

# Betting Against the (Big) House: Bargaining Away Criminal Trial Rights

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## I. INTRODUCTION

The justice system resolves criminal charges in one of four ways. First, a defendant may plead not guilty and take advantage of the full array of trial rights secured by constitutions, laws, and court rules. Second, the government may exercise prosecutorial discretion and dismiss an indictment or information. Third, a defendant may plead guilty without any charging or sentencing concessions from the government. Finally, and most commonly, the accused chooses to plead guilty pursuant to a plea agreement in which the defendant trades his or her full package of trial rights for a reduction in the charge or for a reduced sentence.

In *Counsel's Role in Bargaining for Trials*, Professor Gregory M. Gilchrist suggests a fifth alternative.<sup>1</sup> Under this new option, defendants could trade away some of their trial rights in exchange for a charging or sentencing concession from the prosecution.<sup>2</sup> The defendant would receive a trial but without the discrete trial components sacrificed as part of the bargain. Presumably, for example, an accused charged with armed robbery facing a statutory maximum sentence of 30 years

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1. Gregory M. Gilchrist, *Counsel's Role in Bargaining for Trials*, 99 IOWA L. REV. 1979, 1981–82 (2014).

2. *Id.*

imprisonment might consent to a five-person jury if the State agreed that, if convicted, the defendant's maximum sentence would be 20 years in prison.

Professor Gilchrist's proposal raises three immediate concerns. The first concern is whether the Supreme Court would uphold the constitutionality of trial rights bargaining. And the Court's acceptance of this new form of negotiation is far from certain. With some trepidation,<sup>3</sup> the Court accepts plea bargaining because the defendant "demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary."<sup>4</sup> This rationale does not support the trial rights bargaining model for the obvious reason that under that model the defendant contests the State's ability to prove his guilt. Unlike a plea bargain, the defendant does not "demonstrate by his plea that he is ready and willing to admit his crime" and speed into rehabilitative mode. Also, unlike plea bargaining, after striking a trial rights bargain, the parties still require a method of determining the accused's guilt or innocence. Traditionally, this fact-finding process has been a public trial, which includes a series of procedural safeguards designed to ensure an accurate decision.

Second, as recognized by Professor Gilchrist, trial rights bargaining opens up an infinite number of potential bargaining options.<sup>5</sup> Unless regulated by statute or court rule, the assortment of concessions that could be offered by a defendant in return for a sentencing or charging consideration would be virtually unlimited. Take jury instructions, for example. A defendant could agree: (1) that no instructions, other than verdict forms, be given to the jury; (2) not to object to the government's instructions; (3) not to offer defense instructions; (4) not to offer a specific instruction or instructions; (5) to give an "*Allen*" instruction;<sup>6</sup> (6) to omit or modify specific instructions (for example, omitting the presumption of innocence instruction or substituting a preponderance standard for the reasonable doubt standard in the issues instruction); (7) to print in a larger or smaller font for certain instructions; (8) not to discuss certain instructions in closing argument; (9) not to raise instruction issues in a post-trial motion or appeal; or (10) to forego offering

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3. Cf. Transcript of Oral Argument at 35, *Whitfield v. United States*, 135 S. Ct. 785 (2015) (No. 13-9026), 2014 WL 6772273 (question of Chief Justice Roberts) (expressing concern that a prosecutor may "extort" a plea bargain from a defendant); Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 931 (1983) ("[T]he process of plea bargaining is not one which any student of the subject regards as an ornament to our system of justice." (quoting Justice William H. Rehnquist)).

4. *Brady v. United States*, 397 U.S. 742, 753 (1970).

5. Gilchrist, *supra* note 1, at 1988 ("There are few limits to the plea bargains that creative counsel can reach; trial bargains would be similarly diverse.").

6. See *Allen v. United States*, 164 U.S. 492, 501–02 (1896). An "*Allen*" instruction, sometimes referred to as a "dynamite charge," or the "shotgun" instruction, "is essentially a supplemental instruction given to the jury and designed to encourage a divided jury to agree on a verdict." *United States v. Zabriskie*, 415 F.3d 1139, 1147 (10th Cir. 2005). For one version of an "*Allen*" instruction, see SIXTH CIRCUIT COMM. ON PATTERN CRIMINAL JURY INSTRUCTIONS, PATTERN CRIMINAL JURY INSTRUCTIONS 9.04 (2014), [http://www.ca6.uscourts.gov/internet/crim\\_jury\\_insts/pdf/crmptjur\\_full.pdf](http://www.ca6.uscourts.gov/internet/crim_jury_insts/pdf/crmptjur_full.pdf).

suggestions to the court on the appropriate response to questions from the jury concerning the instructions.

As a specific illustration, a valuable bargaining chip in cases where the State presents accomplice testimony would be the defendant's agreement to modify the pattern instruction that cautions jurors about the reliability of such testimony. Representative of these cautionary instructions, Instruction 3.05 of the *Pattern Criminal Jury Instructions of the Seventh Circuit* concludes by informing jurors that: "You may give . . . [the accomplice's] testimony whatever weight you believe is appropriate, keeping in mind that you must consider that testimony with caution and great care."<sup>7</sup> Defense counsel, in return for good consideration of course, could offer to omit the entire sentence, or end it at the comma, or delete "caution," or "great," or "great care." One of California's accomplice jury instructions consists of nearly 600 words, any combination of which could be changed as part of a bargaining agreement.<sup>8</sup> The point is not whether the multiplicity of bargaining options is a good thing or a bad thing. The point is that the sheer number of possibilities makes it difficult to construct a protocol that brings uniformity and consistency to the trial bargaining process.<sup>9</sup>

Assuming that the Supreme Court approves trial bargaining, and assuming that the infinite combination of potential trade-offs can be managed, another important question remains: Are there any constitutional or other safeguards that a criminal defendant should be prohibited from trading away? At least arguably some rights should be excluded from the bargaining process because: (1) the right is owned by the public and not by individual defendants; (2) absence of the safeguard would jeopardize the accuracy of the truth-finding process; or (3) waiving the right would violate ethical rules governing lawyers and judges.<sup>10</sup>

## II. TRADING AWAY FUNDAMENTAL RIGHTS

It may be that some constitutional and statutory rights must be off the bargaining table either because they are owned by society and not by individual defendants or because they form an untouchable, structural component of the truth-

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7. COMM. ON FED. CRIMINAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT, PATTERN CRIMINAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT 3.05 (2012), [https://www.ca7.uscourts.gov/Pattern\\_Jury\\_Instr/7th\\_criminal\\_jury\\_instr.pdf](https://www.ca7.uscourts.gov/Pattern_Jury_Instr/7th_criminal_jury_instr.pdf).

8. JUDICIAL COUNCIL OF CAL. ADVISORY COMM. ON CRIMINAL JURY INSTRUCTIONS, JUDICIAL COUNCIL OF CALIFORNIA CRIMINAL JURY INSTRUCTIONS no. 334 (2015), [http://www.courts.ca.gov/partners/documents/calcrim\\_juryins.pdf](http://www.courts.ca.gov/partners/documents/calcrim_juryins.pdf).

9. Professor Gilchrist has expressed his willingness to undertake this daunting task by creating an "off-the-shelf" list of bargaining chips and the waiver templates necessary to effectuate an agreement for a simplified trial. Gilchrist, *supra* note 1, at 1997.

10. *See id.* at 1988 (indicating that a trial rights bargain should "maintain[] a meaningful form of adjudication"); *see also* Susan R. Klien et al., *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73, 111 (2015) (suggesting that a defendant can "spend" pre-trial and trial rights to "purchase a shorter prison sentence" unless the right has public policy implications and affects the fairness of the criminal justice system in fact or appearance); John Rappaport, *Unbundling Criminal Trial Rights*, 82 U. CHI. L. REV. 181, 196 (2015) (recognizing that the parties might be prohibited from bargaining away "rights that safeguard the judicial decisionmaking process").

seeking process. Additionally, the ethics rules governing lawyers and judges may preclude the trading of certain rights. To begin the process of identifying rights immune from trial bargains, the remainder of this Essay suggests that criminal defendants should be barred from trading their right to: (1) be free from cruel and unusual punishment; (2) a public trial; (3) an impartial tribunal; (4) a jury of not less than six persons; and (5) be represented by counsel.

#### A. CRUEL AND UNUSUAL PUNISHMENT

A defendant might be willing to voluntarily accept a form of punishment considered by society to be cruel and unusual in order to avoid imprisonment or in some cases to avoid even probation. “[B]anishment, a fate universally decried by civilized people,” could be viewed as preferable to a sentence of life imprisonment.<sup>11</sup> Similarly, some individuals might prefer a humiliating but brief stint in a pillory instead of a two-year probationary sentence mandating 200 hours of public service, a \$1000 fine, and abstention from drugs and alcohol during the probationary period. And these possibilities are far from fanciful, as demonstrated by the defendant who pleaded with a judge to impose a sentence of public flogging rather than prison.<sup>12</sup>

If the primary purpose of the Eighth Amendment’s prohibition against cruel and unusual punishment is to shield individuals from painful, humiliating, and dehumanizing sentences, then a defendant should be able to bargain away this protection. But several facts lead to the conclusion that the Eighth Amendment protects society as a whole as much as it protects the individual members of society.<sup>13</sup>

First, the Eighth Amendment is framed “not in the language of rights, but as a limit on government power, prohibiting cruel and unusual punishments.”<sup>14</sup> It was intended “to restrain lawless and bloody judges”<sup>15</sup> and partisan legislators especially in their attempts to punish anti-government speech.<sup>16</sup> Second, the phrase “cruel and unusual” is not defined in terms of what an individual might be willing to endure as a penalty. Instead, the test is whether the penalty is “unacceptable to contemporary society” or degrading to the dignity of human beings as a group.<sup>17</sup> Third, the

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11. *Trop v. Dulles*, 356 U.S. 86, 102 (1958); *see also State v. Gitchel*, 486 P.2d 328, 329 (Wash. Ct. App. 1971) (classifying banishment as a cruel and unusual punishment).

12. *See United States v. Nobrega*, No. 1:10-cr-00186-JAW, 2012 WL 243090, at \*1 (D. Me. June 20, 2012) (denying a defendant’s motion to be sentenced to a public flogging instead of prison).

13. *Gilmore v. Utah*, 429 U.S. 1012, 1019 (1976) (Marshall, J., dissenting) (“[The Eighth Amendment] also expresses a fundamental interest of society in ensuring that state authority is not used to administer barbaric punishments.”).

14. Jules Lobel, *Separation of Powers, Individual Rights, and the Constitution Abroad*, 98 IOWA L. REV. 1629, 1659 (2013).

15. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 279 (1998).

16. *See id.* at 82 (“The most grisly punishments in England had typically been inflicted on those who spoke out against the government.”); GEORGE ANASTAPLO, THE AMENDMENTS TO THE CONSTITUTION: A COMMENTARY 88 (1995) (stating that the Eighth Amendment was directed at legislators and judges).

17. *Furman v. Georgia*, 408 U.S. 238, 277 (1972).

prohibition serves the public's interest in maintaining a civilized society.<sup>18</sup> Permitting a defendant to bargain for a barbaric form of punishment defeats this goal.<sup>19</sup> Society's collective interest in barring inhuman penalties should prevent an individual from consenting to a violation of the Eighth Amendment.<sup>20</sup> In other words, “[t]he Cruel and Unusual Punishments Clause prohibits the imposition of inherently barbaric punishments under all circumstances.”<sup>21</sup> Bargaining for a punishment that violates the Eighth Amendment contravenes public policy and thus should be disallowed.

#### B. A PUBLIC TRIAL

The guarantee of a public trial serves two related purposes each protected by a separate amendment to the United States Constitution. The Sixth Amendment right to a public trial was “created for the benefit of the defendant.”<sup>22</sup> It assures fair treatment by the prosecutor and court and prevents unjust condemnation of the accused.<sup>23</sup> But ensuring that trials remain public events serves a broader purpose than merely protecting an individual from government overreaching. Public trials also advance community interests in at least two other ways. First, they provide a community therapeutic value by “providing an outlet for community concern, hostility, and emotion,” especially in horrific cases.<sup>24</sup> Second, open proceedings help build public confidence in the justice system by allowing members of society to observe and better understand the workings of the court.<sup>25</sup> These community interests underlie the First Amendment’s protection of the public’s right to attend criminal trials.<sup>26</sup> So, even assuming that a defendant could trade away his or her Sixth Amendment right to a public trial, a defendant cannot waive society’s First

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18. See *Campbell v. Wood*, 18 F.3d 662, 701 (9th Cir. 1994) (Reinhardt, J., concurring and dissenting) (“We reject barbaric forms of punishment as cruel and unusual not merely because of the pain they inflict but also because we pride ourselves on being a civilized society.”).

19. See *Whitmore v. Arkansas*, 495 U.S. 149, 173 (1990) (Marshall, J., dissenting) (“A defendant’s voluntary submission to a barbaric punishment does not ameliorate the harm that imposing such a punishment causes to our basic societal values and to the integrity of our system of justice.”).

20. See *Lenhard v. Wolff*, 444 U.S. 807, 811 (1979) (Marshall, J., dissenting) (“Society’s independent stake in enforcement of the Eighth Amendment’s prohibition against cruel and unusual punishment cannot be overridden by a defendant’s purported waiver.”); *Gilmore v. Utah*, 429 U.S. 1012, 1018 (1976) (White, J., dissenting) (“I believe, however, that the consent of a convicted defendant in a criminal case does not privilege a State to impose a punishment otherwise forbidden by the Eighth Amendment.”); Steven A. Blum, *Public Executions: Understanding the “Cruel and Unusual Punishments” Clause*, 19 HASTINGS CONST. L.Q. 413, 451 (1992) (“One may not consent to cruel and unusual punishment.”); Jeffrey L. Kirchmeier, *Let’s Make a Deal: Waiving the Eighth Amendment by Selecting Cruel and Unusual Punishment*, 32 CONN. L. REV. 615, 642 (2000) (“[T]he Constitution does not allow defendants to waive the Eighth Amendment ban on cruel and unusual punishment.”).

21. *Graham v. Florida*, 560 U.S. 48, 59 (2010).

22. *Gannett Co. v. DePasquale*, 443 U.S. 368, 380 (1979).

23. *Id.*

24. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980).

25. *Id.* at 572.

26. *Id.* at 580 (“We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment . . . ”).

Amendment rights. Since the entitlement to an open courtroom “transcend[s] personal ownership,”<sup>27</sup> no trial bargain should include a waiver of the defendant’s Sixth Amendment right to a public trial.

### C. AN IMPARTIAL TRIBUNAL

Both due process and natural justice mandate a hearing before an impartial decision-maker.<sup>28</sup> Because a partial judge poses an insurmountable obstacle to a fair trial, the Due Process Clause requires the disqualification of a judge who suffers from bias.<sup>29</sup> By protecting against judicial bias, the Due Process Clause ensures, to the extent possible, an accurate case outcome.<sup>30</sup> Viewed in this way, the right to an impartial judge belongs to the litigants. Thus, a defendant should be permitted to waive his or her right to a neutral judge in return for a prosecutorial concession. And it is not beyond the realm of possibility that a defendant might be willing to gamble on a judge’s objectivity in return for a break in sentencing especially when facing a strong prosecution case. Or a defendant might believe that the judge is partial in the defendant’s favor or that the judge maintains a bias against the prosecution.

But regardless, whether the guarantee of an impartial decision-maker is primarily designed to protect individuals and therefore waivable, or serves a broader societal interest militating against waiver,<sup>31</sup> current codes of judicial conduct prevent a judge from accepting a party’s waiver of an impartial tribunal under any circumstance.

Rule 2.11 of the 2007 ABA Model Code of Judicial Conduct disqualifies a judge whenever “[t]he judge has a personal bias or prejudice concerning a party or party’s lawyer . . .”<sup>32</sup> This disqualifying factor cannot be remitted by the parties or their counsel.<sup>33</sup> In other words, if a judge harbors a bias or prejudice for or against a litigant or lawyer recusal is mandatory. The 1972 ABA Code of Judicial Conduct and the 1990 ABA Model Code of Judicial Conduct included the same, non-

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27. See Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist’s Guide to Loss, Abandonment and Alienation*, 68 FORDHAM L. REV. 2011, 2048 (2000) (“Thus . . . it may be tentatively inferred that rights constituting structural protections or promoting public policy, and possibly those that transcend personal ownership or that are stripped away as part of a contract of adhesion, may not be waived by a criminal defendant.”).

28. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (“It is axiomatic that ‘[a] fair trial in a fair tribunal is a basic requirement of due process.’” (quoting *In re Murchinson*, 349 U.S. 133, 136 (1955))); *Johnson v. Johnson* (2000) 201 CLR 488, 501 (Austl.) (Kirby, J.) (“It is a ‘fundamental rule’ of natural justice and an ‘abiding value of our legal system’ that every adjudicator must be free from bias.” (internal citations omitted)).

29. *Caperton*, 556 U.S. at 887 (stating that due process requires disqualification when the circumstances “create[] an unconstitutional probability of bias”).

30. *Addington v. Texas*, 441 U.S. 418, 425 (1979) (“[W]e must be mindful that the function of legal process is to minimize the risk of erroneous decisions.”).

31. Bridgette Toy-Cronin, *Waiver of the Rule Against Bias*, 9 AUCKLAND U. L. REV. 850, 874 (2002) (discussing the public and private rationales underlying the right to an impartial judge and the waiver implications of each).

32. MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(1) (2007).

33. MODEL CODE OF JUDICIAL CONDUCT R. 2.11(C) (2007).

waivable recusal provision.<sup>34</sup> Virtually every state has incorporated this rule into its code of judicial conduct.<sup>35</sup> Similarly, both Canon 3 of the Code of Conduct for United States Judges<sup>36</sup> and the federal disqualification statute<sup>37</sup> bar litigants and counsel from waiving a judge's disqualification based on a personal bias or prejudice. So, unless disqualification statutes and rules are amended to permit remittal of judicial bias and prejudice, a court cannot accept a defendant's offer to give up his or her right to an impartial judge.<sup>38</sup>

#### D. THREE-PERSON JURY?

Compelling a defendant to accept a trial before less than six jurors violates the Sixth and Fourteenth Amendments.<sup>39</sup> But can the accused, as part of a trial bargain, waive this constitutional right and agree to a jury of five or fewer persons? Professor Gilchrist believes that a "defendant can waive the right to any particular number of jurors, whether the right is rule-based or constitutional."<sup>40</sup> Before doing so, however, the accused must be informed and understand that a panel of fewer than six "promotes inaccurate and possibly biased decisionmaking, . . . causes untoward differences in verdicts, and . . . prevents juries from truly representing their communities."<sup>41</sup> Of course, this might be precisely the kind of jury that the defendant desires or at least is willing to accept in return for, let's say, a reduction from the charge of armed robbery with its mandatory prison term, to a probationable robbery charge.

At some point, however, it may be unfair to the justice system and to the public to bestow the venerable title of jury on a body that is too few in number to fulfill the traditional function and purpose of a jury. According to the Supreme Court, a jury consisting of fewer than six is just too small to promote group deliberation, insulate jurors from outside intimidation, provide a representative cross-section of the community, produce consistent and unbiased verdicts,<sup>42</sup> and secure the other

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34. Compare CODE OF JUDICIAL CONDUCT Canon 3(D) (1972) with MODEL CODE OF JUDICIAL CONDUCT Canon 3(E)(1)(a), 3F (1990).

35. See, e.g., FLA. CODE OF JUDICIAL CONDUCT Canon 3(E)(1)(a), 3F; ILL. S. CT. R. 63(C)(1)(a), 63(D); N.Y. CODE OF JUDICIAL CONDUCT §§ 100.3(E)(1)(a)(i), 100.3(F); OHIO CODE OF JUDICIAL CONDUCT R. 2.11(A)(1), 2.11(C); OR. CODE OF JUDICIAL CONDUCT R. 3.10(A)(1), 3.10(D); WASH. CODE OF JUDICIAL CONDUCT R. 2.11(A)(1), 2.11(C).

36. CODE OF CONDUCT FOR U.S. JUDGES Canon 3(C)(1)(a), 3(D).

37. 28 U.S.C. §§ 455(b)(1), 455(e) (2012).

38. While a judge cannot accept a trial bargain that includes the waiver of an impartial tribunal, a defendant could trade away his or her right to file a motion to disqualify a judge, or, in the 18 states that permit it, a motion for an automatic substitution of judge. See Raymond J. McKoski, *Disqualifying Judges When Their Impartiality Might Reasonably Be Questioned: Moving Beyond a Failed Standard*, 56 ARIZ. L. REV. 411, 468 n.357 (2014) (listing the states that "permit[] the peremptory challenge of at least one trial judge").

39. *Ballew v. Georgia*, 435 U.S. 223, 245 (1978).

40. Gilchrist, *supra* note 1, at 1990.

41. *Ballew*, 435 U.S. at 239.

42. *Id.* at 232–38. *But see* Gilchrist, *supra* note 1, at 1994 ("Smaller juries are an improvement from no juries.").

advantages deemed important enough to warrant including the right to a jury in the list of grievances submitted to King George III.<sup>43</sup> And the consent of the defendant does nothing to cloak a three-person jury with these attributes. It also seems unfair to require citizens to forego their everyday work, school, and family responsibilities and obey a summons to serve on a body that is a jury in name only.<sup>44</sup>

If a court approves a trial bargain that places a defendant's fate in the hands of a body consisting of fewer than six persons, the adjudicators should not be designated a "jury," but called what they are—a lay adjudicatory panel. Renaming a fact-finding body of less than six will help avoid misleading the defendant as to the virtues of the group that he has bargained for and will further allow the "jury" to maintain its time-honored role in the judicial system.

#### E. BARGAINING AWAY THE RIGHT TO COUNSEL

The Constitution guarantees a criminal defendant "the guiding hand of counsel at every step of the proceedings,"<sup>45</sup> including the critical stage at which the accused decides whether to accept a plea bargain.<sup>46</sup> Like other constitutional rights, a defendant may waive the right to counsel and exercise his or her First and Sixth Amendment rights to proceed pro se at a trial or guilty plea hearing.<sup>47</sup> Relying on the right to waive counsel, the Texas Court of Criminal Appeals found no constitutional impediment to a plea offer by a prosecutor conditioned on the defendant's waiver of counsel.<sup>48</sup> But, extending the Texas court's holding to permit the extraction of a promise from a defendant to waive counsel in a trial rights bargaining situation encounters a special set of problems.

First, the Texas Court of Criminal Appeals' approval of the prosecutor's effort to convince a defendant that his or her best interests lie in not securing counsel, involved a defendant who had not yet retained counsel.<sup>49</sup> It is quite a different matter to offer a represented defendant a deal on the condition that the defendant fire his or her attorney. This is especially true when the bargain does not fully resolve the charge and contemplates a fact-finding proceeding where the defendant's right to be heard will be of little value without counsel.<sup>50</sup> Second, trial rights bargaining should

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43. See THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776).

44. Of course the other side of the argument is that a three-person jury would spare nine citizens from sacrificing their everyday responsibilities to serve on a jury.

45. Johnson v. Zerbst, 304 U.S. 458, 463 (1938) (quoting Powell v. Alabama, 287 U.S. 45, 69 (1932)).

46. Missouri v. Frye, 132 S. Ct. 1399, 1407–08 (2012) ("[C]riminal defendants require effective counsel during plea negotiations."); Iowa v. Tovar, 541 U.S. 77, 87 (2004) ("[The defendant] had a right to counsel both at the plea stage and at trial had he elected to contest the charge.").

47. Tovar, 541 U.S. at 87–88; Zerbst, 304 U.S. at 465.

48. State v. Guerrero, 400 S.W.3d 576, 586 (Tex. Crim. App. 2013); see also WAYNE R. LAFAVE ET AL., 5 CRIM. PROC. § 21.2(b) (3rd ed. 2011 & 2014 Supp.) ("So too, there is nothing inherently 'improper or coercive' in a prosecutor's tender of a 'plea agreement that is conditioned on the waiver of counsel.'" (quoting *Guerrero*, 400 S.W.3d at 586)).

49. *Guerrero*, 400 S.W.3d at 581–82 n.6.

50. Zerbst, 304 U.S. at 463.

be tempered to some extent by principles of mutuality. Since a defendant cannot tender a proposal premised on the State giving up its right to be represented by an attorney, the State should be precluded from conditioning a bargain on the waiver of defense counsel.<sup>51</sup> Lastly, if trial bargains are to play a role in the disposition of criminal cases, certain fundamental rights should be declared off-limits simply to avoid decades of litigation to determine whether and under what circumstances the right is tradable. The right to counsel should be one of those non-negotiable rights.

### III. CONCLUSION

Today, most defendants, including innocent defendants, enter into negotiated pleas because they are unwilling to bet their future on the chance of a not guilty verdict. Under Professor Gilchrist's proposal, defendants could hedge their bets by retaining a possibility of acquittal while minimizing their prison exposure. This new scheme for resolving criminal cases presents many difficult questions. Is the trial bargaining process constitutional? Should any fundamental rights be off the trading block? Will the sheer number of potential bargaining chips deprive the process of any semblance of uniformity and consistency? Will finality interests suffer from the need to litigate the propriety of hundreds if not thousands of different trial bargains? Regardless of the merits of the proposal, Professor Gilchrist provides the profession with an opportunity to discuss and critically examine trial rights bargaining before it is implemented. Unfortunately, no such opportunity preceded the arrival of plea bargaining and its virtually unregulated expansion.<sup>52</sup>

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51. Cf. James J. Tomkovicz, *Standards for Invocation and Waiver of Counsel in Confession Contexts*, 71 IOWA L. REV. 975, 980–88 (1986) (explaining the importance of counsel in leveling the playing field).

52. See Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CAL. L. REV. 1117, 1121 (2011) (describing the United States Supreme Court's traditional "hands-off approach" to regulating plea bargaining).