The International Proliferation of American-Style Plea Bargaining: From Seeking Justice to Seeking Efficiency

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I. INTRODUCTION

Since the end of World War II and the Cold War, the American influence on foreign legal systems has been undeniable.[1] By the end of the twentieth century, scholars and political commentators were not only recognizing the United States as a formidable nation, but they were also going so far as to characterize the American legal system as the most influential legal system in the world.[2] Through the Department of

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1. Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L. L.J. 1 (2004); Adam Liptak, *U.S. Court Is Now Guiding Fewer Nations*, N.Y. TIMES (Sept. 17, 2008), https://www.nytimes.com/2008/09/18/us/18legal.html ("Judges around the world have long looked to the decisions of the United States Supreme Court for guidance, citing and often following them in hundreds of their own rulings since the Second World War.").

2. *See* Langer, *supra* note 1, at 2 (noting that the American influences on foreign legal systems ranges from general influences like legal realism and pragmatism to influences on specific

Justice's Office of Overseas Prosecutorial Development Assistance and Training (OPDAT),[3] the United States government has provided development funding and legal training to further its influence on criminal justice systems globally.[4] Although OPDAT introduces many types of criminal procedure, one of its suggestions has been widely accepted: plea bargaining.[5]

Plea bargaining is a trial-waiving mechanism whereby the defendant agrees to plead guilty to one or more criminal charges in exchange for some benefit or concession from the government.[6] Benefits can take many forms, including: sentence reductions, charge dismissals, omission or recharacterization of facts, or an agreement to advise the court of the substantial assistance on behalf of the defendant.[7] Although plea bargaining was once a uniquely American animal, it has spread around the world in the past few decades.[8] This Comment explores the

legal areas like constitutional law); Kristen D. Burton, *Cold Conflict*, NAT'L. WORLD WAR II MUSEUM, https://www.nationalww2museum.org/war/articles/cold-conflict (last visited Apr. 6, 2023).

3. Robert Hanson, *The Troubling Spread of Plea-Bargaining from America to the World*, ECONOMIST (Nov. 9, 2017), https://www.economist.com/international/2017/11/09/the-troubling-spread-of-plea-bargaining-from-america-to-the-world; *see also* U.S. DEPT. OF JUST., Section on Office of Overseas Prosecutorial Development, Assistance and Training (OPDAT) https://www.justice.gov/criminal-opdat. The Office of Overseas Prosecutorial Development Assistance and Training was established in 1991 to mentor and contribute expert legal advice. DOJ advisors work with foreign counterparts to strengthen foreign investigation and prosecution of organized crime, corruption, money laundering, economic crimes, human smuggling and trafficking, narcotics trafficking, and others.

4. Owen Bowcott, *'Global Epidemic' of US-Style Plea Bargaining Prompts Miscarriage Warning*, GUARDIAN (Apr. 27, 2017), https://www.theguardian.com/law/2017/apr/27/traditional-trial-rights-renounced-as-countries-adopt-us-style-plea-bargaining ("The US government has provided development funding and technical support for rule of law projects . . . sending out American prosecutors to train foreign judges and lawyers.").

5. Hanson, *supra* note 3; *see also* Cynthia Alkon, *Plea Bargaining as a Legal Transplant: A Good Idea for Troubled Criminal Justice Systems*, 19 TRANSNAT'L L. & CONTEMP. PROBS. 355, 401-02 (2010).

6. Clark Neily, *A Distant Mirror: American-Style Plea Bargaining Through the Eyes of a Foreign Tribunal*, 27 GEO. MASON L. REV. 719, 722 (2020); *see also* Máximo Langer, *Plea Bargaining, Conviction Without Trial, and the Global Administratization of Criminal Convictions*, 4 ANNU. REV. CRIMIN. 377, 379 (noting that plea bargaining is a trial-avoiding mechanism because it enables public officials to find a person formally guilty for the commission of a crime without a trial, relying on the defendant's consent).

7. Langer, *supra* note 6.

8. H.H.A Cooper, *Plea-Bargaining: A Comparative Analysis*, 5 N.Y.U J. INT'L L. & POL. 427, 429 (1972) ("Plea bargaining is peculiarly American precisely because it is tailored to suit American needs.").

importation of American-style plea bargaining in four jurisdictions and assesses the potential dangers in doing so.

Part II of this Comment provides an overview of the two kinds of legal systems that preceded plea-bargaining: the adversarial legal system and the inquisitorial legal system. It also explores the reasoning behind plea bargaining's creation, like mounting caseloads and the expansion of the substantive criminal law. Part III assesses the use of plea bargaining in the United States, where the system has matured the longest. Part IV then discusses the globalization of plea bargaining. In doing so, it focuses on the importation of plea bargaining in three jurisdictions that have noticeably been moving closer to the American criminal justice system: Germany, Taiwan, and England.

Part V of this Comment then examines the dangers that are an inevitable counterpart to the adoption of American-style plea bargaining. First, it discusses how the system can be particularly coercive due to its upregulation and fueling of prosecutorial discretion. Next, it introduces the innocence problem, which refers to the rate at which innocent persons are pleading guilty in order to avoid rolling the dice at trial. Last, it notes the trial penalty which references the tendency courts to punish those who elect to adjudicate their charges rather than plead guilty.

II. OVERVIEW OF LEGAL SYSTEMS PRIOR TO PLEA BARGAINING

A. Inquisitorial Systems versus Adversarial Systems

Before exploring the widespread adoption of plea bargaining, it is worthy to introduce the two types of legal systems that preceded its creation: the inquisitorial system, the legal system found in civil law jurisdictions, and the adversarial system, the legal system found in common law jurisdictions.[9] The inquisitorial system's method of criminal procedure is that of an official investigation, whereby the impartial officials of the state conduct a neutral and transparent investigation in search of the truth.[10] The police and prosecutor have less power, and rather than deciding which of the contesting parties can better present the case, it is the court itself that is expected to unveil the facts and find the

9. Regina E. Rauxloh, *Plea Bargaining in Germany—Doctoring the Symptoms without Looking at the Root Causes*, 78 J. CRIM. L. 392 (2014); *see also* Langer, *supra* note 1, at 7.

10. Langer, *supra* note 1, at 4; *see also* Marvin Zalman & Ralph Grunewald, *Reinventing the Trial: The Innocence Problem and Proposals to Modify the American Criminal Trial*, 3 TEX. A&M L. REV. 189, 218 (2015).

material truth.[11] In contrast to the inquisitorial system, the adversarial system, sometimes referred to as the accusatorial system, is more concerned with procedural truth rather than substantive truth.[12]

In the adversarial system, the parties initiate the case and direct its progress, thereby limiting the judge's role and placing he or she in a passive "umpire-like" position.[13] The judge is not to take any steps to independently find or verify information about the case in order to weigh the strength of the charge.[14] Rather, he or she is to rely on the parties to investigate the truth while ensuring that the procedural rules are obeyed.[15] Because of the aforementioned features of the adversarial system, the prosecutor is the preeminent actor in this particular legal system, holding the ultimate charging discretion and thereby plea bargain discretion.[16]

The concept of the guilty plea is considered inimical to the inquisitorial model.[17] Although an admission of guilt by a defendant can be a weighty element in deciding the outcome of a case, in the inquisitorial legal system the truth cannot be negotiated or compromised.[18] Plea bargaining is plainly inconsistent with the civil law tradition of mandatory prosecution and a duty to investigate the facts of a case independently.[19]

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11. Regina E. Rauxloh, *Formalization of Plea Bargaining in Germany: Will the New Legislation Be Able to Square the Circle?*, 34 FORDHAM INT'L L.J. 296, 296-97 (2011); *see also* Zalman & Grunewald, *supra* note 10; Christoph Safferling & Elisa Haven, *Foreword: Plea Bargaining in Germany After the Decision of the Federal Constitutional Court*, 15 GERM. L.J. 1, 1-2 (2014). In the European inquisitorial system, the trial itself is based on the idea of an inquisitorial judge who not only manages the trial, but also inquiries into the case to try and unfold the truth. The prosecutor and the defendant are not parties before the bench, thus their means to influence proceedings are limited. The judge calls the witnesses and experts, and requests the production of documents.

12. Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 231-32 (2006) ("We are likely to accept the outcome of a criminal case as legitimate as long as it is reached in conformity with procedural rules.").

13. *Id.* at 199; Emilo C. Viano, *Plea Bargaining in the United States: A Perversion of Justice*, 83 REVUE INTERNATIONALE DE DROIT PÉNAL 109, 111 (2012).

14. *Id.*

15. Turner, *supra* note 12.

16. Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 755 (1996).

17. Jenia Iontcheva Turner, *Plea Bargaining and International Criminal Justice*, 48 U. PAC. L. REV. 219, 224 (2017); *see also* Langer, *supra* note 1, at 22 (noting that the concept of the guilty plea does not exist in the inquisitorial model); Samantha Joy Cheesman, *Comparative Perspectives on Plea Bargaining in Germany and the U.S.A.*, RECHTSENTWICKLUNGEN AUS EUROP. . .ISCHER PERSPEKTIVE IM 21. JAHRHUNDERT 113, 138 (2014) ("The plea bargain is completely at odds with [the inquisitorial] process because by it[s] very nature it shortens the process and requires less evidence to be examined.").

18. Langer, *supra* note 1, at 22.

19. Turner, *supra* note 17.

Contrastingly, plea bargaining fits neatly in the adversarial tradition.[20] Because common law jurisdictions see the criminal process as a process between two parties and do not stress the learning of the absolute truth, the adversarial system plainly allows for, and frequently encourages, the negotiation of a contract between the prosecution and the defense.[21] Although the inquisitorial system is incompatible with the mechanism of plea bargaining, some civil law jurisdictions have adopted it along with other trial-avoiding conviction mechanisms, which begs the question: what fuels jurisdictions' appetite for trial avoidance?[22]

B. The Reasoning Behind the Origin of Plea Bargaining

In order to understand what drives the adoption of plea bargaining, it is important to look to its origin in the United States.[23] Prior to the Civil War, plea bargains were almost unheard of.[24] However, by the late nineteenth and early twentieth centuries, guilty plea cases came before the courts with increasing frequency.[25] Although the initial judicial response was in opposition of the new phenomenon, comparing such agreements to a "direct sale of justice," it became apparent that plea bargaining would be the chosen solution for mounting caseloads.[26]

The American trial was growing more and more complex with the formal use of safeguards like the jury trial and the jury fact-finding

20. Turner, *supra* note 12, at 266.

21. Yuguang Lu, *Comparative Research of the Plea Leniency System of China*, 1, 4 (2021) (Maurer Theses and Dissertations, Indiana University).

22. Langer, *supra* note 1, at 37.

23. Lu, *supra* note 21, at 1 ("Plea bargaining has already been a relatively mature system in the United States, as a result of more than 40 years of formal development.").

24. Dylan Walsh, *Why U.S. Criminal Courts Are So Dependent on Plea Bargaining*, ATLANTIC (May 2, 2017), https://www.theatlantic.com/politics/archive/2017/05/plea-bargaining-courts-prosecutors/524112/; *see also* Albert W. Alshuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 19 (1979). After the end of the Civil War, cases of plea bargaining began to arise in American appellate courts. The first case arose in Tennessee in 1865, in which the defendant pleaded guilty to two counts of gambling. The concession, in accordance with the plea bargain, was the dismissal of eight other charges of gambling. The Tennessee Supreme Court ultimately ordered a new trial on a plea of not guilty writing, "By the Constitution of the State, the accused, in all cases, has a right to a 'speedy public trial . . .' and this right cannot be defeated by any deceit or device whatever."

25. Alshuler, *supra* note 24.

26. Wight v. Rindskopf, 43 Wis. 344, 354 (1877) ("Any agreement . . . between a public prosecutor and the attorney of the defendant in an indictment, is an assumption of judicial function, a bargain for judicial action and judgment; hardly, if at all, distinguishable in principle from a direct sale of justice."); *see* Alshuler, *supra* note 24, at 21; *see also* Walsh, *supra* note 24.

mechanism.[27] Although the American jury trial was and is still highly praised, its use had become cumbersome and expensive.[28] In addition to the increasing complexity of the trial process, the expansion of the substantiative criminal law also contributed to the flooding of court dockets.[29] For instance, the Prohibition period during the 1920s led to a steep increase in cases in the federal courts.[30] With "crowded dockets and unwieldly trial procedures," the American legal system demanded a tool that would balance the tensions between the state and individual freedoms, thereby bringing justice more efficiently.[31] Rather than reshape the overly complex trial procedures where the Constitution is omnipresent, American courts looked to the informal and unregulated plea bargaining system where the Constitution is nearly invisible.[32]

III. PLEA BARGAINING IN THE UNITED STATES

In 1970, the U.S. Supreme Court gave plea bargaining a constitutional basis.[33] In *Brady v. United States*, a defendant, eligible for the death penalty, plead guilty and was ultimately sentenced to fifty years imprisonment.[34] After the sentencing, Brady sought relief in the U.S. District Court, contending that his guilty plea was involuntary due to

27. Alshuler, *supra* note 24, at 41; *see also* Langer, *supra* note 6, at 382; Roger C. Park & Richard D. Friedman, EVIDENCE: CASES AND MATERIALS 486 (Foundation Press, 13th ed. 2019). Since the American system relies on a jury untrained in the law, it makes the rules of evidence significantly more stringent and elaborate than rules in most other countries. The complexity of the evidentiary rules has undoubtedly made the American trial more protracted.

28. Alshuler, *supra* note 24, at 41.

29. *Id.* at 42.

30. John F. Padgett, *Plea Bargaining and Prohibition in the Federal Courts, 1908-1934*, 24 LAW & SOC'Y 413, 413-14 (noting that the liquor cases of Prohibition represented a shock to the court system); *see* Walsh, *supra* note 24; *see also* Hanson, *supra* note 3.

31. Gregory M. Gilchrist, *Trial Bargaining*, 101 IOWA. L. REV. 609, 611-12 (2016) ("Crowded dockets and unwieldy trial procedures necessitate[d] a bureaucratic fix."); *see* Cheesman, *supra* note 17, at 113; *see also* Andrew Hammel, *The Difficult Birth of the Criminal Plea Bargain in Germany*, HAMMEL TRANSLATIONS (May 22, 2019), https://hammeltranslations.com/2019/05/22/the-difficult-birth-of-the-criminal-plea-bargain-in-germany/ (noting criminal justice systems' crushing need for an efficient resolution of criminal cases); Alshuler, *supra* note 24, at 1 (describing "bargain justice" as a result of "laziness, bureaucratization, overcriminalization, and economic pressure").

32. Alshuler, *supra* note 24, at 41; *see* William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 791 (2006); *see also* Neily, *supra* note 6, at 719 (noting that "American courts have largely jettisoned the constitutionally prescribed mechanism for adjudicating criminal trials" in favor of an informal and unregulated plea bargaining system).

33. Cheesman, *supra* note 17, at 118; *see* Walsh, *supra* note 24.

34. Brady v. United States, 397 U.S. 742, 743-44 (1970).

looming capital punishment.[35] Nevertheless, a unanimous court held that Brady's plea of guilty was not rendered involuntary.[36] Rather, it was voluntary, knowing, and intelligent, the Court's new test to determine the constitutionality of a plea bargain.[37] Justice White, hammering the final nail in Brady's coffin, wrote that absent an actual threat or misrepresentation, a plea bargain will be a permissible procedure for the resolution of a criminal case.[38] Since the *Brady* decision, plea bargains have become ubiquitous.[39]

With ninety-seven percent of federal convictions and ninety-four percent of state convictions being the result of guilty pleas, some have labeled trials "rare legal artifacts."[40] In fact, the U.S. Supreme Court in a 2012 decision wrote that "criminal justice today is for the most part a system of pleas, not a system of trials."[41] The experiences of practicing lawyers and judges corroborate this claim.[42] For instance, in his four years

35. *Id.* at 744.

36. *Id.* at 742.

37. *Id.* at 748 ("Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.").

38. *Id.* at 755. Justice White wrote that the standard as to the voluntariness of guilty pleas was defined by Judge Tuttle of the Court of Appeals for the Fifth Circuit. The standard determined that a plea of guilty entered by one fully aware of the consequences "must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes)."

39. *Id.* at 742; *see also* Hanson, *supra* note 3.

40. Missouri v. Frye, 566 U.S. 134, 143 (2012); *see* Walsh, *supra* note 24 (noting that ninety-seven percent of federal cases are settled by plea bargain, and state-level data suggests similarly; *see also* Bowcott, *supra* note 4 ("In the United States—which houses a fifth of the world's prison population—as many as ninety-seven percent 97% of federal criminal cases are resolved through guilty pleas involving unregulated negotiations between prosecutors and defendants."); Josh Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, And Most Who Do Are Found Guilty*, PEW RSCH. CTR. (June 11, 2019), https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/ ("Nearly 80,000 people were defendants in federal criminal cases in fiscal 2018, but just 2% of them went to trial."); American Bar Association, *ABA CJS Plea Bargaining Task Force 2023 Report* (last visited Apr. 8, 2023), https://www.americanbar.org/content/dam/aba/publications/criminaljustice/plea-bargain-tf-report.pdf; Carrie Johnson, *The Vast Majority of Criminal Cases End in Plea Bargains, A New Report Finds*, NPR (Feb. 22, 2023), https://www.npr.org/2023/02/22/1158356619/plea-bargains-criminal-cases-justice.

41. *Lafler v. Cooper*, 566 U.S. 156, 170 (2012); Jenia Iontcheva Turner, *Plea Bargaining*, 3 REFORMING CRIM. JUST.: TRIAL & PRE-TRIAL PROCESSES 1 (2017).

42. Benjamin Weiser, *Trial by Jury, a Hallowed American Right, Is Vanishing*, N.Y. TIMES (Aug. 7, 2016), https://www.nytimes.com/2016/08/08/nyregion/jury-trials-vanish-and-justice-is-served-behind-closed-doors.html (discussing the fact that the Southern District of New York held only fifty criminal jury trials in 2015,the lowest since 2004); Turner, *supra* note 41

on the bench in Federal District Court in Manhattan, Judge Jesse M. Furman saw only one criminal jury trial.[43] Judge J. Paul Oetken, in his five years on the same bench, saw four criminal trials.[44]

Although jury trials are the hallmark of the American legal system, serving as an important check against potential prosecutorial abuse, many judges, prosecutors, and even defense counsel argue that all three parties can benefit from plea bargaining's advantages.[45] Proponents argue that by pleading guilty, defendants and their lawyers have a less resource-intensive and time consuming client-attorney relationship.[46] Further, they argue that participating in plea bargaining allows a defendant more control over his or her fate.[47] Although compelling, perhaps the most widely accepted argument is the benefits upon the prosecution and judge.[48] As mentioned above, trials are expensive and can be particularly lengthy.[49] Plea bargaining, however, reduces the stress on government resources, ensuring a conviction for the prosecution and further allowing efforts and resources to be directed towards more serious and complex cases.[50] In fact, it is frequently contended that the modern American criminal justice system would crash or "grind to a halt" without plea bargaining because of the lack of resources to provide each defendant the constitutionally elaborate trial to which they are entitled.[51] Thus, the American criminal justice system depends almost entirely on cooperation

(noting the fact that roughly every two seconds during work hours, a person pleads guilty, and in some jurisdictions prosecutors may practice for months without trying a case).

43. Weiser, *supra* note 42.

44. *Id.*

45. Weiser, *supra* note 42; ERWIN CHEMERINSKY & LAURIE L. LEVENSON, CRIMINAL PROCEDURE: ADJUDICATION 131 (Wolters Kluwer Law & Business, 4th ed. 2018).

46. Chemerinsky & Levenson, *supra* note 45.

47. *Id.*

48. *Id.*

49. Walsh, *supra* note 24; Clark Neily, *Jury Empowerment as an Antidote to Coercive Plea Bargaining*, 31 FED. SENT'G. REP. 284 (noting that trial costs include attorney time, court staff and facilities, and a modest per diem for jurors).

50. Chemerinsky & Levenson, *supra* note 45; Jennifer L. Mnookin, *Review: Uncertain Bargains: The Rise of Plea Bargaining in America*, 57 STAN. L. REV. 1721, 1723 (2005) (noting that plea bargains provide a guaranteed conviction for the prosecutor all while being less time-consuming and resource-intensive than a trial).

51. Michelle Alexander, *Go To Trial: Crash the Justice System*, N.Y. TIMES (Mar. 10, 2012), https://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html (discusses the idea that defendants could deliberately evade plea bargaining and go to trial as a form of resistance to mass incarceration); Neily, *supra* note 6, at 726 (". . . America's criminal justice system would 'grind to a halt' without plea bargaining because it lacks the resources to provide trials to more than a tiny fraction of those who pass through the system.").

on behalf of defendants, and based on the aforementioned statistics, it is receiving it.[52]

IV. THE GLOBALIZATION OF PLEA BARGAINING

American-style plea bargaining has spread around the world in the past few decades, reaching what some have called "epidemic proportions."[53] In a study done by the criminal justice organization Fair Trials, research revealed that use of plea bargaining has increased 300% since 1990.[54] In other terms, of the ninety countries researched, only nineteen used some form of plea bargaining in 1990.[55] By 2017, that number had climbed to sixty-six.[56]

Although the adoption of plea bargaining is widespread as evidenced by the statistic above, this Part of this Comment focuses on the adoption of American-style plea bargaining in three jurisdictions: Germany, Taiwan, and England. Interestingly, with their adoption, each jurisdiction somewhat modified American-style plea bargaining. For instance, Germany constricted its use to less serious offenses and does not enable sentence negotiation to completely waive trial.[57] Taiwan similarly confines plea bargaining to nonserious crimes.[58] England is interesting for other reasons. Although a common law jurisdiction and one that is markedly similar to the United States, the English legal system has managed to retain some of the trial judges' sentencing discretion.[59] Further, it transformed the informal and unregulated method of American plea bargaining to a more regulated sliding scale.[60] Although each

52. Alexander, *supra* note 51 ("If everyone charged with crimes suddenly exercised his constitutional rights, there would not be enough judges, lawyers or prison cells to deal with the ensuing tsunami of litigation.").

53. Hanson, *supra* note 3.

54. *The Disappearing Trial*, FAIR TRIALS, https://www.fairtrials.org/articles/publications/the-disappearing-trial/ (last visited Apr. 6, 2023).

55. *Id.*

56. *Id.*

57. Turner, *supra* note 12, at 218; Cheesman, *supra* note 17, at 133; Ralph Grunewald, *Comparing Injustices: Truth, Justice, and the System*, 77 ALB. L. REV. 1139, 1143 (2014).

58. Margaret K. Lewis, *Taiwan's New Adversarial System and the Overlooked Challenge of Efficiency-Driven Reforms*, 49 VA. J. INT'L L. 651, 674 (2009); Weitseng Chen, *Twins of Opposites: Why China Will Not Follow Taiwan's Model of Rule of Law Transition Toward Democracy*, AM. J. COMP. L. 481, 489 (2018).

59. Langer, *supra* note 6, at 390; Julian V. Roberts, *Structured Sentencing: Lessons from England and Wales for Common Law Jurisdictions*, 14 PUNISHMENT & SOC'Y. 267 (2012).

60. Langer, *supra* note 6, at 390; Carol A. Brook et al., *A Comparative Look at Plea Bargaining in Australia, Canada, England, New Zealand, and the United States*, 57 WM. & MARY L. REV. 1147, 1187 (2016).

jurisdiction translated the American-style plea bargain differently, each country adopted the mechanism for largely the same reason: to seek justice more efficiently.[61]

A. The Importation of Plea Bargaining to Germany

Although Germany was once termed the "land without plea bargaining," the German criminal justice system has grown increasingly reliant on negotiations to resolve criminal cases since the 1980s.[62] Just as caseloads were growing in both number and complexity in the United States, similar trends were occurring in Germany.[63] More specifically, the country was experiencing increasing crime rates and more convoluted case facts due to economic and technological progress.[64] Judges and prosecutors were looking to cure crowded dockets and avoid unwieldy trial procedures and, in turn, defendants were looking for certainty in sentencing and sentence reductions in exchange for their cooperation.[65]

Plea bargaining was initially introduced covertly during the 1980s.[66] In fact, in 1982 a German criminal defense attorney, under the pseudonym Detlef Deal, released an article describing the practice of informal plea bargaining.[67] In his article, he compares the formal trial to "theater," whereby the participants had already agreed on a sentence but nevertheless pretended to contribute to a sentencing decision.[68] Over the next decade, plea bargaining in Germany developed rather organically and without any legislative guidance.[69] In fact, it was not until the late 1990s when the German judiciary decided to step in and set boundaries

61. Turner, *supra* note 12, at 217; Jaw-Perng Wang, *The Evolution and Revolution of Taiwan's Criminal Justice*, 3 TAIWAN IN COMP. PERSP. 8, 11 (2011); Phillip A. Thomas, *Plea Bargaining in England*, 69 J. CRIM. L. & CRIMINOLOGY 170, 176 (1978).

62. John H. Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204 (1979); Jenia I. Turner, *Plea Bargaining and Disclosure in Germany and the United States: Compartive Lessons*, 57 WM. & MARY L. REV. 1549 (2016); Langer, *supra* note 1, at 35.

63. Singa Jung, et al., *Developments in German Criminal Law: The Urgent Issues Regarding Prolonged Pre-Trial Detention in Germany*, 22 GERMAN L.J. 303, 304 (2021); Cheesman, *supra* note 17, at 135 (discussing Germany's need for a response to an ever increasing case load of the courts).

64. Rauxloh, *supra* note 9, at 395.

65. Turner, *supra* note 12, at 217.

66. Cheesman, *supra* note 17, at 133 ("The case of plea bargaining in Germany is distinct from that of the U.S.A. in that the introduction of Germany's plea bargaining into its legal system was done through the back door in the 1980s.").

67. *Id.* at 135; *see also* Rauxloh, *supra* note 11, at 300.

68. Rauxloh, *supra* note 11, at 300.

69. Turner, *supra* note 12, at 217.

on plea negotiations.[70] By 2011, it was found that 17.9% of the criminal proceedings before local courts and 23% of the criminal proceedings before regional courts were concluded on the basis of plea bargains.[71]

Due to Germany being an inquisitorial system and thereby entrusting judges with a more active role in finding the substantive truth, prosecutorial discretion is significantly more narrow than that seen in the United States.[72] Because of this model, higher German courts have held that the duty to verify the truth prevents judges from blindly accepting the defendant's admission of guilt.[73] Rather, judges are required to scrutinize the authenticity of a confession resulting from a plea bargain.[74] Further, Germany's Code of Criminal Procedure places limits on the prosecutor's ability to not file charges.[75] In misdemeanor and other less serious crimes, prosecutors have broader discretion as it relates to filing.[76] In fact, section 153(a) of the German Code of Criminal Procedure gives the prosecutor the opportunity to dismiss the case on the grounds of insignificance as long as the court agrees.[77] This is the notable exception to the principle of "compulsory prosecution."[78] Contrastingly, prosecutors are mandated to prosecute felonies, unless there is insufficient evidence to support the charges.[79] Although German bargains do not replace the trial altogether,

70. Lu, *supra* note 21 (discussing the fact that plea bargaining moved into the light and became systematized in the late 1990s); Turner, *supra* note 12, at 217 (noting that although the higher courts eventually did step in, they only applied very broad limits on plea negotiations).

71. Hammel, *supra* note 31.

72. Turner, *supra* note 12, at 214-15 and 217-18.

73. *Id.* at 217-18, 227 ("Both the German Constitutional Court and the German Federal Supreme Court have repeatedly held that the duty to seek the truth requires judges to probe into the veracity of defendant's confessions resulting from a plea bargain.").

74. *Id.* at 227.

75. *Id.* at 218.

76. STRAFPROZEßORDNUNG [STPO] [German Code of Criminal Procedure], translation at https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html, §§ 153, 153(a); Turner, *supra* note 12, at 218.

77. STRAFPROZEßORDNUNG [STPO] [German Code of Criminal Procedure], translation at https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html, §§ 153, 153(a); Cheesman, *supra* note 17, at 136; *see also* Rauxloh, *supra* note 11, at 305. Section 153(a) of the German Criminal Procedure Code was heavily criticized. Opponents to the statute were concerned with Germany's inching towards American plea bargaining, comparing the plea bargaining to "shady horse trading."

78. Cheesman, *supra* note 17, at 136.

79. STRAFPROZEßORDNUNG [STPO] [German Code of Criminal Procedure], translation at https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html, § 170(1); Turner, *supra* note 12, at 218 (noting that felony charges must be filed if there is an adequate evidentiary basis).

they significantly shorten them by relieving all three parties of preparing the usually burdensome amount of evidence presented in a formal trial.[80]

With the importation of plea bargaining in Germany, opponents to the adoption of American-style plea bargaining have recognized a shift away from the truth-seeking duty that comes with the inquisitorial legal system and towards a uniquely American emphasis on procedural efficiency.[81] Further, they argue that the German adoption of plea bargaining exemplifies the translation of a legal mechanism that could "Americanize" the inquisitorial system.[82] The German legal system will most certainly be an interesting jurisdiction to watch as it moves increasingly closer to the American legal system.[83]

B. The Importation of Plea Bargaining to Taiwan

Taiwan is another jurisdiction interestingly moving closer to the American legal system.[84] In just two decades, Taiwan has completely restructured its criminal justice system.[85] In 2002, it transformed the inquisitorial-like legal system of its dictatorial past into an adversarial legal system of contested trials.[86] In addition to overhauling its prior method of criminal procedure, Taiwan also reformed its criminal code, granting its criminal defendants with more protections, including: *Miranda*-like warnings; the right to the effective assistance of counsel; the right of confrontation; and the exclusionary rule.[87] While outside its

80. Rauxloh, *supra* note 9, at 395 ("The Confession saves a full trial with long-winded hearing of evidence which not only shortens the court hearing itself, but also relieves all three legal professionals (judge, prosecutor and defense lawyer) of preparing a full-blown trial.").

81. Turner, *supra* note 12, at 226.

82. Langer, *supra* note 1, at 34. Professor and author Màximo Langer advanced his "Americanization" thesis to draw attention to the substantial number of foreign legal systems that have gradually come to mimic or recreate the American legal system. An example he believes is particularly telling is the trend with which inquisitorial jurisdictions are importing plea bargaining, which is a mechanism incredibly characteristic of the U.S.'s adversarial system.

83. Cheesman, *supra* note 17, at 135; Langer, *supra* note 6, at 386 (noting that empirical study of plea bargaining and other trial-avoiding conviction mechanisms in jurisdictions around the globe is still in its infancy).

84. Chen, *supra* note 58, at 528-29 (noting that the United States has had an impact on areas like banking, securities, and corporate law).

85. Wang, *supra* note 61, at 8; Lewis, *supra* note 58, at 652.

86. Wang, *supra* note 61, at 8 and 11; Lewis, *supra* note 58, at 652. Prior to 2002, trials in Taiwan were centered around the discovery of truth. The Court was, on its own initiative, to independently investigate evidence even if the facts were uncontested. The prosecutor and the defense were powerless at trial and thereby not truly invested in the case.

87. Wang, *supra* note 61, at 9 and 17-18. Taiwan's reformed Code of Criminal Procedure now requires law enforcement to warn the arrestee of his or her right to silence and right to counsel. If the officer fails to do so, confessions obtained wrongfully will be excluded from the record. The

boundaries, Taiwan's response to human rights violations through transitional justice attracted attention, while within Taiwan the new system was the center of major concern.[88] The courts and their officers were worried about the imminency of an unmanageable caseload due to the protracted nature of Anglo-American style trials.[89]

As expected, trials became time-demanding and complex, and Taiwan was desperate for a way to alleviate the pressure on a newly reformed legal system.[90] To both the Legislative Yuan and the Judicial Yuan, the answer seemed obvious: plea bargaining.[91] Although the adoption of plea bargaining was fiercely debated, and legislators agreed it was not a desirable procedure, it was ultimately deemed necessary for efficiency.[92] Two years after its transition from an inquisitorial system to an adversarial system, Taiwan codified American-style plea bargaining under the name negotiation procedures.[93] However, unlike its unregulated nature in the United States, Taiwan specified its scope.[94] Negotiations are to only begin after indictment and, like its practice in Germany, are limited to non-serious offenses.[95] Uniquely, negotiation procedures in Taiwan demand consultation with the victim prior to their use.[96] Further, the negotiation process involves limited judicial oversight, whereby judges are not permitted to participate in negotiations. Instead, they are to verify that the defendant understands the consequences of the bargain.[97]

Code also codifies the right to obtain a lawyer's assistance and consultation and the right to cross-examine witnesses at trial. Further, the Code includes a provision that mimics the U.S.'s fruit of the poisonous tree doctrine, where evidence illegally obtained shall be excluded.

88. Nien-Chung Chang-Liao & Yu-Jie Chen, *Transitional Justice in Taiwan: Changes and Challenges*, 28 WASH. INT'L L.J. 619 (2019); Lewis, *supra* note 58, at 652.

89. Lewis, *supra* note 58, at 652 and 669. As Taiwan began to implement their newly adopted adversarial system, opponents and proponents alike voiced their concerns that "extravagant trials" would pose an "unmanageable burden." In fact, within the first six months of 2008, prosecutors indicted 115,420 people, signifying a 10.3% increase over the first six months of the last year.

90. Lewis, *supra* note 58, at 669.

91. *Id.* at 705.

92. *Id.* at 674-76 ("As one official from the Judicial Yuan's criminal division stated at a 206 conference, 'I must say, however, that the current results of negotiation procedures are not in line with our ideal.'").

93. *Id.* at 672; Wang, *supra* note 61, at 11.

94. Lewis, *supra* note 58, at 674 ("Reformers agreed on the need for plea bargaining based on efficiency reasons but were conservative with respect to the scope of the procedures.").

95. *Id.*; Turner, *supra* note 12, at 218.

96. Lewis, *supra* note 58, at 675.

97. *Id.*

Judges have the ultimate discretion to either accept or reject the agreement.[98]

Although studies assessing Taiwan's adoption of plea bargaining are still in their infancy, the Judicial Yuan reported that in 2007 11,133 defendants ended their cases by way plea bargaining.[99] By the next year, that number had increased to 12,132.[100] While defending plea bargaining's adoption in the Legislative Yuan, the Secretary-General of the Judicial Yuan opined that in the future between sixty percent and seventy percent of cases could be handled by way of negotiation procedures.[101] Although current levels are not quite at this level, support for American-style plea bargaining is widespread in Taiwan, which makes this legal system another one in which to remain vigilant.[102]

C. The Importation of Plea Bargaining to England

The final system this Comment discusses is the English legal system. England, a common-law and adversarial jurisdiction like the United States, heavily emphasizes the safeguard of the English jury system.[103] Prior to the creation of the U.S. Constitution, the English jury was a mechanism to prevent both potential abuse by the royal judge and the monopolization of the investigation process and factual record.[104] Beginning in the nineteenth century, English citizens began to expect the state to ensure greater security in the face of terrorism, technology-enabled fraud, and privacy intrusions, forcing the state to build prisons, modernize its police force, and bureaucratize the role of the prosecutor.[105] Contemporaneously, England expanded its criminal code, taking account of new risks that came along with industrialization, transportation, and

98. *Id.*
99. *Id.*
100. Wang, *supra* note 61, at 8.
101. Lewis, *supra* note 58, at 705.
102. *Id.*
103. Darryl K. Brown, *Free Market Criminal Justice: How Democracy and Laissez Faire Undermine the Rule of Law*, VA. PUB. L. & LEGAL THEORY RSCH. PAPER NO. 26, 1, 5 (2016).
104. *Id.*
105. *Id.* at 5-6.

commerce.[106] Like the aforementioned jurisdictions, England needed a release valve for unmanageable caseloads.[107]

Although the English legal system markedly mirrors that of the American legal system, plea bargaining was not formally adopted in England until fairly recently.[108] In fact, it was not until 2015 when Parliament adopted Section 144 of the Criminal Justice Act of 2003, which codified sentence reductions in turn for an admission of guilt.[109] In addition to being newly codified, the English plea bargaining system follows a strict schedule based on the stage of the proceeding in which the plea is entered.[110] This schedule, commonly referred to as a sliding sentencing discount, encourages defendants to enter an early plea in which the Crown's prosecutors will offer a one-third sentence reduction.[111] If a defendant decides to plead not guilty in the earlier stages of a prosecution, sentence reduction, unlike many cases in the United States, is not off the table.[112] Rather, the defendant will be entitled to a

106. *Id.* at 6. Industrialization; mass commerce and transport; and other manifestations of modernity posed new risks to the state. In order to address these imminent concerns, the state expanded its range of crimes to allow intervention into the earlier stages of criminal activity. This manifested itself in what is called inchoate offenses, which are aimed to prevent harm rather than respond to its completion. Examples of inchoate offenses are crimes of possession, conspiracy, and attempt.

107. Thomas, *supra* note 61, at 177 ("The administration of criminal justice in England . . . is a highly complex affair which is under increasing pressure from growing crime rates and inadequate budgetary resources for the police, courts, social services, and prisons to keep pace."); Richard Nobles & Davis Schiff, *The Supervision of Guilty Pleas by the Court of Appeal of England and Wales—Workable Relationships and Tragic Choices*, 31 CRIM. L. F. 513, 528 (2020) ("With the increasing involvement of lawyers, trial became more formal, complex, and protracted.").

108. Kirstin Ridley, *UK's Top Fraud Prosecutor Backs U.S.-Style Plea Bargaining Deals*, REUTERS (Mar. 29, 2019), https://www.reuters.com/article/us-britain-sfo/uks-top-fraud-prosecutor-backs-u-s-style-plea-bargaining-deals-idUSKCN1RA28H; John Baldwin & Michael McConville, *Plea Bargaining and Plea Negotiation in England*, 13 L. & SOC'Y. REV. 267 (1979) .

109. Criminal Justice Act, 2003, c. 44 (Eng.), § 144; Ridley, *supra* note 108; Roberts, *supra* note 59, at 278.

110. Baldwin & McConville, *supra* note 108, at 278; Neily, *supra* note 6, at 721.

111. Langer, *supra* note 6, at 390; *see also Sentencing Explained: Sentence Reductions for a Guilty Plea*, SENT'G. ACAD. https://www.sentencingacademy.org.uk/_files/ugd/7afd9a_2db9626c375047b6a19e0509d1b1eecd.pdf (last visited Apr. 16, 2023); Daniel Boffey, *Rise Of Plea-Bargaining Coerces Young Defendants into Guilty Pleas, Says Report*, GUARDIAN (Oct. 6, 2022), https://www.theguardian.com/law/2022/oct/06/rise-of-plea-bargaining-coerces-young-defendants-into-guilty-pleas-says-report.

112. Thomas, *supra* note 61, at 170 (noting that England as compared to the United States has a more flexible sentencing system).

diminished level of reduction.[113] For instance, a defendant who later changes their plea to guilty on the day of trial is eligible to receive a ten percent sentence reduction.[114] Plainly, the level of reduction diminishes the longer the defendant waits to enter a plea of guilt.[115] Although England's importation of plea bargaining is significantly more regulated than that practiced in the United States, the percentage of criminal cases that go through a formal trial is similarly low as that in the United States.[116] In 2019, seventy-eight percent of cases in the magistrates' courts and seventy-one percent of cases in the Crown Court were resolved by a guilty plea.[117] In 2022, the Crown Prosecution Service reported that five-in-six prosecutions ended in a guilty plea or verdict.[118] Thus, both the United States and England operate on a similar assumption: jury trials will only be used in exceptional cases.[119]

V. THE DANGERS OF EXPORTING PLEA BARGAINING

Although it is evident that plea bargaining has been a meaningful solution to unmanageable caseloads around the world, many have criticized plea bargaining as an American export the world can do without.[120] The reliance on plea bargaining in both adversarial systems and inquisitorial systems upsets the balance between efficiency and truth-seeking; it particularly disrupts inquisitorial systems due to their emphasis on finding the absolute truth.[121] By disproportionately fueling prosecutorial power and imposing barriers to jury trials, American-style

113. *Sentencing Explained: Sentence Reductions for a Guilty Plea*, SENT'G. ACAD. https://www.sentencingacademy.org.uk/_files/ugd/7afd9a_2db9626c375047b6a19e0509d1b1eecd.pdf (last visited Apr. 16, 2023); Roberts, *supra* note 59, at 279.

114. *Sentencing Explained: Sentence Reductions for a Guilty Plea*, SENT'G. ACAD. https://www.sentencingacademy.org.uk/_files/ugd/7afd9a_2db9626c375047b6a19e0509d1b1eecd.pdf (last visited Apr. 16, 2023).

115. *Id.*

116. Nobles & Schiff, *supra* note 107, at 519.

117. S*entencing Explained: Sentence Reductions for a Guilty Plea*, SENT'G. ACAD. https://www.sentencingacademy.org.uk/_files/ugd/7afd9a_2db9626c375047b6a19e0509d1b1eecd.pdf (last visited Apr. 16, 2023); *see also* Baldwin & McConville, *supra* note 108, at 287 (finding that eighty-five percent of defendants charged with indictable criminal offenses plead guilty).

118. *Annual Report and Accounts 2021-2022*, CROWN PROSECUTION SERV. (July 12, 2022), https://www.cps.gov.uk/sites/default/files/documents/publications/CPS%20Annual%20Report%20and%20Accounts%202021-22_2.pdf ("Last year the CPS brought around 426,000 prosecutions, with five in every six cases leading to a guilty plea or verdict.").

119. Baldwin & McConville, *supra* note 108, at 287.

120. Clark Neily, Coercive Plea Bargaining: An American Export the World Can Do Without, CATO Inst. (Apr. 23, 2021).

121. Turner, *supra* note 12, at 226-27; Lu, *supra* note 21; Turner, *supra* note 17.

plea bargaining produces three extreme dangers: the innocence problem, the trial penalty, and a coercive justice system.[122]

As evidenced above, American-style plea bargaining led to the inevitable expansion of prosecutorial discretion.[123] Developments in charging, sentencing, and negotiating have led to a diffusion of responsibility that has ultimately housed itself in the office of the prosecutor.[124] As long as criminal justice systems worldwide rely on trial waiving techniques to prevent a "crashing [of] the courts," the prosecutor will feel pressure to enter the negotiation with a position of strength.[125] These pressures—stemming from the lack of government resources to pursue a formal trial—can take the form of overcharging or a huge discrepancy between the reduced sentence and the potential punishment after a conviction.[126] Moreover, American-style plea bargaining often takes place off the record, preventing coerced pleas and misconduct from coming to light.[127]

In addition to producing a coercive system of justice, American-style plea bargaining leads to what many have labeled the innocence problem.[128] The innocence problem refers to the significant rate of guilty pleas by wrongfully accused defendants in response to the pressure exerted by prosecutors during plea bargaining.[129] According to the Innocence Project, of the more than 300 people exonerated, over ten

122. Walsh, *supra* note 24; 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, 17-18 (2013); Somil Trivedi, *Coercive Plea Bargaining Has Poisoned the Criminal Justice System. It's Time to Suck the Venom Out*, ACLU (Jan. 13, 2020), https://www.aclu.org/news/criminal-law-reform/coercive-plea-bargaining-has-poisoned-the-criminal-justice-system-its-time-to-suck-the-venom-out; Neily, *supra* note 49.

123. Misner, *supra* note 16, at 741-42 (noting that a few courts have unsuccessfully formulated a common law of prosecutorial discretion so the authority of the prosecutor continues to grow).

124. *Id.* at 718.

125. Walsh, *supra* note 24; H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63, 65 (2011).

126. Caldwell, *supra* note 125, at 64.

127. *Id.* at 83; Walsh, *supra* note 24 (noting that written records of a deal are almost never required); *see also* Johnson, *supra* note 40 ("Pleas allow police and government misconduct to go unchecked, because mistakes and misbehavior often only emerge after defense attorneys gain access to witness interviews and other materials, with which they can test the strength of a government case before trial.").

128. Dervan & Edkins, *supra* note 122, at 17.

129. Neily, *supra* note 6.

percent pleaded guilty to crimes they did not commit.[130] Thus, plea bargaining induces guilty pleas by a rational actor who refuses to roll the dice.[131] The innocence problem is only further evidence that the plea bargaining process is unduly coercive.[132]

The third danger produced by American-style plea bargaining is the trial penalty.[133] The trial penalty refers to the troubling fact that defendants can be penalized for exercising their constitutional right to a trial, and in common law jurisdictions, a trial by jury.[134] The penalty takes the form of a substantially longer sentence to a defendant who refuses to plead guilty before going to trial.[135] More specifically, studies have found that sentences can increase by between seven to nine years.[136] Although prosecutors define the trial penalty as a necessary means to depress the demand for a formal trial, the truth of the matter is that American-style plea bargaining punishes defendants for choosing to exercise a constitutional right.[137]

VI. CONCLUSION

Although it may be argued that the modification of American-style plea bargaining by Germany, Taiwan, and England will combat the decreasing integrity of the criminal justice system, these three jurisdictions indisputably adopted it in the hopes of jettisoning constitutionally prescribed mechanisms.[138] For instance, in England, the differential between the sentence a defendant will receive if convicted after a trial and the sentence he or she will receive after pleading guilty

130. Neily, *supra* note 118; Hanson, *supra* note 3; *see also* Walsh, *supra* note 24 (discussing data from the National Registry of Exonerations that revealed 362 of 2,006 recorded exonerations were based on guilty pleas).

131. Dervan & Edkins, *supra* note 122, at 17.

132. Emily Yoffee, *Innocence Is Irrelevant*, ATLANTIC (Sept. 2017), https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/ (noting that the American criminal justice system makes it a rational choice to plead guilty to something you did not do).

133. Trivedi, *supra* note 122.

134. Neily, *supra* note 118.

135. *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It*, NAT'L ASS'N CRIM. DEF. LAW. (July 10, 2018), https://www.nacdl.org/Document/TrialPenaltySixthAmendmentRighttoTrialNearExtinct.

136. Johnson, *supra* note 40.

137. Carissa Byrne Hessick, *The Constitutional Right We Have Bargained Away*, ATLANTIC (Dec. 24, 2021), https://www.theatlantic.com/ideas/archive/2021/12/right-to-jury-trial-penalty/621074/.

138. Neily, *supra* note 6, 719.

cannot exceed thirty percent.[139] Indisputably, this guaranteed differential is less coercive than what sometimes is a singular opportunity to accept a sentence reduction in the United States.[140] Nevertheless, the prosecutor will be motivated by making justice swifter and as long as the plea process is motivated by efficiency, coercion, the innocence problem, and the trial penalty will be incredibly threatening concerns.[141]

American-style plea bargaining can too often "snare the innocent" and widen the gap between constitutional promise and constitutional implementation.[142] This is particularly telling by the fact that the United States holds five percent of the world's population, yet detains twenty-five percent of the world's incarcerated persons.[143] In 1971, Chief Justice Burger wrote: "An affluent society ought not to be miserly in support of justice, for economy is not an objective of the system . . . ."[144] Jurisdictions both foreign and domestic must remain vigilant to the potential dangers that accompany trial waiving mechanisms and to the fact it is in their constituents' best interests to pursue transparent, adjudicative procedures.[145]

139. *Id.* at 291.

140. *Id.*

141. Walsh, *supra* note 24; Hanson, *supra* note 3.

142. Hanson, *supra* note 3; Neily, *supra* note 6, at 719.

143. Neily, *supra* note 120.

144. Mayer v. City of Chicago, 404 U.S. 189, 201 (1971) (Burger, C.J., concurring); Walsh, *supra* note 24.

145. Neily, *supra* note 120.