MORALITY OF PLEA BARGAINING IN CRIMINAL PROCEEDINGS AND THE ETHICAL LIMITS OF LAWYERS

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ABSTRACT

Plea bargaining is one amongst the many morally questionable institutions of criminal law. For more than a century, critics have called for its abolition due to its moral ambivalence. However, legal trends across the world show that its criticism has not weakened its appeal. Originally from the United States, it has been adopted by a number of other states over the last three decades. States are considering this as one option for providing relief to their overburdened criminal justice systems. However, the difficulties it poses to criminal justice systems in upholding the integrity and 'do justice' obligations entrusted to the judiciary should not be understated. The article has argued that the moral comorbidities of plea bargaining are not absolute. Discussions on it can aid the prosecutor, defence lawyer, and the judge to understand their respective roles in maintaining a fair plea-bargaining culture. The article begins with shedding light on the evolution of plea bargaining and the reasons for its growing relevance in the criminal justice systems of modern-day states. In third section it provides an analysis of the arguments made for and against its morality. Additionally, in the concluding section it highlights the tangled intersections where moral guidance is needed for prosecutors and defence lawyers for keeping plea negotiations fair and equitable. The article concludes that plea bargaining is not a 'moral disaster', and its volatile aspects can be balanced.

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I. INTRODUCTION[1]

On March 10th, 1969, James Earl Ray pleaded guilty to the murder of American civil rights champion Revenant Martin Luther King Jr. He was to be sentenced to 89 years in prison as part of his plea deal. However, three days later, on March 13th, he recanted his guilty plea. He claimed that his defence lawyer persuaded him to plead guilty to avoid the death penalty, but he was not made aware that the Supreme Court of United States had set a three-year moratorium on the death penalty.[1A] His retraction brought into public discussion the ethical concerns that the plea-bargaining system entails. Albeit such occurrences have prompted questions about the morality of plea bargaining and frequented calls for its repeal, the practice of plea bargaining has not lost any relevance.

Originally a product of the American criminal justice system, plea negotiation has evolved over time into a state-by-state phenomenon.[2] Its scope and legality vary by state; in some, it serves as a substitute for a comprehensive adversarial trial, while in others, it serves only as a supportive pre-trial process.[3] In common parlance, plea bargains[4] are seen as agreements between the defendants and prosecution wherein the defendants agree to plead guilty to a part or more of the charges against them in return for concessions from the prosecutor's side.[5]

The jurisprudence behind plea bargains is a source of constant debate due to its allegedly precarious moral ground. It departs from traditional criminal law principles and leans towards principles of contract. Generally, the reciprocity of benefit leads courts to see a plea agreement through the prism of a contract: as both parties are giving something away in exchange for something else.[6] However, unlike contracts, where the parties control the narrative; in plea bargaining the opposing lawyers

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[1]*Disclaimer*: This paper draws extensively from an assignment submitted by the author for the fulfilment of the LL.M coursework at NALSAR University of Law, Hyderabad, in the academic session of 2020–21. The assignment was titled "Plea Negotiation in Criminal Proceedings: Ethical Limits of Lawyers" and it was written solely by the author.

[1A]Jeff Wallenfeldt, *Assassination of Martin Luther King jr.*, BRITANNICA ENCYCLOPAEDIA, (Mar. 28, 2021) https://www.britannica.com/event/assassination-of-Martin-Luther-King-Jr.

[2] John H. Langbein*, Understanding the Short History of Plea Bargaining*, 13 LAW & SOC'Y REV. 261, 261 (1979).

[3]Carol A. Brook, Bruno Fiannaca, David Harvey & Paul Marcus, *A Comparative Look at Plea Bargaining in Australia, Canada, England, New Zealand, and the United States*, 57 WM. & MARY L. REV. 1147, 1150 (2016).

[4]Also termed as plea agreement; negotiated plea; sentence bargain; plea deal; guilty plea. (Used synonymously by the author).

[5]PLEA BARGAINING, LII CORNELL LAW SCHOOL, https://www.law.cornell.edu/wex/pleabargain (last visited May 7, 2022).

[6]R. Michael Cassidy. "*Some Reflections on Ethics and Plea Bargaining: An Essay in Honour of Fred Zacharias*." SAN DIEGO LAW REVIEW *92,* 98 (2011).

are the principal overseers. The *Prosecution* has a stronger hand in this unequal bargaining setup because of their ability to offer incentives, charge selection, and influence over sentencing.[7] Due to the limited involvement of the courts, there is limited constraint on the prosecutors by the judges.[8] Prosecutor's plea, proposes predominantly set sentences and is held in check by the defence counsel. *Defence lawyers* are the chief caretakers of ensuring fair negotiation and unbiased treatment for their client under this borderline laissez-faire scheme.[9] Although the client has final authority to sign the agreement, the defence attorney plays a determinative role in persuading the client to refuse or plead guilty. As a result, the final agreement does not accurately reflect the victim's, defendant's, or the court's wishes. Instead, it manifests the efforts and intentions of the concerned lawyers, putting the prosecutor and defence lawyer at the centre stage of the plea-bargaining setup. It is their actions that determine the fairness of the plea bargain.

Since its inception, plea bargaining has been a "*grey market*"[10] within the legal scholarship. The most common moral objection is that it circumvents the time-tested trial court system and is a "condemnation without adjudication"[11] Many criticise it as institutionalised coercion wherein innocents are coerced into pleading guilty.[12] It is also a popular argument that instead than serving the ends of justice, it is merely designed to limit the prosecution's work.[13]

Despite a list of concerns about plea bargaining, its position has strengthened. This trend can be noticed across jurisdictions.[14] For many states, the benefits of plea bargaining have outweighed its disadvantages because of its utilitarian aspect. For such states, the cost-benefit eclipses the reservations.[15] The appeal of plea bargaining's comes from the "mutuality of advantage".[16] The prosecutors, defendants, defence

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[7]Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem,* 103 J. CRIM. L. & CRIMINOLOGY 1, 14 (2013).
[8]Stephanos Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms*, 126 HARV. L. REV. 150 (2012).
[9] *Id*. at 150.
[10] *Id.*
[11] Michael Young II., *In Defence of Plea-Bargaining's Possible Morality*, 40 OHIO N.U.L. REV. 251 (2013).
[12] *Id.* at 251.
[13] George Fisher*, Plea Bargaining's Triumph,* 109 YALE LAW JOURNAL 858, 860 (Mar., 2000).
[14] Brook*, supra* note 3, at 1150.
[15] Mike McConville, *Plea Bargaining: Ethics and Politics*, 25 J.L. & Soc'y 562, 564 (1998).
[16] Roland Acevedo*, Is a Ban on Plea Bargaining an Ethical Abuse of Discretion? A Bronx County,* New York Case Study, 64 FORDHAM L. REV. 987, 991 (1995).

lawyers, judges, victims, and the general public all benefit from the procedure.[17] It is more efficient, saves state resources, eliminates the possibility of an acquittal for the accused, and at the same time allows the accused to survive with a lesser punishment than the maximum. Casting some more light on these aspects, the *second part* (II) of this article aims to briefly outline the concept, evolution and reasons behind the rise of plea bargaining.

Critics argue that the institution of plea bargaining is inherently flawed and leads to a slew of moral issues. The major alleged moral issues include the problem of innocent individuals pleading guilty, and the alleged incentivisation for wrongful coercion of defendants by the state. The *third section* (III) of this article presents a comparative analysis of moral critiques and defences made against and in favour of the morality of plea bargaining by prominent scholars such as Frank H. Easterbrook, and Prof. Albert W. Alschuler among others.

This article argues that the impact of the plea-bargaining system is heavily determined by the conduct of the prosecutors and defence lawyers. States have attempted to establish a balance "behind a mask of professional ethics and classical Moralism".[18] However, due of the novel, intimate and unconventional nature of the plea-negotiation process, such established ethics is often laden with unclarity, contradictions and unrealistic targets. There are moral crossroads where the balancing of interests through sound ethical principles is required to establish the limits and responsibilities of lawyers. The *fourth part* (IV) highlights the ethical considerations and limitations of both the prosecutors and defence lawyers in plea negotiations and advocates for an enhanced scholarly scrutiny of the same.

II. THE INSTITUTION OF PLEA NEGOTIATION

A. Concept and nomenclature of the practice

The Black's Law dictionary defines 'Plea bargain' as a "negotiated agreement between a prosecutor and a criminal defendant whereby the defendant pleads guilty to a lesser offence or to one of multiple charges in exchange for some concession by the prosecutor, usually a more lenient sentence or a dismissal"[19]. It is formally categorized into two categories- *Charge bargaining,* as per which in return for a guilty or no

[17] *Id.*
[18] McConville, *supra* note 15, at 562.
[19] BLACK'S LAW DICTIONARY, 1270 (9th ed. 2009).

contest plea from the defendant, the prosecution offers to drop any of the counts or limit the crime to a less serious offence.[20] Other is *Sentence bargain* under which in return for the defendant's guilty or no contest plea, a prosecutor decides to seek a lesser sentence from the court.[21]

The nomenclature and legal positioning of this practice is state-specific. The most widely used term is a 'plea bargain', which originated in the United States and has since been adopted by several other states. Because of the "deal making" connotation being synonymous with "bargaining" some jurisdictions, such as Australia, the expression "plea negotiation" is used; which upon its finalisation becomes a "plea agreement".[22] In the U.K. it is officially referred as "guilty plea".[23] In Canada similar practice is formally referred to as "resolution discussions"[24]. In New Zealand lawyers ask for a "sentence indication" from the judge.[25] Likewise, the popular term for plea negotiations varies by state. However, plea bargain is most commonly used in comparative indications of the practice.

B. Evolution

As per some jurists, concessions of charges and sentences in exchange for guilty pleas have always been a part of the criminal justice system.[26] J.S. Cockburn observed that almost half of the defendants who came in the English home circuit's courts between 1587 and 1590 pleaded guilty. The judge granted them benefit of clergy: a way to avoid execution.[27] Other are of the opinion that in its present sense, the practice originated in seventeenth century England.[28] Differing from them, *Prof. Alschuler* opines that during much of the common law's history, plea dealing was almost unheard of; and the earlier practises that are seen as akin to plea bargaining were actually unilateral acts of discretion by the court or the crown and not plea bargaining as its conceived at present.[29] Due to such differences, pinpointing the exact origins of plea bargaining is difficult.

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[20] *Id.*
[21] *Id.*
[22] Brook, *supra* note 3, at 1153.
[23] McConville, *supra* note 15, at 564.
[24] Brook, *supra* note 3, at 1157.
[25] *Id.* at 1162.
[26] Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 2 (1979), "With respect to plea bargaining, this has been a part of the judicial system ever since man was made to account for crimes against society." [hereinafter Alschuler *History*].
[27] Fisher, *supra* note 13, at 860, 861.
[28] Alschuler, *History, supra* note 26, at 2.
[29] *Id.* at 4 "mercy is given not sold".

The first official records of plea bargaining date from the period following the American Civil War in the United States.[30] The general reaction to it at the time was vehement disapproval.[31] Despite strong scepticism, plea bargaining became the most common means of settling court disputes in several U.S. states by the end of the nineteenth century.[32] Corruption and the everyday influence of third parties on the administration of justice in the nineteenth century United States, such as politicians, fixers, and other influential people, provided oxygen to the plea system and kept it alive.[33] Plea bargaining gained new acceptance in the early twentieth century as the size and complexity of criminal law grew, and courts and prosecutors struggled to deal with the increased volume of cases.[34] By the 1920s, the criminal courts of the United States had become heavily reliant on guilty pleas.[35] Another reason for this acceptance was that the non-trial remedy of plea bargaining, according to *Prof. Langbein*, was not only faster than a bench trial, but it also shielded the frail, elective American trial bench from moral responsibility and political blame for non-populist decisions[36]. For over a century, the United States Supreme Court did not step into evaluating the propriety behind the plea-bargaining mechanism. However, in the same period, many of its decisions increased the difficulty, duration, and expense of trials, adding to the lucrativeness of plea bargaining.[37] Eventually in 1970, in the decision of *Brady v. United States* the Supreme Court concluded that plea dealing is "inherent in criminal law and its administration".[38] The Court, however, did not only formalise the plea system; it also regulated it and established basic standards for what constitutes an acceptable plea. Over the last five decades, plea bargaining has become a foundational pillar of the American criminal justice system, with about 90-95 percent of cases getting resolved through plea bargaining..[39] With the adoption of sentencing guidelines following *Brady*, prosecutors' capacity to build compelling incentives for defendants to take plea deals also increased significantly.[40] Today, a

[30] *Id.* at 6.
[31] *Id.*
[32] *Id.*
[33] *Id*.
[34] Edkins, supra note 7, at 9 “more than one half [accused] were held for violation of legal precepts which
did not exist twenty-five years before."
[35] Lucian E. Dervan & Vanessa A. Edkins*, The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1,9 (2013).
[36] Langbein, *supra* note 2, at 270.
[37] Alschuler, *History, supra* note 26, at 6.
[38] Brady vs. United States, 397 U.S. 742 (1970).
[39] Lindsey Devers, *Plea and Charge Bargaining: Research Summary*, BUREAU OF JUSTICE ASSISTANCE: U.S. DEPT. OF JUSTICE (Jan, 24 2011).
[40] Fisher, *supra* note 13, at 1072.

prosecutor in the United States has sweeping powers to persuade a defendant to waive their right to a trial and accept a plea bargain.[41]

Following the United States lead and recognising the benefits of guilty pleas in dealing with the growing caseload on the courts, many states have enacted legislation in the last three decades to implement the schemes related to plea-bargaining. In states influenced by Common law like *England* in 1994,[42] *Pakistan* in 1999,[43] and *India* in 2006[44] formalised the practise of granting a sentence reduction in exchange for a guilty plea. Plea bargains are also used in the criminal justice systems of *Australia, Canada,* and *New Zealand* with judicial approval and confidence.[45] In *Hong Kong*, where there is no judicial or state sanction of plea agreements, informal plea bargaining has become an important part of the system. It takes place between the defence counsel and the prosecutor outside the involvement of the judge, limited to terms of which charges will be dropped or pursued.[46] States with civil law systems, such as *People's Republic of China*[47], *Brazil*[48] and *France*[49], and others have also experimented with introducing the concept of a guilty plea into their legal scenery.

C. Reasons behind the universal rise of Plea bargaining.

At the functional level of the Court, its three stakeholders- the prosecutor, defendant, and judge all have interests in the plea-bargaining scheme for their own reasons. The proliferation of plea bargaining provided relief to the workload for the prosecutor and the judge, who together possess much of the leverage that counts. It also secures the prosecutor's and judge's professional reputations by removing the possibility of defeat for the prosecutor and the likelihood of reversal for the judge. Plea bargains, in effect, preserved the integrity and thereby

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[41] Devers, *supra* note 39.
[42] Criminal Justice and Public Order Act 1994 § 48, No. 33 Act of Parliament, 1994 (U.K.).
[43] National Accountability Ordinance 1999, § 25(b) Act of Parliament, 1999 (Pakistan).
[44] The Criminal Law (Amendment) Act, 2005, § 4, No. 2, Act of Parliament, 2006 (India).
[45] Brook*, supra* note 3.
[46] Kevin Kwok-yin Cheng, *The Practice and Justifications of Plea Bargaining by Hong Kong Criminal Defence Lawyers*, 1 Asian JLS 395, 399 (2014).
[47]Yorou, *China issues guideline on use of plea bargains*, XINHUA (Oct. 24, 2019) http://www.xinhuanet.com/english/2019-10/24/c_138499653.htm.
[48]Eduardo Soares, *Brazil: Supreme Court Rules Federal Police Plea Bargains Are Constitutional*, LIBRARY OF CONGRESS (June 25, 2018) https://www.loc.gov/law/foreign-news/article/brazil-supreme-court-rules-federal-police-plea-bargains-are-constitutional/.
[49] Y Ma, *Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany, and Italy: A Comparative Perspective*, 12 INT'L CRIM. JUST. REV. 22 (2002).

the credibility of the system by eliminating the risk of any factual or legal mistake in the trials.[50] For defendants, trials are concluded quickly and definitively. It enabled them to avert the stress and uncertainty of a trial while still avoiding the maximum penalty allowed in law.[51]

Historically Courts in *England* defended plea bargaining as it did not, in the classical sense, conflict with either adversary principles or traditional sentencing theory.[52] Plea bargains could justify reducing a sentence if a defendant were truly remorseful. They reasoned that by expressing remorse and confessing to the crime, the defendant had already taken a step toward rehabilitation, which was a major objective for imposing a sentence.[53] Later the English court of appeal, in the decision of *Cain,*[54] indicated that even remorse is not a *sine quo non* for a guilty plea. Subsequent to the Cain decision in 1970s, English courts began to openly acknowledge and justify the administrative basis of the discount. [55] . In the words of the England sentencing council guidelines- "*guilty plea avoids the need for a trial (thus enabling other cases to be disposed of more expeditiously), shortens the gap between charge and sentence, saves considerable cost, and, in the case of any early guilty plea, saves victims and witnesses from the concern about having to give evidence.*"[56]

The Supreme Court of the *United States* reasoned in the landmark decision of *Brady* that the institution is necessary to protect overburdened court systems from collapse.[57] The *Law Commission of India* had also argued for the introduction of plea bargaining for similar reasons. Their report made a case for plea bargaining by highlighting the delays in court resolution and the time spent in prison by defendants prior to sentencing. [58] This, at times, exceeded the maximum legal sentence that could had been imposed. In *People's Republic of China*, efficiency has been a major driving factor in the adoption of guilty pleas in their criminal justice system. [59] They were of the view that plea bargaining encouraged suspects to tell the truth about their crimes while also expediting the legal process.

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[50] Fisher, *supra* note 13, at 867.
[51] Acevedo, s*upra* note 16, at 992.
[52] McConville, supra note 15, at 563.
[53] *Id.*
[54] R v Cain, CRIM. LAW REV. 464 C.A. (1976).
[55] *Id.*
[56]Sentencing Guideline Council, *Retutlion in Sentence for a Guilty Plea* § 2.2 (2004) available at https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/reduction-in-sentence-for-a-guilty-plea-first-hearing-before-1-june-2017/.
[57] Brady, *supra* note 38, at 752.
[58] 142nd Law Commission Report, *Concessional Treatment for Offenders who on their Own Initiative Choose to Plead Guilty without any Bargaining,* LAW COMMISSION OF INDIA 2 (1991).
[59] Yorou, *supra* note 47.

"Economic necessity"[60] and "Administrative realities"[61] have been the major push for most states to embrace the institution of plea negotiation.

III. PLEA BARGAINING AND THE CONTOURS OF MORALITY

Declared as a moral "disaster"[62] by *Prof. Schulhofer*, the institution of guilty pleas has been an object of considerable scrutiny and intense critique. Many scholars believe that the only way to fix the institution of guilty plea is to abolish it entirely. However, the inevitability of plea bargaining due to the emphasis of the modern state on values such as systemic efficiency and rational preference-maximization[63], reduces the likelihood of states opposing the guilty plea recourse.

With abolition out of the question, the only viable option is to contain the institution by imposing ethical constraints on its stakeholders, streamlining the plea-bargaining process and limiting its freewheeling nature. There are several moral junctures where critics argue that the plea system goes too far. However, there is also another group that insists that the guilty plea and morality can be reconciled. This section explores some of these moral stumbling blocks and considers whether the concept of plea bargaining in isolation is morally acceptable.

A. The ideal of Justice and punishment

In any well-functioning criminal justice system, the general rule is that punishment should be proportional to the crime committed. A natural corollary of this proposition is, if there is no wrongdoing, there will be no punishment. This principle is breached in two cases: first, if a guilty person escapes punishment, and second, if an innocent person receives one.

Professor Kipnis argues that entering a guilty plea breaches the principle in both ways. First, it allows a guilty person to receive a lesser sentence than the system had foreseen for them. Second, it tempts an innocent person to accept responsibility for a crime they did not commit and

[60] Alschuler, *History,* supra note 26, at 1.
[61] McConville, supra note 15, at 564.
[62] Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 2009 (1992).
[63] Frank H. Easterbrook, *Plea Bargaining as Compromise,* 101 YALE L.J. 1969,1976 (1992).

punishes them for it.[64] Plea bargaining, according to critics, has resulted in a shift away from due process rhetoric. The one which emphasised on the importance of protecting the innocent over holding the guilty accountable. A system which would prefer to let hundreds of guilty people go free over convicting a single innocent person.

However, the above concern is not as convincing as it seems. In an episode of a popular American legal drama series "Suits"[65], one of the protagonists Mike Ross is charged with falsifying his educational records of studying in Harvard Law School to obtain a job at a reputed law firm, of which he is guilty of as per the preceding plot of the show. A jury trial takes place and amidst the proceedings he accepts a guilty plea from the prosecutor in exchange for a three-year sentence. At the end of the episode, when Mike Ross's defence counsel informally meets with the head of the jury to find out what their verdict would have been if Mike had not accepted the plea deal, the member tells him the jury was thinking of judging him as "Not Guilty."

Although the above incident is a work of fiction, it effectively portrays *Prof. Gorr's* response to Prof. Kipnis's criticism of the plea system. He responds that within the presumption of innocence and rigidities of our system, if all factually guilty defendants were put on trial, it is possible that a significant number of them will be acquitted. [66] However, in a plea-bargaining regime, he confers that given the uncertainty of trial's outcome, some in the latter category will be willing to negotiate and plead guilty. Prof. Gorr's approach is plausible because it allows for the possibility that if the offender voluntarily accepts responsibility for the crime, they will receive some punishment rather than none at all. A lesser punishment for a self-admitted offender obtained through a guilty plea is closer to the ends of justice than allowing him to go free due to a lack of evidence at trial.

Additionally, it's important to note that a plea bargain is an option for the defendant and not a compulsion. Thus, a person who acknowledges themselves as innocent has every right to go for a trial. Nevertheless, in the presence of culpable evidence, even factually innocent persons could be found guilty in a trial by the judge or jury. Such injustice is inevitable in any criminal justice system and is an unfortunate reality. In such cases, the plea-bargaining mechanism will also result in an unfavourable outcome if the innocent person accepts a guilty plea anticipating the trial's negative outcome. However, the accepted punishment will almost

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[64] Gorr, Michael. *The Morality of Plea Bargaining,* 26 SOCIAL THEORY AND PRACTICE 129, 140 (2000).

[65] Suits, Season 5 Episode 16, *25th Hour*, (2016) available at https://www.netflix.com/in/title/70195800.

[66] Gorr, *supra* note 64, at 141-142.

certainly be less severe than the one imposed after the trial. In this regard, a guilty plea option appears to be less morally compromised than a trial ordeal, as it unleashes a lesser evil on the innocent.

B. The Innocence Problem

The "innocence problem"[67] refers to the concern that plea bargaining would result in the conviction of innocent people who have been wrongfully accused. The fear stems from the belief that plea bargains can be used to persuade or coerce innocent people to plead guilty. Critics argue that criminal suspects plead guilty mainly because they believe that doing so would result in more lenient punishment than a verdict at trial.[68] According to a study of students, accused of cheating, as many as 56.7 percent of innocent students were willing to plead guilty in exchange for a lesser punishment.[69] Based on the findings, *Prof. Edkins and Prof. Dervan* had criticised the position taken by Supreme Court of the U.S in *Brady*. The Top court had stated that an accused's wisdom will act as a safety valve against accepting a guilty plea when she is innocent because if given a free choice, an accused is unlikely to falsely condemn themself.[70] Based on their study, Prof. Edkins and Dervan have argued against this, claiming that even in presence of a free will, when given the opportunity to defend their innocence in court, in exchange for a good enough advantage persons will be willing to unfairly blame themselves for something they have not done.[71]

Wrongful convictions are unavoidable in any justice system. However, Calls for the abolition of plea bargaining will be justified when the number of wrongful convictions obtained through plea bargaining exceeds the number obtained through a trial. There is a lack of evidence that this has been the case. *Prof. Young* has noted a fact that just 7.6%, or nineteen, of the 250 individuals found to be innocent by DNA findings by the *Innocence Project*[72] pleaded guilty, while the rest of them were convicted after trials.[73] He concluded that, when compared to traditional trials, plea-bargaining does not appear to have a "innocence problem.".[74]

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[67] Robert E. Scott & William J. Stuntz*, Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1949 (1992).
[68] Schulhofer *supra* note 62, at 1982.
[69] Edkins, *supra* note 7, at 34.
[70] Brady, *supra* note 38, at 757-758.
[71] Edkins, *supra* note 7, at 48.
[72]"The Innocence Project is a nonprofit legal organization based in the U.S that is committed to exonerating individuals who it claims have been wrongly convicted, through the use of DNA testing*" website*: https://innocenceproject.org/.
[73] Young*, supra* note 11, at. 259.
[74] Id.

From the statistics of the Innocence Project, it is quite evident that students caught cheating are not the best analogy for a criminal defendant facing trial, hence the Supreme Court was not wholly unjustified in trusting the defendant to determine their best interests, as opposed to the opinion of Prof Edkins and Dervan.

However, it is important to ensure that the defendant has a free choice in a genuine sense. The concerns of critics against plea bargaining are mostly fuelled by the prosecutor's unrivalled ability to coerce or induce an innocent into pleading guilty, rendering the defendant's free will illusory. Nonetheless, this is not something which makes a case against the very concept of plea negotiation. The real fix to this concern is a prosecutor constrained and checked by professional ethics, defence counsel and the Judge. The fourth section of this paper has attempted to throw some light on this issue.

C. Is Plea Negotiation Coercive?

Critics contend that defendants are unfairly forced to accept a plea under plea-bargaining rather than exercise their right to a trial. Critics have called it "institutionalised coercion."[75] In broad terms, coercion entails overriding a person's will through the use of wrongful influences on his decision-making.[76] Prof. Kipnis has compared a prosecutor asking a defendant to plead guilty in exchange for a lenient sentence akin to a "Gunman" asking the victim to surrender their belongings in exchange for sparing their life.[77] He has asserted that, just as a contract between the gunman and the victim cannot be enforced, a plea deal should also be unenforceable because it was obtained under duress and thus it was not voluntary.

However, to fairly assess whether something is coercive, it is essential to have a prior, independent understanding of the extent of choices or alternatives that an individual had.[78] Prof. Wertheimer has given a persuasive to Kipkis contention by pointing out that plea bargain gives the claimant the opportunity to refuse without deteriorating her situation compared to the baseline. This sort of proposition is an offer and not a threat.[79] .In the case of a victim facing the Gunman, the victim's baseline would be their state prior to the extortion. Here, the threat would put the victim in a worse situation than before they met the Gunman. However, in the case of a defendant facing trial the condition after they have been

[75] Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea-Bargaining Reform,* 50 CRIM. L.Q. 67, 91 (2005).
[76] Young, supra note 11, at 263.
[77] Gorr, *supra* note 65, at 142.
[78] Young, *supra* note 11, at 263.
[79] *Id.*

charged would be the relevant baseline. The prosecutor's proposal should be evaluated against this baseline, i.e., after the defendant has faced the possibility of being found guilty in the court. If they believe that they will be found innocent at trial, they are free to reject the plea deal. Only if they suspect that they might be convicted, they would consider taking the plea deal. This in most cases will result in a lesser sentence hence a position better off than a lengthier sentence at the trial. Therefore, a comparison of a prosecutor with a gunman is exaggerated and not analogous. Also, presence of a wrongful influence or threat is essential for coercion which is not present in a healthy well-functioning plea setup.

A prosecutor's unjust practises, such as threats to overcharge a defendant if he does not plead guilty, among others, can be seen as a form of coercion. Nevertheless, these practices can be restrained with suitable checks and balances. They by no means suggest that the plea bargaining by itself is morally dysfunctional.

D. Differential sentencing for similarly situated defendants

The defendant's willingness to accept a plea bargain largely depends upon reductions they receive in exchange for pleading guilty. They are unlikely to sign it until it is appealing. This, however, means that sentences for similarly situated criminals may differ, and the difference will be determined by their decision to plead guilty or not plead guilty. Critics refer to the extra sentencing he received for opting for a trial as a "Trial penalty".[80] The price they pay for refusing to plead guilty. This disparate treatment, according to the critics, reveals a disturbing lack of respect for equality among similarly situated convicts and violates revered maxims of justice of treating like cases alike.[81]

The defenders of plea bargaining have argued that the distinction in punishment between plea-bargaining and trial convicts should be seen as benefit for choosing to plea-bargain rather than a penalty for choosing to go to trial.[82] This benefit comes due to their contribution to the public good by avoiding a costly trial.[83]

Prof. Young's defence is more compelling than the arguments of public good presented above. He raises concerns about the 'Trial Penalty'

[80] Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea-Bargaining Reform,* 50 CRIMINAL L.Q. 91 (2005).
[81] Young, s*upra* note 11269.
[82] Easterbrook, *supra* note 63, at *1977.*
[83] Young, *supra* note 11, at 270.

critique's restrictive view of equality. The 'Trial penalty' criticism's view of equality is based on the assumption that equality is essentially about avoiding variations in the allocations of things: in this case, penalties.[84] He asserts that the distributional view of equality should be discarded by a relational view of equality, in which the primary consideration of equality is the avoidance of relationships of unfair dominance or subordination between entities.[85] Specific disparities in institutional treatment can be an indicator of subordination and unfairness. However, a disparity alone cannot necessarily be interpreted as a sign of inequality. One consequence of the proper "equality-as-non-subordination" view is that, in general, an unequal treatment for which an individual itself is responsible is not inequality.[86] Prof Young has concluded that when the defendants are responsible for their plea-bargaining actions and refuse a plea-bargain, are sentenced, and serves a harsher sentence, they cannot legitimately claim that they were subordinated or dominated by a scheme that refused to value equality. [87] He provides a plausible response to this criticism by giving an alternate perspective of equality. The defendant's decision to opt for or waive a trial is self-inflicted, and the consequences of that decision will not disrupt equality.

E. Efficiency and commodification of Justice.

While efficiency is seen as the most appealing aspect of plea bargaining, critics rightly point out that efficiency does not equal justice.[88] Critics argue that in the want of efficiency plea bargaining has expedited the commodification of justice where cases are stripped of their personality and uniqueness to lump them into a common group that determines their value in the legal marketplace.[89] In the race for efficiency, plea bargaining has become a go-to device for courtroom players because the higher the percentage of guilty pleas, the more 'efficient' the system becomes. Critics argue that the price of quick case resolution is the sacrifice of values associated with the contested trial which can be adequately catered to only in an adversarial system.[90] *Prof. Schulhofer* has taken the argument a step further, claiming that plea bargaining is inefficient because it erodes the accuracy of the guilt-determination process and the public trust in the regime.[91] The crux of the argument of the critics is that by pushing for a plea bargaining system, states

[84] *Id.* at 272.
[85] *Id.*
[86] *Id.* at 273.
[87] *Id.* at 274.
[88] *Id.* at 255-256.
[89] McConville, *supra* note 15, at 581.
[90] *Id.*
[91] Schulhofer, *supra* note 62, at 1996.

prioritise cost-effective resource allocation over ensuring the prosecution of the accused and the acquittal of the innocent. They thus put economics ahead of morality and justice.

Plea bargaining has become a practical necessity rather than a choice for many as they grapple with the societal consequences and public backlash of cases piling up on their judges' desks. *Prof. Mconville* believes that unlike what critics claim, a guilty plea does not compromise the adversarial ideal because no one is imprisoned for choosing to go to trial. Even if those who choose to plead guilty are not set free or absolved of their misdeeds; they receive a reduced sentence in exchange for system conserving its resources.[92] He asserts that as resources are scare, costs also have a moral dimension attached with them.[93] In the case of emerging economies, it takes on greater significance because their responsibilities to their people exceed their economic capabilities of fulfilling them. Therefore, when the prosecutor makes a telling case on record, it would be not only self-defeating but also morally unethical to contest the case and scanty resources be wasted on cases where outcome is beyond doubt.[94]

This also gives courtroom players more time to work on genuine cases where factually innocent people are on trial, as well as saving victims from further stress and witnesses from exposure and harm. As a result, the value that plea bargaining adds to the criminal justice system is not only economic, but also humane.

IV. ETHICAL LIMITS OF LAWYERS

The opposition of critics of plea bargaining has not stopped states from adopting it. As argued in the third part of this paper the orthodox critique of plea bargaining has not been able to show any fundamental perversion in the concept of plea bargaining but their suspicions do carry weight when directed at the parties on whom the institution of plea bargaining is predicated. The success of plea bargaining, like any other system of justice, is determined by the three pillars of the Court: the prosecutor, the defence council, and the judge. Clearly defining their ethical obligations and limitations toward the defendant and society is critical for preventing them from going overboard. This section will illuminate

[92] McConville, s*upra* note 15, at 582.
[93] *Id.* at 586.
[94] *Id.*

the crucial crossroads the lawyers may face when responding to the plea-bargaining question.

A. Prosecutors

A plea agreement is made and steered by the prosecutors. Both the supporters and opponents of plea bargaining concur that the prosecutor is the key enabling figure in the entire plea negotiation process.[95] As the defendant has no right to get an offer, the decision to use plea negotiation lies solely within the discretion of prosecutor. They can outrightly refuse or set their terms and conditions to offer a plea agreement. The prosecutor's unfettered control over the plea negotiation process has led many to conclude that they have an "unregulated monopoly."[96] As brought up in the third section of this paper, an unabated behaviour, could lead to a slew of moral issues, rendering the plea-bargaining system morally reprehensible. Also, prosecutors' responsibilities in most states as "ministers of justice" [9798] are not merely symbolic, but also have a moral content. This pointers explained below highlight the are moral flashpoints which almost every prosecutor has to face where properly understood ethical limits and responsibilities will make him clearer of his duties towards the system.

i. Zealous advocacy vs. Duty Towards Justice

As a state lawyer, the prosecutor is expected to defend the state's interests vigorously. However, as minister of justice, they are also expected not to do so at the expense of justice. This puts the prosecutor in a unique position among lawyers because their responsibilities are twofold: they are expected to conduct zealous fact-finding to prosecute the defendant while also actively ensuring that they do not aid in imprisoning an innocent person. This boundness of acting as a “player and referee”[99] puts them in a difficult position. They have to internalise the importance of a binaural decision-making, serving as an agent of justice as opposed to a purer agency model in which lawyers solely identify with their clients' preferences.[100]

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[95] Roland, s*upra* note 16, at 994.
[96] *Id.*
[97] Model Rules of Prof’l Conduct R, AMERICAN BAR ASSOCIATION § 3.8 cmt. 1 (2021), accessible at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_8_special_responsibilities_of_a_prosecutor/comment_on_rule_3_8/.
[98]Jitendra Kumar, Ajju v. State (Nct of Delhi) and Anr, 84 (2000) DLT 88, (India) “He [Public Prosecutor] must consider himself as an agent of justice and truth.”
[99] Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?* 44 VAND. L. REV. 45, 110 (1991).
[100] Cassidy, *supra* note 6, at 96.

While considering plea negotiation prosecution has to balance between the victim's desire for retribution, the society's need for deterrence and security, the defendant's right to a due process, and the system's requirement for quick conflict resolution. Before offering a plea deal, the prosecutor must determine through their skill whether there is sufficient evidence for the court to believe the defendant is the delinquent. The United States Supreme Court has ruled that the prosecutor is responsible for presenting all evidence, even if it is favourable to the defendant and withholding any such evidence is against their right to trial.[101] Similarly, it is only ethical for a prosecutor to desist from offering a plea if she has evidence that supports the accused's acquittal. They are bound by morality to consider all the mitigating and aggravating conditions. A guilty plea option should only be used when the prosecutor is confident that even if the case goes to trial, the likely outcome will be conviction.

ii. Individual Views of the Prosecutor

To figure out what constitutes just conduct in the context of plea bargaining, a prosecutor must first figure out what plea negotiation is supposed to accomplish. Since different theories of plea bargaining produce different ideas of justice,[102] and because plea bargaining is at the prosecutor's discretion, inconsistent standards between prosecutors within a single regime are likely to emerge. Its of extreme significance that states identify which plea-bargaining ideas the criminal justice system of the state, subscribes to. So that prosecutors do not impose their own personal notions of justice on defendants in a capricious and internally contradictory manner. This is primarily to provide a reference point for the prosecutor, and not to prevent them from using their own practical wisdom. As each state has its own ideas and reasons for using plea bargaining, a clear statement of those reasons and ideas would encourage the prosecutor to stick to those reasons rather than going astray under their whim of justice.

iii. Accessibility for the Defendant

Due to a lack of resources and attention to the rights of the defendant, the quality of defence lawyers may not to be satisfactory everywhere. Due to this reason, the prosecutor's role in ensuring that the defendant understands what happens after she signs a plea deal becomes even critical. For a prosecutor, some of the suggestions are very simple to implement in order to make the entire process more accessible to the defendant. For instance, when sending draft plea agreements to defence

[101] Brady v. Maryland, 373 U.S. 83 (1963).
[102] Cassidy, *supra* note 6, at 101.

lawyers, prosecutors can simplify them into writing, in whatever native language the defendant best understands.[103] The prosecutor may also discuss with the defendant, to the best of her knowledge, the possible outcomes of a trial, including the likelihood of conviction and the expected sentence in a trial as against a plea.[104]

They should also inform the defendant about the direct and incidental consequences of signing a plea agreement. The Supreme Court of the United States, for example, has ruled that noncitizen defendants have the right to obtain correct information concerning their deportation before pleading guilty.[105] In a similar vein, the prosecutor should inform defendants of all the consequences that their action of pleading guilty will have on their immigration, employment, child custody claims, and right to trial, among other things.

iv. Waiver of rights

It's a grey area practise in which a prosecutor inserts an express provision in a plea deal stating that the defendant waives their right to appeal the conviction later on different grounds. For instance, the defendant's lack of adequate representation by her counsel during earlier proceedings. In the United States, where plea deals are seen through the prism of a contract, prosecutors by such waiver clauses attempt to protect the plea deals from an assault on any grounds in order to bring the criminal process to final closure.[106] Waivers of this nature have become commonplace, to the point where *Prof. Cassidy* refers to prosecutor's mentality of "let's throw every possible waiver."[107] as "Waiver Crazy"[108] . However, not all waivers would hold up in court, and prosecutors include them just to see what can stick. According to commentators such ineffective waivers, are the worst kind of overreach and incompatible with a prosecutor's duty as a minister of justice.[109]

v. Threats to Prosecute Dear Ones

Prosecutors may sometimes go to great lengths to persuade a defendant to accept a plea deal, even if it means breaking ethical boundaries. They commonly intimidate defendants by threatening to prosecute the defendant's family members or loved ones. In many states, including the United States, there are not enough regulations prohibiting such conduct by the prosecutor, even at the level of the Bar ethics guidelines.[110] The United States Supreme Court has ruled that, while such threats and

[103] Bibas, *supra* note 8, at 167.
[104] Id.
[105] Padilla v. Kentucky, 130 S. Ct. 1486 (2010).
[106] Cassidy, *supra* note 6, at 104.
[107] Id.
[108] Id.
[109] Id. at 107.
[110] Id. at 104.

methods by the prosecution are harsh, they are constitutionally permissible.[111] However, threatening prosecution against members of the family and loved ones to obtain a guilty plea is ethically questionable. It undermines the defendant's autonomy and subjects him to a cruel election between his right to trial and his loyalty and love for his dear one.[112] . This practice can be described as coercive and not furthering any legitimate principle of criminal law. It would be proper for prosecutors to desist from using such methods.

B. Defence Lawyers

Defence lawyers are the guarantors of fair negotiations in a guilty plea system. They act as a safety valve against the sweeping powers of the prosecutor. Plea negotiations are impacted greatly by intangibles like defence counsel's expertise, remuneration, and enthusiasm[113]. The nature of the defence lawyer's job frequently puts their ethical limits to the test. It forces them to make moral decisions regularly. For example, deciding how to handle a client who is willing to plead guilty in exchange for a plea bargain but insists on being innocent in private. To serve the client's best interests in a criminal proceeding, a defence lawyer must frequently persuade them to make a decision that they may not want to make, as almost every option is unpleasant and thus difficult for the client to accept. Such moral forks in the road abound, necessitate discussions to address the defence lawyer's priorities and ethical limits in such situations.

i. Meaning of Client Centeredness

It is difficult to pin down exactly what a client-centered representation entail. For a general lawyer, it usually translates to the client's wishes being fulfilled and their autonomy being respected. However, it is not so straightforward for a criminal defence lawyer working in a plea-negotiation system. A client-centred representation for a defence lawyer would be to represent their client's interests to minimise punishment. With this approach the lawyer knows that accepting the client's wishes primae facie, may not be the best recourse to ensure minimum risk. Client-centeredness in criminal defence is taking the time to counsel and persuade the client to retain as much liberty as possible.[114] A defence lawyer is better able to understand the consequences of a client's actions because of their professional insight. It is their responsibility to provide

[111] Blackledge v. Perry, 417 U.S. 21 (1974).
[112] Cassidy, *supra* note 6, at 104.
[113] Bibas, *supra* note 8, at 167.
[114] Abbe Smith, *The Lawyer's "Conscience" and the Limits of Persuasion*. 36 HOFSTRA L. REV. 480,490 (2007).

perspective and help the client make the best decision possible. By merely acquiescing to their clients' misguided requests, defence lawyers may cause harm to their clients. Prof. Doyle sees this as a professional dereliction of duty motivated by a "false sense of respect for client autonomy."[115] It can be a disguised as complacency or fear of truly engaging with the client.[116] Although the client has the final say, it is the lawyer's implicit moral duty to do everything in their ability to awaken them while staying within ethical bounds.

ii. Persuasion Bordering on Coercion

After studying the case, a good lawyer is expected to advise the client on what she considers to be the most reasonable choice between going to trial and accepting a plea deal. Generally, defendants will also tend to favour the more reasonable option. However, there are times when some defendants are drawn to a decision that is not only ill-considered but also a potentially disastrous one. The defendant would rather have a different option than what they effectively have. When there is no doubt that going to trial would be to a client's harm or that accepting a plea agreement will result in a pre-mature sentence—and the client does not appear to understand this—good defenders usually feel compelled to do whatever it takes to reach the client.[117] However, in doing so, they will enter a morally tumultuous territory, where their strategies may appear coercive to some. *Prof. Smith* opines it is the counsel's ethical obligation to explain the difference between a plea offer and her client's chances at trial in a compelling manner so that he gets it, within the available time frame, even if it means putting the client under severe emotional turmoil.[118] He insists that without intense engagement, no conscientious, client-centred counsel should support a client's rejection of a good plea offer.[119] He asserts that when the stakes are high, the defence attorney should use methods tailored to the client's nature to persuade him to see his point of view.[120] To convince him, he purports - to use blunt language and not mince words, ask question and be persistent; talk a lot and also use silence when necessary; use full range of emotions from yelling, pleading. arguing, cajoling and even crying; take help and bring in other lawyers keeping the race, gender, sex of the client in mind.[121] Prof. Smith contends that he believes in "arm-bending but not arm-breaking" and contends that a diligent lawyer is always mindful to avoid the breaking

[115] *Id*.
[116] *Id*.
[117] *Id*.
[118] *Id*. at 483.
[119] *Id*.
[120] *Id*. at 491.
[121] *Id*. at 491-492.

point of the client.[122] Smith's tactics may appear coercive, but they are prudent as they are directed towards securing the best interests of the client. However, if a defendant insists on going to trial despite the counsel's best efforts, the counsel's ethical responsibility is to comply with his client's demand.

iii. Use of Family Members

This point is a corollary to the second point mentioned above. In a case, the accused was alleged to have committed a brutal murder.[123] He wanted to go to trial because he claimed he acted in self-defence but his lawyers were of opinion that he will be found guilty and sentenced to death. His lawyers negotiated a plea with the prosecution, where he would plead guilty and the capital murder charge will be dropped. However, even after much convincing the accused refused the plea and insisted on a trial. They tried for months to persuade him, but he consistently refused, so the lawyer then enlisted the help of his mother, who also agreed that it was foolish of his son to go to a trial and risk a death penalty. His mother confronted him, asking how she would feel if she had to claim her son's electrocuted body.[124] He still relented, but when she became hysterical, he finally gave in. Two days after a "repeat performance"[125] by his mother, he pled guilty. But after his mother went away, prior to sentencing, he retracted his guilt plea. The federal district court ruled the plea was involuntary and ordered a new trial. However, the court of appeals overturned the decision, ruling that it was voluntary and based on "sound advice"[126]. *Prof. Alshuler* disagrees with the court and saw this as a wrongful calculated use of family members to induce guilty plea[127]; *Prof Smith* differed with him and defended such persuasive techniques, claiming that they are sometimes necessary for efficiently conveying "sound advice."[128] For inmates facing trial for capital offences American Bar Association also refers to soliciting the support of relatives, friends, religious mentors , and other inmates to convince an individual to not make a self-destructive choice.[129]

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[122] *Id*. at 492.
[123] United States ex rel. Brown v. LaVallee 424 F.2d 457 2d Cir. (1970).
[124]Albert W. Alschuler, The Defense Attorney's Role in Plea Bargaining, 84 YALE L.J. 1179 (1975)..
[125] Smith, *supra* note 114, at 484
[126]Alshuser, *supra* note 124, at 1194.
[127] *Id*. at 1192.
[128] Smith, *supra* note 114, at 485.
[129] ABA Guidelines for The Appointment And Performance Of Defence Counsel In Death Penalty Cases, AMERICAN BAR ASSOCIATION, Guideline 10.5.

Using loved ones to persuade the client for his own good does is not morally problematic, given that the client makes the final decision.

iv. The Guilty Plea Culture and "Don'ts" for a Defence Lawyer

A guilty plea culture mentality refers to defence lawyers' tendency of aversion towards a trial. It is exacerbated by the availability of a sentence reduction, which encourages them to take the guilty plea route indiscriminately.[130] Ethnographic studies[131] show that a plea-bargaining system has a natural tendency to move towards adopting a guilty plea culture. Where such culture thrives, defence lawyers approach their job based on standardised case theories and preconceptions about the sort of persons who get involved in criminal activities. The clients' accounts are not taken seriously and investigation is based mainly on the initial police report. Such lawyering dents the very foundation of plea-bargaining setup. Other tactics, such as threatening to withdraw or informing the client that if the plea is not accepted, he will have to do a less-than-zealous trial representation. Additionally, Lying or misrepresenting, erode the moral appeal of the plea negotiations. To make a plea bargain morally acceptable, defence counsel should not act based on prejudices or convenience.

v. The Dilemma of Withdrawal

Commentators believe that threatening withdrawal is unethical regardless of the reason for the threat.[132] Nevertheless, there are instances where morality may demand the defence lawyer to withdraw. For some of these scenarios professional ethics are already in place. For instance, when a lawyer knows their client is guilty but chooses to maintain their innocence in court; they are held as conniving with the client. This is because professional ethics requires them not to assert a fact or evidence as true what they know is false.[133] So, in a not guilty plea, professional ethics prohibit the defence counsel from engaging in fraud or deception in front of the court, and they are required to withdraw whenever they are confronted with such a situation.

However, the above principle should also be extended, when a lawyer is faced with the decision of whether or not to withdraw when client is willing to plead guilty in exchange for a lucrative incentive but privately admit to the defence counsel that they are innocent. Or in similar vein, when the defendant is willing to plead guilty in exchange for money or

[130] McConville, supra note 15, at 572.
[131] *Id*.
[132] *Id*.
[133] Standards Applicable to Criminal Cases, Code of Conduct, THE UK BAR, paras. 13.3 and 13.4.

to protect someone else. The rules are either silent or like in U.S and U.K. they do not confer any such capacity for the counsel to withdraw themselves from the case.[134] Resultantly, counsel is also exempt from liability for intentionally deceiving the Court. *Prof. Lee Bridges* believes that the decision to keep representing a defendant who maintains their innocence after entering a guilty plea should be based on the defence lawyer's evaluation of both the reliability of the client's secret assertion of innocence and the strength of the case of prosecution.[135] Thus they should have an option to withdraw in such cases. Deviation from the principle of shared responsibility does not stand on a firm ground from viewpoint of morality this inconsistency of standards should be addressed.

V. CONCLUSION

Plea negotiation has it flaws, and this article is not intended to extol it. However as argued in section three, it is not a morally inexcusable practice and deserves focus and discussions on its moral paradigm. Rather than dismissing it as a "moral disaster" in its entirety, scholarly attention to the moral crossroads can provide solutions to the existing grey areas. This may assist in the transition from a "guilty plea culture" to an adversarial plea-bargaining system.

Robust ethics for the actors involved in plea negotiations can keep this institution from going awry and devolving into the nightmare that some critics claim it is. The author contends that it is the lack of proper ethics and discussions, and not the institution of plea bargaining by itself, that makes it a 'moral disaster'. With proper ethics in place, the coercive pressures imposed by such codes of conduct could keep subjects wary of their actions and would gradually imbue ethical practices into their routine conduct. It will ensure overall fairness of the procedure. However, there are "inherent limitations on what ethics rules and the disciplinary process can accomplish"[136] An overbearing prosecutor, a sluggish defence attorney, or an uninterested judge are all red flags that harm plea bargaining, and the system should ensure that each has sufficient power and incentives to keep the others in line. Other influences on this tripartite arrangement, such as training, funding, incentivizing, unburdening and sensitization, are just as important in

[134] McConville, supra note 15, at 568.
[135] Lee Bridges, *The Ethics of Representation on Guilty Plea*, 9 LEGAL ETHICS 80, 97 (2006).
[136] Cassidy, *supra* note 6, at 109.

keeping the system fair and steady. With the growing acceptance of plea bargaining, a well-established plea negotiation culture based on strong professional ethics can prove out to be a significant reform for states struggling with an overburdened judiciary.

As *Prof. McCoville* puts "The jewel in the adversary crown remains the trial but a full-dress contest should be [only] reserved for *triable* cases"[137].Plea bargaining is not a morally reprehensible practice. However, to overcome its apparent vulnerabilities, it is crucial for courtroom actors to understand when to plea bargain and when not to.

[137] McConville, *supra* note 15, at 585.