How the "Shackles" of Individual Ethics Prevent Structural Reform in the American Criminal Justice System

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The core critique of the modern American Criminal Justice System is that the legislative and judicial expansion of criminal law in the 1960s and 1970s led to prosecutorial overcharging and has resulted in mass incarceration. Prosecutors are able to extract guilty pleas in virtually all criminal cases: roughly ninety-five percent of all criminal defendants plead guilty. This essay posits that the focus on individual ethics (i.e., the criminal defense lawyer's obligation to obtain the best result for each individual client) robs the defense bar of the most powerful tool available to them: the ability to collectively refuse to plead guilty. Due to the criminal justice system's inability to provide jury trials to even a significant percentage of criminal defendants, mass refusal of defense lawyers to negotiate guilty pleas would result in a much needed paradigm shift in criminal sentencing. This essay will then discuss obstacles to this type of collective action, as well as why, given the realities of representation of criminal defendants, it should be a tool available to criminal defense lawyers.

INTRODUCTION

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In recent years, there has been a robust debate about criminal justice reform,[1] much of it focused on reducing the risk of wrongful convictions.[2] The constantly growing number of DNA exonerations has established that innocent people are found guilty of crimes they did not commit.[3] Modifications to eyewitness identification procedures, limiting the admissibility of some types of "junk" forensic evidence (e.g., bite-mark evidence), restrictions on the use of jailhouse informants, liberalized discovery, recording police interrogations and other reforms have been proposed in an effort to stem the tide of wrongful convictions. In some jurisdictions, the proposals have been adopted by courts or legislatures.[4] These reform efforts are laudable. Innocent people should not be found guilty of, or be compelled to plead to, crimes they did not commit.[5] However, the innocence-focus that dominates much of the current criminal justice reform conversation overlooks one basic fact: most defendants are not innocent. They may not have done precisely what they are charged with (or in many cases all of it), but most defendants are not factually innocent.[6] Thus, concern with reducing the number of wrongful convictions – while tremendously important – does not get to the nub of the fundamental inequities in the American twenty-first century criminal justice system.

The core critique of the modern American criminal justice system – and in my view the correct one – is over-criminalization, leading to overcharg-

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1. *See, e.g.*, Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1, 49–50 (2007).

2. *See, e.g.*, BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 269–72 (2011); *see also* Keith A. Findley, *Toward a New Paradigm of Criminal Justice*: *How the Innocence Movement Merges Crime Control and Due Process*, 41 TEX. TECH L. REV. 133, 139 (2008); Samuel R. Gross & Barbara O'Brien, *Frequency and Predictors of False Conviction: Why We Know So Little*, 5 J. EMP. LEG. STUD. 927, 928 (2008).

3. INNOCENCE PROJECT, http://www.innocenceproject.org (last visited Sept. 14, 2015) (showing that to date there have been 330 post-conviction DNA exonerations).

4. *See, e.g.*, State v. Henderson, 27 A.3d 872, 917 (N.J. 2013) (adopting reforms to eyewitness identification procedures to reduce the likelihood of mistaken identifications); BRIAN L. CUTLER, REFORM OF EYEWITNESS IDENTIFICATION PROCEDURES 6–12 (2013).

5. *See* John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157, 157 (2014).

6. *See, e.g.*, Joseph Di Luca, *Expedient McJustice or Principled Alternative Dispute Resolution—A review of Plea Bargaining in Canada*, 50 CRIM. L. Q. 14, 38 (2005).

> While many commentators note that it is difficult to qualify how many innocent people plead guilty, they all agree that the problem exists at least to some degree. The conviction of the innocent is an especially relevant topic in the United States where the trial penalty is in many cases extraordinary.

Id. at 38 n.56.

ing, resulting in mass incarceration.[7] The "get tough on" and "war on" crime mentality that has proliferated among politicians and policymakers. Since the late 1960s, this mentality led to the legislative expansion of the criminal codes of all states and the federal government, including more criminal offenses, lengthier sentences, and a host of mandatory-minimum and recidivist statutes designed to "protect" society from criminals.[8] An increase in funding at the state and federal levels for additional law enforcement officers and the creation of various task forces to combat drug use, gang violence, and other hot button criminal justice issues has resulted in a system where prosecutors can charge criminal defendants with as many (and the most severe) charges they can imagine.[9]

And prosecutors do. Why? To "encourage" defendants to plead guilty.[10] And they do; more than ninety-five percent of all criminal cases in the United States are concluded by guilty pleas.[11] As Justice Kennedy recently and correctly stated: "We now have a system of pleas not a system of trials."[12] Stephanos Bibas has aptly stated: "charging is now convicting,

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7. *See, e.g.*, WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 283 (2011); *see also* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLOR BLINDNESS 5–9 (The New Press 2012) (2011). *See generally* Michael Tonry, *Remodeling American Sentencing: A Ten-Step Blueprint for Moving Past Mass Incarceration*, 13 CRIMINOLOGY & PUB. POL'Y 503 (2014).

8. Blume & Helm, *supra* note 5, at 164–65 (detailing the historical developments leading to the current state of affairs).

9. *See generally Organized Crime Drug Enforcement Task Forces*, DEP'T OF JUST. (June 9, 2015), www.justice.gov/criminal/organized-crime-drug-enforcement-task-forces; Blume & Helm, *supra* note 5, at 180; Press Release, President Clinton, President Clinton Announces New Crime Bill Grants to Put Police Officers on the Beat (Oct. 12, 1994) (on file with the New England Journal on Criminal and Civil Confinement).

10. In broad strokes, it is not unethical, at least as a matter of the Rules of Professional Responsibility, for a prosecutor to "load up" the charges to induce a guilty plea. The only ethical restraint is that a prosecutor cannot bring a charge that is not supported by probable cause. *See* MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt 1 (Am. Bar Ass'n 2015). Even aside from the obvious (lack of) enforcement problem, given how easy the probable cause standard is to meet under current Supreme Court doctrine, prosecutors are generally free to charge in any manner that is likely to induce a plea. *See* Illinois v. Gates, 462 U.S. 213, 243 n. 43 (1983) (finding "substantial chance" or "fair probability" of criminal activity meets the probable cause standard).

11. BUREAU OF JUSTICE ASSISTANCE, PLEA AND CHARGE BARGAINING: RESEARCH SUMMARY 1 (Jan. 24, 2011); *see also* Vida B. Johnson, *A Plea for Funds: Using* Padilla, Lafler, *and* Frye *to Increase Public Defender Resources*, 51 AM. CRIM. L. REV. 403, 424 (2014) (noting that 97% of federal defendants and 94% of state defendants plead guilty).

12. Lafler v. Cooper, 132 S. Ct. 1376, 1388 (2012). In a companion case issued the same day, Justice Kennedy also stated: plea bargaining "is not some adjunct to the criminal justice system, it is the criminal justice system." Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012). Kennedy's view of the criminal justice system, while not embraced, was acknowl-

which is sentencing."[13] The United States incarcerates more prisoners than any other country in the world.[14] Nearly one in one-hundred adults in this country are in prison or jail, which is a rate five to ten times higher than in Western Europe and other democracies.[15] Furthermore, the length of the average sentence has on average doubled (and in some jurisdictions tripled) in the last thirty years.[16] One in every nine criminal sentences being served is a life sentence, and many more are terms of years that exceed any reasonable inmate's life expectancy.[17] There are more people (especially People of Color) doing more time in the United States than in any other country in the world, and more than at any other time in our nation's history.[18]

PRESSURE TO PLEA

A defendant who balks at accepting a proposed plea bargain, either because he asserts his innocence or because he believes the *deal* being offered is unfair, will generally be threatened by the prosecutor with additional charges or, if he has a prior record, with an indictment under a recidivist

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edged as empirically correct even by the dissenters. *See Cooper*, 132 S. Ct. at 1398 (Scalia, J., dissenting) (noting that the court is affording constitutional status to the "trial-by-bargain" system proposed by the majority).

13. Stephanos Bibas, *Incompetent Plea Bargaining and Extra Judicial Reform*, 126 HARV. L. REV. 150, 171 (2012).

14. John Conyerse, Jr., *The Incarceration Explosion*, 31 YALE L. & POL'Y REV. 377, 377 (2013).

15. Emily Badger, *The Meteoric, Costly and Unprecedented Rise of Incarceration in America*, WASH. POST (Apr. 30, 2014), http://www.washingtonpost.com/news/wonkblog/wp/2014/04/30/the-meteoric-costly-and-unprecedented-rise-of-incarceration-in-america/.

16. *See* Jennifer Warren et al., *Time Served: The High Cost, Low Return of Longer Prison Terms*, THE PEW CTR. ON THE STATES 1, 3 (2012), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing_and_corrections/prisontimeservedpdf.pdf. Again, and for comparison purposes, the average criminal sentence for a felony in the United States is three to five times higher than a similar sentence for a similar crime in Western Europe. *See also* Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations'*, N.Y. TIMES, (Apr. 23, 2008), http://www.nytimes.com/2008/04/23/us/23prison.html (comparing length of sentence served for burglary in the United States with Canada and England).

17. ASHLEY NELLIS, LIFE GOES ON: THE HISTORIC RISE IN LIFE SENTENCES IN AMERICA, THE SENT'G PROJECT 1, 5 (2013), http://www.sentencingproject.org/doc/publications/inc_Life%20Goes%20On%202013.pdf.

18. *Id.* at 8. The brunt of American mass incarceration is felt by communities of color. *Id*. African-American males are incarcerated at a rate 6.4 times higher than white males. *Id*. While African-Americans make up 13% of the general population, they represent 53% of those sent to prison for drug offenses. *See also* David Cole, *Turning the Corner on Mass Incarceration?*, 9 OHIO ST. J. CRIM. L. 27, 28 (2011).

statute.[19] The Supreme Court legitimized this tool in the prosecutorial arsenal, in *Bordenkircher v. Hayes*,[20] when it held that charging a defendant as a recidivist and obtaining a life sentence after the defendant refused to accept a five year sentence for writing a forty dollar bad check was not vindictive or coercive, and thus did not violate due process.[21] Even if the prosecution does not add additional charges (perhaps because they have already charged everything they can think of), the defendant's lawyer will likely cajole the defendant to accept the plea offer, generally after negotiating for a slightly better deal.[22] Defense counsel will tell the client what all the repeat players in the system know: if the defendant goes to trial and is (as is likely) found guilty, the judge will "tax" him for exercising his Sixth Amendment right to jury trial.[23] Some judges do this more than others, but the average sentence following a conviction after trial vastly exceeds the term of imprisonment offered by the prosecution in the plea bargaining process.[24] So, given the brutally harsh sentencing regimes that exist in every state (and in the federal system), virtually all defendants—even innocent ones—plead guilty.[25] The end result of the current regime is mass incarceration.

THE SYSTEM CAN ONLY FUNCTION AS IT DOES IF NEARLY ALL DEFENDANTS PLEAD GUILTY.

It is universally accepted that given the number of persons charged with crimes in this country, the only way the criminal justice system can process

19. *See generally* Blume & Helm, *supra* note 5 (discussing the dynamics of modern plea bargaining).

20. Bordenkircher v. Hayes, 434 U.S. 357, 364–65 (1978).

21. *Id.* The Court "accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forego his right to plead not guilty." *Id*. at 364. And in the "'give-and-take' of plea bargaining, there is no . . . element of punishment or retaliation so long as the accused is free to accept or reject the offer." *Id.* at 363.

22. *See* Abbe Smith, *The Lawyers "Conscience" and the Limits of Persuasion*, 36 HOFSTRA L. REV. 479, 480 (2007).

23. Vincent Aprile II, *Judicial Imposition of the Trial Tax*, 29 CRIM. JUST. 30, 30 (2014) ("Trial tax is a euphemism for a judge imposing a more severe sentence on a defendant, in whole or in part, because the accused, who elected to reject the prosecution's plea agreement and go to trial, wasted judicial and prosecutorial resources involved in a trial."). While the penalty for rejecting a plea offer is generally unspoken, Aprile cites several examples where judges candidly admit imposing the "trial tax."

24. Symposium, *When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guidlines States*, 105 COLUM. L. REV. 959, 992 (2005) (noting that a defendant convicted at trial can receive a sentence that is four to five times higher than a defendant who pleads guilty).

25. Blume & Helm, *supra* note 5, at 157.

cases is for an overwhelming majority of criminal defendants to plead guilty.[26] While the current criminal justice system can tolerate a few "show trials" to perpetuate the myth of the fundamental right to trial by jury, there is a systemic need for almost everyone to plead.[27] And, as noted above, they do. In some cases, due to bulging criminal dockets and systemic under-funding of indigent defense, the only time a criminal defendant may talk to his attorney is in court immediately prior to entering a guilty plea.[28] Thus, the *status quo* is stabilized and, in effect, legitimized. Overcharging remains the coin of the realm; everyone pleads guilty, draconian sentences are the norm, and mass incarceration continues.[29]

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26. *See, e.g.*, Scott W. Howe, *The Value of Plea Bargaining*, 58 OKLA. L. REV. 599, 615 (2005) (noting that there are simply not enough prosecutorial, defense or judicial resources for any significant number of criminal defendants to go to trial).

27. John H. Langbein, *On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial*, 15 HARV. J.L. & PUB. POL'Y 119, 121 (1992).

28. This is sometimes referred to as a "meet 'em and plead 'em" system. *See* Alan Berlow, *Requiem for a Public Defender*, THE AM. PROSPECT (Dec. 19, 2001), http://prospect.org/article/requiem-public-defender (describing a part-time Georgia public defender who disposed of more than 900 felonies a year often never meeting his clients except in the courtroom when they entered guilty pleas). One public defender in New Orleans calculated that given his case load and a fifty-hour-work week, he had just eleven (yes, eleven) minutes for each client. Johnson, *supra* note 11, at 423–24. Public Defenders in Miami Dade County report disposing of twenty-three cases by plea in a single morning. *Id.* A public defender in Ohio was held in contempt for refusing to represent a defendant he had just met in a guilty plea. The judge reasoned that many public defenders only have a brief time with their clients, "he spent twenty minutes with him, which is probably all the time you're going to spend with a client." Milan Simonich, *Contempt Upheld for Ohio Public Defender*, PITT. POST-GAZETTE (Aug. 25, 2007, 6:45 AM), http://www.post-gazette.com/frontpage/2007/08/24/Contempt-upheld-for-Ohio-public-defender/stories/200708240267.

29. To be fair, recently there has been some discussion of the need for sentencing reform. In fact, former Attorney General Holder had called for reduced sentences in drug cases involving low level offenders. *See* Sari Horwitz, *Holder Calls for Reduced Sentences for Low-Level Drug Offenders*, WASH. POST (Mar. 13, 2014), https://www.washingtonpost.com/world/national-security/holder-will-call-for-reduced-sentences-for-low-level-drug-offenders/2014/03/12/625ed9e6-aa12-11e3-8599-ce7295b6851c_story.html. For the most part, however, the proposed reforms are negligible and would not significantly disturb the current sentencing regime. Joseph Tanfani, *Bipartisan Praise for an End to Tough Federal Sentencing*, L.A. TIMES (Aug. 12, 2013), http://articles.latimes.com/2013/aug/12/nation/la-na-holder-crime-20130813 (noting that despite bipartisan support skepticism still remains that the proposed reforms will not have a large impact).

BUT WHAT IF DEFENDANTS DID NOT PLEAD GUILTY?

Imagine a criminal justice system where more than ninety-five percent of all defendants do not plead guilty. Imagine instead that all criminal defense lawyers in a particular jurisdiction become fed up with facilitating the assembly line to prison, reject the prosecutions' plea offers and simultaneously move for speedy trials under the state speedy trial act of their jurisdiction and the Sixth Amendment right to a speedy trial.[30] What would happen if all members of the criminal defense bar rose up in collective action and brought the plea grist mill to a halt? Prosecutors would scream foul, judges would likely threaten the lawyers and their clients in an attempt to cajole them to accept offers, but if the defense lawyers (and thus their clients) held firm, they could create a paradigm shift in charging and sentencing practices.

As noted above, it is a given that the system cannot provide trials to everyone (or even close to everyone) charged with a crime.[31] Defendants, on the other hand, have a Sixth Amendment right to a jury trial and a *speedy* one at that.[32] So, what would happen if all the lawyers exercised those rights on behalf of all of their clients? Pretrial detention centers—already packed to capacity—would soon literally be overflowing.[33] A small number of defendants—the unlucky ones—would be trotted out for trials, and if convicted, *hammered* by the trial judge at sentencing for participating in the "cartel," but the criminal justice system would effectively be stopped dead in its tracks.[34]

Given the exponentially growing backlog of the dockets,[35] the lawsuits

30. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy trial." U.S. CONST. amend. VI.

31. *See* Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 935 (1983).

32. U.S. CONST. amend. VI; Barker v. Wingo, 407 U.S. 514, 531 (1972) (finding that delay due to "overcrowded courts" in the Sixth Amendment right to a speedy trial context is weighed against the government because the "ultimate responsibility for such circumstances" is properly placed with the government as opposed to an individual defendant).

33. *See* Richard M. Aborn & Ashley D. Cannon, *Prisons: In Jail, But Not Sentenced*, AMERICAS Q. (Winter 2013), http://www.americasquarterly.org/aborn-prisons.

34. *See* Jamie Fellner, *An Offer You Can't Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty*, HUM. RTS. WATCH (Dec. 5, 2013), https://www.hrw.org/report/2013/12/05/offer-you-cant-refuse/how-us-federal-prosecutors-force-drug-defendants-plead (highlighting some instances of prosecutorial tactics used to induce guilty pleas).

35. *See, e.g.*, Brian Rogers, *More Cases Crowd Dockets, Slowing Criminal Courts*, HOUS. CHRON. (June 23, 2013), http://www.houstonchronicle.com/news/houston-texas/houston/article/More-cases-crowd-dockets-slowing-criminal-courts-4617759.php (noting that since the last time the Houston Legislature created a criminal court, the number of

that would be legitimately filed, challenging the increasingly deplorable pre-trial detention conditions, and the possibility of mass dismissals due to violations of the right to a speedy trial,[36] prosecutors would have no choice but to offer (substantially) better deals by reducing charges, recommended sentences, or both.[37]

The majority of legal academics and almost all criminal defense lawyers lament prosecutorial excess in charging, the bone crushing sentencing regime, and the resulting mass incarceration. Yet the plea beat goes on.[38] Well-meaning public defenders and court appointed counsel, many of whom are competent trial lawyers, continue to participate in the "system of pleas" identified by Justice Kennedy.[39] They negotiate around the edges for what they can get for their clients in a fundamentally unfair system, try the (very) occasional case,[40] and complain to their colleagues over beers about particular prosecutors and judges they loathe.[41] But why don't they do something about it? They have in their hands the power to create systemic change.[42]

ETHOS AND THE ADVERSARIAL SYSTEM

As is true with many systemic, structural defects there is no single answer. Part of it may be lack of awareness of the seismic shift in criminal justice. Prosecutors resist structural change because it requires them to relinquish some of the power imbalance built into the current criminal justice

felony filings doubled to over 44,000).

36. *See* Natalia Nicolaidis, *The Sixth Amendment Right to a Speedy and Public Trial*, 26 AM. CRIM. L. REV. 1489, 1497–98 (1988) (listing the factors to determine whether a defendant's right to a speedy trial has been violated, include: the length of the delay; the reason for the delay; the defendant's assertion of his right; and the prejudice suffered by the defendant).

37. I am not persuaded that the system would need one-hundred percent buy-in to work. As long as the free riders could be kept to a minimum, the same result would likely be achieved given the vast number of pending cases at any particular time.

38. *See* Lafler v. Cooper, 132 S. Ct. 1376, 1381 (2012) ("[C]riminal justice today is for the most part a system of pleas, not a system of trials.").

39. *Id.*

40. One of (many) ironies in the criminal justice system is that virtually all training of criminal defense lawyers focuses on trial skills with little to no emphasis on negotiating. As others have noted, we train public defenders to act in a world that does not exist. Ronald Wright & Jennifer Roberts, *Training for Bargaining*, 57 WM. & MARY L. REV. (forthcoming Spring 2016).

41. *See* Alexandra Natapoff, Gideon *Skepticism*, 70 WASH. & LEE L. REV. 1049, 1064–65 (2013) (noting that the structural challenges of fair plea bargaining far exceed the question of counsel's performance in any individual case).

42. *See* Oren Bar-Gill & Omri Ben-Shahar, *The Prisoner's (Plea-Bargain) Dilemma*, 1 J. LEGAL ANALYSIS 737, 760 (2009).

system which gives them virtually all the cards.[43] Many younger defense lawyers (as well as prosecutors and judges) have never experienced any other system than the current regime. Thus the new normal is the old normal.[44] Some of it is likely attributable to the staggering caseloads that prevent defense lawyers from seeing beyond the piles of files on their desks that must be moved.[45] But the primary reason is the adversarial system itself and its accompanying ethos that a criminal defense lawyer is ethically obligated to work diligently to obtain the best outcome possible for each individual client.[46] As stated by one criminal defense lawyer: "[T]he obligation of the criminal defense lawyer is absolutely simple and clear. We have one focus, one responsibility, and one loyalty: it is to our client without regard to any other fallout from the result of our case or our actions."[47] This focus on individual clients in effect "shackles" criminal defense lawyers from acting collectively to achieve structural modification to a grossly inequitable system. One client at a time, one relatively good (but nevertheless draconian) plea bargain at a time, the criminal justice machine slogs on with little prospect for significant structural change.

The individualized ethical ethos of the modern criminal defense lawyer, also codified in the Model Rules of Professional Responsibility, dooms actions to achieve collective good.[48] Stay with my initial "thought experi-

43. *See* Bibas, *supra* note 12, at 172–73.

44. *Cf.* Marc Mauer, *Sentencing Reform: Amid Mass Incarcerations—Guarded Optimism*, 26 CRIM. JUST. 27, 33 (2012) (noting that many sitting federal judges today have been on the bench since the adoption of sentencing guidelines and are more comfortable with the guidelines as opposed to the discretionary federal sentencing system).

45. *See* Lauren Sudeall Lucas, Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731, 1731 (2005).

46. *See* Richard Klein, *The Role of Defense Counsel in Ensuring a Fair Justice System*, THE CHAMPION June 2012 at 38, 43–44.

47. Cristina C. Arguedas, *Duties of a Criminal Defense Lawyer*, 30 LOY. L.A. L. REV. 7, 7 (1996). The historical roots of this view of the criminal defense lawyer can be traced to the early 1800s. Lord Henry Brougham, a Scottish barrister who moved to London and became a member of parliament, was retained as defense counsel by Queen Caroline, who was accused of adultery. The highly publicized case was tried before the House of Lords. Brougham was accused by many of acts akin to treason for defending the Queen against accusations of adultery against the King. He responded: "[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and among them to himself, is his first and only duty . . . ." M.H. Hoeflich, *Legal Ethics in the Nineteenth Century: The "Other Tradition"*, 47 U. KAN. L. REV., 793, 794–95 (1999). While this view of the criminal defense lawyer's role has been criticized, it is the dominant view as reflected in the Model Rules of Professional Responsibility and certainly among practicing criminal defense lawyers.

48. Even outside the context of the criminal defense lawyer, which for the most part is treated as *sui generis* in the academic legal ethics circles, there is no generally agreed up-

ment." What would happen if criminal defense lawyers collectively agreed to refuse to plea bargain until there was a significant paradigm shift in charging and sentencing? Some lawyers—seeking to obtain a better deal for their individual client(s)—would attempt to negotiate with prosecutors behind-the-scenes. Alternatively, prosecutors would approach lawyers with whom they have friendly working relationships and offer their client a better than the (current) average "deal." And when word leaked out (and it would) of a break in the wall, there would be panic in the ranks and a rush to try and get in on the plea bargaining action. In fact, one could persuasively argue, that a lawyer would—under the current rules—be ethically obligated to circumvent the collective action agreement on behalf of their individual client(s). The failure to do so would breach the duty of loyalty to the individual client.[49]

COLLECTIVE ACTION

The reality is that the only tool that criminal defendants and their lawyers have to avoid the current plea and oppressive sentence mill is collective action.[50] Since the modern American criminal justice system cannot

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on view of the ethical principles that should guide a lawyer's decision making. *See generally* W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO LAW (2010) (describing competing normative visions of the role of lawyers). The closest argument that would justify the collective action I am advocating for was presented by William H. Simon when he stated that "[t]he lawyer should take those actions that, considering the relevant circumstances of the case, seem most likely to promote justice." *See* William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1090 (1988). Duncan Kennedy also at one point offered the view that lawyers representing marginalized individuals and clients should use "sly, collective tactics" to outflank, sabotage or manipulate the "bad guys." WENDEL, *supra*, at 131 (describing Kennedy's view of the role). What I am proposing is much more transparent and more legitimate than Kennedy's subterfuge principle. And the most radical view is that offered by Daniel Markovits, who has proposed that lawyers have a responsibility in our adversary system to lie and cheat on behalf of their clients. DANIEL MARKOVITS, A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE 10 (2008). I am definitely not endorsing—in fact, I explicitly reject—Markovits' view of the role of the lawyer.

49. David Luban, *Review of Daniel Markovits, A Modern Legal Ethics: Adversary Advocacy in a Democratic Age*, GEO. PUB. L. AND LEGAL THEORY RES. PAPER No. 10–28 1, 1–2 (2010), http://ssrn.com/abstract=1614952.

50. The Model Rules of Professional Responsibility in particular, and much of the field of legal ethics in general, are based on two assumptions which are not present in the modern criminal justice system: (1) lawyers are relatively evenly matched in terms of ability, resources etc.; and, (2) lawyers and clients can interact as equals and after being appropriately "counseled," clients can make rational decisions regarding what course of action is in their best legal interest. MODEL RULES OF PROF'L CONDUCT r. 1.2 (AM. BAR ASS'N 1983). As my colleague Bradley Wendel describes it, the rules start with a view of imagining Abe Lincoln interacting with the town banker. However, neither assumption is remotely true in the modern American criminal justice system. Prosecutors have virtually all the bargaining

accommodate any significant number of trials, defendants, and more importantly their lawyers, have the power—collectively but not individually—to force changes to charging and sentencing practices.[51] Thus, an ethical norm that allowed lawyers to pursue a course of action that benefitted not only the overwhelming majority of their own clients, but also criminal defendants in general, would do more clients (and defendants collectively) substantially more good than the current loyalty to the individual client ethical norms which perpetuate what is, and stymie what could be.[52] Given the changes to the substantive criminal law, increases in criminal sentences, bloated criminal dockets, and excessive case loads, individual client based ethical responsibility makes change elusive, if not unattainable.[53] Collective action is the only path to create structural change within the grasp of criminal defense lawyers.[54] Why doesn't it happen; and what are the objec-

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power, including charging discretion, information imbalances, greater resources, the threat of prolonged pre-trial detention, mandatory-minimum sentences, etc. *See* Natapoff, *supra* note 42, at 1064. And, many clients have impairments (intellectual disability or low cognitive functioning, mental illness, substance abuse disorders, etc.) that prevent them from understanding the ramifications of certain decisions and often from acting in their own best interests. Timothy David Edwards, *The Lawyer as Counsel Representing the Impaired Client*, GPSOLO MAG. Oct.–Nov. 2004, at 34. In short, the Rules of Professional Responsibility present *ideal* theories for how lawyers should act when confronted with a range of issues which are doomed to fail in the criminal justice context because they must be implemented in a far from ideal world.

51. Other academics have noted the potential benefit of the type of collective action this essay proposes, but almost immediately dismiss it due to the conflict with defense counsel's ethical obligation to individual clients. *See, e.g.*, Bar-Gill & Ben-Shahar, *supra* note 43, at 761–62.

52. I would note that in other areas of the law, e.g., class action litigation, ethical norms are in the process of adjusting to the reality that the aggregate good can sometimes take precedence over the individual good. For example, the American Law Institute (ALI) has recently proposed that Model Rule 1.8(g) be amended to allow collective settlements absent individualized consent from all settling clients (which the rules now require). *See* Thomas D. Morgan, *Client Representation v. Case Administration: The ALI Looks at Legal Ethics in Aggregate Settlements*, 79 GEO.WASH. L. REV. 734, 738–39 (2011); Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733, 735–36 (1997).

53. *See* William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2554 (2004).

54. Let me attempt to quantify this. Assume that the average felony sentence following a guilty plea is five years. Thus for every one hundred defendants, if 97% of all defendants plead guilty, it results in 485 prison years. Assume that of the remaining three defendants, one is acquitted and two are convicted and "trial taxed" to 22.5 years each (an additional 45 prison years) for a total of 530 prison years under the current regime. Now, assume that collective action can reduce the average sentence by 50% (which I think is very realistic). However, before that could be achieved, some defendants would be taken to trial (assume 10 of every 100). If two are acquitted and eight are convicted and "trial taxed" at

tions?

OBJECTIONS TO COLLECTIVE ACTION

One possible objection to a collective client/defendant benefit ethical focus is that it will lead to pitting some clients against others, or the lawyers' interests against the clients' interests.[55] That is theoretically possible, but here is another cold, hard truth. The theoretical *zealous advocacy* to get the best result possible for each individual client is violated by criminal defense lawyers every day. This is not necessarily intentional and sometimes not even conscious, but it inevitably happens.[56] While most defendants are indigent and rely upon public defenders or court-appointed counsel, some defendants do hire lawyers.[57] Their families may scrape together enough money to secure the services of a "real" lawyer (as many defendants refer to retained counsel) but the lawyers they will generally be able to afford are not necessarily very skilled.[58] And because they are almost always paid a flat up-front fee, they have financial incentives to dispose of the case as quickly as possible with as little work as possible via a plea bargain.[59] In

22.5 years (180 prison years) before the system implodes, and the remaining defendants are sentenced on average to 2.5 years (225 prison years), which totals 405 prison years or a net savings of 125 prison years. This yields a 24% reduction in the average sentence during the initial collective action phase. Once the "new normal" sets in, the client savings would be 50%. Bar-Gill & Ben Shahar, *supra* note 43, at 763–64.

55. Another variation of this argument might be that my proposal this poses the same danger as other forms of *cause lawyering* by placing too much power in the hands of lawyers allowing them to play an elitist *top-down* role. But that also is true of the current regime. It is not unusual for an experienced public defender to walk into the jail's visiting room and tell the client, possibly even at the first meeting, "this is what is going to happen." *See* Eve Brensike Primus, *Culture as a Structural Problem in Indigent Defense*, 100 MINN. L. REV. (forthcoming 2016*)*.

56. *See generally* Bruce A. Green, *The Ten Most Common Ethical Violations*, 24 LITIG. 48 (1998) (discussing common ethical violations committed by attorneys).

57. Blume & Helm, *supra* note 5, at 182 n.150.

58. Stewart O'Brien et al., *The Criminal Lawyer: The Defendant's Perspective*, 5 AM. J. CRIM. L. 283, 300 (1977). There are many highly skilled, extremely competent criminal defense lawyers. For the most part, however, these lawyers go where the money is: white collar criminal defense, large drug conspiracy cases, and organized crime matters. Most communities also have a small handful of well-known go-to criminal defense lawyers who get the lion's share of the other case (e.g., homicides, where defendants can afford counsel). However, the fees these lawyers charge put their services beyond the reach of all but a small handful of criminal defendants.

59. Laurel L. Burke, *Alternative Billing Methods: Not Just By the Hour Anymore*, 28 COLO. LAW. 59, 59–60 (1999). The same financial incentives also discourage retained counsel from hiring investigators and experts to assess the strength of the prosecution's case unless the client (or his family) can afford to pay for the investigative and expert services, which in the majority of cases is simply not financially possible. Stanley Schneider, *The Fi-*

indigent cases, private court-appointed counsel are either paid by the hour, but often with a ridiculously low cap of less than a thousand dollars, or given a fixed fee of several hundred dollars depending on the type of case.[60] These compensation arrangements also create financial incentives to spend as little time as possible on the case and to negotiate a plea as soon as possible.[61] Public defenders often have staggering caseloads which prevent them from spending more than a few hours on most cases.[62] In addition, these heavy caseloads require *en masse* plea bargaining which inevitably leads to encouraging clients (sometimes even innocent ones) to accept plea bargains which are not as favorable as they would be if the case were adequately investigated and aggressively litigated.[63] In the words of Jonathan Rapping: "Public defenders today . . . are expected to work with crushing caseloads, lack of resources, and disrespect that make it impossible to provide every client the representation they deserve . . . . [T]his embarrassingly low standard of justice has become the accepted norm."[64] Any criminal

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nancial Side of Expert Witnesses, 73 TEX. BUS. J. 552, 554 (2010) (discussing that paying for an expert witness can be difficult because the "accused has used every available resource to post bond and hire a lawyer").

60. William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 10–11 (1997).

61. Bibas, *supra* note 13, at 164.

62. *See* John H. Blume & Sheri L. Johnson, Gideon *Exceptionalism?*, 122 YALE L.J. 2126, 2142 (2013) (describing how caseloads frustrate the right to counsel). For example, a commission appointed by former Chief Judge Judith Kaye of the New York Court of Appeals concluded there were structural impediments to effective representation in indigent defense due to inadequate funding and caseloads. In one county in New York, the commission found that attorneys had annual case loads of more than 1000 misdemeanor cases and 175 felony cases. HON. BURTON B. ROBERTS & WILLIAM E. HELLERSTEIN, COMM'N ON THE FUTURE OF INDIGENT DEF. SERV., FINAL REP. TO THE CHIEF JUDGE OF THE ST. OF NEW YORK 11, 18 (2006) https://www.nycourts.gov/ip/indigentdefense-commission/IndigentDefenseCommission_report06.pdf. Other studies have concluded that even public defenders with relatively low caseloads would have—at most—six hours to devote to each case.

63. Some comments in this essay sound more critical of public defenders than I actually intend to be. Many public defenders are skilled, competent, dedicated criminal defense lawyers. *See* LISA J. MCINTYRE, THE PUBLIC DEFENDER: THE PRACTICE OF LAW IN THE SHADOWS OF REPUTE 83–86 (1987). I know and admire such people for doing hard work under extremely difficult circumstances. However, for the most part, they work in offices where high case loads and budgetary constraints prevent them from providing the quality of representation they could provide with a reasonable case load and adequate resources. *See* Alexandra Natapoff, *Gideon's Servants and the Criminalization of Poverty*, 12 OHIO ST. J. CRIM. L. 445, 449 (2015) ("In practice, most public defenders do not and cannot perform all the functions that their job demands.").

64. Jonathan Rapping, *The Revolution will be Televised: Popular Culture and the American Criminal Justice Narrative*, 41 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 5, 14 (2015).

defense lawyer, whether retained or appointed, who is a repeat player in the system, frequently balances the interests of an individual client in a particular case against the interests of other current or future clients in a variety of ways.[65] Fostering and maintaining working relationships with prosecutors and judges, for example, often leads to encouraging a client to accept a particular plea that might not necessarily be the best deal that could be obtained.[66] Sometimes motions are not filed, funding for investigators and experts are not sought, or cases are not aggressively litigated pre-trial for the same reasons.[67] Thus, if the type of utilitarian client-defendant dynamic is already affecting defense attorneys' actions in ways that work to defendants' detriment,[68] why not legitimize it and allow it to work to most defendants' advantage?

Another possible objection is that the type of collective client-defendant dynamic this essay proposes is nothing more than an attempt to circumvent the law. The argument would go that Congress and the State Legislatures, dutifully elected representatives of the people, enacted the mandatory-minimum and repeat offender statutes that have created the current situation. Federal and State judges have upheld those laws and are bound to apply them faithfully.[69] Prosecutors, who are either elected or appointed by the Executive, make the charging decisions.[70] Thus, given the approval and involvement of all three branches of government in the current regime, a collective refusal to "play by the rules" would be nothing more than an attempt to nullify laws that criminal defendants and their lawyers do not like. I resist this objection for several reasons. First, the same can be (and has been) said about plea bargaining in general;[71] it effectively semi-privatizes

65. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2480 (2004) (discussing cases where a defense lawyer trades a concession in client A's case for a harsher sentence in client B's case).

66. *See id.*

67. Stephen J Schulhofer, *Client Choice for Indigent Criminal Defendants: Theory and Implementation*, 12 OHIO ST. J. CRIM. L. 505, 506 (2015) ("[O]ptimally adversarial lawyering becomes a luxury that counsel for the indigent must ration among clients rather than guarantee to all.").

68. Roger Fairfax, Jr., *Searching for Solutions to the Indigent Defense Crisis in the Broader Criminal Justice Reform Agenda*, 122 YALE L.J. 2316, 2321–22 (2013) (stating that inadequate resources and lack of independence is "severely compromising the quality of representation provided to indigent defendants").

69. *See, e.g.*, Jones v. State, 647 A.2d 1204, 1207 (Md. 1994) (stating that once predicate requirements for imposition of repeat violent offender statutes has been established, sentencing judge has no choice but to impose mandatory minimum penalties upon a third conviction of a violent crime).

70. Michael J. Ellis, Note, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528, 1538 (2012).

71. Lafler v. Cooper, 132 S. Ct. 1376, 1398 (2012) (Scalia, J., dissenting) (stating that

the criminal law, leaving questions of charging and sentencing to prosecutors and defense lawyers with little judicial supervision or community involvement.[72] This, in turn, leads to cases being resolved in ways that are at times inconsistent with the laws as enacted.[73] Thus, the collective client-defendant ethos is just an extension of the current plea bargaining regime which rarely results in any substantial benefit to any significant number of clients.[74] Second, but relatedly, prosecutors now have the power to make the type of collective decisions I am advocating that defense lawyers should have. Prosecutors can decide whether or not to extend plea offers at all, to make (or not make) offers in certain types of cases, or whether the *discounts* for pleas should be across the board or individualized.[75] Thus, there is an element of "good for the goose, good for the gander" in this proposal as well.[76] Even aside from these reasons—which I find sufficient—I would still conclude that given the basic unjustness of the current regime (especially to persons of color), that it is morally appropriate to attempt to circumvent it.[77]

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plea bargaining gives a defendant a chance to "beat the house" and to "serve less time than the law says he deserves").

72. Bibas, *supra* note 12, at 150.

73. One of my former client's cases is illustrative. Bobby Lee Holmes was charged with the murder and sexual assault of an eighty-two year old female. The prosecution filed a notice of intent to seek the death penalty. However, due to perceived proof problems, the prosecution offered to allow Holmes to plead guilty to voluntary manslaughter and to recommend a sentence of ten years, which they had already determined would be accepted by the trial judge. While this also raises other ethical issues not the subject of this essay (e.g., *how low do you go* in order to secure some kind of plea bargain and conviction), no one—not the prosecutors nor Holmes' defense counsel—believed that the crime committed was voluntary manslaughter; it was a brutal, intentional murder. But because there were questions as to whether Holmes committed the crime, he was offered a plea to a crime he unquestionably did not commit. *See generally* Holmes v. South Carolina, 547 U.S. 319 (2006).

74. *See* Blume & Helm, *supra* note 5, at 182.

75. *See* Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1044–48 (2006) (noting that prosecutors have almost unlimited discretion to make charging and plea bargaining decisions and act with discretion that is almost unmatched anywhere else in the law).

76. Another possible objection to this proposal is that it relocates moral decision making and best-interests decision making power to the lawyer, and thus is paternalistic. There is some force to this argument. On the other hand, due to many defendant's mental impairments and the information gap that actually exists between lawyers and clients as to what is (or is not) a *good* deal, lawyers already in fact do most of the decision-making either directly or indirectly in criminal cases.

77. *See* H.L.A. HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 73 (1983) ("[I]f laws reach a certain degree of iniquity then there would be a plain moral obligation to resist them and to withhold obedience.").

CONCLUSION

Zealous advocacy on behalf of criminal defendants is to be applauded. However, in its current form, the defense counsel's focus on obtaining the best result possible for each individual client legitimizes and stabilizes the status quo of overcharging, guilty pleas, draconian sentences, and mass incarceration.[78] If lawyers had the ability to act collectively and to take actions, something approaching structural reform of the criminal justice system would likely be achieved. The current state of affairs would no longer be sustainable, and over a (likely brief) period of time, a new normal would settle in.[79] But unless we remove the "shackles," nothing can or will change. This *is* detrimental to all criminal defendants as the current criminal justice system grinds on, and individual clients, mostly poor and black or brown, are charged, plead guilty, sentenced to long terms of incarceration, and sent off to bulging at the seams prisons to pay their "pound of flesh."[80]

78. *See generally* Steven Hanlon, *Needed a Cultural Revolution*, 39 HUM. RTS. 2 (2013) (noting that the principal function of all the players in the current criminal justice system, including defense counsel, is to serve as facilitators of mass incarceration on an unprecedented scale); Andrew E. Taslitz, *Trying Not to be like Sisyphus: Can Defense Counsel Overcome Pervasive Status Quo Bias in the Criminal Justice System*, 45 TEX. TECH L. REV. 315 (2012) (examining the effects of cognitive bias in the maintenance of the status quo and its impact on the criminal justice system).

79. As some readers will note, there is a subjective *stopping point* problem, i.e., at what point do lawyers conclude that the offered pleas are sufficiently fair and return to the plea bargaining table. Or put differently, what is the end game? Other readers may ask whether sentences would creep back up over time, and if so, whether the process would have to be repeated? Both are legitimate questions that would need to be answered through experience, trial and error, but are beyond the scope of this essay, which is intended to posit a different way of thinking about the role of the criminal defense lawyer that would even bring those difficult issues into play.

80. WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 4, sc. 1 ("The pound of flesh, which I demand of him is dearly bought, 'tis mine and I will have it.").