1)(C) and the Sentencing Guidelines: Bargaining Outside the Heartland?*, 87 IOWA L. REV. 587, 600-01 (2002) (noting the trend toward including waivers of defendants' rights under Rule 410 of the Federal Rules of Evidence and the corresponding Rule 11(e)(6) of the Federal Rules of Criminal Procedure); see also *infra* Part III.B.1.

122. See FED. R. EVID. 411 (prohibiting the admission of evidence of insurance on "the issue of whether the person acted negligently or otherwise wrongfully"); see also Andrew E. Taslitz, *What Feminism Has to Offer Evidence Law*, 28 SW. U. L. REV. 171, 218 (1999) (noting that "[s]ome evidence rules partly serve the purpose of promoting desired behavior outside the courtroom").

410 later in Part III to demonstrate further how this Rule has been manipulated in a manner that encourages coercive plea bargaining tactics, thus undermining confidence in the system's reliability.¹²³ For now, it is important to note simply that there is a decided policy in favor of compromising criminal cases in the Federal Rules of Evidence as written and as interpreted by the Supreme Court. The larger question with which I will grapple later is whether this is a desirable policy, particularly in light of the realities of plea bargaining.¹²⁴ Is this a system that justifies the sacrifices to the truth-seeking function of the evidentiary rules?¹²⁵

B. How the Practical Operation of the Prior Conviction Impeachment Rule Promotes Plea Bargaining

1. The General Operation of Rule 609 in Practice

Rule 609 is an exception to the general ban on character evidence in the Federal Rules of Evidence.¹²⁶ Under the federal version of the Rule, which a majority of states have adopted in large part (some states verbatim),¹²⁷ a criminal defendant's prior convictions can be used against that defendant should she choose to take the stand in her own defense, as long as the initial crime "required proof or admission of an act of dishonesty or false statement."¹²⁸ Thus, the prosecution can claim that the defendant is not credible when she tells the jury that she is not guilty of the current crime because she has been convicted previously of a separate, unrelated crime in prior court proceedings.¹²⁹ It is important to note that under the Rule,

123. See *infra* Part III.B.1.

124. See *infra* Part III.B.

125. See *infra* Part III.B.

126. See generally FED. R. EVID. 404 (stipulating that character evidence is generally inadmissible to prove action in conformity with that character). I recognize that Rule 404(b) provides for the admissibility of "[o]ther crimes, wrongs, or acts" under certain circumstances, such as to prove motive, opportunity, or absence of mistake or accident, but not to prove propensity. FED. R. EVID. 404(b). Moreover, there are special rules that allow a person's prior sexual offenses or child molestation offenses to be admitted in cases involving allegations of sexual offenses or child molestation. See FED. R. EVID. 413-415 (providing the rules relevant to the admissibility of evidence of sexual assault and child molestation offenses). Rules 404(b) and 413 through 415 deserve separate treatment because of the very different manner in which they are treated in comparison to Rule 609 convictions. Thus, it is beyond the scope of this Article to address these rules in detail.

127. For a survey of various state versions of Rule 609, see Carodine, *supra* note 65, at 538-39 & nn.92-96.

128. FED. R. EVID. 609.

129. See, e.g., H. Richard Uviller, *Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale*, 42 DUKE L.J. 776, 813 (1993) (explaining that Rule 609 is based on an assumption that propensity to lie under oath can be inferred from a prior conviction).

convictions need not be from the particular jurisdiction in which the instant proceedings are pending.¹³⁰ Thus, the federal rule would allow a federal prosecutor to impeach a defendant with her state conviction, and the state rule would allow a state prosecutor to impeach a defendant with her federal conviction. For ease of reference, this Article will mainly refer to the federal rule.

Generally, the Rule applies to convictions that are punishable by death or by imprisonment in excess of one year, which are usually felonies.¹³¹ The operative word here, particularly for purposes of this Article, is “punishable.” The actual sentence that a defendant receives is not relevant to the inquiry. This is particularly important in the plea bargaining context, where often the “bargain” is a discount from the sentence that a defendant would likely have received if convicted at trial, in exchange for forgoing trial.¹³² Thus, even if the defendant receives much less prison time as a benefit of the bargain or receives no prison time at all, the conviction can still be used against her later for impeachment purposes under Rule 609. The judge has discretion to refuse to admit a prior felony conviction against a criminal defendant under Rule 609’s balancing test, by which the court should consider whether the probative value of the conviction outweighs its prejudicial effect.¹³³ In fact, the balancing test under Rule 609 for criminal defendants is supposedly a more exacting variation on the typical Rule 403 balancing of probative value and prejudicial effect.¹³⁴ But despite courts’ ability to disallow the use of prior felony convictions against criminal defendants, courts routinely admit these convictions at trial.¹³⁵ The routine admission of prior convictions against defendants for impeachment is particularly troubling given that Con-

130. See FED. R. EVID. 609 (declining to include such a requirement).

131. FED. R. EVID. 609(a)(1); Uviller, *supra* note 129, at 799 (explaining that Rule 609’s provision that a prior conviction is admissible if it is punishable by death or imprisonment of more than one year allows admissibility if “the prior crime was a felony under the law of the jurisdiction of commission”).

132. Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *FORDHAM L. REV.* 13, 24 (1998).

133. FED. R. EVID. 609(a)(1).

134. See Jeffrey Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants with Prior Convictions*, 42 *U.C. DAVIS L. REV.* 289, 307–12 (2008) (offering a brief overview of Congress’s modified incorporation of the Rule 403 balancing test in Rule 609); see also FED. R. EVID. 403 (providing that “evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice”).

135. See Carodine, *supra* note 65, at 540 (explaining that “judges routinely admit evidence of testifying defendants’ prior convictions for impeachment purposes” (citing R. Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 *WM. & MARY L. REV.* 15, 45 (1981))).

gress expressly intended that courts apply a more rigid balancing test for admitting such evidence against criminal defendants than for other witnesses.¹³⁶ Jeffrey Bellin, a former Assistant U.S. Attorney, solidified this point in an extensive examination of how courts have “circumvent[ed]” congressional will with respect to prior conviction impeachment.¹³⁷ He exposes the fact that although Rule 609 is supposed to be “unflinchingly hostile” to the use of prior convictions against criminal defendants, courts’ “reflexive approach to admitting defendants’ prior convictions has become the norm.”¹³⁸

It is important to note here that under Rule 609, where the elements required to establish a crime require proof of an act of dishonesty or false statement, the convictions are per se admissible against a defendant, regardless of the punishment.¹³⁹ So, Congress did not intend to apply a balancing test with respect to these types of crimes. Also, though the Rule reaches a wide range of convictions, it is limited to those that were obtained within the preceding ten years, except under the unusual circumstance where the probative value of the evidence substantially outweighs its prejudicial effect and the court determines that the evidence should be admitted in the interests of justice.¹⁴⁰ Additionally, prior juvenile adjudications are inadmissible against a criminal defendant.¹⁴¹ When a prosecutor uses a prior conviction against a defendant under Rule 609, she uses that conviction for impeachment purposes to demonstrate that the defendant is *not truthful*.¹⁴² The Rule does not permit, at least in theory, the use of the prior convictions as evidence of general bad character.¹⁴³

2. Controversy Surrounding Rule 609

Rule 609 embodies an “ancient” theory that “[f]elons of all descriptions are forever afterward less truthful than other folk on any subject.”¹⁴⁴ Though the underlying theory of Rule 609 is indeed antiquated, the Rule itself survives and thrives in our justice system and

136. See Bellin, *supra* note 134, at 307 (“[T]he balancing test incorporated into the final version of Rule 609 distinctly favors criminal defendants . . .”).

137. See *id.* at 293 (“[T]he federal courts are not merely out of step with commentators on this issue [of prior conviction impeachment], but have also diverged from the intent of Congress.”).

138. *Id.*

139. FED. R. EVID. 609(a)(2).

140. FED. R. EVID. 609(b).

141. FED. R. EVID. 609(d).

142. Uviller, *supra* note 129, at 786, 794–95.

143. See Carodine, *supra* note 65, at 538 (“Juries are not . . . supposed to use the prior convictions as evidence of the defendant’s bad character generally.”).

144. Uviller, *supra* note 129, at 803–04.

serves as a powerful weapon in a prosecutor's arsenal against the defendant.

Like plea bargaining, Rule 609 is highly controversial—arguably the most controversial of all the rules of evidence—as some evidence scholars have asserted.¹⁴⁵ The use of prior convictions for impeachment purposes has been the subject of numerous law review articles and other legal commentary, much of which challenges the Rule's rationale—that a felony conviction is proof of untruthful character.¹⁴⁶ Even putting aside the tenuous link between prior felonious behavior and truthfulness, it is difficult to deny that informing the jury of the defendant's prior convictions is highly prejudicial, as scholars have recognized.¹⁴⁷ The jury may very well convict the defendant on the basis of the prior record and not on the basis of what actually occurred in the present case.¹⁴⁸ Defendants with criminal records, often repeatedly targeted by the system,¹⁴⁹ are more likely to be convicted than those without a prior criminal record.¹⁵⁰ Scholars and judges have believed this to have been the case for some time, and recent

145. See, e.g., Victor Gold, *Impeachment by Conviction Evidence: Judicial Discretion and the Politics of Rule 609*, 15 CARDOZO L. REV. 2295, 2295 (1994) (“No provision of the Federal Rules of Evidence has sparked more controversy than Rule 609”); Hornstein, *supra* note 8, at 6 (“The issue [of impeachment through prior convictions] is perhaps one of the most controversial in the law of evidence.”).

146. See, e.g., Teree E. Foster, *Rule 609(a) in the Civil Context: A Recommendation for Reform*, 57 FORDHAM L. REV. 1, 2–5 (1988) (asserting that Rule 609 is flawed because of its discredited “assumptions that criminal convictions reflect character”); Richard Friedman, *Character Impeachment Evidence: Psycho-Bayesian [!?] Analysis and a Proposed Overhaul*, 38 UCLA L. REV. 637, 637–38 (1991) (“[E]vidence about prior bad acts . . . is almost certain to yield no significant new information about [a person's] truth-telling inclination in [a] specific case.”); Abraham P. Ordover, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b) and 609(a)*, 38 EMORY L.J. 153, 155–58 (1989) (claiming that evidence of other crimes committed is always evidence of propensity to commit later crimes, but never of specific intent); Uviller, *supra* note 129, at 802–15 (arguing that prior convictions are generally irrelevant to veracity).

147. See, e.g., Cordray, *supra* note 9, at 498–99 (stating that “Rule 609 of the Federal Rules of Evidence provides one of the most potent, and potentially prejudicial, methods of impeachment,” and noting that “[i]n a criminal case, when the defendant is impeached with his prior convictions, it is widely recognized that the defendant faces a unique, and often devastating, form of prejudice”).

148. Robert D. Dodson, *What Went Wrong with Federal Rule of Evidence 609: A Look at How Jurors Really Misuse Prior Conviction Evidence*, 48 DRAKE L. REV. 1, 3 (1999) (“It is widely accepted that in all likelihood a jury will consider the evidence for improper purposes.”).

149. See *infra* notes 179–82 and accompanying text.

150. Dodson, *supra* note 148, at 39, 41 n.421 (noting that prior records “increase the likelihood of conviction” and that jurors who know about prior convictions are “significantly more likely to convict” a defendant than jurors without such information (citations and internal quotation marks omitted)).

empirical evidence, discussed below, supports those beliefs, particularly in cases in which evidence against a defendant is weak.¹⁵¹

The current scheme under Rule 609 places a criminal defendant in a no-win situation at trial. The defendant can remain silent and not testify, thus prejudicing her in the eyes of the jury for failing to tell her side of the story.¹⁵² Alternatively, the defendant with a prior record can face certain prejudice by testifying and being impeached with her convictions.¹⁵³ Effectively, then, Rule 609 impeachment provides prosecutors with a route to “efficient” convictions by either keeping defendants off the stand at trial or by forcing them to plead guilty and forgo a trial altogether.¹⁵⁴ Given the controversy surrounding Rule 609,¹⁵⁵ it has garnered more debate than any other rule and has also been the subject of much scholarly interest and criticism.¹⁵⁶ In the face of defendants’ dilemma, much criticism challenges the notion that a prior felony conviction, especially one that did not require the establishment of an act of dishonesty or false statement, is probative of truthfulness.¹⁵⁷ Moreover, depending on the nature of the crime, there is the very real danger, almost an inevitability, that many jurors will punish the defendant for her past crimes—regardless of whether the evidence in the case at hand proves guilt beyond a reasonable doubt—or for being a “bad” person generally.¹⁵⁸

Given the degree of criticism of the Rule, its failure to ascertain credibility with any reasonable measure of certainty, and the serious potential to cause prejudice to criminal defendants, it is troubling that it remains part of evidence law. Even more troubling are the findings

151. See Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353, 1356–57 (2009) (explaining that in cases with weak evidence, juries disproportionately rely on criminal records to convict, although in cases with strong evidence, they do not); see also *infra* text accompanying notes 159–63.

152. See Dodson, *supra* note 148, at 47 (“A jury is likely to draw a negative inference from the fact the defendant did not testify.”).

153. See, e.g., Foster, *supra* note 146, at 2–3.

154. Dodson, *supra* note 148, at 4, 44–47 (stating that “[c]urrent rules generally allowing prior conviction evidence place a premium on efficiently convicting people,” and explaining that these rules generally place defendants in the position of deciding between testifying and having convictions admitted or not testifying and thus appearing guilty to the jury).

155. See *supra* note 145.

156. See *supra* note 146.

157. Uviller, *supra* note 129, at 813.

158. See, e.g., Cordray, *supra* note 9, at 498–99 (“Rule 609 of the Federal Rules of Evidence provides one of the most potent, and potentially prejudicial, methods of impeachment In a criminal case, when the defendant is impeached with his prior convictions, it is widely recognized that the defendant faces a unique, and often devastating, form of prejudice.”).

of a recent study that provides empirical data supporting the long-held belief that jurors misuse Rule 609 evidence against defendants. Professors Theodore Eisenberg and Valerie Hans, both of whom are empiricists, studied data from more than 300 criminal trials in four large U.S. counties and concluded that there were “[s]tatistically significant associations” between “the existence of a criminal record and [a defendant’s] decision to testify at trial,” and, moreover, “in cases with weak evidence, between the jury’s learning of a criminal record and conviction.”¹⁵⁹ They found that “[j]uries appear to rely on criminal records to convict when other evidence in the case normally would not support conviction.”¹⁶⁰ Specifically, Eisenberg and Hans discovered that the effect of a prior record in cases that are “otherwise weak . . . can increase the probability of conviction to over 50% when the probability of conviction in similar cases without criminal records is less than 20%.”¹⁶¹ Professors Eisenberg and Hans further note that “[t]he criminal-record effect could be even stronger” than their findings suggest.¹⁶² This possibility seems to be very real given that they relied on jurors’ evaluation of the strength of the case and observed that jurors may “incorporate” the fact of a defendant’s criminal record into their “narrative account of the evidence in the case,” thus viewing the case as stronger than it actually was.¹⁶³

The legislative history of Rule 609 demonstrates that Congress was fully aware of the Rule’s inherent prejudice. Indeed, this prejudice is precisely why Rule 609(a) was such a controversial rule when it was proposed: It generated more discussion than any other evidentiary rule.¹⁶⁴ The proponents of the Rule seemed to view Rule 609 as part of an overall crime-fighting agenda. This is evident in comments by Senator McClellan. McClellan, who along with Senators Hruska, Roth, Talmadge, and Thurmond had proposed a much stricter version of the Rule that would have admitted all prior convictions, stated on the Senate floor:

We have gone pretty far already in trying to protect criminals and granting every advantage to *them against society*. . . .

159. Eisenberg & Hans, *supra* note 151, at 1353.

160. *Id.*

161. *Id.* at 1357.

162. *Id.* at 1388.

163. *Id.* at 1365–66.

164. Gold, *supra* note 145, at 2303 (noting that “[t]he extent of the floor debate in the House over Rule 609(a) far exceeded that relating to any other provision in all the proposed Federal Rules of Evidence” (citing 120 CONG. REC. H2375–81 (daily ed. Feb. 6, 1974); 120 CONG. REC. H1414–15 (daily ed. Jan. 30, 1974))).

....

... *Should society be denied the opportunity, in trying to protect itself, in its effort to discover the truth, to show that the witness before it is a man who has committed such a crime and, therefore, might be willing to now lie to a jury?*¹⁶⁵

The version of Rule 609 that was ultimately adopted has broad applicability. Of course, it applies to convictions obtained as the result of a full-blown criminal trial. Additionally, the Rule applies to convictions obtained through the plea bargaining process. There is simply no distinction in the language of the Rule between convictions obtained after a full-blown trial and those obtained after a few minutes of plea negotiations.¹⁶⁶ And courts have recognized that untried convictions can be used for impeachment purposes under Rule 609.¹⁶⁷ Thus, it is indeed striking that the criticisms of Rule 609 have paid little to no attention to the fact that the overwhelming majority of prior convictions are untried convictions.

165. 120 CONG. REC. 37,076 (1974) (emphasis added).

166. See FED. R. EVID. 609 (referring only to convictions without any reference to the plea bargaining process).

167. See, e.g., *United States v. Nickl*, 427 F.3d 1286, 1294 n.2 (10th Cir. 2005) (“A prosecutor may properly use a codefendant or coconspirator’s guilty plea to aid the jury in its assessment of the codefendant or coconspirator’s credibility, but may not use the guilty plea as substantive evidence of a defendant’s guilt.” (citations omitted)); *Brewer v. City of Napa*, 210 F.3d 1093, 1096 (9th Cir. 2000) (concluding that guilty pleas, including no contest pleas, can be used for impeachment purposes under Rule 609); *United States v. Sonny Mitchell Ctr.*, 934 F.2d 77, 79 (5th Cir. 1991) (finding that a nolo contendere plea, “a tacit confession of guilt,” is admissible for impeachment purposes under Rule 609 (quoting *Piassick v. United States*, 253 F.2d 658, 661 (5th Cir. 1958))); *United States v. Lipscomb*, 702 F.2d 1049, 1070 (D.C. Cir. 1983) (noting that a plea of guilty is admissible for impeachment purposes under Rule 609); *People v. Buckner*, 876 N.E.2d 87, 90–91 (Ill. App. Ct. 2007) (noting that under Illinois’s version of the prior conviction impeachment rule, “[a]s a general rule, a defendant may cross-examine a witness who has pled guilty to misdemeanor theft, a crime of dishonesty, about that conviction to impeach the witness’s credibility” (citing *People v. Spates*, 395 N.E.2d 563 (Ill. App. Ct. 1979))); *Outback Steakhouse of Fla., Inc. v. Markley*, 856 N.E.2d 65, 84–85 (Ind. 2006) (noting that Rule 609(a) “draws a bright line at conviction before a prior crime may be used to impeach a witness”); *Specht v. State*, 734 N.E.2d 239, 240–41 (Ind. 2000) (noting that under Indiana’s version of Rule 609, a guilty plea is admissible for impeachment purposes even when it has not been reduced to a judgment); *State v. Holleran*, 197 S.W.3d 603, 608 (Mo. Ct. App. 2006) (noting that under Missouri’s version of the prior conviction impeachment rule, “when a defendant testifies, he or she is subject to cross-examination and impeachment, and his other prior criminal convictions, including guilty pleas, may be proved, by cross-examination or by the record, to impeach his or her credibility.” (citations omitted)); *Jewel v. Commonwealth*, 536 S.E.2d 905, 906 (Va. 2000) (stating that “[w]e have described a guilty plea as ‘in reality, a self-supplied conviction authorizing imposition of the punishment fixed by law,’” and noting that, therefore, Virginia’s prior conviction impeachment rule applies to plea bargains (quoting *Peyton v. King*, 169 S.E.2d 569, 571 (Va. 1969))).

3. *Plea Bargaining and Rule 609: Strong Allies*

Rule 609 promotes the plea bargaining regime, which has *become* the criminal justice system. Many criminal defendants with prior felony convictions prefer to plea bargain, rather than take their chances at trial, where they know that the jury is likely to hold their prior convictions against them as evidence of their guilt, regardless of the strength of the prosecutor's case.¹⁶⁸ Rule 609 also promotes plea bargaining by treating untried convictions the same as convictions resulting from trial, which I will refer to as "tried convictions."¹⁶⁹ The distinction between untried convictions and tried convictions is not insignificant.¹⁷⁰ But under Rule 609, a prosecutor can offer untried convictions to impeach a defendant just as she can offer tried convictions. Thus, the Rule, which treats tried convictions and untried convictions alike, gives plea bargaining a stamp of legitimacy.

There has been no in-depth consideration of the role of plea bargaining in the vast majority of criminal convictions in this country and how the reality of today's plea bargaining system might actually undermine the validity of Rule 609 and its underlying rationale. Professor George Fisher, however, has recognized the degree to which the adoption of the prior conviction impeachment rule, in its pre-Rule 609 form, actually *facilitated* the explosion of plea bargaining onto the American criminal justice scene.¹⁷¹ In recounting the history of plea bargaining, Professor Fisher noted that "[t]he upshot was that a law that purported to grant defendants a new right to testify at trial instead deprived those defendants who had criminal records of the right to any meaningful trial, and left them with little alternative but to seek the best plea bargain they could get."¹⁷² In fact, "[t]he dramatic conversion to a plea bargaining regime" began a relatively short period after defendants gained the right to testify, and, in turn, the risk of impeachment based on their prior convictions.¹⁷³ Though there is no formal recognition of this fact in the evidentiary rules, the prior conviction impeachment rule is a "strong all[y]" that aids in promoting the plea bargaining system.¹⁷⁴

168. *See infra* Part III.B.2.

169. *See supra* note 166 and accompanying text.

170. *See infra* Part III.A.

171. GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 107-08 (2003).

172. *Id.* at 107.

173. *Id.* at 109.

174. *Id.*

Consistent with Professor Fisher's analysis, empirical evidence demonstrates that whether a defendant has a prior conviction is among those "crucial considerations" that a criminal defendant and her lawyer take into account when deciding whether to forgo a trial and to accept a plea agreement.¹⁷⁵ This should come as no surprise. Good litigators, in both the civil and criminal arenas, will readily note that the rules of evidence are important not only at trial, but also, and perhaps more so, during the pre-trial stage of a case. As one commentator noted, lawyers are always operating in the "shadow of litigation," which makes the evidentiary rules very important outside the courtroom.¹⁷⁶ Knowing beforehand the likelihood that certain information will or will not be admissible significantly aids the evaluation of a case's strength. Indeed, available data and common experience demonstrate that Rule 609 is a very real threat to criminal defendants with prior records; it is one that they consider—and which is often at the forefront of their minds—in deciding whether to go to trial.¹⁷⁷ The real fear of being impeached could dissuade many defendants from taking the stand if they go to trial, and in a number of cases, from even going to trial at all.¹⁷⁸

Describing the prior conviction impeachment rule as allied with the plea bargaining regime is not surprising when one considers that those who plea bargain often tend to be alleged repeat offenders, or those whom the system would call recidivists.¹⁷⁹ In fact, most of the criminal defendants in the system at a given time are people labeled as recidivists.¹⁸⁰ For example, "in 2002, in the nation's seventy-five largest counties, seventy-six percent of state-court felony defendants had at least one prior arrest, fifty percent had five arrests or more, fifty-nine percent had at least one prior conviction, and twenty-four percent had five or more convictions."¹⁸¹ Furthermore, "this recidivist majority is overrepresented among the population of wrongfully ac-

175. DEBRA S. EMMELMAN, *JUSTICE FOR THE POOR: A STUDY OF CRIMINAL DEFENSE WORK* 41 (2003).

176. DAVID A. SKLANSKY, *EVIDENCE: CASES, COMMENTARY, AND PROBLEMS* 2 (2003).

177. *See* Eisenberg & Hans, *supra* note 151, at 1353 (explaining that, "[f]or testifying defendants with criminal records, juries learned of those records in about half of the cases," and in cases with weak evidence, there was a statistically significant association between the jury's learning of a defendant's criminal record and the jury's convicting the defendant).

178. *Id.*

179. *See* Bowers, *supra* note 8, at 1125 (explaining that repeat offenders, also referred to as "recidivists," comprise the majority of criminal defendants).

180. *Id.*

181. *Id.*

cused, because institutional biases select for erroneous arrest, prosecution, and trial conviction of recidivist defendants.”¹⁸²

As I will discuss in the next Part, one of the most important adjudicative-type decisions that prosecutors make is the charging decision.¹⁸³ The manner in which they often carry out this decision has an inherent bias against defendants with a prior record.¹⁸⁴ As a general matter, when presented with a case, prosecutors “err on the side of charging” because of “comity” concerns with respect to police departments.¹⁸⁵ They defer out of comity, or out of respect, to the findings and will of the police. The fact that police tend to round up “the usual suspects” poses serious problems for persons with prior criminal records.¹⁸⁶ Indeed, the government expends great resources investigating those with a reputation for being “bad actors.”¹⁸⁷ Thus, defendants with prior records are more likely than others to be charged.¹⁸⁸

Moreover, prosecutors tend to act on a “presumption of guilt” whereby they resolve ambiguities and other problems in their cases in favor of guilt.¹⁸⁹ Presuming “that recidivists are guilty of some crime . . . prosecutors are unlikely to exercise discretion to decline prosecution” and therefore “[e]ven in the weakest cases, prosecutors can go forward with charges and anticipate pleas because they know that recidivists cannot easily fight charges at trial under existing evidence rules,” particularly Rule 609.¹⁹⁰ Thus, Rule 609 actually promotes plea bargaining generally, and particularly in weak cases, and works against innocent defendants.

Not only is Rule 609 a powerful tool in a prosecutor’s arsenal, but the very applicability of the Rule to convictions obtained by plea bargaining—that is, the fact that an untried conviction can be used against a defendant in later criminal proceedings—promotes the system by giving it a stamp of legitimacy without really questioning its

182. *Id.*

183. *See infra* Part III.A.2.b.

184. *See infra* notes 284–85 and accompanying text.

185. Bowers, *supra* note 8, at 1126.

186. See Stephen J. Ellmann, *Racial Profiling and Terrorism*, 46 N.Y.L. SCH. L. REV. 675, 703 (2002–2003) (internal quotation marks omitted) (explaining why the police target “the usual suspects” (internal quotation marks omitted)).

187. David A. Dana, *Rethinking the Puzzle of Escalating Penalties for Repeat Offenders*, 110 YALE L.J. 733, 753 & n.27 (2001) (internal quotation marks omitted).

188. Bowers, *supra* note 8, at 1127; *see also* Eisenberg & Hans, *supra* note 151, at 1365 (noting that “[s]ome of the impact of [a] criminal record may occur at early stages of case processing”).

189. Bowers, *supra* note 8, at 1126–27 (internal quotation marks omitted).

190. *Id.* at 1127.

fundamental fairness. The remainder of this Article is devoted to the task of questioning the fundamental fairness of using plea bargains as evidence under Rule 609 and addressing ways in which we can disentangle the current dysfunctional relationship between plea bargaining and Rule 609. Doing so will do much to improve the efficacy of the rules of evidence in aiding the search for truth in criminal proceedings.

III. "IMPEACHING" THE PLEA BARGAINING SYSTEM IN THE UNITED STATES

This Part explores the fundamental fairness issues surrounding the use of untried convictions to impeach criminal defendants charged in subsequent cases. I am concerned about the quality of untried convictions as an evidentiary matter. As mentioned earlier, plea bargaining is one of the most controversial practices in the criminal system and has garnered much scholarly commentary, both in favor of and against the practice.¹⁹¹ This Article does not neatly fit within these two categories of "for" or "against" plea bargaining. It is not necessarily my goal in this Article to argue for the end of the practice. But it is my goal to critique it as a source of evidence in subsequent cases and, in a larger sense, to critique the role of the evidentiary rules in the plea bargaining regime. While the evidentiary rules can and do at times promote larger social policies,¹⁹² they must do so while simultaneously staying true to the overarching goal of truth-seeking and accuracy in trial proceedings.¹⁹³

Given the substantial prejudice that a criminal defendant faces once his prior convictions are revealed to the jury,¹⁹⁴ it is of paramount importance to evaluate the quality of that evidence. Even though prior convictions are to be used technically for impeachment purposes only, jurors are highly likely to disregard a court's limiting instructions and to use such convictions as substantive evidence of guilt.¹⁹⁵ Indeed, empirical data has exposed this problem.¹⁹⁶ The reality of how jurors really use prior conviction evidence strongly dic-

191. See *supra* Part II.

192. See *supra* note 122 and accompanying text.

193. See *infra* Part III.B.

194. See *supra* Part II.B.2.

195. See *supra* text accompanying notes 159–60.

196. See Eisenberg & Hans, *supra* note 151, at 1361 ("Although the defendant's credibility can be harmed by knowledge of a record, credibility does not appear to be the main way that criminal record information affects the guilt judgments of jurors. The experimental research also suggests that limiting instructions are not a reliable method for eliminating the negative impact of criminal records.").

tates that prior convictions must be trustworthy and reliable, *not just in theory, but in fact*. And I do not believe that juries are likely to understand the unreliability of untried convictions and discount them even if a court were to reveal that the impeaching conviction was the result of a bargain. As discussed later in Part IV, contrary to the reality of what goes on with plea bargaining, many members of the public view plea bargaining as the defendant getting off easily. Juries may, then, give even more weight to untried convictions.¹⁹⁷ We must, therefore, impeach the plea bargaining system as a source of evidence and re-establish the evidence rules as a means by which we seek truth and accuracy, particularly in criminal proceedings.¹⁹⁸

There are some people, perhaps some of them judges, who will be uncomfortable with the idea that a conviction, plea bargained or not, was a sufficient basis on which to send someone to prison but is qualitatively lacking in evidentiary value. My response is that systems should have internal checks on the quality of their output as well as external checks. There must be various points of internal quality control within the criminal system to come as close to perfection as possible. And in each subsequent case, we should strive to improve upon the process and not simply replicate and compound errors and injustices. A conviction should be of superior quality and reliability, as an evidentiary matter, when its reach is far beyond the case from which it resulted—as in the Rule 609 context—and when it can result in an entirely new conviction with additional, and possibly even more severe, penalties.¹⁹⁹

One may inquire, how does the plea bargaining system fare when it is impeached? A common theme in criticisms of the plea bargaining system and the indigent defense system, which is a significant part of the bargaining system, is that as they stand today, there is a failure to afford defendants fundamentally fair procedures with any degree of satisfactory consistency.

A. *The Qualitative Difference in “Untried Convictions” and “Tried Convictions”*

In *Gordon v. United States*,²⁰⁰ one of the cases that pre-dated but laid the foundation for Rule 609, then-Judge Burger noted the difference between an untried conviction and one obtained after a trial in

197. See *infra* Part IV.B.

198. See *infra* Part III.B.

199. See *infra* Part IV.

200. 383 F.2d 936 (D.C. Cir. 1967).

which the defendant testified on his own behalf.²⁰¹ Judge Burger observed that untried convictions may have a “different” evidentiary value than convictions obtained through the trial process.²⁰² In *Gordon*, and its companion case *Luck v. United States*,²⁰³ the United States Court of Appeals for the District of Columbia Circuit outlined various factors that courts should consider in exercising their discretion in determining the admissibility of prior convictions for impeachment purposes.²⁰⁴ Judge Burger suggested that among those various factors should be a consideration of whether the conviction was the result of a trial or the result of a plea bargain.²⁰⁵ Even though the *Luck/Gordon* doctrine has been incorporated into Rule 609 via the balancing test that judges are supposed to conduct,²⁰⁶ Judge Burger’s distinction between untried and tried convictions has largely been lost.

Also, some years ago, Professor David Shapiro argued that in *civil cases*, plea bargained convictions should have only a rebuttable presumption of preclusive effect.²⁰⁷ The facts of a criminal case may become an issue in a civil case, and the issue with which Professor Shapiro dealt in his essay was the extent to which the guilty plea should be used in a civil case to establish *conclusively* the elements of the crime to which a party had pled guilty, which would be important in determining civil liability.²⁰⁸ He was concerned that the plea bargaining process did not yield the same results as trials would: “[I]f the guilty plea process duplicated sufficiently the process of contested litigation to yield substantially identical results, to yield a high probability of legal guilt, preclusion *might* be warranted. But it does not.”²⁰⁹ Indeed, he cited to a study purporting to demonstrate that over twenty-five percent of defendants who pled guilty would have been acquitted

201. *Id.* at 940 n.8.

202. *Id.* (explaining that “[t]he relevance of prior convictions to credibility may well be different . . . where conviction of the accused was by admission of guilt by a plea and . . . where the accused affirmatively contested the charge and testifie[s]” because “[i]n the latter situation the accused affirmatively puts his own veracity in issue when he testifies”).

203. 348 F.2d 763 (D.C. Cir. 1965).

204. *See Gordon*, 383 F.2d at 939–41 (describing when a court should admit a conviction for purposes of impeachment); *see also Luck*, 348 F.2d at 769 (listing factors that might be relevant when a court is determining whether to admit a conviction for impeachment purposes).

205. *Gordon*, 383 F.2d at 940 n.8.

206. *E.g.*, *United States v. Brewer*, 451 F. Supp. 50, 53 (E.D. Tenn. 1978).

207. David L. Shapiro, *Should a Guilty Plea Have Preclusive Effect?*, 70 IOWA L. REV. 27, 49–50 (1984).

208. *See id.* at 30–35 (discussing “whether a guilty plea may have preclusive effect in a later civil action”).

209. *Id.* at 46 (emphasis added).

at trial.²¹⁰ The more recent studies that I discuss in this Article further support this conclusion that he made over twenty-five years ago.²¹¹

Theoretically, impeachment in a criminal case is much different from issue preclusion in the civil context. After all, in the context of issue preclusion, the guilty plea will be used as substantive proof to establish whatever elements are at issue. Rule 609 is, of course, an evidence rule that in theory is only about impeachment of credibility, not substantive evidence of guilt.²¹²

Judge Burger and Professor Shapiro's observations about the difference between a conviction obtained in a trial setting and one obtained through the plea bargaining process are apt. There is indeed something about the trial setting itself that lends far more legitimacy and credibility to a conviction than plea negotiations, particularly in the context of Rule 609.²¹³ Professor Shapiro's analysis with respect to the issue preclusion context in civil cases is particularly useful here also because, as discussed above, empirical data indicate that jurors actually improperly use Rule 609 convictions as substantive evidence of guilt.²¹⁴ Thus, we should be even more concerned about the reliability of the plea bargaining system as a source of evidence in the criminal system. The reality is that plea bargaining is inferior to the trial process, which is central to the theory underlying Rule 609.²¹⁵

1. *The Centrality of the Trial Process to the Theory of Rule 609*

Rule 609 is an exception to the rule against hearsay.²¹⁶ A judgment of conviction fits the classic definition: It is an out-of-court statement (that is, it was not made in the current proceedings) now being offered to prove the truth of the matter asserted (the matter being that the defendant committed the underlying act for which she was convicted).²¹⁷ The exception in Rule 609 that allows the admissibility of judgments from other courts, which would otherwise be deemed

210. *Id.* at 44–45 (citing Michael O. Finkelstein, *A Statistical Analysis of Guilty Plea Practices in the Federal Courts*, 89 HARV. L. REV. 293 (1975)).

211. *See infra* Part III.A.2.

212. Some jurors continue to treat Rule 609 evidence as evidence of guilt, however. *See supra* Part II.B.2.

213. *See infra* Part III.A.1–2.

214. *See supra* text accompanying notes 159–63.

215. *See infra* Part III.A.1.

216. *See, e.g.*, Hiroshi Motomura, *Using Judgments as Evidence*, 70 MINN. L. REV. 979, 980 & n.8 (1986) (noting that prior judgments, including prior criminal convictions, are hearsay).

217. *See id.* at 980 & n.4 (defining hearsay).

inadmissible hearsay, is based on the supposed reliability of the prior court's pronouncements.²¹⁸ Those pronouncements are deemed reliable presumably because there is a presumption that the defendant was afforded various constitutional protections and had a full and fair opportunity to defend against the government's charges.²¹⁹ Indeed, it has been noted that "despite its hearsay character, the evidence involved [that is, the prior conviction] is peculiarly reliable" because "[t]he seriousness of the charge . . . encourages its full litigation, and the reasonable doubt standard of conviction ensures that the question of guilt will be thoroughly considered."²²⁰

This presumption is on its most firm standing when there was a full-blown trial in which the defendant was represented by competent counsel and had a full and fair opportunity to mount her defense before a fair and impartial jury with a fair and impartial judge presiding over the proceedings. Ideally, the defendant is able to test the prosecution's case before the jury through mechanisms such as the cross-examination of its witnesses, the challenging of the quality and quantity of physical evidence, and the presentation of her own version of the facts and evidence. Moreover, the reasonable doubt standard gives us comfort, as it is the highest standard of proof that we require in any court proceeding.²²¹ Additionally, the criminal system is an adversarial system. That model provides more assurances, in theory, that we can have confidence in the outcomes: "Indeed, the premise of our adversarial system is that the clash between partisan advocates produces *reliable, accurate results*. In theory, then, if the adversary system is working properly, innocent persons will not be convicted."²²²

What I have described above is American criminal justice at its best. It is in such proceedings that we feel most confident that the truth about the facts in issue will come to light and that innocent defendants will be acquitted and guilty ones will be convicted.

218. *See* *People v. Wheeler*, 841 P.2d 938, 946 (Cal. 1992) (describing evidence of a prior conviction as being "peculiarly reliable" (citation omitted)).

219. *See id.* (noting that a conviction guarantees the comprehensive consideration of "the question of guilt" (citation and internal quotation marks omitted)); *see also* Motomura, *supra* note 216, at 988-89 (noting that the rationale underlying hearsay exceptions in rules of evidence allowing for the admissibility of prior convictions is that "criminal convictions are reliable and trustworthy").

220. *Wheeler*, 841 P.2d at 946 (citation and internal quotation marks omitted); *see also* Motomura, *supra* note 216, at 989 (noting that "[c]ourts and commentators cited the higher standard of proof required in criminal cases" as justifying an exception to the hearsay rule for the admissibility of prior convictions into evidence).

221. *See* Motomura, *supra* note 216, at 989 (explaining that the high standard of proof for convictions after trial promotes reliability).

222. Uphoff, *supra* note 80, at 740 (emphasis added).

I am often asked when presenting the ideas in this Article about the fact that trials often suffer from analogous problems that I highlight regarding the plea bargaining process. I understand that even in the trial context, some of the deficiencies that I describe with respect to plea bargaining—such as poor representation—may and often do infect the proceedings. Indeed, I have made the point about various deficiencies in *all* aspects of the process (pre-trial and trial) affecting the reliability of prior convictions previously in my race critique of Rule 609.²²³ Thus, this Article does not propose the naive view that the trial process is perfect. The point, however, is not to idealize the trial process *as it currently stands* and as it may play out in every case. My goal here is to provide a reminder of why the criminal system was initially considered a reliable source of Rule 609 evidence—because of the trial process—and to demonstrate how the use of plea bargaining has severely undercut the reliability of the criminal system.²²⁴ I am demonstrating that Rule 609 operates in a manner that is contrary to the evidentiary principles upon which it was conceived.

I would argue, moreover, that to the extent that aspects of the criminal trial process have been denigrated, it has been in large part a consequence of the policies that drive our overreliance on plea bargaining. A failure to adhere to our own ideals, often constitutionally mandated, has corrupted the entire system. We must start to conceive of reliability as an overarching goal that should even take precedence over judicial economy.²²⁵ I see this Article as fitting more broadly with efforts to improve the overall reliability of the system, including the trial process. In fact, using Rule 609 as a check on poor plea bargaining practices will, along with other reform measures, help to improve not only the quality of plea bargaining but the quality of trials. There has to be an unraveling of the practices that produce unreliable results, and my focus here on plea bargaining and its relationship to Rule 609 works toward that broader goal to improve all aspects of the process.²²⁶

That being said, an imperfect trial process that possesses even some of the attributes that I discuss in this Part is much better than the plea bargaining practices that I discuss in this Article. And the better the process, the better the reliability for Rule 609 purposes. But many worry about the guilty getting off.

223. See generally Carodine, *supra* note 65 (discussing certain problems with American criminal justice).

224. See *infra* Part III.A.2.

225. See *infra* Part III.B.

226. See *infra* Part IV.

Purportedly, in an ideal trial setting, even if guilty defendants somehow are able to establish reasonable doubt in the minds of the jury, we can still place our confidence in this system because it is far better for the guilty defendant to go free than for an innocent defendant to be convicted.²²⁷

In an ideal system, plea bargaining would produce the same results that would occur in the (ideal) trial setting.²²⁸ Plea bargaining would simply be a more efficient adjudicative process that still protected criminal defendants' rights. Guilty defendants would be appropriately charged and sentenced, while innocent defendants would not be charged at all or, after consideration of the evidence, any charges against them would be dropped. Indeed, it has been argued that the plea bargaining system is currently as good as, and sometimes better than, the trial process.²²⁹

Judge Frank Easterbrook has stated that various steps in the plea bargaining process "make plea bargaining at least as effective as trial at separating the guilty from the innocent" and "[t]o the extent there is a difference, negotiation between sophisticated persons unencumbered by the rules of evidence is superior."²³⁰ Judge Easterbrook is unconvinced "that there is a distinctive informational problem in the process of bargaining."²³¹ In detailing why he sees trials as even *inferior* to plea bargaining, he notes that "[t]rials come with a variety of rules that exclude probative evidence thought to mislead jurors who may not be perfect Bayesians."²³² Rather, during plea bargaining, according to Judge Easterbrook, "the parties can consider all the evidence that will come in at trial, and then some" and "[t]he persons doing the considering are knowledgeable; prosecutors are more likely than jurors to discount eyewitness accounts, and prosecutors know from experience which details are most likely to separate guilt from

227. See Uphoff, *supra* note 80, at 740 (noting that "[o]ur system imposes this high burden on the prosecution [of requiring proof of guilt beyond a reasonable doubt] and provides the defendant with so many rights because we believe that it is better to let the guilty go free than to convict the innocent").

228. See, e.g., Scott W. Howe, *The Value of Plea Bargaining*, 58 OKLA. L. REV. 599, 600-01 (2005) ("[P]roponents [of the so-called shadow of trial theory] claim that plea bargaining is justified because it largely mirrors the results that would have occurred after a highly regulated trial process, discounted to reflect uncertainty and adjudication costs. Plea bargaining is efficient in punishing crime if it achieves the same overall results as trials while expending fewer resources. Likewise, plea bargains are not systematically unfair to defendants if they only reflect discounted results from a trial process that we accept as legitimate." (internal quotation marks and footnote call numbers omitted)).

229. See *infra* text accompanying notes 230-37.

230. Easterbrook, *supra* note 19, at 1972.

231. *Id.*

232. *Id.* at 1971.

innocence.”²³³ He therefore concludes that “[t]he full panoply of information plus sophisticated actors are the standard ingredients of adroit decisionmaking.”²³⁴

According to Judge Easterbrook, in a “perfect” plea bargaining system, no innocent defendants would plead guilty.²³⁵ Even if they are unsure that they will be acquitted at trial, they are highly motivated to go to trial: “Prosecutors set high offers that will be attractive only to the guilty; the innocent accused turn them down because of their higher probability of success at trial.”²³⁶ He also addresses other scholars’ concerns about the inability of innocent defendants to make their cases to prosecutors. Any difficulty in distinguishing between guilt and innocence is not a problem with plea bargaining, he reasons, but a problem with the *trial process*:

What disrupts this separation of the guilty from the innocent is not a flaw in the bargaining process but a flaw at trial. When the innocent bear a significant risk of conviction, the bargaining reflects that anticipated outcome. Innocent persons are accused not because prosecutors are wicked but because these innocents *appear* to be guilty.²³⁷

As I demonstrate below, the reality is that in far too many instances, plea bargaining is a “different” and far more inferior means by which to dispose of criminal cases.²³⁸ The entire idea of “innocence” and “appearance of innocence” that supporters of plea bargaining adhere to wrongly takes the focus away from the process by which we establish guilt and innocence. As Professor Lloyd Weinreb said some time ago in his blistering critique of the entire criminal process, including plea bargaining, “The assumption of the Supreme Court and others that ‘the innocent’ do not plead guilty treats criminal guilt too much as if it were unequivocal and entirely independent of the process by which guilt is established.”²³⁹ In the Rule 609 context, plea bargaining is a much more inferior source from which to accept evidence than the trial process.²⁴⁰ Moreover, in many jurisdictions the system both impliedly, and even expressly, does in fact coerce innocent defendants to plead guilty.²⁴¹

233. *Id.*

234. *Id.*

235. *Id.* at 1969.

236. *Id.* at 1969–70.

237. *Id.* at 1970 (footnote call number omitted).

238. See *supra* note 202 and accompanying text.

239. LLOYD L. WEINREB, DENIAL OF JUSTICE 86 (1977).

240. See *infra* Part III.A.2.

241. See *infra* Part III.A.2.

Regardless of what one thinks about the theory that certain prior criminal activity reveals an untruthful character, prior convictions can only be useful for impeachment purposes to the extent that the underlying conduct actually did occur. It is the prior bad conduct that impeaches. The fact of conviction supposedly gives us the assurance that the conduct actually occurred.²⁴² Using plea bargained convictions can substantially diminish this assurance, in varying degrees, depending on the circumstances surrounding the negotiations.²⁴³

This next Section deals with the reality of plea bargaining by pointing out some of the extensive problems that plague this regime, and consequently, diminish the evidentiary value of prior convictions for impeachment purposes.²⁴⁴ I am not attempting to make the argument that all plea bargaining is always inherently problematic; I am simply exposing the reality of the system with well-documented evidence of its failings in many respects. Rule 609 largely relies on this system—the system produces some ninety-five percent of convictions²⁴⁵—as a lie detector, but there are serious questions regarding the system's reliability and ultimately its credibility. Viewing the system as a whole, we should ask ourselves if this is a system upon which we want to rely for producing quality, reliable, and credible evidence—the type of evidence for which the rules of evidence have a strong preference.²⁴⁶

2. *The Reality of Plea Bargaining in the United States*

The plea bargaining process is not just part of the American criminal process; rather, with over ninety-five percent of convictions resulting from plea bargains both at the state and federal levels, plea bargaining *is* the American criminal process.²⁴⁷ Most of those convictions are the result of so-called “negotiated” plea deals between prosecutors and the defendants, as opposed to guilty pleas entered absent any type of negotiation between the parties.²⁴⁸ As I will discuss, however, the term “negotiated” is often an overstatement of what actually

242. See *supra* notes 218–22 and accompanying text.

243. See *infra* Part III.A.2.

244. See *infra* Part III.A.2.

245. See *infra* text accompanying note 247.

246. See, e.g., Diane Marie Amann & Edward J. Imwinkelried, *The Supreme Court's Decision to Recognize a Psychotherapist Privilege in Jaffee v. Redmond*, 116 S. Ct. 1923 (1996): *The Meaning of “Experience” and the Role of “Reason” Under Federal Rule of Evidence 501*, 65 U. CIN. L. REV. 1019, 1033 (1997) (noting the bias in the Federal Rules of Evidence for reliable evidence).

247. Covey, *supra* note 10, at 1238.

248. See Note, *The Prosecutor's Duty to Disclose to Defendants Pleading Guilty*, 99 HARV. L. REV. 1004, 1009–10 (1986).

occurs.²⁴⁹ Typically, with plea bargains, the prosecutor agrees to dismiss a more serious charge or charges against a defendant in exchange for the defendant's plea of guilty to a less serious charge or charges and a shorter sentence or maybe even no jail time at all.²⁵⁰

Assurances about the quality of results in the criminal process diminish substantially with the current system of plea bargaining. Indeed, there exists much distrust of the plea bargaining system on the part of the public.²⁵¹ If plea bargaining produced the same results that we would expect to see if every case went to trial, there would be little question about the quality of untried convictions in comparison to convictions obtained after a trial. Given the widespread flaws in the system, it is difficult to make a credible case that plea bargaining is a suitable substitute for trials.

Professor Ronald Wright has raised concerns about the quality of the federal plea bargaining system in particular. He has articulated what he calls the "trial distortion theory," according to which "criminal courts in a jurisdiction produce too many dysfunctional guilty pleas when those guilty pleas distort the pattern of outcomes that would have resulted from trials."²⁵² His trial distortion theory focuses on results and trends in jurisdictions, and thus takes a holistic view of the system as opposed to examining individual cases.²⁵³ He writes, "A healthy system would aspire to replicate through its guilty pleas the same pattern of outcomes that trials would have produced."²⁵⁴

Professor Wright sees a link between the high plea bargain rate and the low acquittal rate as signifying a problem with the quality of untried convictions: "Acquittals and dismissals play a starring role in the trial distortion story. These are cases that might have resulted in a defendant's freedom, and when a system starts to produce fewer acquittals and fewer dismissals, it triggers a warning light about the truth-finding function of the criminal justice system."²⁵⁵ Can it be then that virtually *all* defendants charged in the system are guilty? Professor Wright seems to think not. An accurate system ought to have more acquittals and dismissals than we currently see. Wright ar-

249. See *infra* Part III.A.2.c.

250. Davis, *supra* note 132, at 24.

251. See Sergio Herzog, *Plea Bargaining Practices: Less Covert, More Public Support?*, 50 CRIME & DELINQ. 590, 590-92 (2004) (discussing the public distrust of the plea bargaining process).

252. Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 83 (2005) (internal quotation marks omitted).

253. *Id.*

254. *Id.*

255. *Id.*

gues that in the federal system, which has a disproportionately low acquittal rate,²⁵⁶ plea bargaining practices “distort the truth-finding function of trials.”²⁵⁷ He notes that this problem is not unique to the federal system, but rather is happening in state systems as well.²⁵⁸ With respect to the federal system, he theorizes that over the last few decades or so, changes in federal sentencing law have made it far less of an attractive option for defendants to maintain their innocence and go to trial.²⁵⁹ It is now too costly for defendants to go to trial given the great leverage the sentencing guidelines provide to prosecutors.²⁶⁰ So, if given the option to plead, defendants perhaps wisely do so. And as I discuss below, prosecutors sometimes purposely refuse to plead in strong cases just to obtain trial convictions, which creates the erroneous public perception that the system does not make mistakes.²⁶¹ In other words, those who should go to trial and prove their innocence are not doing so, and a few cases that should not go to trial will go, and prosecutors will easily win. Therefore, Professor Wright’s theory is quite persuasive. Plea bargains have indeed corrupted the trial process.

The so-called “triumph”²⁶² of plea bargaining is particularly unsettling given the mounting evidence that innocent as well as guilty defendants routinely plead guilty.²⁶³ Indeed, central to the debate over the plea bargaining regime is the so-called “innocence problem”—that is, the reality that our system has convicted a number of innocent people, many of whom have served or are serving time in prison and some tragically even being on death row.²⁶⁴ Innocent defendants will often plead guilty rather than risk going to trial, being convicted, and receiving more time than if they had just taken the plea.²⁶⁵ As a matter of efficiency, prosecutors may be more likely to charge innocent defendants because of the predominance of the plea

256. *Id.* at 84, 104.

257. *Id.* at 154.

258. *Id.*

259. *Id.* at 116–17.

260. *Id.* at 117.

261. *See infra* notes 316–19 and accompanying text.

262. *See* Fisher, *supra* note 13, at 859 (claiming that “plea bargaining has triumphed”).

263. *See* Covey, *supra* note 10, at 1239 (“However, mounting evidence suggests that guilty pleas are not reserved only for the guilty.”).

264. *See* Bowers, *supra* note 8, at 1124 (“There is no longer any serious question that innocent people are charged with and convicted of crimes.”).

265. Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 *CARDOZO L. REV.* 2295, 2306 (2006) (“Proponents of the plea bargaining system do not question the fact that sometimes innocent defendants plead guilty.”).

bargaining regime. I will address the innocence problem more fully below.²⁶⁶

At any rate, I am not suggesting that the only problem with plea bargaining is the chance that innocent defendants plead guilty, though that is the most unsettling one. Even for guilty defendants, many aspects of the process in the day-to-day grind of the disposal of cases from the criminal docket are wholly repugnant to the laudable ideals of the American criminal process. The next Sections take a realistic view of bargain-basement justice that seems to have the goal of obtaining convictions by the cheapest means possible, even at the expense of gross inequities toward criminal defendants as a class.²⁶⁷ I address the role of the law as well as the roles of the major actors in the process—prosecutors,²⁶⁸ defense attorneys,²⁶⁹ and judges²⁷⁰—and how, in carrying out their roles, they can and often do impede the truth-seeking process.²⁷¹

a. Role of the Law: Contractual Theory

Much has been made of the contractual theory of plea bargaining as a justification for the practice. After all, current legal standards require that the defendant enter into any plea deal with a prosecutor knowingly and voluntarily.²⁷² But the “knowing and voluntary” requirement has rightly been described as “anemic” because the facts and supporting evidence needed to meet this low standard are “remarkably thin,” and therefore, often supposedly “‘knowing’ and ‘voluntary’ guilty pleas are nevertheless coercive and unjust.”²⁷³ The voluntariness aspect of the test is particularly troubling if one takes into account how coercive the plea bargaining setting is in many instances. There can be a vast difference in the sentence that a defendant might face if she plea bargains and the sentence that she might face at trial if she rejects the plea.²⁷⁴ Despite this tremendous pressure—choosing between a few years or taking the chance of life imprisonment, for example—all the defendant has to say are the “magic

266. *See infra* Part III.A.3.

267. *See infra* Part III.A.2.a–d.

268. *See infra* Part III.A.2.b.

269. *See infra* Part III.A.2.c.

270. *See infra* Part III.A.2.d.

271. For a discussion of police roles and how that relates to the criminal system’s reliability, see Carodine, *supra* note 65, at 560–66.

272. Wright, *supra* note 252, at 92–93.

273. *Id.* at 82.

274. *Id.* at 93.

words” to the judge at the plea hearing for her plea to be considered voluntary.²⁷⁵

Even more troubling is that, in reality, there is often no genuine concern for the truth. According to Professor Wright, “[t]he strength of the defendant’s available defense does not figure at all” and “[t]he government’s evidence gets only the most perfunctory testing when the prosecutor orally summarizes, in a few moments at the guilty plea hearing, the ‘factual basis’ of the government’s case.”²⁷⁶

b. Prosecutors’ Roles: De Facto Adjudicators Who Answer to No One

Prosecutors have virtually all of the power in the plea bargaining process.²⁷⁷ A defendant is simply unable to plead to a lesser crime unless the prosecutor has offered a deal.²⁷⁸ Indeed, courts have recognized that “[t]here is no constitutional right to a plea bargain, and the decision whether to offer a plea bargain is a matter of prosecutorial discretion.”²⁷⁹ Many commentators agree that “[p]rosecutors are the most powerful officials in the criminal justice system.”²⁸⁰ Indeed, prosecutors have tremendous influence in determining criminal defendants’ ultimate convictions and sentences.²⁸¹ Prosecutors’ daily decisions, which are “totally discretionary” and “virtually unreviewable,” have a greater influence on the administration of justice than that of any other actor in the criminal process.²⁸² Prosecutorial decisions to charge and/or plea bargain are among those discretionary calls that courts have largely determined to be un-

275. *Id.*

276. *Id.* at 93–94.

277. See Davis, *supra* note 132, at 25 (“Although prosecutors make important, influential decisions at other stages of the criminal process, the charging and plea bargaining stages provide the most independent power and control and allow the least opportunity for counterbalancing input from the defense.”).

278. *Id.* (“A criminal defendant cannot plead guilty to a less serious offense unless the prosecutor decides to make a plea offer.”).

279. *United States v. Estrada-Plata*, 57 F.3d 757, 760 (9th Cir. 1995) (quoting *United States v. Moody*, 778 F.2d 1380, 1385–86 (9th Cir. 1985)).

280. *E.g.*, ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 5 (2007); Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 725 n.59 (2006) (“Mandatory minimum sentences and the overwhelming prevalence of plea bargains have arguably made federal prosecutors more powerful than judges; once the prosecutor decides which offense to charge, the prosecutor has, in effect, locked in a very narrow range of discretion for the judge in deciding the sentence.”).

281. Daniel M. Filler & Austin E. Smith, *The New Rehabilitation*, 91 IOWA L. REV. 951, 964–65 (2006) (“[T]he growing literature on plea bargaining recognizes the important role of prosecutors and prosecutorial discretion in determining actual sentences.” (citing Bibas, *Plea Bargaining Outside*, *supra* note 10, at 2470–76)).

282. DAVIS, *supra* note 280, at 5.

reviewable.²⁸³ While many prosecutors no doubt strive for and in many respects achieve some degree of equity in the criminal process, there is growing evidence indicating that many others use their discretion in ways that yield inequitable results.²⁸⁴ Often defendants who have committed similar crimes—or even the same crimes—receive vastly different treatment from prosecutors.²⁸⁵

Some criminal procedure scholars have made the argument that prosecutors are the “primary adjudicators of the American criminal justice system.”²⁸⁶ In so many ways, this is a true statement because prosecutors have de facto authority to adjudge guilt and innocence. Consider the charging decision. It is up to the prosecutor to determine who is charged and who is not charged, whether to offer the persons charged any type of deal, and, if she so elects, how much of a deal to offer.²⁸⁷ The decision whether to charge a defendant is likely to be the single most important decision that the prosecutor makes, given that “[i]n conjunction with the plea bargaining process, the charging decision almost *predetermines* the outcome of a criminal case” in terms of guilt or acquittal, and, in many instances, even determines the defendant’s sentence.²⁸⁸

The charging decision is not the only duty that is consistent with the prosecutor-as-adjudicator model. There are various other features

283. Ronald F. Wright & Rodney L. Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, 84 N.C. L. REV. 1935, 1936 (2006) (explaining that “[l]egal rules grant broad powers to prosecutors, including the power to decide which cases to prosecute, to recommend bail, to dismiss or revise charges after the original filing, to negotiate guilty pleas to less serious charges than might be provable in court, and to recommend sentences,” yet it “is difficult to convince judges to interfere with prosecutor charging decisions”).

284. DAVIS, *supra* note 280, at 5 (using individual examples as evidence of the inequity resulting from prosecutorial discretion).

285. *Id.* at 3–4 (noting the disparity in sentences between Andrew Klepper, arrested for “attacking a woman with a baseball bat, sodomizing her at knifepoint with the same bat, and stealing over \$2,000 from her,” who received only probation and time at an out-of-state facility for troubled youth, and that of his much less involved accomplices, both of whom served jail time).

286. *E.g.*, Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 224 (2006); see also Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 758 (2003) (noting that “[p]rosecutors are the exclusive gatekeepers over federal court”).

287. See Langer, *supra* note 286, at 224–25 (acknowledging that prosecutors’ power with respect to charging, plea bargaining, and sentencing makes them “de facto adjudicators,” but opining that this is true only in cases where their plea bargain offers “are coercive”).

288. Davis, *supra* note 132, at 23 (emphasis added) (footnote call number omitted). Furthermore, the prosecutor’s power over sentencing is extensive due to the federal sentencing guidelines in federal court, which “virtually eliminate judicial discretion,” and because the penalty range is set by the initial charging decision in state courts. *Id.* at 23–24.

of the American criminal justice system that, as a general matter, are consistent with this model. In jurisdictions across the country that have other screening processes for cases (such as the grand jury) intended to serve as checks on the prosecutor's authority, the procedures often amount to nothing more than a "rubber stamp" on prosecutorial decisions.²⁸⁹ The prosecutor's activities at the pre-trial stage are completely informal and largely unsupervised by the courts.²⁹⁰ Even when there are guilty pleas, in most jurisdictions, the court's inquiry into the voluntariness of the defendant's plea is cursory at best.²⁹¹ Given that defendants quite often feel they have no choice but to accept the prosecutor's deal, the prosecutor's plea decision will effectively be the final adjudicatory decision in a great majority of cases.²⁹² To summarize:

[S]ince in the Prosecutorial Adjudication System the prosecutor is the sole de facto adjudicator of the case, dismissals and final plea proposals are the two ways in which the prosecutor acquits or convicts criminal defendants. When the prosecutor decides to dismiss charges against a defendant, the prosecutor effectively acquits the defendant. When the prosecutor makes her final coercive plea proposal, the prosecutor effectively convicts the defendant of a specific charge or charges.²⁹³

Having prosecutors act as the primary adjudicators in the vast majority of cases, with little oversight or accountability, raises concerns about how their various individual biases affect their day-to-day decisionmaking—much of which is hidden from the public eye. Indeed,

289. *Id.* at 23 ("Because the sentencing guidelines and mandatory sentencing laws virtually eliminate judicial discretion, the prosecutor often effectively determines the defendant's sentence at the charging stage of the process, if the defendant is eventually found guilty." (footnote call number omitted)). An example of an alternative screening process is the grand jury. Davis notes the following, however: "Although some state courts have some form of sentencing guidelines, most states give judges more discretion in determining the sentence for a convicted defendant. Nonetheless, the range of penalties is set by the initial charging decision." *Id.* at 23–24 (footnote call number omitted).

290. *See id.* at 20–21 (explaining that "[t]he deficiency of prosecutorial discretion lies not in its existence, but in the randomness and arbitrariness of its application," as "[s]elf-regulation by prosecution offices is largely nonexistent or ineffective, and Supreme Court jurisprudence has protected prosecutors from both public and judicial scrutiny" (footnote call number omitted)).

291. *See id.* at 24–25 (explaining that "[a]lthough the judge must approve plea bargains in most jurisdictions, judges routinely approve these agreements because they expedite the process by disposing of criminal cases without the time and expense of a trial").

292. *See id.* at 25 (noting that the defense attorney's power is effectively limited to attempting to negotiate the best deal possible for a client, as the prosecutor effectively makes the ultimate decision).

293. Langer, *supra* note 286, at 250.

one of the most significant aspects of plea bargaining that undermines public confidence in the system's credibility and reliability is its clandestine nature. Much of the screening process and the negotiations that lead to untried convictions are shrouded in secrecy.²⁹⁴ Indeed, Professor Bibas has noted the following:

Plea bargaining usually occurs in conference rooms, courtroom hallways, or on private telephone calls instead of open court. Important conferences take place at sidebar or in judges' chambers. Public jury trials are the exception, not the rule.

Even those hearings that are technically open to public view are in practice obscure. Hearings are often scheduled by conference call or orders tucked away in dockets, and court clerks do not publicize schedules. Plea and sentencing hearings are usually mere formalities that rubber-stamp bargains struck in secret.²⁹⁵

It is undeniable that “[p]rosecutors can [and do] charge a handful of defendants and ignore hundreds of thousands of violators.”²⁹⁶ What we will often never discover is what went into the prosecutors' decisions to let some violators “off the hook” and aggressively pursue others. How much of a factor was the prosecutor's perception of the strength of the case? How much of a factor was the prosecutor's perception of the potential defendants? To what extent did the prosecutor identify or not identify with the defendant and/or victim?

Now, of course, we may never know what affected a jury's decisionmaking process if they choose not to talk about their deliberations. Their deliberations are also vigorously protected by the rules of evidence.²⁹⁷ But we do have access to the same information to which the jury had access; thus, we can have more (or less) confidence in

294. See, e.g., Edward K. Cheng, *Structural Laws and the Puzzle of Regulating Behavior*, 100 Nw. U. L. REV. 655, 676 (2006) (noting the secrecy surrounding plea bargaining with respect to tax evasion laws); Samuel Walker, *Too Many Sticks, Not Enough Carrots: Limits and New Opportunities in American Crime Policy*, 3 U. ST. THOMAS L.J. 430, 450 (2006) (observing that “it is entirely possible . . . that a prosecutor's office handles plea bargains in a fair and evenhanded manner, but that because of the secrecy surrounding plea negotiations many people believe them to be unfair and unreasonable”).

295. Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 923–24 (2006) (footnote call numbers omitted).

296. William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781, 791 (2006).

297. See FED. R. EVID. 606(b) (“Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith.”).

their decisionmaking in light of the actual evidence in the case. Furthermore, judges have the ability to throw out cases where there is insufficient evidence—keeping the case from ever reaching the jury deliberation room—or later to throw out the jury’s verdict if there was insufficient evidence.²⁹⁸ The public nature of trial records acts as a check on quality control and reliability in the process.

Unlike in a typical trial where the transcript is readily available, the public simply lacks access to the vital information that reflects the makings of the vast majority of criminal convictions, which, of course, happen in the plea bargaining process.²⁹⁹ So, for example, with a prosecutor’s decision *not* to charge a defendant (an effective acquittal), who would have access to such information? Unless the crime has attracted some type of media attention, generally no one other than the potential defendant and the victim would have knowledge of this very crucial decision by the prosecutor.³⁰⁰ Thus, the decision not to prosecute—essentially to acquit—just as the decision to prosecute and coerce a plea—effectively convicting—is usually immune not just from judicial review, but from any type of review by anyone.³⁰¹ Contrast this reality with that of public trials in which the evidence in the case is available not just for the jury, but for the entire public, and there are standards by which judges admonish juries to consider the strength of the evidence.³⁰² Generally, there are no set methods that prosecutors must use in carrying out their adjudicative function.³⁰³ These aspects of trial—the public nature, use of standards, and formality—lend far more credibility to trial practice than that seen in plea bargaining.

I am not asserting that all prosecutors have unsavory motives in carrying out their duties. Much of the inequity that prosecutors per-

298. Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1354 (2008).

299. *See id.* at 1353–54 (“Unless the crime received media attention and the press has followed the prosecutor’s investigation or the victim can somehow raise the profile of the case, the public and elected officials will have no knowledge of the facts that support bringing charges.”).

300. *Id.*

301. *See id.* at 1353 (“Put another way, one reason why prosecutors have not received the same scrutiny as these other actors may be that fewer noteworthy examples of improper exercises of discretion come to the public’s attention because a prosecutor’s decision not to charge is sequestered from *any* kind of review, not just judicial review.”).

302. *See id.* at 1354 (comparing prosecutorial decisions with those of juries and pardons, which occur in a public forum making abuse easier to see).

303. *See id.* at 1351–52 (“Prosecutors need not follow any particular protocols before reaching a decision not to bring charges, nor must they provide reasons for their decision.”).

petuate stems from the economic reality in which they operate.³⁰⁴ The exercise of prosecutorial discretion, like plea bargaining itself, has been described as “a kind of unpleasant necessity.”³⁰⁵ As Professor Angela Davis, who has often criticized prosecutorial discretion, has noted, “Despite its potential abuse . . . prosecutorial discretion is necessary. It is difficult to imagine a fair and workable system that does not include some level of measured discretion in the prosecutorial process.”³⁰⁶

Still, she has been careful to point out fundamental problems with this aspect of the criminal process: “The deficiency of prosecutorial discretion lies not in its existence, but in the randomness and arbitrariness of its application. Even in prosecution offices that promulgate general policies for the prosecution of criminal cases, there is no effective mechanism for enforcement or public accountability.”³⁰⁷ Prosecutors do not regulate themselves generally, and Supreme Court precedent shields them from judicial scrutiny.³⁰⁸ Even prosecutors, relying on the public to elect them, are able to act without much accountability “in part because their most important responsibilities—particularly the charging and plea bargaining decisions—are shielded from public view.”³⁰⁹

Just as there are too many criminal cases to go to trial efficiently, there are also too many crimes for the system to process efficiently.³¹⁰ Simply put, the prosecutor has limited time and resources to go after everyone who has committed a crime.³¹¹ In fact, prosecutors dismiss most cases that come across their desks.³¹² Now, it is also true that various other factors, in addition to pure economics, play into the prosecutor’s decision not to prosecute a case; such factors include potential political ramifications of the case, the prosecutor’s own private interests in pursuing the case, the interests of the victim, the defendant’s history (personal, professional, criminal, or otherwise), the na-

304. See Gazal-Ayal, *supra* note 265, at 2308 (explaining that the limited resources of prosecutors contributes to why they are unable to prosecute all crimes that occur).

305. Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117, 2136 (1998).

306. Davis, *supra* note 132, at 20.

307. *Id.* at 20–21 (footnote call number omitted).

308. *Id.*

309. DAVIS, *supra* note 280, at 5.

310. See Davis, *supra* note 132, at 20–21 (noting that prosecutorial discretion is necessary for a fair system).

311. See Gazal-Ayal, *supra* note 265, at 2308 (noting that prosecutors screen cases because they have limited resources and the criminal process is complex).

312. *Id.*

ture of the alleged crime, and several others.³¹³ All of these issues raise concerns about the credibility of convictions as evidence in subsequent cases.³¹⁴ Can we really be assured to some reasonable degree of certainty that the evidence that led the prosecutor to charge, and ultimately effectuate plea convictions, rose to the level of reliability such that the conviction should be given what is essentially double dipping power under Rule 609?³¹⁵

In the prosecutor's decision whether to charge and then offer a plea deal, the strength of the case against a defendant in reality might not factor at all or might be factored in an undesirable and repugnant manner.³¹⁶ With the knowledge that nearly all cases will end in plea bargains, the prosecutor has little incentive to consider the actual strength of a case in determining whether to charge the defendant.³¹⁷ And often when they have a strong case, prosecutors are more likely to take those cases to trial than plea bargain: "Self-interest, in contrast, pushes prosecutors toward trying the strongest cases. Prosecutors can discourage defendants in strong cases from pleading guilty by refusing to make any concessions, while they can make irresistible offers in weak cases."³¹⁸ With weaker, more ambiguous cases, prosecutors are more likely to plea bargain with defendants and "[t]hus, instead of allowing juries to air and wrestle with the hard, troubling cases, prosecutors may hide them from view."³¹⁹ Aside from protecting their conviction rate, which has been shown to be quite important to most prosecutors,³²⁰ they may also have other motives that serve as protection of the system at large:

If, for example, prosecutors bargain away most cases involving dubious confessions, they avert public scrutiny of police interrogation tactics. If they buy off credible claims of innocence cheaply, they cover up faulty investigations that mistak-

313. *Id.*; see also Anthony V. Alfieri, *Prosecuting Race*, 48 DUKE L.J. 1157, 1240–41 (1999) (listing various factors that prosecutors might consider in the charging and/or plea bargaining process).

314. See Robert D. Okun, *Character and Credibility: A Proposal to Realign Federal Rules of Evidence 608 and 609*, 37 VILL. L. REV. 533, 549 (1992) (suggesting that there are "significant questions" about the probative value of prior convictions).

315. See *id.* (questioning the reliability of prior convictions).

316. See Gazal-Ayal, *supra* note 265, at 2307 (suggesting that because of the availability of plea bargaining, "the strength of evidence of any given case becomes less important to the prosecution").

317. *Id.*

318. Bibas, *Plea Bargaining Outside*, *supra* note 10, at 2473 (footnote call number omitted).

319. *Id.*

320. *Id.* at 2471.

only target innocent suspects. By pressing the easiest cases, prosecutors turn jury trials into rubber stamps or mere formalities.³²¹

The counterintuitive manner in which some prosecutors proceed based on the strength or weakness of cases³²² severely undermines the quality of untried convictions. Untried convictions will be less reliable, then, because those cases will tend to be weaker, which raises the serious question as to whether the defendant actually committed the charged offense.³²³ Recall that the theory of Rule 609 is that someone who has committed an act that rises to the level of a felony or a crime that requires proof of an act of dishonesty or false statement is less truthful than someone who has not committed such an act.³²⁴ It is crucial for the Rule's effectiveness that the act have actually occurred, and we have much less assurance of this with many plea bargains than we do with trial convictions.

c. Defense Attorneys' Roles and the Special Problem of Indigent Defendants

As do prosecutors, defense attorneys play a major role in the plea bargaining process,³²⁵ and it is important to consider that role when evaluating the quality of convictions produced in this system. The effective assistance of competent defense counsel is one of the surest means by which to ensure the accuracy of the criminal process.³²⁶ The Supreme Court has stated that "[t]he Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system

321. *Id.* at 2473.

322. *See id.* at 2472 ("This dynamic [of prosecutors pushing strong cases to trial to boost reputation] is the opposite of what one might expect: strong cases should plead guilty because trial is hopeless, while weak cases have genuine disputes that merit resolution at trial.")

323. *See* Laura Berend, *Less Reliable Preliminary Hearings and Plea Bargains in Criminal Cases in California: Discovery Before and After Proposition 115*, 48 AM. U. L. REV. 465, 522-23 (1998) (suggesting that in California, plea bargains may be a result of incomplete information about the strength of the charges, and defense counsel may risk not achieving reliable "legal truth" (internal quotation marks omitted)); John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 15-16 (1978) (likening the factual unreliability of the plea bargain to that of a tortured confession).

324. *See* Okun, *supra* note 314, at 537-38, 545-46 (suggesting that the credibility of a convicted felon is less than that of someone who has not been convicted of a criminal act).

325. *See* Bibas, *Plea Bargaining Outside*, *supra* note 10, at 2476 (explaining that "like prosecutors, defense lawyers prefer to avoid losing cases at trial, which would harm their reputations").

326. *See* Strickland v. Washington, 466 U.S. 668, 685 (1984) (discussing the importance of effective assistance of counsel).

to produce just results.”³²⁷ Indeed, one commentator has observed the following:

The Sixth Amendment’s right to effective assistance of counsel assures a fair trial by placing the adversaries on a relatively equal playing field, even where a defendant is indigent and the government has essentially unlimited resources at its disposal.

In reality, the system *rarely* operates in this manner.³²⁸

One of the most important factors to remember about the defense side of the criminal process is that in an overwhelming majority of cases, it is the government itself that provides (or fails to provide) representation through the indigent defender system.³²⁹ The criminal system is in the business of convicting poor people and many through guilty pleas.³³⁰ Poverty, often along with race, equates with guilt.³³¹

An unfortunate truth in our criminal justice system is that the majority of criminal defendants in the state and federal systems are indigent.³³² In over eighty percent of felony cases at the state level, the defendants are indigent.³³³ This number is probably higher because, as discussed below, many people who most reasonable persons

327. *Id.*

328. Klein, *supra* note 9, at 2030 (emphasis added) (footnote call number omitted); *see also* Uphoff, *supra* note 80, at 741 (“[I]f the adversarial system is to function properly, a defendant must be provided the effective assistance of counsel.”).

329. *See* David A. Sklansky & Stephen C. Yeazell, *Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 GEO. L.J. 683, 690 (2006) (noting that most criminal trial participants are “on the government payroll”).

330. *See* Adam M. Gershowitz, *Raise the Proof: A Default Rule for Indigent Defense*, 40 CONN. L. REV. 85, 92–93 (2007) (suggesting that indigent defense lawyers often pressure their clients to accept guilty pleas).

331. *See* Wright, *supra* note 252, at 149–50 (suggesting that race or ethnicity correlates with plea negotiations).

332. *See* Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U.C. DAVIS L. REV. 111, 172 (2007) (noting that most criminal defendants are “young, poor, of color, nonviolent, and/or addicted to drugs or alcohol”); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1988 (1992) (noting that “[o]nly a minority of criminal defense attorneys (as few as twenty percent in many urban jurisdictions) are retained by paying clients”); Sklansky & Yeazell, *supra* note 329, at 690 (noting that “the vast majority of criminal defendants are indigent”); Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1446 (2008) (noting that “most federal defendants are indigent”).

333. *Kowalski v. Tesmer*, 543 U.S. 125, 140 (2004) (Ginsburg, J., dissenting) (noting that about “eight out of ten state felony defendants use court-appointed lawyers” (citing HARLOW, *supra* note 107, at 1, 5)); Sklansky & Yeazell, *supra* note 329, at 690 (noting that over eighty percent of state defendants are indigent).

would deem indigent *are not poor enough* to qualify for indigent defender services.³³⁴

At any rate, of those indigent defendants who have court-appointed counsel, around seventy percent plead guilty, and of those convicted, around seventy percent are incarcerated.³³⁵ And there is widespread agreement that the system for indigent defense, as a whole, in this country is appallingly under-funded.³³⁶ Of course, there are some defendants who are wealthy and tend to enjoy a higher quality of legal representation.³³⁷ There are also some jurisdictions that provide appropriate resources for their indigent defender programs.³³⁸ For example, the federal indigent defender system is better funded and less burdened than most state systems.³³⁹ Still, only around five percent of defendants in this country are processed in the federal system, and the vast majority of criminal cases are tried in state criminal systems.³⁴⁰ Thus, most Rule 609 evidence comes from under-funded state systems—this evidence, regardless of the jurisdiction from which it came, can be admitted against a defendant in both federal and state court.³⁴¹

Make no mistake about it: Money can and often will buy a better result for defendants who can afford private counsel.³⁴² It is true that the Federal Bureau of Justice Statistics released a report finding that the conviction rates for defendants with “publicly financed” counsel and those with private counsel were about the same;³⁴³ however, the report also noted that defendants with private attorneys were less

334. See, e.g., Uphoff, *supra* note 80, at 765 (suggesting that because the financial eligibility threshold in Wisconsin is set at only thirty-three percent of the federal poverty guidelines, thousands of poor people are deemed ineligible for indigent defense).

335. *Kowalski*, 543 U.S. at 140 (citing HARLOW, *supra* note 107, at 6 tbls.10–11).

336. Gershowitz, *supra* note 330, at 91.

337. See Uphoff, *supra* note 80, at 747–48 (noting that wealthy defendants can hire attorneys who have more time to better prepare and defend and can choose to hire someone else if dissatisfied).

338. *Id.* at 742–43, 764–65.

339. *Id.* at 742 n.14 (“The federal criminal justice system handles far fewer cases and generally provides indigent defendants with counsel who are better paid, have more manageable case loads, and have greater access to investigative services and experts.”).

340. *Id.* (citing HARLOW, *supra* note 107, at 4).

341. See, e.g., *United States v. Kane*, 944 F.2d 1406, 1412 (7th Cir. 1991) (finding no error in a trial court’s admission of a state court conviction to impeach a defendant’s credibility); *Brown v. State*, 703 N.E.2d 1010, 1018 (Ind. 1998) (finding no error in admission of an out-of-state conviction to impeach a defendant’s credibility).

342. See Uphoff, *supra* note 80, at 747–48 (explaining that money helps defendants hire attorneys who have time to research and who can enlist the help of others, and enables defendants to hire a new attorney if dissatisfied).

343. HARLOW, *supra* note 107, at 1.

likely than indigent defendants to receive prison time.³⁴⁴ Moreover, those defendants with private attorneys had greater access to their attorneys.³⁴⁵ This report, alongside other data collected on the ground about the plea bargaining process, raises the question as to whether the indigent defendants were over-convicted.³⁴⁶ One wonders whether their rates of conviction would be lower if they had the same quality of representation.

Not only can money buy excellent representation at the trial stage, but as one commentator has noted, “[M]oney buys wealthier defendants more leverage in the plea-bargaining process.”³⁴⁷ It is quite frequently the case that “well-paid defense counsel can push more aggressively in the bargaining process because both [defense] counsel and the prosecutor know that [defense] counsel has the ability, time, and incentive to push forward to trial if a favorable bargain is not struck.”³⁴⁸ Additionally, money affords wealthy defendants with substantial power and leverage in their relationships *with their own attorneys*. They can avoid what indigent defendants so often cannot—yielding to intense pressure by defense counsel to accept plea deals.³⁴⁹ If unhappy with their attorneys, wealthy defendants have the option to hire new counsel.³⁵⁰

The story of Andrew Klepper, the son of a lawyer, demonstrates how money can buy a good deal and leverage within the system.³⁵¹ Klepper was arrested for allegedly beating a woman with a baseball bat and sodomizing her with that bat while threatening her with a knife.³⁵² His accomplices, whose actions were not as culpable as Klepper’s, went to jail.³⁵³ But Klepper was able to plead guilty to lesser charges, get probation, and check into a facility for troubled youth at the expense of his parents.³⁵⁴

Poor defendants are forced either to rely on the indigent defense system, which is often under-funded, or to attempt, often in vain, to

344. *Id.* at 3–4.

345. *Id.* at 8 (noting that prison inmates spoke to their court-appointed attorneys later and less frequently than those with private lawyers).

346. See John R. Lott, Jr., *Should the Wealthy Be Able to “Buy Justice”?*, 95 J. POL. ECON. 1307, 1314 (1987) (noting that “the probability of conviction is lower for wealthy individuals”).

347. Uphoff, *supra* note 80, at 748.

348. *Id.*

349. *Id.*

350. *Id.*

351. See DAVIS, *supra* note 280, at 3–5 (discussing the Andrew Klepper case as well as a public defender’s personal experience).

352. *Id.* at 3.

353. *Id.* at 3–4.

354. *Id.* at 3.

scrape together funds to pay for their own counsel.³⁵⁵ Indeed, many working poor defendants, who barely make enough money to feed themselves and their families, make too much to qualify for indigent defender status in the criminal system.³⁵⁶ Those truly unfortunate individuals really have *no choice*—they cannot afford an attorney and the government refuses to provide them with one. Plea bargaining is their only real option.³⁵⁷ As one commentator put it, “[i]n the plea bargain setting, the lamentable quality of legal representation means that most indigent defendants cannot see any realistic way out of the plea bargain trap.”³⁵⁸

To be sure, there are defendants who plead guilty who are in fact guilty. Some, including at least one Supreme Court Justice, even believe that nearly all defendants who plead guilty do so because they are in fact guilty.³⁵⁹ However, an alarming number of cases are coming to our attention in which defendants, particularly poor defendants, have been “railroaded” into accepting plea bargains when they are in fact innocent of any wrongdoing or when, even if guilty of some crime, they deserve much less than the bargained-for sentence.³⁶⁰

Their stories are indeed compelling. Take, for example, the disturbing story of an indigent defendant who was convinced on the eve of trial to plead guilty—as that was the “only hope” for his co-defendant wife to be acquitted of child rape.³⁶¹ According to a witness, “[t]he lawyer did no investigation and did not meet with the jailed client prior to trial, despite the client’s repeated requests.”³⁶² So, the defendant pled guilty to multiple child rape charges and was sentenced to forty-five years in prison.³⁶³ His wife was, nevertheless,

355. See Uphoff, *supra* note 80, at 754 (“Indigent defendants represented by overworked public defenders or poorly compensated appointed counsel often experience the same dismal representation provided to the working poor who have scraped up a minimal retainer to hire counsel.” (footnote call number omitted)).

356. See *id.* at 749.

357. *Id.* at 763.

358. Michael Tigar, *Lawyers, Jails, and the Law’s Fake Bargains*, MONTHLY REV., July 2001, at 29, 38.

359. See, e.g., Morris B. Hoffman, *The Myth of Factual Innocence*, 82 CHI-KENT L. REV. 663, 663 (2007) (“Almost all criminal defendants plead guilty, and almost all of them do so because they are guilty.”); see also *supra* text accompanying note 18.

360. Tigar, *supra* note 358, at 38.

361. AM. BAR ASS’N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE, A REPORT ON THE AMERICAN BAR ASSOCIATION’S HEARINGS ON THE RIGHT TO COUNSEL IN CRIMINAL PROCEEDINGS* 12 (2004) [hereinafter *GIDEON’S BROKEN PROMISE*] (internal quotation marks omitted).

362. *Id.*

363. *Id.*

found guilty at trial.³⁶⁴ After serving five years in prison, he was released when an investigation revealed that he was indeed innocent of the charges.³⁶⁵

Sometimes the plea system causes an injustice even though the defendant may be guilty of committing some crime—though not a crime as serious as the charge and sentence ultimately reflect. Consider the story of Ronald Barnett, a mentally ill defendant, who entered a guilty plea on the day of his trial for arson because his court-appointed lawyer had no witnesses and was completely unprepared for trial.³⁶⁶ Hoping for “leniency,” he entered a plea of guilty, but instead of getting the leniency for which he hoped, he received a twenty year prison sentence.³⁶⁷ It turns out that Barnett actually had a good defense: He suffered from such severe depression that he had suicidal thoughts and was prescribed medication.³⁶⁸ Unable to afford his medication after losing his job, he stopped taking it and then “abrupt[ly] resum[ed]” taking it just two days before the fire, which, according to expert psychiatrists who evaluated him, caused him to attempt suicide in what was the alleged act of arson in which no one was hurt.³⁶⁹

Barnett studied Georgia law himself while in prison and learned that he could have his plea withdrawn after hearing the prosecutor recommend the long sentence.³⁷⁰ His court-appointed lawyer “admitted he had not known the plea could be withdrawn.”³⁷¹ Determined to have his guilty plea withdrawn, he proceeded pro se on appeal, and the appellate court threw out his guilty plea and granted him a new trial.³⁷² The *Atlanta Journal-Constitution* reported the following: “For more than a year after the ruling in his favor [throwing out the plea], Barnett was in jail awaiting a trial. His case seemed to languish after his defense was handed over to a state office, where it was transferred between lawyers because of budget cuts.”³⁷³

Barnett engaged in his own “letter-writing campaign” from jail by “sending voluminous handwritten arguments studded with legal cita-

364. *Id.*

365. *Id.*

366. David Simpson, *Arson Plea May Open Door to Parole*, ATLANTA J.-CONST., Dec. 2, 2007, at D16.

367. *Id.*

368. David Simpson, *Man Waits 4 Years for Day in Court*, ATLANTA J.-CONST., Oct. 26, 2007, at D3.

369. *Id.*

370. *Id.*

371. *Id.*

372. *Id.*

373. Simpson, *supra* note 366.

tions to judges, lawyers and the news media.”³⁷⁴ His ability to have his original plea withdrawn as a pro se defendant navigating through the Georgia criminal process is “very unusual,” according to Stephen Bright of the Southern Center for Human Rights.³⁷⁵ Bright noted that Barnett’s case is an example of the influence of money on the quality of defense.³⁷⁶ Someone who could afford to hire an attorney would not have experienced these problems, according to Bright.³⁷⁷ As Barnett told the Atlanta newspaper, he had to “tak[e] on the big guns with a cap pistol.”³⁷⁸ Fortunately for him, the media gave him a voice. For far too many other defendants, they simply have no voice and thus no weapons.

Less than a month after his story ran in the newspaper, Barnett was in court and was able to get a much better deal reflecting the fact that his actions resulted from the effects of prescribed medication.³⁷⁹ Having spent over four years in prison already—which actually was the amount of time reserved for the worst arson offenders under Georgia law—he was immediately eligible for parole.³⁸⁰ Given that his defense, if fully and zealously pursued, could have won him an acquittal, one has to think that the reason he pled the second time was because he had already served time and could be immediately released.

One might wonder how Barnett’s story is relevant to Rule 609. It is directly relevant because given that Barnett’s new plea was entered as a “first offender,” under Georgia law, he will not have a criminal record if he abides by the terms of his probation.³⁸¹ Should he ever be charged again after his record is expunged, the new plea will not be used against him for Rule 609 purposes. Had Barnett not researched the law himself, he would likely still be in prison and would have a lifelong record. Now, he is out of prison and has the opportunity to wipe his record clean. Barnett blamed his four year wait for a trial on Georgia’s poorly funded indigent defender program, and he pled guilty for a second time, even as a jury was being seated at his long-awaited new trial, simply hoping and praying to “be home soon.”³⁸²

374. Simpson, *supra* note 368.

375. *Id.* (internal quotation marks omitted).

376. *Id.*

377. *Id.*

378. *Id.* (internal quotation marks omitted).

379. Simpson, *supra* note 366.

380. *Id.*

381. *Id.* (internal quotation marks omitted).

382. *Id.* (internal quotation marks omitted).

Barnett's case represents one problem: Many defendants are unable to get an appropriate plea, particularly one that cannot later be used in the Rule 609 context, due to injustices in the system. The *Miami Herald* conducted a study of nearly 800,000 cases to determine whether there was unfairness based on race in the criminal process.³⁸³ The study revealed that white criminal defendants were more likely to get a "withhold of adjudication," which is a type of plea deal in which there is an admission of guilt to a felony, but upon completion of the terms of the deal, it will be wiped away from the person's record.³⁸⁴ Indeed, the study found that "[w]hite criminal offenders in Florida are nearly 50 percent more likely than blacks to get a withhold of adjudication."³⁸⁵ Disparities existed even when the conduct of black and white defendants was almost "identical."³⁸⁶

And then there are the cases that have not been written about. The reality is that the number of cases that we know about in no way reflects the enormity of the problem. Norm Lefstein, who has chaired the American Bar Association's Indigent Defense Advisory Group, has noted that the cases of which we are aware "likely are only the tip of the iceberg" and that "[t]his is an enormous problem."³⁸⁷

But not everyone sees the poor quality of indigent defense as a problem. Some members of the public are either apathetic or have little sympathy for the poor in the criminal system. For example, one radio host, upset that his state legislature raised the pay for court-appointed lawyers to avoid a "crisis" in its indigent defender program, reportedly said that "'poor people eat crummy food, they live in crummy houses and drive crummy cars, so why shouldn't they have crummy lawyers?'"³⁸⁸ Sadly, the criminal system seems to take this view as well: "Whether they face serious felony charges or misdemeanors, the poor often find themselves alone in a sometimes-Kafkaesque system where they have little, if any, voice."³⁸⁹ Left alone in this sys-

383. Manny Garcia & Jason Grotto, *Odds Favor Whites for Plea Deals*, MIAMI HERALD, Jan. 26, 2004, at 1A.

384. *Id.* (internal quotation marks omitted).

385. *Id.* (internal quotation marks omitted).

386. *Id.*

387. Kit R. Roane, *When the Poor Go to Court*, U.S. NEWS & WORLD REP., Jan. 23, 2006, at 34 (internal quotation marks omitted).

388. Laura Parker, *8 Years in a Louisiana Jail, But He Never Went to Trial*, USA TODAY, Aug. 29, 2005, at A1 (reporting the paraphrasing of a radio host by Tom Workman, president of the Massachusetts Association of Court Appointed Attorneys).

389. Roane, *supra* note 387.

tem, many plead guilty just to be released from jail and have often already spent months or even years in jail awaiting a trial.³⁹⁰

In December 2004, the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants ("ABA Committee") reported that "thousands of persons are processed through America's courts every year either with no lawyer at all or with a lawyer who does not have the time, resources, or in some cases the inclination to provide effective representation."³⁹¹ Furthermore, the report noted that defendants, even innocent defendants, "[a]ll too often" enter guilty pleas even though they do not understand what they are doing or what their rights are under the law.³⁹² The report was the "culmination of a painstaking analysis of hundreds of pages of testimony" from experts on indigent defense services around the country.³⁹³ The report is said to have "accurately captured the widespread difficulties in delivering adequate defense services for the poor" across the country.³⁹⁴

Among the various problems that lead to constitutionally deficient representation for poor defendants is the phenomenon of the "meet 'em and plead 'em" attorney.³⁹⁵ This scenario occurs when the public defender meets with her client for the first time on the day of arraignment or on the day of trial, informs the client of the "deal" that she has "negotiated" for the client, and tells the client to "sign here."³⁹⁶

In Quitman County, Mississippi, for example, a study of felony cases processed in that county during a five year span revealed that forty-two percent of the cases involving an indigent defender resulted in guilty pleas entered into on the day of arraignment, which also happened to be the first time that the attorney had met with her client.³⁹⁷ According to a witness from Alabama, "contract defenders in that state basically do nothing but process defendants to a guilty plea in as expeditious a manner as possible."³⁹⁸ Another witness from Georgia reported that "meet 'em and plead 'em" was a "pretty prevalent prac-

390. This seems to be what Barnett did with his second plea rather than take his chances at trial in a system that had failed him repeatedly. See *supra* text accompanying notes 379–80.

391. *GIDEON'S BROKEN PROMISE*, *supra* note 361, at iv.

392. *Id.*

393. *Id.* at 1.

394. *Id.* at iv.

395. *Id.* at 16 (internal quotation marks omitted).

396. *Id.* (internal quotation marks omitted).

397. *Id.*

398. *Id.*

tice throughout the state of Georgia.”³⁹⁹ Stephen Bright, Director of the Southern Center for Human Rights, explained the morning routine in Crisp County, Georgia: “[C]all[] the arraignment calendar and no one except people who have paid lawyers would have a lawyer. Everyone else will be appointed a lawyer when his or her case is called. By twelve noon everybody will have pled guilty and been sentenced.”⁴⁰⁰ He went on to describe the afternoon court session in Crisp County. For that session, “court will convene at the jail.”⁴⁰¹ There would be a contract lawyer present and criminal defendants would be “paraded out and plead guilty and be sentenced.”⁴⁰² The judge would wait as lawyers negotiated pleas “in open court” and “then the judge [would] come on the bench when everybody is ready to plead guilty and move the calendar along.”⁴⁰³

As Mr. Bright saw it, this was not true legal representation, let alone constitutionally sufficient legal representation. He stated that “[t]his is [just] processing” and therefore “[h]igh school students could do this.”⁴⁰⁴ It is difficult to disagree with him on this point in light of the substantial evidence supporting his statement. One reporter stated the following: “Indigent attorneys can rarely use the tools of investigation and expert witnesses which are standard fare for paying customers. The costs are prohibitive and many times unrecoverable. It’s just enough to know their client’s name and to plea bargain a sentence. Guilt or innocence rarely enters the equation.”⁴⁰⁵

d. Judges’ Roles: Plea Bargaining Advocates?

In the criminal context, the judge’s involvement in the plea bargaining process is of the utmost importance given its prevalent use in disposing of cases.⁴⁰⁶ Although nationally there are norms that purport to discourage judges from taking a participatory role in the plea bargaining process, many judges engage in the process in order to move cases along expeditiously.⁴⁰⁷ Indeed, many judges across the country have been sending “[t]he undeniable message to defend-

399. *Id.* (internal quotation marks omitted).

400. *Id.* (internal quotation marks omitted).

401. *Id.* (internal quotation marks omitted).

402. *Id.* (internal quotation marks omitted).

403. *Id.* (internal quotation marks omitted).

404. *Id.* (internal quotation marks omitted).

405. *One Roadblock Remains to Adequate Indigent Defense*, MACON TELEGRAPH, Apr. 3, 2003, at A10.

406. Richard Klein, *Due Process Denied: Judicial Coercion in the Plea Bargaining Process*, 32 HOEFSTRA L. REV. 1349, 1361 (2004).

407. Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1077 (2006).

ants . . . that they will be punished for exercising the right guaranteed to them by the Constitution.”⁴⁰⁸ One commentator has written that “[t]o apply contract theory to a situation where an all-powerful judge is negotiating with a powerless defendant about how long the judge will send the defendant to prison for is inappropriate” given that “[t]he process of negotiation generally implies and assumes relatively comparable positions of power on each side.”⁴⁰⁹ The idea that a criminal defendant will believe her position is in any way comparable to that of a judge, who has the power to sentence her to prison, possibly for her entire life depending on the charges, is almost risible.⁴¹⁰

Reported cases, newspaper articles, and investigative reports are replete with stories of judges who have used tactics that range from questionable to completely reprehensible.⁴¹¹ Such tactics are all in the name of facilitating the plea bargaining machine for the sake of efficiency.⁴¹² In Ohio, for example, one judge told a defendant the following: “You have a right to counsel in this case, *but if you would like to resolve the matter today* you may waive that right and plead guilty.”⁴¹³ In Rhode Island, a judge told an unrepresented defendant that he could plead guilty right then and receive a six month sentence, but cautioned him that if he demanded an attorney he would likely be sentenced to three years.⁴¹⁴ A witness to those Rhode Island proceedings even filed a disciplinary complaint against the judge.⁴¹⁵ In addition, practically everyone in a courtroom pled guilty when a California judge told a defendant the following: “If you plead guilty today, you’ll go home. If you want an attorney, you’ll stay in jail for two more days and then your case will be set for trial and, if you can meet the bail amount, you’ll be released.”⁴¹⁶

One New York Supreme Court judge, determined to proceed with his docket, appointed a lawyer who happened to be sitting in the courtroom to represent a defendant charged with burglary.⁴¹⁷ Once

408. *Id.* at 1078.

409. Klein, *supra* note 406, at 1356 (footnote call number omitted).

410. *Id.*

411. *See, e.g.*, Backus & Marcus, *supra* note 407, at 1077 (describing a New York judge who used a “combination of exorbitant bail and a taste of jail to coerce defendants into pleading guilty”).

412. *Id.*

413. *Id.* at 1075 (emphasis added) (quoting THE SPANGENBERG GROUP, ASSESSMENT OF INDIGENT DEFENSE SYSTEMS IN OHIO 50 (1991)).

414. GIDEON’S BROKEN PROMISE, *supra* note 361, at 25.

415. *Id.*

416. *Id.* (internal quotation marks omitted).

417. Sam Roberts, *For One Zealous Judge, Hard Bargaining Pushes Cases Through the Courts*, N.Y. TIMES, Apr. 29, 1985, at B1.

the “appointed” attorney approached the bench with the attorney’s new “client,” the judge informed them of the specific plea offer and explained that it was good just for that day and would become progressively less attractive each subsequent day.⁴¹⁸ For judges like this one, having an attorney is a “mere legal formality, a precondition for the court’s efforts to obtain the desired plea.”⁴¹⁹ The idea is “to co-opt the attorney, to have the lawyer act as a mere assistant in the rapidly-moving assembly line, and in doing so to redefine the role of counsel so that the whole process would have the appearance of legitimacy.”⁴²⁰ Other judges may not be as crude as the New York Supreme Court judge, but the effect is essentially the same.

According to the ABA Committee, stories like these demonstrate “how innocent defendants without legal knowledge or the assistance of counsel easily can be coerced by judges or prosecutors into believing they will receive jail time unless they plead guilty.”⁴²¹ Moreover, “aside from an obvious risk of wrongful conviction, uncounseled guilty pleas are also deeply troubling in light of the potentially harsh, collateral consequences of criminal convictions.”⁴²² These collateral consequences can include deportation and the loss of the right to vote,⁴²³ as well as difficulty finding employment.⁴²⁴ Furthermore, contrived recidivism, the alarming problem that this Article seeks to address, is another reality for the defendants. These people will in all likelihood find themselves at odds with the criminal justice system again, and their prior records will be used against them.⁴²⁵

Still we have judges who, instead of vigorously protecting defendants’ rights in the plea bargaining setting, actually act as advocates for the prosecution or even purport that they are acting in the best interest of the defendant. In the Wisconsin case *State v. Williams*,⁴²⁶ for example, the defendant sought on appeal to withdraw his guilty plea

418. See *id.* (quoting the judge saying that “[a]fter today, it’s 3 to 6, after that, it’s 4 to 8” and that “if they’re ever going to plead, today is the time to do it”).

419. Klein, *supra* note 406, at 1364.

420. *Id.*

421. *GIDEON’S BROKEN PROMISE*, *supra* note 361, at 25.

422. *Id.*

423. *Id.*

424. See Miranda Oshige McGowan, *From Outlaws to Ingroup: Romer, Lawrence, and the Inevitable Normativity of Group Recognition*, 88 MINN. L. REV. 1312, 1338 & n.160 (2004) (“Most job applications ask whether the applicant has ever been convicted of a felony, and most employers will not knowingly hire people who have a criminal record.”).

425. See *id.* at 1338 (“Being a former felon forges a persons’ [sic] identity—if by nothing else, than by mere force of circumstance and treatment by those on the outside.”).

426. 666 N.W.2d 58 (Wis. Ct. App. 2003).

for drug possession with intent to deliver.⁴²⁷ Williams argued on appeal that the judge in the trial court coerced and pressured him into pleading guilty.⁴²⁸ Indeed, the judge had done just that. On the morning of trial, the court had Williams and his attorney as well as the prosecutor come to his chambers for a “little chat.”⁴²⁹ After this “little chat,” Williams pled guilty in exchange for an amended charge that effectively reduced the penalty range for the conviction.⁴³⁰ Though the conversation in chambers was not recorded,⁴³¹ the judge attempted to “recreate” the conversation for the record and openly acknowledged his “understanding that to some extent it’s not appropriate for Courts to get involved in the plea bargaining.”⁴³² Incredibly, the judge then accepted Williams’s guilty plea as “freely, voluntarily and intelligently entered.”⁴³³ Williams asked the trial court to withdraw his guilty plea when, according to him, he was not sentenced in accordance with the judge’s promise of one to three years.⁴³⁴ Instead, he received a total of five years imprisonment and five years supervised release.⁴³⁵ Williams’s conversation with the judge illustrates the unequal bargaining power between the defendant and a judge. Williams relayed to the court the following:

I had no intentions of pleading guilty, but by my being young and inexperienced, being ignorant of the law, you invited me into [your] chambers, you influenced me and pressured me into giving a guilty plea. As you said, if I was to lose trial, it is a good chance I would receive a seven to ten year sentence.

Your Honor, since I originally turned down a plea bargain in the hallway, I can honestly say if you wouldn’t have taken me in your chambers, I wouldn’t have never pled guilty. Myself being in a powerful judge’s chambers, you eroded my ability to make a decision of my own.⁴³⁶

The judge refused to withdraw the plea, stating the following to Williams: “You feel you’ve been railroaded. You feel you didn’t get your trial. . . . But at this point in time the record does not support

427. *Id.* at 59.

428. *Id.* at 60.

429. *Id.* (internal quotation marks omitted).

430. *Id.* at 61.

431. *Id.* at 60.

432. *Id.* (internal quotation marks omitted).

433. *Id.* (internal quotation marks omitted).

434. *Id.*

435. *Id.*

436. *Id.* at 62 (alteration in original).

me allowing you to withdraw the plea because at the time it appeared in all respects that this was a free and voluntary thing.”⁴³⁷ Adopting a “bright-line rule” that any judicial participation in plea negotiation raises a presumption of the involuntariness of the conviction, the Court of Appeals of Wisconsin overturned Williams’s conviction.⁴³⁸

Unfortunately, Williams’s case is not an isolated example of judicial advocacy in plea bargaining. In *United States v. Bradley*,⁴³⁹ the Fourth Circuit threw out several defendants’ guilty pleas because of the trial judge’s improper influence over the negotiations.⁴⁴⁰ During the course of the trial, which was originally expected to take five to six weeks, the court made various coercive comments to the defendants to attempt to persuade them to accept the government’s plea deal.⁴⁴¹ At one point the judge told one of the defendants, “‘I don’t know what it was that caused that plea to break down. It was a wonderful offer. It was an incredible offer.’”⁴⁴² At the end of a three hour recess, when the prosecution told the court that there was still no plea agreement and one of the defense attorneys stated that it was because of the offered sentence, the court “expressed puzzlement that the recommended sentence in the plea agreement presented a stumbling block because the court . . . was not bound by the sentence set forth in a plea agreement.”⁴⁴³

At one point, the court “expressed sadness that the Defendants had not taken advantage of the ‘very, very favorable . . . even . . . extraordinarily favorable, plea offers that have been made.’”⁴⁴⁴ Another time, the court said the following about two defendants’ refusal to plead guilty: “‘That really just absolutely boggles my mind. It absolutely boggles my mind It’s really sad.’”⁴⁴⁵ While acknowledging that “‘nobody can ever predict what a jury is going to do,’” the court still pressed upon the defendants that “‘this is one of the strongest cases ever to be brought in this courthouse.’”⁴⁴⁶ The trial court further explained to the defendants as follows:

[T]he unfortunates who get involved in the drug trade come to recognize eventually . . . that there is benefit in not push-

437. *Id.* (internal quotation marks omitted).

438. *Id.* at 67.

439. 455 F.3d 453 (4th Cir. 2006).

440. *Id.* at 455.

441. *Id.* at 456–59.

442. *Id.* at 457–58.

443. *Id.* at 458.

444. *Id.*

445. *Id.* (alteration in original).

446. *Id.*

ing the government to actually do what the government is prepared in every case to do, and that is to marshal evidence to produce against the defendants who are indicted, . . . to prove guilt beyond a reasonable doubt.⁴⁴⁷

One of the defendants rightly objected to the trial judge's pressure and the way he was "judging" them: "You keep telling us to cop out, like we are already guilty."⁴⁴⁸ Shortly thereafter, one of the defendants attempted to plead guilty, but the court refused to accept his guilty plea unless his co-defendants pled guilty as well.⁴⁴⁹ Finally, after more facilitation from the court, all defendants entered guilty pleas.⁴⁵⁰ Their sentences ranged from twenty-four-and-one-half years to life in prison.⁴⁵¹

The Fourth Circuit found plain error in the extensive participation by the trial judge in the plea negotiations.⁴⁵² Refusing to find plain error, according to the appellate court, "would seriously affect the fairness, integrity and public reputation of judicial proceedings."⁴⁵³ The court further noted that "[t]he district court repeatedly appeared to be an advocate for the pleas rather than . . . as a neutral arbiter."⁴⁵⁴ The appellate court rightly refused to ignore the "repeated judicial intervention" in the plea bargaining process: "The fact is, the jury rendered no verdict in this case; there has been no 'fair and reliable determination' of the Defendants' guilt."⁴⁵⁵

These reported cases are troubling in and of themselves. While I applaud the Fourth Circuit's decision, it will not be often that a plea agreement is overturned (or frankly even appealed in the first place). Indeed, it is troubling that there are cases that we will never hear about. The reported cases demonstrate just how easily judges can be tempted to, and will, improperly exert influence over defendants and coerce them into plea deals, even while on the record and acknowledging that their behavior is inappropriate. There is great potential for judicial coercion inherent in the process to begin with because the "unequal positions of the judge and the accused, one with the power to commit to prison and the other deeply concerned to avoid prison,

447. *Id.* at 458–59 (third alteration in original).

448. *Id.* at 459.

449. *Id.*

450. *Id.*

451. *See id.* (providing the specific lengths of their sentences).

452. *Id.* at 464.

453. *Id.*

454. *Id.*

455. *Id.*

at once raise a question of fundamental fairness.’”⁴⁵⁶ The problem inherent in the considerably unequal positions of the judge and criminal defendant is substantially magnified when the judge makes any indication at all that she wishes for the defendant to plead guilty.⁴⁵⁷ A defendant would quite reasonably expect that if she does not go along with the judge’s wishes that she will receive a longer sentence should she go to trial, as well as unfair and biased treatment from the judge.⁴⁵⁸

Rule 11 of the Federal Rules of Criminal Procedure unequivocally prohibits judges from engaging in or participating in plea negotiations.⁴⁵⁹ Specifically, the Rule provides the following: “An attorney for the government and the defendant’s attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions.”⁴⁶⁰ The purpose of the Rule is to prevent judges from coercing defendants into guilty pleas and from appearing as an advocate as opposed to a “neutral arbiter.”⁴⁶¹ Courts have recognized that pleas obtained by coercion are a violation of a defendant’s fundamental rights under the Constitution.⁴⁶²

In *United States v. Rodriguez*,⁴⁶³ a judge pressured a defendant into accepting a guilty plea.⁴⁶⁴ When the defendant stated that he wanted to go to trial, she asked if he was sure about that, and told him that he

456. *Id.* at 465 (quoting *United States v. Barrett*, 982 F.2d 193, 194 (6th Cir. 1992)).

457. *See id.* (“When a judge becomes a participant in plea bargaining he brings to bear the full force and majesty of his office. His awesome power to impose a substantially longer or even maximum sentence in excess of that proposed is present whether referred to or not.” (quoting *Barrett*, 982 F.2d at 194)).

458. *See id.* at 460 (“The defendant may fear that rejection of the plea will mean imposition of a more severe sentence after trial or decrease his chances of obtaining a fair trial before a judge whom he has challenged.” (quoting *United States v. Werker*, 535 F.2d 198, 202 (2d Cir. 1976))).

459. *See* FED. R. CRIM. P. 11(c)(1) (“The court must not participate in [plea] discussions.”).

460. *Id.*

461. *Bradley*, 455 F.3d at 460 (citation and internal quotation marks omitted); *see also* *United States v. Markin*, 263 F.3d 491, 497 (6th Cir. 2001) (“[A] judge’s participation in plea negotiation is inherently coercive”); *United States v. Rodriguez*, 197 F.3d 156, 159 (5th Cir. 1999) (“[T]he judge’s participation creates a misleading impression of his role in the proceedings. The judge’s role seems more like an advocate for the agreement than a neutral arbiter if he joins the negotiations.” (internal quotation marks and footnote call number omitted)).

462. *Bradley*, 455 F.3d at 460 (citing *Waley v. Johnston*, 316 U.S. 101, 104 (1942) (per curiam)).

463. 197 F.3d 156.

464. *Id.* at 159.

was likely to be found guilty if he did.⁴⁶⁵ The Fifth Circuit found improper coercion in violation of Rule 11 on the part of the judge: “Any of these statements would have been sufficient to put pressure on Rodriguez. Even absent these statements there was other pressure present because pressure is inherent in *any* involvement by a judge in the plea negotiation process.”⁴⁶⁶

While the law has recognized the substantial damage to the criminal defendant’s rights when a judge gets involved in plea bargaining negotiations, the stories discussed above, and even in the reported cases in which appellate courts rebuked the trial judges’ actions, show how easily judges who are caught up in the day-to-day business of moving along their dockets can violate defendants’ rights and diminish the fundamental fairness of the proceedings. A judge even openly acknowledged that racial biases may influence a judge trying to stay afloat in managing a very large docket: “There’s great pressure to say: ‘Look, we have time for X cases today, and the calendar has X plus 200. We’re going to have to hurry. Go out and deal In that process, it is certainly possible that preconceived notions and misconceptions and stereotypes can creep in.’”⁴⁶⁷

3. *The Innocence Problem*

I would be remiss in not discussing the most troubling aspect of the criminal justice system in general and the plea bargaining regime in particular—the innocence problem. The innocence problem gets to the heart of many scholars’ and other commentators’ concerns with the fairness of the criminal process, particularly as it relates to plea bargaining.⁴⁶⁸ As Professor Bibas bluntly stated, “It should go without saying that it is wrong to convict innocent defendants. Thus, the law should hinder these convictions instead of facilitating them”⁴⁶⁹ But there is a real and legitimate fear that the plea bargaining machine, in many areas across the country, has sacrificed accuracy so much so that innocent people are being coerced into pleading guilty.

465. *Id.*

466. *Id.*

467. Christopher H. Schmitt, *Plea Bargaining Favors Whites as Blacks, Hispanics Pay Price*, SAN JOSE MERCURY NEWS, Dec. 8, 1991, at A1 (quoting Alameda County, California Superior Court Judge Ken Kawaichi).

468. See Russell, *supra* note 4, at 1226 (“The extraordinary impact of the innocence movement lies in the compelling simplicity of its theoretical underpinnings: If innocent people have been and continue to be incarcerated and even executed, upon what claims of legitimacy does our criminal justice system rely?”).

469. Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1382 (2003).

Indeed, the innocence movement has uncovered the most disturbing and uncomfortable aspect of our criminal justice system: Many—indeed, far too many—innocent defendants have been wrongfully convicted.⁴⁷⁰

There is no way to know just how many defendants have been convicted of crimes that they did not commit; at least one study has estimated that annually, as many as 10,000 cases involving serious felony charges result in wrongful convictions.⁴⁷¹ According to the Innocence Project's website, "[i]n about 25% of DNA exoneration cases, innocent defendants made incriminating statements, delivered outright confessions or pled guilty."⁴⁷² The website notes that a study of cases in which DNA exonerated convicted persons reveals that "[i]nnocent defendants are convicted or plead guilty in this country with less than adequate defense representation."⁴⁷³

But the "known innocence cases represent the tip of an iceberg."⁴⁷⁴ Indeed, "known exonerees remain only a subset of innocent convicts; many cases do not or cannot receive DNA testing."⁴⁷⁵ Professor Brandon Garrett has conducted an interesting examination of the iceberg's tip. He discusses reasons for wrongful convictions in his study of 200 cases, in which nearly all of the inmates were convicted of either rape, murder, or both and were exonerated through innocence projects relying on DNA testing.⁴⁷⁶ Of those 200, nine of the defendants had actually pled guilty.⁴⁷⁷ At first blush, this may not raise cause for concern with the plea bargaining system's conviction of innocent persons.⁴⁷⁸ But as Professor Garrett notes, these exonerees "do not reflect the typical criminal convicts in that very few suspects are charged with rape or murder and even fewer are convicted"; indeed, "[a]ccording to the Bureau of Justice Statistics . . . only 0.7% of felony

470. See *infra* notes 471–79 and accompanying text.

471. *GIDEON'S BROKEN PROMISE*, *supra* note 361, at 3.

472. The Innocence Project, Understanding the Causes: False Confessions, <http://www.innocenceproject.org/understand/False-Confessions.php> (last visited Apr. 8, 2010).

473. The Innocence Project, Understanding the Causes: Bad Lawyering, <http://www.innocenceproject.org/understand/Bad-Lawyering.php> (last visited Apr. 8, 2010).

474. Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 62 (2008).

475. *Id.*

476. See *id.* at 64–74 (providing the relevant discussion).

477. *Id.* at 74.

478. See, e.g., Colin Starger, *Death and Harmless Error: A Rhetorical Response to Judging Innocence*, 108 COLUM. L. REV. SIDEBAR 1, 1 (2008), <http://www.columbialawreview.org/articles/death-and-harmless-error-a-rhetorical-response-to-judging-innocence> ("While critics of contemporary criminal justice policies will likely see Professor Garrett's data as revealing the tip of an iceberg of deeper structural flaws, defenders of the status quo will predictably resist generalizations from this closed data set to any larger picture of criminal justice administration.").

defendants are convicted of murder and only 0.8% are convicted of rape.”⁴⁷⁹ Rape and murder are some of the *most serious crimes* with which defendants can be charged, and the prosecutors may simply not have offered plea deals at all or may have offered deals that were not attractive. Also, these are just the cases that Professor Garrett knew about at the time of his article—those in which the defendants had been successful at obtaining post-conviction DNA testing. Many more convicted persons are attempting to get such testing or have failed to secure it for various reasons, including lost evidence.

But just suppose that there were 1000 cases of rape and murder where defendants were wrongfully convicted, and around four percent pled guilty—that would be forty people having actually pled guilty to one of the most serious criminal offenses in this country. Moreover, what about the less serious offenses that nevertheless carry serious prison time? More importantly, what about those crimes in which DNA is not even an issue? Many wrongly convicted defendants may never be able to prove their innocence, and these troubling questions reveal just why some people reasonably believe that the innocence movement has only uncovered the “tip of an iceberg.”⁴⁸⁰

We have no real way of knowing just how many innocent defendants have served prison time or are serving prison time right now for crimes that they did not commit, and of those, how many actually pled guilty. Whatever the number truly is, whether it is 10,000 or 10, we should not be satisfied with a system that would convict *anyone* who is innocent.⁴⁸¹ Furthermore, we should never be satisfied with a system that actually coerces people to plead guilty.⁴⁸² While it may be unrealistic to expect that there will ever be a perfect system, we must constantly and vigilantly seek to perfect the system’s accuracy. We should, despite Justice Scalia’s deep skepticism during oral arguments in *United States v. Ruiz*,⁴⁸³ be “horrified” with the coercive plea bargaining practices used against innocent defendants.⁴⁸⁴

479. Garrett, *supra* note 474, at 74 (citation omitted).

480. *See id.* at 62 (arguing that “known innocence cases represent the tip of an iceberg”).

481. *See, e.g.*, Transcript of Oral Argument, *supra* note 18, at 26 (revealing that Justice Scalia would be “horrified” if our criminal justice system encouraged innocent people to plead guilty).

482. *See supra* Part III.A.2.

483. 536 U.S. 622 (2002).

484. *See supra* text accompanying notes 80–81.

Innocent defendants do plead guilty because of inherently coercive plea bargaining practices.⁴⁸⁵ Indeed, the law formally recognizes and accepts that an innocent defendant can plead guilty.⁴⁸⁶ The Supreme Court has approved of what are known as *Alford* pleas, through which a defendant enters a guilty plea while at the same time maintaining her innocence.⁴⁸⁷ Specifically, the Court in *North Carolina v. Alford*⁴⁸⁸ stated as follows:

[W]hile most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty. An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.⁴⁸⁹

In *Alford*, the Court found no constitutional error in the trial court's acceptance of the defendant's plea and stated that it was "reasonabl[e]" for the defendant to have entered the guilty plea because it thereby "limited the maximum penalty" that would be imposed upon him.⁴⁹⁰

Justice Scalia's comment that "[t]here is nothing in our system that encourages or even allows an innocent person . . . to plead guilty"⁴⁹¹ indicates that he would not agree with the system's use of *Alford* pleas. Moreover, presumably, he would certainly not agree with the criminal process—occurring daily across this country—whereby efficiency is the primary concern and innocence is often simply not an issue.⁴⁹²

485. See, e.g., Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 231 (2007) (noting that "bargaining leverage leads to plea bargains inappropriately replacing trials and may play a role in wrongful convictions"); see also *supra* Part III.A.2.

486. See *North Carolina v. Alford*, 400 U.S. 25, 29, 39 (1970) (holding that the Fourth Circuit erred in finding a defendant's plea of guilty, made when the defendant had denied guilt, constitutionally invalid).

487. See *id.* at 37–39 (recognizing a defendant who pleads guilty while maintaining innocence may be criminally punished without violating the U.S. Constitution).

488. 400 U.S. 25.

489. *Id.* at 37.

490. *Id.*

491. Transcript of Oral Argument, *supra* note 18, at 26.

492. See *infra* Part III.B.

B. *Is Rule 609's Promotion of Plea Bargaining Worthy of the Sacrifice in Evidentiary Quality?*

Rule 609 promotes plea bargaining by actually facilitating pleas, as discussed above, and by legitimizing the system in giving substantial evidentiary power to untried convictions.⁴⁹³ Even though in theory Rule 609 only permits impeachment of criminal defendants, the reality is that prior convictions are used as substantive evidence of guilt.⁴⁹⁴ I have offered above a discussion of major flaws in the plea bargaining system to lay the foundation for addressing the larger policy question of whether the rules of evidence should promote this system.

As I previously mentioned in the brief discussion of Federal Rule of Evidence 410,⁴⁹⁵ a specialized relevance rule,⁴⁹⁶ there are several instances in which the evidentiary rules promote certain social policies.⁴⁹⁷ Of course, Rule 410 itself promotes plea bargaining.⁴⁹⁸ Additionally, Rule 411 excludes evidence regarding liability insurance as proof of negligence.⁴⁹⁹ The policy behind Rule 411 is to discourage jurors from deciding the case on "improper grounds"; moreover, liability insurance or the lack thereof has little, if any, probative value in determining liability issues, such as whether someone was negligent or not.⁵⁰⁰ Rule 407 excludes the use of subsequent remedial measures to prove liability.⁵⁰¹ By insulating parties from liability, Rule 407 encourages parties to implement remedial measures.⁵⁰² At the same time, the Rule also recognizes that the actions that one takes subsequent to an incident generally have little probative value in the apportionment of liability for that incident.⁵⁰³

The rules that come under the rubric of the "Rape Shield" law advance social policies as well.⁵⁰⁴ These evidentiary rules generally ex-

493. *See supra* Part II.B.

494. *See supra* text accompanying notes 159–63.

495. *See supra* notes 114–25 and accompanying text.

496. *See* FED. R. EVID. 410 & advisory committee's note (excluding certain evidence regarding plea bargaining as a matter of social policy).

497. *See supra* note 122 and accompanying text.

498. *See infra* Part III.B.1.

499. FED. R. EVID. 411.

500. FED. R. EVID. 411 advisory committee's note.

501. FED. R. EVID. 407.

502. FED. R. EVID. 407 advisory committee's note.

503. *See id.* (characterizing the probative value of subsequent remedial measures as weak by noting that "[t]he conduct is not in fact an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence").

504. *See* FED. R. EVID. 412–415 (dealing with sex offense, sexual assault, and child molestation cases).

clude evidence of a victim's sexual history or predisposition.⁵⁰⁵ The underlying policy shields victims from having to confront embarrassing evidence or to endure harassing lines of questioning regarding their sexual histories.⁵⁰⁶ These evidentiary protections encourage victims to report sexual offenses.⁵⁰⁷ Moreover, they assist the fact-finding process by keeping irrelevant and unfairly prejudicial evidence from the jury.⁵⁰⁸ Indeed, the common thread that connects the "social policy" evidentiary rules is that each rule promotes its respective policy while simultaneously enhancing the truth-seeking process.

In contrast, rules that promote and legitimize plea bargaining, such as Rules 410 and 609, impede the truth-seeking process. Consider how prosecutors have manipulated Rule 410 to force defendants to accept plea bargains.⁵⁰⁹

1. *Lessons from Prosecutors' Use of Rule 410*

In practice, defendants rarely invoke Rule 410 at trial because prosecutors routinely coerce defendants into waiving their rights under this Rule before they will even offer a plea deal.⁵¹⁰ In *United States v. Mezzanatto*,⁵¹¹ the Supreme Court upheld the constitutionality of plea-statement rule waivers.⁵¹² Faced with an argument that such waivers would impede the plea bargaining process, the Court instead found that waivers could also *encourage* plea bargaining.⁵¹³ The Court reasoned that prosecutors, unable to secure waivers, might never initiate negotiation talks.⁵¹⁴ Rather than disrupting the plea bargaining process, the Court found that waivers could *facilitate* the process.⁵¹⁵

The Court's analysis in *Mezzanatto*, finding that Rule 410 waivers facilitate plea bargains, comports with the reality of the plea system in

505. See FED. R. EVID. 412 (generally prohibiting the admission of evidence of the victim's "other sexual behavior" and "sexual disposition").

506. FED. R. EVID. 412 advisory committee's note.

507. *Id.*

508. *Id.*

509. See *infra* Part III.B.1.

510. See *infra* note 516 and accompanying text.

511. 513 U.S. 196 (1995).

512. *Id.* at 210 ("We hold that absent some affirmative indication that the agreement was entered into unknowingly or involuntarily, an agreement to waive the exclusionary provisions of the plea-statement Rules is valid and enforceable.").

513. *Id.* at 207-08.

514. *Id.* The Court noted that prosecutors might refuse to plea bargain without such waivers, particularly early on in criminal cases when prosecutors are still gathering evidence and building a case. *Id.* at 207. At that point, a suspect might be willing to provide such evidence and information regarding other suspects in exchange for leniency and immunity. *Id.*

515. *Id.* at 208.

that plea-statement waivers of Rule 410 protections are quite routine.⁵¹⁶ Ironically, Rule 410's policy of promoting plea bargaining is carried out when defendants waive the evidentiary protections embodied in the Rule. Of course, prosecutors do not use Rule 410 waivers solely to facilitate initiation of plea deals. Rather, they routinely invoke Rule 410 to discourage defendants who receive higher-than-expected sentences from backing out of plea deals.⁵¹⁷ Theoretically, such waivers must be executed "knowing[ly], voluntar[ily] and competent[ly],"⁵¹⁸ but the reality of plea bargain negotiations calls into question whether the waiver requirements are being met on a routine basis.

Even so, Rule 410 waivers promote the plea bargaining regime by discouraging defendants from renegeing on plea deals because they have waived the evidentiary protections that otherwise prohibit the prosecutor from introducing adverse statements, offered during the plea negotiations, at trial.⁵¹⁹ Moreover, waivers promote the plea bargaining regime by vesting even more coercive power in the prosecutor.

The way in which prosecutors have subverted and manipulated Rule 410 to gain even more leverage in the plea bargaining process is quite troubling. While it is true that Rule 410 was intended to facilitate plea bargaining, it was to do so in a way that protected criminal defendants because it gave them the freedom to engage in candid negotiations with the government without the fear that their statements might later be used against them.⁵²⁰ The Rule, as intended, protected defendants while at the same time promoting plea bargaining. The Rule, as intended, also promoted the goals of truth-seeking and accuracy in the plea bargaining process by encouraging defendants to speak candidly with prosecutors.⁵²¹

By allowing waivers of Rule 410's protections, the judiciary privileged plea bargaining with no concern at all for protecting the defendant from coercion. The practical misuse of Rule 410 illustrates what

516. See *United States v. Stevens*, 935 F.2d 1380, 1396 (3d Cir. 1991) ("Plea agreements, for example, commonly contain a provision stating that proffer information that is disclosed during the course of plea negotiations is inadmissible as substantive evidence of guilt, but is admissible for purposes of impeachment." (emphasis added)).

517. See *Hall*, *supra* note 121, at 601-02 ("[A] waiver of her rights under Rule 410 . . . effectively prevents a defendant from ever withdrawing her plea since the government would be able to introduce all admissions of guilt made during the plea hearing.").

518. *Id.*

519. See *supra* note 517.

520. See *Rasmusen*, *supra* note 119, at 1550.

521. FED. R. EVID. 410 advisory committee's note.

can happen when the rules of evidence are used to advance judicial efficiency at the expense of accuracy and truth-seeking. The rules simply become another means by which prosecutors and judges coerce defendants into accepting pleas. To insulate defendants from coercion and to restore the truth-seeking function of the judiciary, we must disentangle the dysfunctional relationship between plea bargaining and the evidence rules.

2. *Conducting a Cost-Benefit Analysis*

Rule 102 of the Federal Rules of Evidence provides that “[t]hese rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.”⁵²² Indeed, even before the enactment of the Federal Rules of Evidence, the Supreme Court observed that “[r]ules of evidence are designed in the interest of fair trials.”⁵²³ Long before making that assertion, the Court explained, “The fundamental basis upon which all rules of evidence must rest—if they are to rest upon reason—is their adaptation to the successful development of the truth.”⁵²⁴ To be sure, Rule 102 addresses both efficiency (hence the concern for “elimination of unjustifiable expense and delay”) as well as the overarching goals of fairness, justice, and the ascertainment of truth.⁵²⁵

How, then, does the use of prior untried convictions to impeach fit in with the goals of the evidentiary rules? Is the purported efficiency achieved through promoting and legitimizing plea bargaining at the expense of the goals of accuracy and truth-seeking? Or is the system maximizing its ability to achieve both efficiency and accuracy? To answer these questions, a cost-benefit analysis that examines untried convictions admissible under Rule 609 is appropriate.

Judge Posner considered Rule 609 in a law review article that applied economic theory to evidence law.⁵²⁶ He made the following conclusion: “On balance, there is probably no benefit in enhanced

522. FED. R. EVID. 102; *see also* Okun, *supra* note 314, at 533 (noting that it is “axiomatic . . . that the primary purpose of a trial is to discover the truth”).

523. *United States v. Augenblick*, 393 U.S. 348, 352 (1969).

524. *Funk v. United States*, 290 U.S. 371, 381 (1933).

525. *See* FED. R. EVID. 102 (“These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.”).

526. *See* Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 *STAN. L. REV.* 1477, 1526–27 (1999) (discussing Rule 609).

accuracy to allowing the use of prior-crimes evidence in cross-examination. But there is a cost—the same cost as the cost of allowing prior-crimes evidence to be used to prove a criminal propensity.”⁵²⁷ As have other scholars and judges criticizing Rule 609, Judge Posner acknowledged that “[d]espite the limiting instruction to which the defendant is entitled, the jury cannot be expected to confine its consideration of prior-crimes evidence to the issue of the defendant’s credibility.”⁵²⁸ He noted that it is “doubtful” that someone who has “flouted the criminal law in the past” is “*more* unlikely to take his oath seriously than a first-time offender who thinks he can lie his way to an acquittal.”⁵²⁹ Moreover, “[t]here is no basis for supposing that recidivists are more likely than first-time offenders to lie; both are criminals, and the incentive of a criminal to lie is unrelated to whether he has committed one crime or more than one.”⁵³⁰ Posner posits that Rule 609 is antithetical to the criminal law’s goal of deterrence:

Rule 609 thus undermines the deterrence of habitual offenders by reducing the probability that a habitual offender who testifies will be acquitted, thereby deterring habitual offenders from testifying. The jury is apt to infer guilt from the defendant’s failing to testify (and this, once again, regardless of any limiting instructions).⁵³¹

Posner’s theory properly acknowledges that persons with prior records know, perhaps better than anyone else, that they are targets of law enforcement and that they will be rounded up as “the usual suspects” in criminal investigations.⁵³² Judge Posner even observed that rules like Rule 609, which parade defendants’ prior convictions before the jury, encourage prosecutors to go after persons with criminal records: “Prosecutors would find it so much easier to convict habitual offenders, *guilty or not*, that their incentives to prosecute first-time offenders would be impaired (assuming that prosecutors operate with a budget constraint and . . . want to maximize convictions weighted by length of sentence, subject to that constraint).”⁵³³ Knowing that their criminal records will be used against them as presumptions of guilt, those with such records will have little incentive to avoid future crimi-

527. *Id.* at 1527.

528. *Id.*

529. *Id.* at 1526–27.

530. *Id.* at 1527.

531. *Id.*

532. See Ellmann, *supra* note 186, at 703 (internal quotation marks omitted) (discussing the police’s practice of rounding up “the usual suspects” (internal quotation marks omitted)).

533. See Posner, *supra* note 526, at 1526 (emphasis added).

nal behavior. From this perspective, Judge Posner is correct that Rule 609 undermines deterrence.

Judge Posner's analysis can be applied in the plea bargaining context as well. Indeed, the problems that he described with respect to the trial setting are magnified in the plea bargaining setting. Furthermore, because the plea bargaining system supplies the vast majority of convictions, it is in the context of plea bargaining that Rule 609 has the greatest impact.⁵³⁴ Prosecutors are more likely to obtain plea bargains from alleged recidivists regardless of the strength of the case, knowing that they will have little chance of acquittal.⁵³⁵

Thus, promoting and legitimizing plea bargaining through Rule 609 promotes a fundamentally flawed system that effectively creates recidivism at the expense of going after many first-time offenders. Moreover, Rule 609 sacrifices accuracy in results. While efficiency is no doubt valuable in the criminal justice system, it is certainly not, or at least it should not be, what the system values the most.⁵³⁶ Where these two goals are at odds, efficiency must give way to accuracy, and certainly accuracy must not be sacrificed for the sake of efficiency. In short, efficiency in the criminal justice system has little value unless the system is accurate.

IV. ADDRESSING THE FUNDAMENTAL (UN)FAIRNESS OF USING PLEA BARGAINS TO IMPEACH AND PROPOSALS FOR REFORM

In this Part, I offer both legislative and judicial proposals for dealing with the fundamental unfairness of using prior convictions obtained through the deeply flawed plea bargaining system. First, I address the constitutional problem associated with using such convictions. I establish that, if due process permits prior conviction impeachment at all, it must only permit the admissibility of *reliable* prior convictions against criminal defendants, and that the current system of plea bargaining in many jurisdictions across the country falls well short of providing such reliability.⁵³⁷ I then propose that Congress and state legislatures that have adopted Rule 609 address the due process issue.⁵³⁸ Alternatively, unless and until Congress acts, I offer suggestions for those judges who are interested in addressing the

534. See *supra* Part II.

535. See Dodson, *supra* note 148, at 39, 41 n.421 (discussing research suggesting that defendants with criminal records are more likely to be convicted than those with clean records).

536. Bibas, *supra* note 469, at 1382.

537. See *infra* Part IV.A.

538. See *infra* Part IV.A.

fundamental fairness concerns that I have raised with respect to the use of untried convictions under Rule 609.⁵³⁹ My proposals here complement and expand on previous guidelines that I have offered in suggesting that judges expressly consider defendants' race and racial biases in the criminal process when assessing the reliability of prior convictions.⁵⁴⁰

A. *Proposal for Legislative Action*

Scholarly criticism of Rule 609 is appropriate given the Rule's faulty underlying premise and the grave potential for prejudice to criminal defendants. Ideally, Congress and state legislatures that have adopted Rule 609 should exclude the Rule's applicability to criminal defendants altogether in order to eliminate the unfair prejudice to defendants resulting from using their prior convictions to impeach them. The problems inherent in using untried convictions under Rule 609 that I have raised in this Article provide additional, and I would argue even more compelling, reasons for the elimination of the Rule altogether, at least with respect to criminal defendants.⁵⁴¹ Moreover, my criticism of the use of untried convictions in particular goes beyond the usual critique of Rule 609 by looking to the realities of today's criminal process, which relies heavily upon the plea bargaining regime—a regime that often cares very little about whether, and does little in practice to ensure that, individual defendants actually committed the crimes with which they are charged and ultimately convicted.⁵⁴²

This reality is at odds with Rule 609's underlying premise that all felonious behavior, as well as criminally deceptive behavior, renders a criminal defendant less credible.⁵⁴³ The use of convictions from the plea bargaining system, plagued by the flaws I discussed above, is wholly inconsistent with Rule 609's premise. If the Rule is to remain a part of evidence law—and to be clear, I believe that it should not—it should at least recognize the reality of plea bargaining; it should also recognize that the trial setting, though it may not be perfect, is still a far better source for Rule 609 evidence, particularly as used against a criminal defendant.⁵⁴⁴ I am far less concerned about the use of such

539. See *infra* Part IV.B.

540. See Carodine, *supra* note 65, at 586–87 (providing greater detail regarding this previous proposal).

541. See *supra* Part III.

542. See *supra* Part III.

543. See *supra* note 129 and accompanying text.

544. See *supra* Part III.A for a comparison between tried and untried convictions.

evidence against ordinary witnesses for the prosecution, because I see no problem with a criminal defendant using the government's unreliable convictions against its own witnesses.

The due process problem has been raised with respect to the use of prior convictions to impeach criminal defendants—even without a specific focus on untried convictions. For example, the Supreme Court of Hawaii, which has adopted a rule prohibiting impeachment of a criminal defendant with his prior convictions, found that the prior conviction impeachment rule unreasonably burdens a criminal defendant's right to testify and thus violates due process.⁵⁴⁵ The court explained, "While technically the defendant with prior convictions may still be free to testify, the admission of prior convictions to impeach credibility 'is a penalty imposed by courts for exercising a constitutional privilege.'⁵⁴⁶ The burden might be outweighed, according to the court, "if there were some value" in using prior convictions to impeach criminal defendants.⁵⁴⁷ But it was "apparent" to the court that "prior convictions are of little real assistance to the jury in its determination of whether defendant's testimony as a witness is credible."⁵⁴⁸ The court was not even persuaded that crimes involving dishonesty or false statement were of much value: "Even if the crime involves dishonesty or false statements, in light of the fact that every criminal defendant may be under great pressure to lie, the *slight* added relevance which even a perjury conviction may carry would not seem to justify its admission."⁵⁴⁹ Additionally, the court noted that juries are "presumably qualified to determine whether or not a witness is lying from his demeanor and his reaction to probing cross-examination."⁵⁵⁰

As the Hawaii Supreme Court observed, the prior conviction impeachment rule admits marginally relevant evidence against a defendant. I argue that the already low probative value of such evidence is diminished further when the convictions were bargained for, and the prejudice to the criminal defendant is magnified by the use of such unreliable convictions.

Realistically, I recognize that Rule 609 is a deeply entrenched evidentiary rule and that Congress and most state legislatures will likely be reticent to eliminate it altogether. There does seem to be increas-

545. *State v. Santiago*, 492 P.2d 657, 661 (Haw. 1971).

546. *Id.* at 660 (quoting *Griffin v. California*, 380 U.S. 609, 614 (1965)).

547. *Id.* at 661.

548. *Id.*

549. *Id.* (emphasis added).

550. *Id.*

ing concern, however, about the accuracy of the criminal justice system, particularly in light of the important work that the Innocence Project and others have done in heightening awareness about our system's deep flaws.⁵⁵¹ As the previously referenced ABA Committee observes, some lawmakers are particularly concerned about the delivery of competent legal counsel to indigent defendants, and are poised to implement significant reforms (or have already begun doing so).⁵⁵²

To the extent that Congress and state legislatures wish to promote overall fairness in the criminal justice system and in the plea bargaining process in particular, they must align the rules of criminal procedure, criminal statutes, and, of course, the rules of evidence with those goals. The time to address the fundamental unfairness of Rule 609 is long overdue. It is particularly crucial given that the plea bargaining system has shown itself as a whole to be inferior to the trial process—in many instances, woefully inferior.⁵⁵³ If we are to have a prior conviction impeachment rule against defendants at all, untried convictions should not be used in subsequent proceedings to impeach (and effectively reconvict) criminal defendants. Congress and state legislatures should use the evidentiary rules as a part of an overall effort to achieve fairness and accuracy in plea bargaining, not merely as a means by which to promote an efficient, yet deficient, system. Lawmakers should remove plea bargains from Rule 609's applicability.

Alternatively, lawmakers should recognize that the vast plea bargaining machine that has almost entirely displaced the criminal process severely undercuts Rule 609's legitimacy to the extent that the Rule itself should be eliminated entirely. Either approach would rightly delegitimize the flawed plea bargaining regime. Rule 609, as it currently stands, legitimizes a broken system and goes further by actually reproducing its failings in subsequent proceedings.⁵⁵⁴ Unless we can be certain that plea bargaining is equal in reliability to trials and that it affords criminal defendants the full panoply of protections that a trial would (in practice and not just in theory), Rule 609 will remain one of the most fundamentally unfair and repugnant rules applicable in criminal cases.

551. See *supra* Part III.A.3.

552. See *GIDEON'S BROKEN PROMISE*, *supra* note 361, at iv (describing the lack of effective legal representation).

553. See *supra* Part III.

554. See *supra* Part II.B.

B. Proposal for Judicial Action: Expanding the Loper Doctrine

Until Congress acts, courts should recognize and address the fundamental unfairness associated with using untried convictions to impeach criminal defendants. The unreliability of plea bargains as evidence under Rule 609 raises serious due process concerns, and courts have a duty to address and alleviate those concerns. I realize that some judges, particularly those who have themselves become advocates in the plea bargaining system, might scoff at the notion that untried convictions are unreliable sources of Rule 609 evidence.⁵⁵⁵ While I would hope to persuade those judges otherwise, realistically, the judges I am most likely to reach are those who are already concerned about the injustices inflicted by the discussed plea bargaining machine as well as about the impact of Rule 609 on a macro level.⁵⁵⁶ There is precedent, as I will discuss below, upon which such judges can rely and build in addressing these issues.

As discussed earlier in this Article, in the plea bargaining setting, prosecutors often use Rule 609 as leverage in coercing pleas from criminal defendants.⁵⁵⁷ In the trial setting, prior convictions under Rule 609 are routinely admitted against criminal defendants.⁵⁵⁸ When the government introduces a prior conviction against a defendant for impeachment purposes, in practice the defendant has little ability under existing law to launch a challenge to the substantive validity of the prior conviction and the fundamental fairness of its use. Indeed, a leading evidence treatise explains that “many cases forbid any explanation, extenuation or denial of guilt even by the witness himself on redirect.”⁵⁵⁹ This prohibition is “a logical consequence of the premise of conclusiveness of the judgment.”⁵⁶⁰ The treatise, however, also notes the following:

[A] substantial number of courts, while not opening the door to a retrial of the conviction, do permit the witness himself to make a *brief and general* statement in explanation, mitigation, or denial of guilt, or recognize a discretion in the

555. See *supra* text accompanying notes 18–19; see also *supra* Part III.A.1.

556. See, e.g., Stephen J. Fortunato, Jr., *Judges, Racism, and the Problem of Actual Innocence*, 57 ME. L. REV. 481, 505–10 (2005) (discussing Judge Stephen Fortunato’s argument for the elimination of Rule 609 and noting that “[w]hile the admission of a prior record hurts a defendant, whatever his color, blacks wishing to testify in their own defense in a criminal trial are more disadvantaged as a group than whites”).

557. See *supra* Part III.A.2.b.

558. See *supra* notes 135–36 and accompanying text.

559. MCCORMICK ON EVIDENCE § 42 (John William Strong ed., 4th ed. 1992).

560. *Id.*

trial judge to permit it. Wigmore aptly terms it a “*harmless charity* . . .”⁵⁶¹

Thus, no serious consideration is given to the conviction’s reliability.

The Supreme Court, however, has carved out one constitutionally compelled exception that rests on due process principles of fundamental fairness, but the exception is narrow. The Supreme Court in *Loper v. Beto*⁵⁶² held that convictions that are void because they resulted from criminal proceedings in which the defendant was denied the right to counsel under *Gideon v. Wainwright*⁵⁶³ are per se unreliable and inadmissible under Rule 609.⁵⁶⁴ The Court found that the use of such convictions would violate the fundamental fairness requirement of the Due Process Clause.⁵⁶⁵ *Loper*’s holding applies only to convictions obtained in cases where the right to counsel was denied altogether and the conviction was later determined to be void.⁵⁶⁶

Loper remains instructive, however, because the core principle in the case was that prior convictions must be reliable to be admissible under Rule 609.⁵⁶⁷ There are some who will likely not want to apply *Loper* more broadly in cases in which the source of unreliability was not the outright denial of counsel, but “the rationale of *Loper* could be extended beyond cases in which the right to counsel was denied.”⁵⁶⁸ *Loper*’s reliance on due process as the basis for holding that convictions obtained absent the right to counsel were unconstitutional “permits the argument that procedures violating *other* rights essential to reliability could also produce unreliable tainted convictions.”⁵⁶⁹

561. *Id.* (emphasis added).

562. 405 U.S. 473 (1972).

563. 372 U.S. 335 (1963).

564. *Loper*, 405 U.S. at 483 (“The absence of counsel impairs the reliability of such convictions just as much when used to impeach as when used as direct proof of guilt.” (quoting *Gilday v. Scafati*, 428 F.2d 1027, 1029 (1st Cir. 1970))).

565. *Id.*

566. *See, e.g.*, *Smith v. Collins*, 964 F.2d 483, 486 (5th Cir. 1992) (“[The defendant’s] reliance on *Loper* is misplaced. *Loper* involved convictions used for impeachment which were constitutionally invalid because the accused was denied the right to counsel—a defect which impairs the very integrity and reliability of a conviction. [The defendant’s] prior convictions were invalidated because the indictments *contained technical defects*. The factual reliability of his convictions were [sic] not questioned.” (emphasis added) (citations omitted)); *State v. Dahlin*, 971 P.2d 763, 765 (Mont. 1998) (“Here, no prior conviction later determined invalid was introduced into evidence. . . . In contrast to the prior convictions at issue in . . . *Loper*, [the defendant’s] testimony has not been ruled invalid or void . . .”).

567. 28 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE & PROCEDURE § 6140 (1993).

568. *Id.* (italics added).

569. *Id.* (emphasis added).

Interestingly, if the conviction were from another country, comity principles, which are far less rigid, would apply. Comity focuses on the “fundamental fairness” of the prior proceedings.⁵⁷⁰ Comity proceeds from the notion that there is no obligation to recognize judgments rendered in foreign jurisdictions, including judgments of convictions.⁵⁷¹ The recognition of those judgments stems from an act of courtesy, respect, or goodwill.

Fundamental fairness is the basic measure by which we evaluate foreign country judgments, including foreign convictions.⁵⁷² While we do not require a foreign judgment to have been rendered under a system that provides for trial by jury,⁵⁷³ our courts do look for basic procedural protections.⁵⁷⁴ For Rule 609 purposes, we should examine untried convictions from U.S. domestic courts with at least the same minimal level of scrutiny. We should treat criminal defendants who have been convicted in our own system at least as well as those who have been convicted in foreign systems.

A foreign country conviction is admissible against a defendant for impeachment purposes “provided the accused has not shown evidence of a lack of fairness in the foreign justice system.”⁵⁷⁵ In *United States v. Wilson*,⁵⁷⁶ the Fourth Circuit applied a fundamental fairness test to a German criminal proceeding that resulted in a rape conviction.⁵⁷⁷ The defendant was impeached with the German conviction during his rape trial in federal court.⁵⁷⁸ The Fourth Circuit addressed the admissibility of the conviction under Rule 609 by analyzing the fundamental fairness of the proceedings.⁵⁷⁹ Noting that the fundamental fairness inquiry does not require trial by jury, the court observed as follows:

The only question here is whether the German legal system is so fundamentally unfair that a conviction obtained under it is inadmissible. The defendant has not shown that the

570. *United States v. Wilson*, 556 F.2d 1177, 1178 (4th Cir. 1977).

571. See Montré D. Carodine, *Political Judging: When Due Process Goes International*, 48 WM. & MARY L. REV. 1159, 1165–67 (2007) (explaining that comity proceeds from the fact that there is no full faith and credit due to foreign judgments).

572. See, e.g., *Wilson*, 556 F.2d at 1178 (“The only question here is whether the German legal system is so fundamentally unfair that a conviction obtained under it is inadmissible.”).

573. *Id.*

574. See *infra* text accompanying note 584.

575. Riechmann v. State, 581 So. 2d 133, 139 (Fla. 1991).

576. 556 F.2d 1177.

577. *Id.* at 1178.

578. *Id.*

579. *Id.*

German legal system lacks the procedural protections necessary for fundamental fairness. We note that . . . the defendant does not claim that he lacked the assistance of counsel during his trial in Germany.⁵⁸⁰

Our courts generally respect foreign legal authority, but there have been a few instances in which American courts have refused to recognize a foreign court's judgment because of concerns about the lack of fundamental fairness. In *United States v. Moskovits*,⁵⁸¹ in the context of addressing a sentencing enhancement issue, a federal district court refused to allow the prosecution to use a Mexican conviction against a criminal defendant.⁵⁸² The court found that the proceedings were lacking in basic fairness because the defendant was denied counsel at "crucial stages" of the criminal process.⁵⁸³ The *Moskovits* court explained that courts "should test a foreign conviction by its conformity with those particular norms of American criminal procedures, jurisprudence constitutionalized, that are the particular domain of *absolute rock bottom fundamental fairness*."⁵⁸⁴ And according to the court, "[t]he participation of counsel at crucial stages of the criminal proceeding is one such fundamental norm."⁵⁸⁵

In the civil context, our courts have refused to recognize certain Iranian judgments after finding that they lacked fundamental fairness because the judiciaries at the time the judgments were rendered lacked independence, were highly politicized, and did not hold public trials, and the parties had "little reasonable expectation of justice."⁵⁸⁶ Similarly, our courts have refused to recognize particular Liberian judgments because their entire system was plagued by corruption and the "incompetent handling of cases remained a recurrent problem."⁵⁸⁷ While I take issue with courts, as an institutional competence matter, passing judgments on a country's entire judicial system, these cases are instructive for purposes of evaluating Rule 609 evidence to the extent that the fundamental fairness inquiry can be applied to the particulars of the circumstances giving rise to a defendant's untried conviction. As in the case of a foreign judicial system, the political

580. *Id.*

581. 784 F. Supp. 183 (E.D. Pa. 1991).

582. *Id.* at 192.

583. *Id.* at 190.

584. *Id.* (emphasis added).

585. *Id.*

586. *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1411-12 (9th Cir. 1995) (citations and internal quotation marks omitted).

587. *Bridgeway Corp. v. Citibank*, 201 F.3d 134, 138 (2d Cir. 2000) (citation and internal quotation marks omitted).

branches of government are much better suited to critique the fundamental fairness of the entire plea bargaining system, which is why my first proposal is for lawmakers to act.⁵⁸⁸

It is important to note that these foreign conviction cases typically involve claims that the defendants were denied the right to counsel, but the courts in those cases have never limited the scope of their fundamental fairness inquiry to the right to counsel, in contrast with the *Loper* doctrine. As the *Moskovits* court noted, the assistance of counsel is *one* of those fundamental norms that ensure fundamental fairness.⁵⁸⁹ The foreign civil judgment cases indicate that a system is fundamentally unfair if the judiciary lacks independence and is highly politicized, if trials rarely are held publicly, and if parties have “little reasonable expectation of justice.”⁵⁹⁰ These indicators of fundamental fairness sound remarkably similar to the realities of the plea bargaining system. It would be interesting to see how a court would evaluate an untried conviction obtained in another country under some of the same troubling circumstances outlined earlier in this Article.

Judges who are concerned about fundamental fairness when faced with the question of whether to admit a prior conviction for impeachment purposes should expand *Loper’s* doctrine and formulate an analysis akin to that which courts use in the foreign judgment cases. Courts should not routinely admit untried convictions under Rule 609. Instead, they should seriously consider a defendant’s claims regarding the lack of fundamental fairness in the plea bargaining process. If a defendant makes a colorable claim that the plea bargaining process that resulted in his conviction was fundamentally unfair, the burden should shift to the prosecutor to establish the fundamental fairness of those proceedings.

Sharp prosecutors might attempt to get around this proposed system by requiring, as part of the plea bargain, that defendants waive their ability to challenge the Rule 609 use of their untried convictions in later and unrelated proceedings.⁵⁹¹ But courts should refuse to allow prosecutors to avoid scrutiny of untried convictions offered for impeachment purposes by invoking any such waivers, which would smack of unconscionability. Moreover, the defendant would certainly

588. See *supra* Part IV.A.

589. *Moskovits*, 784 F. Supp. at 190.

590. *Bank Melli Iran*, 58 F.3d at 1411–12 (citations and internal quotation marks omitted).

591. See *supra* Part III.B.1 for a discussion of waivers under Federal Rule of Evidence 410.

not be making a knowing and voluntary waiver⁵⁹² because he would have no idea about the exact context or contexts in which the untried conviction could be used against him to convict him of other crimes. For example, the later charges could be for simple assault, or they could be much more serious, such as first degree murder. And the strength of the prosecutor's case could vary greatly, which the defendant would have no way of knowing prior to being charged.

My proposal requires that judges determine reliability prior to admissibility of untried conviction impeachment evidence. I do not think that this is a matter that should be left for juries to determine because of the potential that they will prejudice defendants even more for having pled guilty previously.⁵⁹³ There is a very negative public perception—indeed, a “widespread unpopularity”—of plea bargaining.⁵⁹⁴ Thus, courts should be particularly careful when considering the possible prejudice that might result should prosecutors wish to reveal to the jury that a conviction was from a plea bargaining process.

There should be a preference, under due process fundamental fairness standards, for trial convictions under Rule 609. As Judge Burger suggested years ago, there is something very different about plea bargaining, and courts should recognize this.⁵⁹⁵ To protect the rights of the defendant, judges should make a determination as to the reliability of untried convictions as a preliminary matter under Rule 104(a) of the Federal Rules of Evidence,⁵⁹⁶ which applies the preponderance of the evidence standard. At all times, the ultimate burden should be on the prosecution to establish the fundamental fairness of the proceedings that resulted in the conviction sought to be used under Rule 609.⁵⁹⁷ Even if a court finds that the untried conviction is reliable, it should still consider whether the probative value, under the

592. See Hall, *supra* note 121, at 601–02 (requiring Rule 410 waivers to be made knowingly and voluntarily).

593. See *supra* text accompanying notes 159–63 for a discussion of how jurors improperly use knowledge of a defendant's prior conviction.

594. See Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 *FORDHAM L. REV.* 885, 912 n.171 (2004) (referring to the “widespread unpopularity” of plea bargaining); see also Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 *STAN. L. REV.* 937, 979 (1985) (describing arguments made by critics of plea bargaining).

595. See *supra* notes 200–05 and accompanying text.

596. *FED. R. EVID.* 104(a).

597. See, e.g., *People v. Gaines*, 341 N.W.2d 519, 521 (Mich. Ct. App. 1983) (finding that the prosecution has the burden of proving fairness of a foreign criminal system if the defendant objects to impeachment with the foreign conviction on the basis of unfairness of foreign system).

circumstances, should be discounted in its required Rule 403-style balancing test that is actually a part of Rule 609.⁵⁹⁸

What I propose is similar to what some courts do in the civil context with respect to applicability of issue preclusion or collateral estoppel to convictions resulting from plea bargains, which I discussed earlier in this Article.⁵⁹⁹ For example, in *Talarico v. Dunlap*,⁶⁰⁰ the Illinois Supreme Court said that it would “look behind the curtain of . . . negotiated plea[s]” to determine “on a case-by-case basis” whether the criminal defendant had an “incentive to litigate” his criminal case, which is necessary for the application of issue preclusion.⁶⁰¹ Thus, the court considered the terms of the defendant’s plea deal and the record of the proceedings in his criminal case to determine if there was a “compelling showing of unfairness.”⁶⁰²

I envision an analogous inquiry with untried convictions offered for impeachment. With respect to the issue of assistance of counsel, for example, courts should be concerned with more than whether there was an attorney representing the defendant on the record as a mere formality. Defendants should be able to raise claims that their attorneys pressured them into pleading or were otherwise ineffective during the bargaining process.⁶⁰³ Furthermore, judges should consider the fundamental fairness of some indigent defense rules that do not adequately provide for persons who are poor and cannot afford counsel, but who are not poor *enough* under the relevant statutes.⁶⁰⁴

Of course, access to effective counsel, as the foreign conviction cases aptly illustrate, is one of the fundamental norms necessary for basic fairness.⁶⁰⁵ Former Attorney General Janet Reno once explained that her “experiences as a prosecutor and as Attorney General ha[d] taught [her] just how important it is for *every* leg of the criminal justice system to stand strong.”⁶⁰⁶ This, according to Reno, includes indigent defense:

598. FED. R. EVID. 609 (stating that the “probative value” must “outweigh[the conviction’s] prejudicial effect to the accused”); *see supra* note 134 and accompanying text.

599. *See supra* notes 207–15 and accompanying text.

600. 685 N.E.2d 325 (Ill. 1997).

601. *Id.* at 331–32.

602. *Id.* at 330.

603. *See supra* Part III.A.2.c.

604. *See supra* Part III.A.2.c.

605. *United States v. Moskovits*, 784 F. Supp. 183, 190 (E.D. Pa. 1991) (explaining that “participation of counsel at crucial stages of the criminal proceeding” is one of the “fundamental norm[s]” of fairness).

606. OFFICE OF JUSTICE PROGRAMS, IMPROVING CRIMINAL JUSTICE SYSTEMS THROUGH EXPANDED STRATEGIES AND INNOVATIVE COLLABORATIONS: REPORT OF THE NATIONAL SYMPOSIUM ON INDIGENT DEFENSE xiii (1999) (emphasis added).

Indigent defense is an equally essential element of the criminal justice process, one which should be appropriately structured and funded and operating with effective standards. . . . When the conviction of a defendant is challenged on the basis of inadequate representation, the very legitimacy of the conviction itself is called into question. Our criminal justice system is interdependent: if one leg of the system is weaker than others, the whole system will ultimately falter.⁶⁰⁷

A consistent theme in the aforementioned ABA Committee report is that “indigent defense in the United States remains in a state of crisis, resulting in a system that lacks fundamental fairness and places poor persons at constant risk of wrongful conviction.”⁶⁰⁸ The Supreme Court has observed the following:

[M]ere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and . . . a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense.⁶⁰⁹

Judges should judge each other and refuse to admit prior convictions obtained as the result of coercive practices by the court.⁶¹⁰ The courts likewise should consider prosecutors’ behavior in the bargaining process to determine if they used unduly coercive practices that resulted in fundamental unfairness.⁶¹¹ Judges should have broad discretion to consider all of the realities of the plea bargaining system that I discussed above.

I would expect the usual fallback, the judicial economy argument, to be made by critics of my proposal. But as one scholar aptly stated, “The primary objective of our criminal justice system must be fairness and justice, not finality and judicial economy”⁶¹² (or what really is a false sense of judicial economy). Additionally, I would expect related arguments that allowing defendants to “impeach” the plea bargaining process will result in a “mini-trial” on a “collateral issue.” I would point out that Rule 609 is effectively much more than a collateral issue, which is why scholars have been so critical of prior conviction impeachment. Jurors can and will use prior convictions as

607. *Id.*

608. *GIDEON’S BROKEN PROMISE*, *supra* note 361, at v.

609. *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985).

610. *See supra* Part III.A.2.d.

611. *See supra* Part III.A.2.b.

612. Klein, *supra* note 406, at 1368.

substantive evidence of guilt.⁶¹³ So, it is a serious mistake to minimize the importance of this evidence. Judges need to take the time to ensure that prior convictions are reliable if they are going to admit them against criminal defendants.

Furthermore, there may be some who are concerned that my proposal will result in fewer plea bargains, which might potentially overburden the system even more. To the contrary, my proposal will improve the overall accuracy of the system, which is a more cost effective strategy in the long run than perpetuating assembly-line justice. As one commentator recently noted in critiquing his state's indigent defense system, "Each person wrongfully incarcerated costs Michigan taxpayers \$35,000 a year."⁶¹⁴ Convicting the innocent also results in psychological scars—not only for the victim, but for society as a whole. Furthermore, an accurate system is more effective for dealing with crime, which costs us all as a society financially and emotionally.⁶¹⁵ So, in a sense, an inaccurate system causes our society at least a double burden, if not more. As the Michigan commentary aptly reminds us, "when innocent people are convicted, the guilty remain at large."⁶¹⁶ Any concern about further burdening the system must be addressed through properly funding the system, as a handful of jurisdictions are attempting to do.⁶¹⁷

Finally, some might argue that it is unreasonable or even unfair to place the burden on prosecutors to prove the reliability of untried convictions, and that they may not have access to information necessary to refute claims of undue coercion, as when the conviction is from another jurisdiction. My response is that if the court finds that the defendant can make a colorable claim of fundamental unfairness, the prosecution should have to justify the admission of this highly prejudicial evidence. The prosecution always has the option of simply not using the evidence, as it certainly has no fundamental right to have prior convictions admitted against a criminal defendant. If its case against the defendant is strong, the prosecution should have no reason to worry.

613. See *supra* text accompanying notes 159–63.

614. Editorial, *No Justice on the Cheap; Guaranteeing Citizens' Constitutional Rights Is a Basic Function of State Government—And Adequately Funding Indigent Defense Will Save Michigan Money in the Long Run*, DETROIT FREE PRESS, Mar. 8, 2009, at 1.

615. *Id.*

616. *Id.*

617. See *id.* (citing Louisiana, for example, as a state that has "quadrupled" its funding for indigent defense).

V. CONCLUSION

This Article has taken a New Legal Realist approach to an exploration of two of the most controversial practices in the criminal justice system—plea bargaining as well as the use of prior convictions for the purposes of impeaching criminal defendants at trial. By exposing the interdependence on these practices, both of which are deeply flawed, I have demonstrated that working together, they both undermine the reliability of the criminal process. My focus in this Article on the plea bargaining process as the source of unreliable impeachment evidence provides a much needed consideration of the real manner in which Rule 609 currently operates on the ground within our system of justice.

Moreover, my proposed solutions offer real world approaches for working within the system to improve its reliability. To the extent that Congress does not act, judges who are genuinely interested in reforming the system can restructure the relationship between plea bargaining and prior conviction impeachment by utilizing Rule 609 as an independent quality control mechanism as opposed to the codependent device that promotes and legitimizes our broken plea bargaining process.

Criminal defendants have a right to fundamental fairness—even if this right was previously denied and resulted in an unreliable conviction. We should not allow past injustices in the system to justify future injustices. Disentangling the dysfunctional relationship between plea bargaining and the prior conviction impeachment practice will permit the rules of evidence to further the goals of accuracy and truth-seeking—thus promoting fairness in the criminal system and helping to re-establish its legitimacy.