

The Blind Bargain

Removing the Plea Bargaining Blindfold with One Simple Reform ¹

Jason Lee Mitchell, II

Rebecca D. Gill

University of Nevada Las Vegas

¹ Paper prepared for presentation at the Annual Meeting of the Western Political Science Association in Hollywood, CA, March 29, 2013. Jason Lee Mitchell, II, J.D., LL.M., holds a Juris Doctorate from Syracuse University's College of Law, a Master of Laws from California Western School of Law, and is currently a doctoral student at the University of Nevada, at Las Vegas. Rebecca D. Gill is an Assistant Professor of Political Science at the University of Nevada Las Vegas. Please direct inquiries to rebecca.gill@unlv.edu.

One of the main goals of the criminal justice system in America is purportedly to protect the innocent from unjust prosecution and punishment. In Western culture, this sentiment dates back centuries. It is captured nicely by Sir William Blackstone's adage: "It is better that ten guilty persons escape than that one innocent suffer" (Blackstone 1760). The formal American criminal justice system continues to advance toward the realization of this ideal. The protection of due process, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, has been one of the major achievements of the U.S. Supreme Court in the past half century. But the vast majority of criminal cases are decided outside this formal system. The practice of plea bargaining now dominates the day-to-day processing of criminal cases, and this system of plea bargaining turns Blackstone's adage on its head.

Legal scholars and political scientists have long decried the injustices of the plea bargaining system in America. Despite decades of reform proposals, though, no lasting progress has been made. This paper is the first step in our project to change that. We begin with a short review of the problems of plea bargaining and the proposals that have been suggested as remedies. We next illustrate the critical importance of correcting the information asymmetry between the prosecution and the other actors in the process. We suggest a simple reform that would be a strong first step toward correcting this imbalance. Finally we explore a few reasons to be optimistic that now is an opportune time to push for reform.

Much of the classic research on plea bargaining assumed that the system does not systematically disadvantage the defendant. The assumption is that defendants would never agree to deals that were not in their best interests. This is based on the idea that "the parties stand as equal autonomous disputants before the court" (Lynch 1998, 2121). There was a time

when the legal profession as a whole was “largely united in its opposition to plea bargaining,” but practitioners have changed their attitude toward it as the temporal and financial pressures have made relying on plea bargaining seem unavoidable (Alschuler 1968, 51). But a schism has been growing between the opinion of scholars, who now are generally critical of plea bargaining, and practitioners, who generally support it.

Recently, many scholars have recognized that the plea bargaining situation does place defendants at a significant bargaining disadvantage. The notion that the plea bargain is only possible when both parties are better off for having made the deal—a perspective gleaned largely from the law and economics literature on out of court settlements in civil cases—is “an oversimplification” at best (Savitsky 2012, 136). For decades now, legal scholars have argued that plea bargaining in America “seriously impairs the public interest in effective punishment of crime and in accurate separation of the guilty from the innocent” (Schulhofer 1979, 1979).

To see how plea bargaining fails to achieve the goals of the formal criminal justice process, it is worthwhile to discuss the way the pre-trial system is supposed to work in those cases destined for trial. This process is set into motion once an arrest has been made. At this time, the prosecuting attorney will usually seek an indictment, which sets forth the charges being brought against the individual. Once this indictment is obtained, the individual is now officially a defendant.

Although every state has its own unique procedural structures, the basic process is the same. The defendant is entitled to a bail hearing, where the defendant may make an argument before a judge requesting release from custody. When the judge makes this ruling, the court also sets several deadlines as mandated by law. This includes the trial date as well as the date

by which the prosecutor must disclose the evidence and information the government expects to use in prosecuting the defendant. This date is usually several months after the initial hearing, which allows the prosecution time to assemble its case.

When the evidence has been disclosed to the defendant, the defendant and his lawyer have the opportunity to review the prosecution's case. The defendant can also interview all of the government's witnesses and conduct any necessary examinations—scientific or otherwise—in order to challenge the veracity of the government's evidence. The defendant may also secure expert witnesses to challenge, rebut, or refute any expert witnesses being offered by the prosecution. Lastly, the defendant will prepare its own witnesses for trial. The trial does not begin until all of these evidentiary benchmarks have been reached.

The majority of criminal cases in the United States are conducted entirely outside of this formal process. Unfortunately, it is the formal process alone that protects the constitutional rights of defendants. For the vast majority of criminal defendants, the process described above veers off the rails almost immediately after indictment, when the prosecution begins to negotiate a plea deal with the defendant (Lynch 1998). The plea bargaining process involves an iterated game between the prosecution and the defendant—through his or her attorney—during which the two sides attempt to secure a workable outcome.

To be sure, each party may have something to gain from the process. In its role as advocate for the interests of society at large, the prosecution is interested in maximizing conviction rates and punishments. In its administrative role, it must realize this goal in the context of limited time and budgetary constraints (Adelstein 1978). The defendant is generally interested in reducing the risk of facing a severe sentence if convicted at trial. Since both

parties begin in a position where bargaining could improve their situations, this seems to be a natural opportunity for coming to an agreement outside of the trial process. But this is based on the assumption that the defendant—even when represented by counsel—is in a position to accept such a bargain on a truly voluntary basis. This “shadow of trial” argument sees the decisions made by the prosecution and the defendant as being rational reactions to the expected outcome at trial (Easterbrook 1983, 1992; Scott and Stuntz 1992). While this argument might hold in some situations, it is woefully inadequate in others.

In much of the recent research on plea bargaining, both sides of the discussion have conceded the fact that plea bargaining is likely encouraging innocent people to plead guilty, although most agree that innocents are underrepresented in the pool of defendants who accept plea bargains (Gazal-Ayal and Tor 2012). And, with each plea bargain that is accepted, the prosecutor can essentially reallocate the money that would have gone to bringing that case to trial to further strengthen his bargaining position vis-a-vis the next defendant in line. Thus, accepting a plea bargain essentially gives the prosecutor “enhanced power in subsequent cases” (Savitsky 2012, 140).

Researchers have made many suggestions about how to reform the system. Calls for the complete abolition of plea bargaining date back decades (Schulhofer 1979). Even those scholars recommending comparably modest reforms acknowledge the fact that “it is unlikely policymakers will in the near future adopt all the necessary reforms to make defendants’ guilty pleas truly voluntary” (Langer 2006, 227). In the last 30 years, we have witnessed increasing prosecutorial discretion and power result in a staggering increase in the proportion of criminal cases disposed of with guilty pleas; in the federal system, this number has jumped from an

already substantial 86% of all federal convictions in 1971 to 95% of all federal convictions in 2001 (*U. S. v. Joyeros*, 204 F. Supp. 2d 412 [E.D.N.Y] (2002), 430). Relatively recent changes in the law gives prosecutors unprecedented discretion to prosecute. Attempts to limit this discretion via sentencing guidelines and mandatory minimum sentences have failed badly, as they provide prosecutors with additional leverage with which to intimidate defendants into accepting plea bargains even in cases where the prosecution's case is weak.

Some have suggested creating a parallel criminal justice system that features a simplified process (Gazal-Ayal and Tor 2012). This is problematic for many reasons, not the least of which is the need to encourage defendants to agree to abbreviated procedures (which will likely mean waiving important, constitutionally-protected rights) in exchange for taking more severe punishments off of the table. It has occasionally been suggested that reformers should concentrate on ensuring procedural justice by giving “defendants opportunities to tell their sides of the story before making or responding to an offer” so that they “perceive the practices [of plea bargaining] to be procedurally just” (O'Hear 2008, 411 & 413).

One of the most common recommendations for reform has to do with increasing the quality of the representation indigent defendants receive (Schulhofer 1979). Recent developments in Supreme Court jurisprudence on the topic of representation during plea bargaining, as well as the anniversary of the landmark decision in *Gideon v. Wainwright* 372 U.S. 335 (1963), have inspired renewed calls for increasing the standard of representation. A trilogy of three cases—*Padilla*, *Lafler*, and *Frye*—have “call[ed] into question the increasingly pervasive and pernicious ‘meet and plead’ practices” (Wayne and Reimer 2012, 4). Scholars

have even called for raising standards knowing that a lack of government funding is likely to leave public defenders ill-equipped to meet these new standards (Chin 2011).

Another popular reform proposal focuses on creating restrictions on the permissible sentence reductions that prosecutors can offer in exchange for a guilty plea (Bar-Gill and Gazal-Ayal 2006; Gazal-Ayal and Tor 2012). By limiting the degree to which prosecutors can bargain sentences down, this reform could create a “selection-of-cases” effect that would discourage prosecutors from pursuing cases with a low probability of conviction at trial (Bar-Gill and Gazal-Ayal 2006). Of course, this kind of strategy only works when the judge knows 1) what charges the prosecutor has threatened to prosecute at trial, and 2) the benchmark sentence for these charges. The combination of weak sentence guidelines and rampant charge bargaining makes restrictions on permissible sentence reductions an impractical tool for protecting defendants who would not likely be convicted at trial.

Much of the reason that the aforementioned reforms have proven ineffectual has to do with the information asymmetry between the prosecution and the defense when plea negotiations happen outside the formal pre-trial process. To illustrate how information asymmetry can cause problematic results in plea bargaining, we introduce two stylized hypotheticals.

Let us first consider a simplified version of what the plea bargaining process might look like at its least coercive; we’ll call this Situation A. We will assume that the defendant has been indicted for a single criminal charge. We will also assume that the prosecutor has not “overcharged” the defendant, and as such the charge is in line with the evidence that the prosecutor has amassed against the defendant. This means that the prosecutor believes she

has a high probability of obtaining a conviction at trial. This makes the defendant what Bar-Gill and Gazal-Ayal (2006) call an “H” defendant, or one who has a high probability of getting convicted at trial. Of course, the prosecutor also has to consider the costs of taking a case to trial. In the context of her limited budget, she may still have a strong incentive to avoid trial even when she has a high probability of winning.

Let us assume, also, that the prosecutor in Situation A demonstrates to the defendant the strength of her case by showing him the evidence she has against him. In this situation, the defendant has a strong incentive to accept a plea bargain. If the prosecutor has a strong case, then her threat to take the case to trial is credible. The defendant may have a sense that the prosecutor cannot take *every* defendant to trial due to the constraints of time and money. But the prosecutor has significant power to convince each individual defendant that the threat to prosecute *that* defendant is credible, even though in the aggregate this is most certainly not the case (Bar-Gill and Ben-Shahar 2009). As such, the defendant in this situation would reasonably assume that his choice is between the plea bargain and a loss at trial; thus, it is in his interest to take a plea bargain.

So far, this process seems reasonably equitable, as the defendant in Situation A has the information he needs in order to avoid being unduly coerced into accepting a bad deal. Since the evidence against this defendant is quite strong, there is a high probability that this defendant is truly guilty. In this way, a plea bargain benefits both the prosecution (by providing a more efficient conviction) and the defendant (by allowing him to serve less time for his crime).

But consider the situation where the prosecution has less evidence against the defendant; we will call this Situation B. As it stands, this defendant would be what Bar-Gill and Gazal-Ayal (2006) call an “L” defendant, or one with a relatively low risk of being convicted at trial. This lower probability of conviction at trial is related to the weakness of the prosecution’s case, which in turn is associated with an increased likelihood that this defendant could be truly innocent.

In Situation B, the prosecutor has an even greater incentive to avoid trial by making a plea bargain. Not only does she have to consider the time and money it takes to go to trial; she must also face the higher probability that she will lose at trial. In this situation, it is more difficult for the prosecutor to convince the defendant that her threat to go to trial is credible. Here, the prosecutor has an interest in concealing the nature of the evidence she has against the defendant. If the defendant were to see the thin evidence, he would be less likely to agree to a deal. In this situation, the prosecutor’s best hope of getting a deal is for the prosecutor to make the deal particularly appealing to the defendant. Alschuler’s extensive interviews as far back as the late 1960s revealed that prosecutors were willing to “reduce to almost anything rather than lose” (Alschuler 1968, 59). The weaker the case, the more appealing the prosecutor must make the deal in order to avoid losing the conviction altogether.

It is in circumstances like Situation B where prosecutors will have an incentive to bluff the defendant, even to the point of engaging in “overcharging.” Overcharging happens when prosecutors charge defendants with more or more serious crimes in order to give themselves enough leeway to negotiate a sentence that is much more lenient. Overcharging gives prosecutors more room to reduce the sentence for the purpose of plea bargaining, and it also

anchors the defendant's expectations to an unreasonably high sentence, compared to which the reduced sentence offered by the prosecutor will seem quite a bargain (Bibas 2004).

As one of Alschuler's interviewees noted, "Prosecutors throw everything into an indictment they can think of, down to and including spitting on the sidewalk. They then permit the defendant to plead guilty to one or two offenses, and he is supposed to think it's a victory" (Alschuler 1968, 86). Prosecutors have the ability to manipulate the original charges levied against the defendant "with virtually no judicial review," and their purpose for doing this is often to generate a large disparity between the purported sentence at trial and the offer in the plea bargaining process (Tor et al. 2006, 100). But this process of overcharging in order to increase the magnitude of the sentence discount is particularly problematic. Social science evidence has demonstrated that even innocent defendants will routinely accept a plea bargain when the disparity between the severity of the threatened sentence and the that of the deal offered as part of a bargain is large enough (Dervan and Edkins 2013).

The likely result in Situation B is that the prosecutor charges—or threatens to charge—the defendant with crimes that she would not be able to sustain at trial. This would give her a relatively high sentence to which the defendant will anchor his expectations. Then, in order to secure the conviction in the face of weak evidence, the prosecutor would have a strong incentive to heavily discount these charges; this would generate the high level of sentence disparity she needs in order to convince the defendant to accept the plea.

As one early observer of the plea bargaining process once noted, "[m]ost defenders of plea negotiation recognize that sentencing should be based on penologically relevant considerations; no sentence should be imposed simply because it may result in less expensive,

faster resolution of the case” (Alschuler 1968, 57). But there are few reasons other than these practical, administrative ones that can justify the difference in the prosecutor’s approach between Situation A and Situation B.

The more interesting question, though, is this: how is the prosecutor able to convince the defendant that her threat is credible? In Situation A, the prosecutor’s threat *was* credible; her only real motivation to plea bargain in that case was an administrative one. But in Situation B, the prosecutor must convince the defendant that she can and will successfully prosecute the defendant for the inflated charges she is threatening.

The best strategy here, of course, is for the prosecutor to hold her evidence close to the vest. In Situation A, it made sense for her to reveal the strength of her evidence in order to extract a relatively severe punishment via a plea agreement. But in Situation B, the prosecutor needs to maintain her bluff. Unfortunately for the defendant, this is not terribly difficult for the prosecutor to accomplish.

There is a significant information asymmetry between the prosecution and the defendant in the plea negotiation process. The defendant is usually the only person who knows if he is truly guilty or not. This is an important piece of information for the defendant, especially if truly innocent defendants are less likely to accept a plea bargain, *ceteris paribus* (Schulhofer 1979; Tor et al. 2006). But the prosecution is often the only one who knows the strength of the case she has against the defendant prior to discovery. In part as a result of this, the prosecutor is the only one who knows whether her threat to take the case to trial is credible. Indeed, aside from the knowledge of the true culpability of the defendant, “the joys of secret knowledge usually belong only to the prosecutor” (Alschuler 1968, 66).

The judge, whose job it is to formalize the plea bargain, is at least as disadvantaged as the defendant when it comes to information asymmetry. Most of the time, the judge assents to a plea bargain on the basis of essentially no information about whether the defendant is likely to have committed the crime for which he has been charged. The judge generally “does not have enough information to make an intelligent determination of whether the defendant’s guilt is even likely, let alone certain” (Lynch 1998, 2122). So, while judges in all jurisdictions have the power to reject or lower the sentences associated with guilty pleas (Schulhofer 1979), they do not have the information required to do so.

Because of this dearth of information, the role of the judge is reduced to making a determination about whether the plea was entered into voluntarily by the defendant. Of course, as we have demonstrated, the inherent coerciveness of the plea bargain is intimately related to the quality of the case the prosecution has built against the defendant. In Situation A, the prosecution has an incentive to be candid about her evidence and stingy with her plea bargain offer. This amounts to a less coercive decision making environment for the defendant. But Situation B presents the prosecutor with strong incentives to conceal the weakness of her case while maximizing the discount she offers to the defendant. This, of course, creates the coercive decision making environment that flies in the face of the “voluntary agreement” requirement. Unfortunately, judges are not in a good position to distinguish between Situation A and Situation B.

One promising reform proposal that has remained unimplemented is the expansion of pretrial discovery, such that discovery must happen before a plea bargain is accepted. As it stands, the discovery process has long been of very limited usefulness to the defense outside of

the formal trial mechanism (Alschuler 1968). The prosecutor currently has a monopoly on the information about the strength of her case—and consequently the probability that the defendant would be convicted at trial. As long as the prosecutor expects to avoid the formal trial process, she may conceal this information when it suits her purposes, as in Situation B.

In the context of formal pre-trial procedures, the prosecutor must share her evidence with the defendant in advance of the trial. The individual courts create their own timeline for this process, which consists of periodic discover deadlines by which time the government must adhere. No similar discovery requirements attach to the plea bargaining process. The prosecution is free to engage in plea negotiation without having provided the defense all of the information that would be required were the case to go to trial.

Our simple proposal would remedy the information asymmetry in the plea bargaining process by requiring dynamic discovery deadlines, which would be triggered by the start of plea bargaining negotiations. If the prosecutor wishes to begin plea negotiations, she would need to comply with the pre-trial discovery requirements first. This would essentially move those deadlines forward to the point of negotiations so that the prosecution must provide the defense with access to the prosecution's evidence before negotiations begin.

The National Association of Criminal Defense Attorneys (NACDA) has adopted a similar recommendation as part of its updated policy on indigent defendants; the NACDA argues that “[e]very accused person must have the right to consult with a *fully informed* attorney before entering a guilty plea to any criminal charge” (Wayne and Reimer 2012, 5 [emphasis added]). But some scholars have expressed doubt that such a reform would be helpful. Their main complaint is that such a reform would only be useful if “defense counsel were afforded better

capacities and incentives for zealous representation” (Schulhofer 1979, 1998). In other words, they argue that a dynamic discovery deadline reform must be combined with a complete overhaul of the public defender system in order to realize the benefits of reduced information asymmetry.

This pessimism makes good sense if we are relying solely on the defense to make use of the information. But recall that the defense is not the only party to the process with a dearth of information on the strength of the prosecution’s case. It is the judge who, with almost no information about the nature of the case against the defendant, must decide whether or not to accept the plea deal. Now, the informed involvement of the judge in the process of plea negotiations is not without its own problems. It has long been understood that, given the judge’s position of power, it would be inherently coercive for the judge to be involved in the process of negotiating a plea bargain (Heinz and Kerstetter 1979). But it is an accepted part of the process that the judge be able to make an informed assessment of the degree to which the plea may have been coerced.

Without any real information about the history of the negotiations or the strength of the prosecution’s evidence, the judge has little to go on besides the defendant’s assertion that he understands and is voluntarily agreeing to the plea bargain. But the discovery process will allow the judge access to the same materials that the defendant had access to. In this way, the judge will be in a better position to monitor the coerciveness of the plea bargain by making note of the discrepancy between the evidence provided by the prosecutor and the plea bargain that has been reached.

Although this simple reform would be relatively revenue neutral and has the potential to provide substantial benefits in terms of fairness and justice, it is hard to be optimistic that any reform of the plea bargaining process is even possible. For more than 40 years now, reform-minded observers of the process have offered proposals. All of these reform proposals lay scattered along the path to the 95% guilty plea rate we have now. Despite this poor track record, however, we have reason to be optimistic that a modest but powerful reform like this one could make its way into law now. We believe that the time is right for pushing for reform.

In days past, politicians and other government officials in policy making positions neither conceded, nor investigated the possibility, that plea bargains were inherently coercive. But today's politicians are doing just that. Recent unrelated events have conspired to create a political and judicial environment that may be more receptive to the possibility of change and more conducive to implementation of procedural reforms in the plea bargaining process.

On March 6, 2013, Attorney General Eric Holder was questioned at length regarding the suicide of Aaron Swartz. Swartz was a young computer programming prodigy and freedom of information activist. As part of his freedom of information activism, he downloaded millions of articles from the online digital repository JSTOR, apparently with the intent to make access to this information available to non-paying members of the public. He was later indicted on charges that held the possibility of 35 years in prison. What made this case shock the conscience is that the prosecutor prosecuting Mr. Swartz offered plea bargains of 3 months, 4 months, and 0 – 6 months. The indictment of 35 years, it seems, was for the sole purpose of pressuring Mr. Swartz into accepting a plea that he did not want to accept. Mr. Swartz did not take the plea deal; on January 11, 2013, he committed suicide in his Brooklyn apartment.

At a Congressional hearing where this topic was discussed, Senator John Cornyn of Texas asked Attorney General of the United States, Eric Holder if it struck him as “... odd that the government would indict someone for crimes that would carry penalties of up to 35 years in prison and million dollar fines and then offer him a 3- or 4-month prison sentence?” In response to this question, Mr. Holder responded: “I think that’s a good use of prosecutorial discretion to look at the conduct, regardless of what the statutory maximums were and to fashion a sentence that was consistent with what the nature of the conduct was. And I think what those prosecutors did in offering 3, 4, zero to 6 was consistent with, with that conduct.”

Senator Cornyn took exception to Mr. Holder’s explanation. He expressed concerns shared by a growing number of people that the government was bullying Mr. Swartz by ratcheting up the charges. This was of major concern for Senator Cornyn because he realized that it is entirely possible for the government to engage in this sort of behavior against an average citizen who does not have the powerful friends or the financial resources necessary to withstand such pressure from the government. Senator Cornyn surmised that, in such a case, pressure and coercion and not guilt or innocence will be the catalyst that secures a conviction. Senator Cornyn found this reality quite disturbing, especially in light of the tragic result of the enormous pressure exerted on Mr. Swartz by federal prosecutors (Peters 2013).

In the judiciary, there has also been some recent movement toward acknowledging the inherent dangers of the plea bargaining process. Two 2012 United State Supreme Court decisions (*Missouri v. Frye*, 132 S. Ct. 1399 and *Lafler v. Cooper*, 132 S. Ct. 1376) turned their attention to the issue of plea bargaining. These cases made new law regarding the invalidation of convictions when pleas could have been accepted; moreover, the Court recommended

possible changes that can be implemented by state and federal courts to ensure competency of defense counsel in, and during, the plea bargaining process.

In *Frye*, Justice Kennedy delivered a 5 – 4 opinion wherein the Court found an attorney’s behavior during plea negotiations amounted to a violation of the defendant’s 6th Amendment right to competent counsel. As is usually the case in Supreme Court rulings, equally important to the holding is the reasoning of the court in arriving at their ruling. The Court found that “plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages” (Justice Kennedy in *Frye* at 1407). In expounding on this assertion the Court took the liberty of suggesting ways in which this can be accomplished; however, the Court acknowledged that final rules and implementation, at least at this stage, would be left to the individual states and to state and federal courts.

Justice Kennedy’s suggestions included possibly requiring the documenting of both a formal offer’s terms and the plea bargain process itself; secondly, states could require that any and all offers made to the defendant be in writing; and thirdly, any and all formal offers made to the defendant can be made part of the record at any subsequent plea proceeding or before trial. This would serve to ensure, and to satisfy the court, that a defendant has been fully advised before the later proceedings commences and no late or frivolous claim will be brought.

In *Lafler*, Justice Kennedy found that when defendants get bad advice to reject a plea bargain, “a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the

defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed" (Kennedy in *Lafler*, at 1386). What *Frye* and *Lafler* demonstrate is a willingness on the part of the Court to acknowledge the central role that plea bargaining plays in the criminal justice system and that in its current manifestation plea bargaining has some shortcomings. This new willingness to acknowledge the need to extend constitutional rights to the bargaining process that happens outside of the path to trial is critical for our purposes; it suggests a window may be opening up for reconsideration of the fundamental premise that bargaining happens in the shadow of trial.

Due to the recent publicity regarding high profile plea bargains—and because legislative bodies, both State and Federal, take notice when the Supreme Court speaks on an issue—we believe the time is ripe to institute reforms to the plea bargaining system. The Court has essentially placed the law making community on notice that convictions can be attacked and invalidated based on claims of inadequate assistance of counsel during the plea bargaining process. But the Court has also demonstrated that procedural safeguards exist that the Court can and will use to render any post-conviction attacks as nonviable. Therefore, the law making community will have to address the concerns expressed by the Court and procedural reforms will have to be undertaken. If they do not, the Court has essentially opened an entirely new avenue of attack against convictions. This will likely not sit well with legislatures across the country. The central reform suggestion of this paper, therefore, is possible at least as much for its timing as for its novelty. The suggestions for reform made in this paper are both viable and

possible precisely because both the political climate and the judicial attitude regarding plea bargaining have shifted.

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