# AC – Rousseau

## Framework

#### The value of human freedom is a precondition to all other values, because the act of valuing itself presupposes freedom. The sphere of the state is derived from the constitutive force of free agreement from the general will of the population. Such conceptions stem from the natural value of human freedom.

Rousseau 1. [Rousseau, Jean Jacques. “The Social Contract or Principles of Political Right”. 1762. Translated by G.D.H Cole. Constitution Project]

I SUPPOSE men to have reached the point at which the obstacles in the way of their preservation in the state of nature show their power of resistance to be greater than the resources at the disposal of each individual for his maintenance in that state. That primitive condition can then subsist no longer; and **the human race** would perish unless it changed its manner of existence.But, as men can**not engender new forces, but only unite and direct existing ones**, **they** ha**ve no other means of preserving themselves than the formation, by aggregation, of** a sum of **forces** great enough to overcome the resistance. These they have to bring into play **by means of a single motive power** and cause to act in concert. **This** sum of forces **can arise only where** several **persons come together**: **but, as the force and liberty of each** man **[person] are the chief instruments of** his **[their] self-preservation, how can** he **[they] pledge them without harming** his **[their]** own **interests**, and neglecting the care he owes to himself? This difficulty, in its bearing on my present subject, may be stated in the following terms: *"***The problem is to find a form of association** which will defend and protect with the whole common force the person and goods of each associate, and **in which each,** while uniting himself with all, may **still** obey himself alone, and **remain[s] as free as before***."*This is the fundamental problem of which the *Social* *Contract* provides the solution. If then we discard from the social compact what is not of its essence, we shall find that it reduces itself to the following terms: **"Each** of us **puts** his person and all his **power in common under** the supreme direction of **the general will**, and, in our corporate capacity, **we receive each** member **as an indivisible part of thewhole**." At once, in place of the individual personality of each contracting party, **this act of association creates a** moral and **collective body**, composed of as many members as the assembly contains votes, and **receiving from this act** its unity, its common identity, its life and **its will**. This public person, so formed by the union of all other persons formerly took the name of *city*,and now takes that of *Republic* or *body**politic*; it is called by its members *State* when passive. *Sovereign* when active, and *Power* when compared with others like itself. **Those who are associated** in it **take** collectively **the name** of *people*, and severally are called **citizen**s, as sharing in the sovereign power, and *subjects*, as being under the laws of the State. But these terms are often confused and taken one for another: it is enough to know how todistinguish them when they are being used with precision. This formula shows us that the act of association comprises a mutual undertaking between the public and the individuals, and that each individual, in making a contract, as we may say, with himself, is bound in a double capacity; as a member of the Sovereign he is bound to the individuals, and as a member of the State to the Sovereign. But the maxim of civil right, that no one is bound by undertakings made to himself, does not apply in this case; for there is a great difference between incurring an obligation to yourself and incurring one to a whole of which you form a part. *But the body politic or* **the Sovereign, drawing its being** wholly **from** the sanctity of **the contract, can never** bind itself, even to an outsider, to **do anything derogatory to the original act**, for instance, **to alienate any part of itself**, or to submit to another Sovereign. **Violation of the act by which it exists would be self-annihilation**; and that which is itself nothing can create nothing. In order then that the social compact may not be an empty formula, it tacitly includes the undertaking, which alone can give force to the rest, that **whoever refuses to obey the general will shall be compelled to do so** by the whole body. This means nothing less than that the will be forced to be free; for this is the condition which, by giving each citizen to his country, secures him against all personal dependence. In this lies the key to the working of the political machine; **this alone legitimizes civil undertakings,** which, without it, would be absurd, tyrannical, and liable to the most frightful abuse.

#### If the sovereign does not respect the general will, then they exert power over and above the citizenry and the contract dissolves since something other than the collective contract would govern state action.

Rousseau 2 [Rousseau, Jean Jacques. “The Social Contract or Principles of Political Right”. 1762. Translated by G.D.H Cole. Constitution Project]

I WARN the reader that this chapter requires careful reading, and that I am unable to make myself clear to those who refuse to be attentive. Every free action is produced by the concurrence of two causes; one moral, i.e., the will which determines the act; the other physical, i.e., the power which executes it. **When I walk** towards an object, **it is necessary** firstthat **I** should **will to go** there, **and**, in the second place, **that my feet** should **carry me.** If a paralytic wills to run and an active man wills not to, they will both stay where they are. **The body politic has the same** motive powers; here too **force and will are distinguished, will under the** name of **legislative** power **and force under** that of **executive** power. **Without** their **concurrence nothing** is, or **should be done**. We have seen that the **legislative power belongs to the people**, and can belong to it **alone**. It may, on the other hand, readily be seen, from the principles laid down above, that the **executive power cannot belong to the generality** as legislature or Sovereign, **because it consists** wholly **of particular acts** which fall **outside the** competency of the **law**, and consequently of the Sovereign, whose acts must always be laws. The **public force** therefore **needs an agent of its own to bind it together and set it to work under the direction of the general will,** to serve as a means of communication between the State and the Sovereign, and to do for the collective person more or less what the union of soul and body does for man. **Here** **we have** what is, in **the State**, the basis of government, often wrongly confused with the Sovereign, whose minister it is.What then is government? An intermediate body set up between the subjects and the Sovereign, to secure their mutual correspondence, charged with the execution of the laws and the maintenance of liberty, both civil and political. The members of this body are called magistrates or *kings*, that is to say *governors*, **and** the whole body **bears the name** ***prince***.[**18**](http://www.constitution.org/jjr/socon_03.htm#18) Thus those who hold that the act, by which a people puts itself under a prince, is not a contract, are certainly right. It is simply and solely a commission, an employment, in which the rulers, mere officials of the Sovereign, exercise in their own name the power of which it makes them depositaries. This power it can limit, modify or recover at pleasure; for the alienation of such a right is incompatible with the nature of the social body, and contrary to the end of association. I call then *government*, or supreme administration, the legitimate exercise of the executive power, and prince or magistrate the man or the body entrusted with that administration. In government reside the intermediate forces whose relations make up that of the whole to the whole, or of the Sovereign to the State. This last relation may be represented as that between the extreme terms of a continuous proportion, which has government as its mean proportional. The government gets from the Sovereign the orders it gives the people, and, for the State to be properly balanced, there must, when everything is reckoned in, be equality between the product or power of the government taken in itself, and the product or power of the citizens, who are on the one hand sovereign and on the other subject. Furthermore, none of these three terms can be altered without the equality being instantly destroyed. If the Sovereign desires to govern, or the magistrate to give laws, or if the subjects refuse to obey, disorder takes the place of regularity, force and will no longer act together, and the State is dissolved and falls into despotism or anarchy. Lastly, as there is only one mean proportional between each relation, there is also only one good government possible for a State. But, as countless events may change the relations of a people, not only may different governments be good for different peoples, but also for the same people at different times. In attempting to give some idea of the various relations that may hold between these two extreme terms, I shall take as an example the number of a people, which is the most easily expressible. Suppose the State is composed of ten thousand citizens. The Sovereign can only be considered collectively and as a body; but each member, as being a subject, is regarded as an individual: thus the Sovereign is to the subject as ten thousand to one, i.e., each member of the State has as his share only a ten-thousandth part of the sovereign authority, although he is wholly under its control. If the people numbers a hundred thousand, the condition of the subject undergoes no change, and each equally is under the whole authority of the laws, while his vote, being reduced to a hundred-thousandth part, has ten times less influence in drawing them up. The subject therefore remaining always a unit, the relation between him and the Sovereign increases with the number of the citizens. From this it follows that, the larger the State, the less the liberty. When I say the relation increases, I mean that it grows more unequal. Thus the greater it is in the geometrical sense, the less relation there is in the ordinary sense of the word. In the former sense, the relation, considered according to quantity, is expressed by the quotient; in the latter, considered according to identity, it is reckoned by similarity. Now, the less relation the particular wills have to the general will, that is, morals and manners to laws, the more should the repressive force be increased. The government, then, to be good, should be proportionately stronger as the people is more numerous. On the other hand, as the growth of the State gives the depositaries of the public authority more temptations and chances of abusing their power, the greater the force with which the government ought to be endowed for keeping the people in hand, the greater too should be the force at the disposal of the Sovereign for keeping the government in hand. I am speaking, not of absolute force, but of the relative force of the different parts of the State. It follows from this double relation that the continuous proportion between the Sovereign, the prince and the people, is by no means an arbitrary idea, but a necessary consequence of the nature of the body politic. It follows further that, one of the extreme terms, viz., the people, as subject, being fixed and represented by unity, whenever the duplicate ratio increases or diminishes, the simple ratio does the same, and is changed accordingly. From this we see that there is not a single unique and absolute form of government, but as many governments differing in nature as there are States differing in size. If, ridiculing this system, any one were to say that, in order to find the mean proportional and give form to the body of the government, it is only necessary, according to me, to find the square root of the number of the people, I should answer that I am here taking this number only as an instance; that the relations of which I am speaking are not measured by the number of men alone, but generally by the amount of action, which is a combination of a multitude of causes; and that, further, if, to save words, I borrow for a moment the terms of geometry, I am none the less well aware that moral quantities do not allow of geometrical accuracy. The government is on a small scale what the body politic which includes it is on a great one. It is a moral person endowed with certain faculties, active like the Sovereign and passive like the State, and capable of being resolved into other similar relations. This accordingly gives rise to a new proportion, within which there is yet another, according to the arrangement of the magistracies, till an indivisible middle term is reached, i.e., a single ruler or supreme magistrate, who may be represented, in the midst of this progression, as the unity between the fractional and the ordinal series. Without encumbering ourselves with this multiplication of terms, let us rest content with regarding government as a new body within the State, distinct from the people and the Sovereign, and intermediate between them. There is between these two bodies this essential difference, that the State exists by itself, and the government only through the Sovereign. **Thus the dominant will of the prince** is, or **should be, nothing but the general will** or the law; his force is only the public force concentrated in his hands, and, **as soon as to base any absolute** and independent **act on own authority, the tie** that binds the whole together **begins to be loosened**. **If** finally **the prince should** come to **have a** particular **will more active than the** will of the **Sovereign**, **and should employ the public force in** his hands in **obedience to this particular will, there would be**, so to speak, **two Sovereigns, one rightful and the other actual, the social union would evaporate** instantly**, and the body politic** would be **dissolve**d**.**

#### Impacts:

#### A. Hijacks the internal link between normativity and state obligation – even if their ethical theory is true, it would be impossible absent citizens implementing it collectively under the state. A state is not permitted to take actions derogatory to its existence if such actions would be net beneficial.

#### B. The question of WHAT the will the state operates under is irrelevant—the framework establishes a conflict between the rightful and actual sovereign – proves that the effects of an action that is illegitimate cannot serve as the basis for moral evaluation. Your disads do not link.

#### The standard is consistency with deliberative democracy.

#### Prefer:

#### 1/ The framework locates the grounding contract not between the sovereign and the people, but between the people themselves to construct a sovereign—since legitimate states don’t exist external to the population, states are bound to the peoples’ will and thus cannot be exclusive of any.

#### 2/ The AC provides an ontological account of the nation which precludes since unless we know what the nation is, we cannot know what its obligations could be.

#### 3/ Deliberation is the best method for arriving at moral truth.

**Habermas 03:** *Truth and Justification.* Jurgen Habermas. Translated by Barbara Fultner. The MIT Press. Massachusetts. 2003

**Participants must be mutually sensitized to one another’s understanding of themselves and of the world. Among the necessary presupposition of argumentation are: complete inclusion of all those affected**, [means] **equal distribution of argumentational rights** and obligations, the uncoerciveness of the communicative situation, **and the participants’ orientation toward reaching mutual understanding. Under these** exacting **conditions** of communication, **all available information, suggestions, reasons, evidence, and objections** that are **relevant to selecting, specifying, and resolving a**n obvious **problem are supposed to come into play such that the best arguments are introduced and that the best argument always holds sway.**

#### This means a) the AC controls the internal link to arriving at the truth of their theory b) debate is deliberative—that’s the only way to preserve the possibility of engagement with other projects to develop tolerance and understanding.

#### 4/ Oppression is obviously bad, but that needs to be rigorously warranted—unjustified assumptions are the root cause of all oppression. My framework best explains why oppression’s bad—it’s undemocratic to exclude the perspectives of the minority. And, hoping that intuitions are enough to justify why we resist oppression fails—Nazism is also within the scope of things people have thought are intuitive. Developing principles helps us determine which intuitions can be trusted.

## Advocacy

#### I defend the resolution as a general principle.

## 1 – Trials

#### Plea bargaining prevents 97% of criminal cases from going to trial.

Emilio C. Viano 12, DOI : 10.3917/ridp.831.0109, 1-3-2012, "Plea Bargaining in the United States: a Perversion Of Justice," Cairn.info, https://www.cairn.info/revue-internationale-de-droit-penal-2012-1-page-109.htm

In a country that prides itself on being a beacon of democracy, the rule of law, the protection of human rights and enlightened justice policies, the exponential growth of plea bargaining is instead a clear signal that the American justice system is not working that well, that, on the contrary, is being skewed and distorted by the confluence of several negative factors. The majority of Americans takes it for granted that when someone is accused of a crime by the state, the case routinely goes to trial. There, it is believed, the prosecution and the defense spar over the facts of the case in front of a jury of citizens that will eventually deliberate, at times at great length, before reaching a verdict on the innocence or guilt of the accused based on the “evidence” provided by the two parties. More fundamentally, it is held in the United States that the law gives more weight and value to avoid convicting the innocent than to obtain the maximum possible convictions of the guilty. Procedural criminal law is seen as putting into practice these values and ensuring that criminal cases are decided accordingly, especially by extending to the accused the presumption of innocence and by requiring proof beyond a reasonable doubt in order to obtain a conviction. [1][1] Tim Lynch, The Devil’s Bargain: How Plea Agreements... Unfortunately, this depiction of the American justice system does not reflect what really happens in courtrooms around the country. Actually, very few criminal cases go to trial. About 97 percent of the criminal cases are resolved by plea bargains. In a plea bargain, the prosecutor normally offers a reduced prison sentence if the defendant agrees to forego[es] his right to a jury trial and admit guilt in a summary proceeding before a judge. The data are unmistakable. In fiscal year 2010, the prevalent mode of conviction in U.S. District Courts of all crimes was by plea of guilty (96.8% of all cases). [2][2] Sourcebook of Criminal Justice Statistics Online 2010;... The percentage ranges from a relative low of 68.2% for murder to a high of 100% for cases of burglary, breaking and entering. With the exception of sex abuse (87.5%), arson (86.7%), civil rights (83.6%) and murder (68.2%), for all other crimes the rate of convictions by plea of guilty is well over 90%. In the recent U.S. Supreme Court decision, Missouri v. Frye [3][3] No. 10-444, 2012 WL 932020 (U.S. Mar. 21, 2012 ), Justice Kennedy, writing the majority opinion, pointed out the statistics that 97% of federal convictions and 94% of state convictions are the result of guilty pleas. Given the federalist nature of the United States, states and localities have their own substantive and procedural laws and regulations. Consequently, data on convictions by pleas of guilty vary from state to state but they are all substantial.

#### Trials are key to democratic flourishing—they publicly air evidence relevant to social debates, create accountability for prosecutors and the government, and improve the nuance of policymaking.

Chair Mary Jo White 13 , The Importance of Trials to the Law and Public Accountability, November 14, 2013, US SEC <https://www.sec.gov/news/speech/2013-spch111413mjw> //ilake MW

So as I thought about what to speak to you about tonight, I had trials and in particular SEC trials on my mind. Learning about Judge Flannery and his trial experience both as a lawyer and as a judge “sealed the deal” on my choice of topic. In my remarks tonight, I’ll make a few observations about the importance of trials and their unique place in our system of justice, and talk a bit about the role they play at the SEC. The personal and professional satisfaction that any of us gets from a trial, of course, pales in comparison to the greater purpose that trials serve. Simply put, they put our system of justice — the best in the world — on display for all to see. In any given courthouse in America, anyone can walk into a courtroom and watch the strength of our trial system. The public airing of facts, literally in open court, creates accountability for both defendants and the government. How we resolve disputes and how we decide the guilt or innocence of an accused are the true measure of our democracy. Thomas Jefferson once said that he considered “trial by jury [is]as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution.” Perhaps that is why trials have always captured our imagination. Beyond the courtroom dramas depicted in our books, movies, and television, our country’s history is replete with real trials that maintain special meaning for us because they represent the passage of judgment by the community on very important matters. Just think back over the years, and the impact of trials on our society becomes obvious: the Rosenbergs, the civil rights trials of the 1960s, the Pentagon Papers, the terrorism trials of the 1990s, the Enron trial. There are many to choose from. Earl Silbert, also a legendary U.S. Attorney for this District and your Flannery lecturer two years ago, has rightly called trials the “crown jewel” of our system of justice. But what is it about trials that make them so important? We need to step back from our idealized visions of Atticus Finch or Clarence Darrow thundering away on cross-examination and instead try to distill what, in its essence, happens at trials that gives them such a lofty and hallowed place in our justice system. While I am sure there are many reasons we could each identify, I’d like to focus on just two of the important roles that trials play in our administration of justice: how they foster the development of the law, and perhaps even more importantly how they create public accountability for both defendants and the government through the public airing of charges and evidence. What Is Lost With the Decline of Trials I suppose I should start with some unwelcome reality. For all that trials mean to our system of justice, there is no denying that trials have slowly but continuously declined over time. They have indeed become a rare species. Seventy years ago, 20 percent of all federal civil cases went to trial. By 2009, that percentage had dropped to less than 2 percent and the most recent data suggests this number has remained steady. In terms of actual numbers, we had about 12,000 federal trials in 1985. Twenty-five years later, the number had decreased to just over 3,000. And this drop occurred during a period when the number of civil filings overall was increasing dramatically. On the federal criminal side, we see a similar pattern. In 1962, 15 percent of the cases found their way into the courtroom. As of 2009, the number was less than 5 percent. And here again, that percentage has remained steady if not decreased somewhat in the last four years. There are many theories proffered for these declines. Earl Silbert rightly pointed in his Flannery lecture to the federal sentencing guidelines as a major cause. In the face of potentially “draconian” prison terms, many defendants with “triable” offenses choose to plead guilty where the sentence can be known or at least predictable. On the civil side, the push for ADR (arbitrations, mediations, and other alternative dispute resolution mechanisms) including local civil rules that require parties to file ADR statements have had a significant impact. To be sure, there are obviously benefits of efficiency and resource preservation with the decline in trials and the increase of settlements, guilty pleas, and summary dispositions of cases by motion. But we should always reflect on what we also lose when trials become the exception. Trials Foster the Development of the Law Judge Patricia Wald, a beyond legendary jurist of your Circuit Court, has for example cautioned us against the “creeping preeminence” of summary judgment and the case law relying too heavily on pre-trial litigation: “in which law is mostly made on the basis of undisputed facts ‘pleaded,’ ‘stipulated,’ or ‘inferred’ rather than on fuller trial records that may more accurately represent the complexity and ambiguity of life.” She asks, “Will our jurisprudence craft rules and principles and hand them down fully formed from the netherworld of law school hypotheticals, instead of forging them in the heat of pitched battle and hammering them into shape on the anvil of trials, witnesses, cross-examinations, and live evidence evaluated by ordinary lay persons?” Her observations as always are “spot on” and capture well the importance of trials to the development of the law. Trials allow for more thoughtful and nuanced interpretations of the law in a way that settlements and summary judgments cannot. And we can all point to cases where trials led to significant legal rulings of greater importance than the facts of the particular case, but rulings nevertheless enhanced by the full trial record of the particular case. U.S. v. O’Hagan One example is U.S. v. O’Hagan, which established the “misappropriation” theory of insider trading. In that case, O’Hagan, a partner at a prominent Midwest law firm, learned that his client was trying to acquire another company. He then began trading in securities of the acquisition target and profited greatly when the deal was announced. The SEC conducted a parallel investigation along with the Department of Justice, and O’Hagan was charged civilly by the SEC and indicted by the DOJ for securities fraud. After his criminal trial, O’Hagan was convicted by a jury on all 57 counts in the indictment and sentenced to 3½ years in prison. The Supreme Court upheld the conviction and extended securities fraud liability — known as Section 10(b) — to cases where the wrongdoer misappropriates confidential information in violation of a fiduciary duty even if the wrongdoer owes no such duty to the company in whose stock he traded. This misappropriation theory forms the basis for many of the insider trading cases that we bring today. And it is a theory supported by the law established on a fully developed trial record. That has become a luxury that is rare in our current “trial-light” system, and in my view the law often suffers. Public Accountability Through Trials The reduction in the number of trials also carries with it other unfortunate consequences. As Professor Robert Burns has said, “The death of trials would… remove a source of disciplined information about matters of public significance. ... It would mean the end of an irreplaceable public forum and would mean that more of the legal order would proceed behind closed doors. And it would deprive us, as American citizens, of an important source of knowledge about ourselves and key issues of public concern.” I agree. Like many of you here tonight, I appreciate the near-sacred nature of the courtroom. For it is in places like this — across the country in little towns and big cities — where prosecutors, SEC lawyers, and other litigants are required to meet their burden of proof, and where there is up-close-and-personal accountability for whatever the trial is about. It is a place where victims and the witnesses have the chance to tell their stories and where the public can hear the facts set forth in open court. And it is a place for public closure on hotly disputed facts and legal issues. For many of us, the trial is a deeply meaningful process that involves intense preparation, opening and closing statements filled with strong advocacy, and direct testimony and cross examination designed to prove or disprove a case. A trial creates an indelible record of the facts of the case.

## 2 – Separation of Powers

#### Plea bargaining conflates executive and judicial powers in prosecutorial discretion—means prosecutors can target specific groups, destroys rights of the accused and occludes the workings of criminal proceedings.

Barkow 05, Rachel E., "Separation of Powers and the Criminal Law" (9-7-2005). New York University Public Law and Legal Theory Working Papers. Paper 8. <http://lsr.nellco.org/nyu_plltwp/8> //ilake mw

Although many scholars have criticized plea bargaining on a number of grounds,281 they have largely ignored the separation of powers analysis. But the dangers of plea bargaining come into full relief when approached in this manner. Prosecutors use the judicial process – the very means of checking the prosecutor and Congress – as the key bargaining chip in negotiations. In the classic plea bargaining scenario, if a defendant elects to go to trial, he or she faces a longer sentence and more charges. If the prosecutor charged a defendant $20,000 for going to trial but there was no charge if the defendant pleaded guilty, it would seem obvious that the bargain was unconstitutional. Yet when prosecutors put a different – in some cases, far more costly price – on going to trial, it is currently considered acceptable. With this bargaining chip in hand, it is not surprising that almost all cases result in plea bargains. With the ability to put a price tag on trial, the prosecutor becomes a cheaper adjudicator for the defendant, combining both executive and judicial power and posing the very danger the Framers tried to prevent.282 If there were institutional and procedural checks on the prosecutor as there are for other administrative actors, perhaps this would not be so troubling.283 But as Part II explained, these protections are absent in the plea bargaining context. As a result, the prosecutor acts with discretion that is almost unmatched anywhere in law. The real question in a plea bargained case, then, should not be whether the plea of any individual defendant is voluntary or knowing, but whether there is a sufficient check on prosecutors’ use of the bargaining power. If the Court focused on the structural relationship among branches instead of on individual defendants, it would see there is currently no check at all. Prosecutors have unbridled discretion to make or not make these deals in any given cases. But this is the kind of unbridled discretionary power that the separation of powers is supposed to prevent.284 If prosecutors can put a higher price on judicial oversight, the state can selectively target groups and individuals for prosecution in a manner that avoids both political and judicial oversight.285 The political process will not work because the vast majority of people will be unaffected and will not mobilize to fight against the practice. And the judicial process will not work if the only question in a given case is whether the individual defendant before the Court made the deal knowingly and voluntarily.286 The Framers recognized dangers such as this and required a strong judicial role in criminal cases to prevent it. A system where upwards of 95% cases never go to trial and where prosecutors make all the key judgments does not fit comfortably with the separation of powers. What does the separation of powers require? While a full analysis is beyond the scope of this Article, it would seem to prohibit a system of plea bargains and agreements in which the judicial process is used as a bargaining chip for leverage that undercuts the judicial role – at least under the current scheme of unregulated prosecutorial discretion. Specifically, prosecutors should not be allowed to threaten individuals with more charges or longer sentences if they go to trial or, put differently, to offer discounts of shorter sentences or fewer charges if a defendant pleads guilty. Trial should not be part of the bargain. This would not stop judges from using their discretion to give sentencing breaks if a defendant pleads guilty and accepts responsibility. But that power should rest with them, not prosecutors. Because the only power the accused has vis-à-vis the state is the power to go to court, and the only way society knows whether criminal proceedings are working properly is if they are conducted in the open, before a judicial actor.

That outweighs—plea bargains are undemocratic since limitless prosecutorial discretion circumvents judicial oversight and allow defendants to be stripped of their right to trial—leads to abuses of power *without institutional checks against them*.

#### Aff solves: There’s too little oversight of plea bargains now regardless, but the number of plea bargains would definitely decrease. And, forcing cases to go to trial would make the federal government rethink its allocation of resources—plea bargains make incaerceration cheap and drive up rates.

Barkow 05, Rachel E., "Separation of Powers and the Criminal Law" (9-7-2005). New York University Public Law and Legal Theory Working Papers. Paper 8. <http://lsr.nellco.org/nyu_plltwp/8> //ilake mw

There are two serious objections to this analysis. The first involves what can be called the inevitability of plea bargaining. Even if plea agreements are deemed unconstitutional, that will not take away prosecutorial discretion. Prosecutors would retain the freedom to charge or not charge a defendant,287 and because a defendant’s act usually violates more than one statute, to choose from among various possible charges.288 The key difference would be that prosecutors could not make that decision in an explicit bargain with the defendant. In light of that power, it might be reasonable to expect plea bargaining to continue, but under the sub rosa regime that existed before the Court accepted the practice in the early 1970s.289 The concern, then, is that plea bargaining would continue, but there would be insignificant oversight because it would take place underground and it would be hard to distinguish bargained guilty pleas from guilty pleas made without deals. As an initial matter, it is important to reemphasize how little oversight takes place now, with plea bargaining existing as an overt practice. Judges do not scrutinize pleas. Instead, the judicial inquiry is typically a cursory look at whether the defendant made the deal knowingly and voluntarily. The loss of judicial review over bargains would therefore be slight because judicial review itself is slight. Moreover, the loss of the minimal judicial review that currently exists seems outweighed by the fact that undoubtedly the number of plea bargains would decrease if plea bargaining is declared a violation of the separation of powers. If prosecutors and defense lawyers are told that this practice is unlawful, many should be deterred from engaging in it on ethical grounds. In addition, some jurisdictions have experimented with plea bargaining bans, lending further support to the notion that much plea bargaining can be limited.290 The second major objection to finding plea bargaining to be a violation of separation of powers is a practical one. The concern here is that the system will be overwhelmed by trials and will not be able to function. While undoubtedly a greater drain will be placed on the system, it is not at all clear that the system will approach anything close to collapse. First, because the separation of powers argument only applies to the federal government, the claim here applies only to the federal government.291 It is a matter of state, not federal, constitutional law whether the same infirmities exist in the state system. And while the states themselves have also shown a commitment to the separation of powers,292 the arguments for using formalist reasoning to interpret the Constitution might not apply at the state level.293 Moreover, even assuming that some states followed the lead of the federal courts and interpreted state constitutions with separation of powers provisions to ban plea bargaining, state constitutions are more easily amended than the federal Constitution..294 So, states could change their constitutions if they decide that plea bargaining is crucial to the functioning of their criminal justice system. But what about the drain on the federal system? First, it is not necessarily true that federal expenditures on criminal enforcement would increase dramatically in the absence of plea bargaining. Instead, if the federal government must internalize the costs of constitutional procedures, it might be less likely to federalize so many crimes in the first place. It is a common criticism that there are too many federal criminal laws that serve no purpose other than to duplicate state laws for political posturing.295 If federal prosecution becomes more costly, it would create incentives for Congress and prosecutors to be more selective in the use of federal resources.296 Enforcing separation of powers would therefore serve federalism values.297 Second, the increased costs are in a very real sense the point.298 Federal criminal enforcement should be expensive enough that the government has to think about where and when to use it. Because if it comes cheaply, it will come too often and the political process will be unable to stop it. One need look no further than the current incarceration rates for evidence of this phenomenon. As plea bargaining has increased, so have the incarceration rates. It seems to be more than a coincidence that this rate correlates with a plea bargaining process that combines the efficiency of the administrative model with none of the checks. While it might seem radical to suggest putting a brake on this dynamic, that is only because plea bargaining has grown so familiar in the absence of an analysis under the separation of powers. But a return to first principles – to the very reasons why we bother separating power in the first place – shows that this familiarity does not make the current system sound. On the contrary, it is a system with a dangerous aggregation of power in the hands of front line federal prosecutors that is vested in them by Congress. If the federal government is sufficiently concerned that the system the Framers established has become too dangerous and too costly, then it could fix it by amending the Constitution to allow plea bargains or bench trials or some other streamlined system. But the Framers had the foresight to set the default rules to protect minority interests that could be subject to abuse by political majorities.299 At the very least, we should have to think long and hard before we abolish that system in the name of convenience.300

## 3 – mass incarceration

#### Plea deals entrap people of color and impoverished people. Undemocratic—penalties of felony conviction such as denial of voting rights prevent crucial voices from democratic participation, which outweighs since it affects people who most need rights now.

Heiner 16. Heiner, Brady. Ph.D, Associate Professor of Philosophy and CSUF “The procedural entrapment of mass incarceration: Prosecution, race, and the unfinished project of American abolition.” Philosophy and Social Criticism, vol. 42, no. 6, pp. 594-631. // ilake mw

In actuality, the plea bargain regime is concretely constituted by structural asymmetries and relations of domination that are masked by the liberal contractual framework. The ‘self-incrimination’ that results from plea bargains is frequently the product of duress and unconscionable information deficits wherein defendants (who are often indigent) are deprived of the opportunity to deliberatively evaluate the ‘exchange’ of risks and penalties into which they enter. For instance, one formerly incarcerated person with whom I spoke at Project Rebound in San Francisco was given 10 minutes in court to decide in isolation whether to accept a plea carrying a 25-year sentence or face a potential life sentence. Such duress is not exceptional. Also, few criminal defendants (or people in general) realize that felony conviction, beyond possible prison time, entails a host of ‘collateral consequences’ or civil penalties that persist even after one has been released from prison. Judges and lawyers are not required to inform criminal defendants of some of the most important rights and entitlements that defendants are forfeiting when they plead guilty to a felony (and that they incur whether or not they spend a day in prison). These civil penalties (technically called ‘civil disabilities’, since courts have generally declined to interpret that such sanctions, for constitutional purposes, are actually ‘punishment’) include deportation, and denial of the rights to Heiner 601 vote, serve on a jury, or be employed in certain occupations, as well as lifetime ineligibility for food stamps, cash assistance programs, public housing and student loans.51 Legislative and judicial representatives readily admit that mandatory minimum sentencing schemes are excessive and thus in violation of the retributive principle of proportional punishment – not by accident, but by design.52 And they readily admit that such utilitarian design is consequentially to ‘induce’ defendants to forfeit their constitutional rights. In the executive branch, prosecutors routinely and openly apply leverage and overlap these excessive sentencing schemes to compel defendants to ‘self-incriminate’ by ‘pleading out’ of the jury trial system to which they are constitutionally entitled. And yet, the Supreme Court masks the coercion that undergirds this system. In the 1978 precedent-setting case that gave ultimate legal sanction to prosecutorial compulsion in plea bargaining, the Court acknowledged that punishing a person accused of a crime for exercising his or her right to trial by jury ‘is a due process violation of the most basic sort, and for an agent of the State to pursue a course of action whose objective is to penalize a person’s reliance on his legal rights is patently unconstitutional. But’, the Court continues, ‘in the ‘‘give-and-take’’ of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution’s offer.’53 This was in the context of a decision ruling it constitutionally legitimate for a prosecutor to threaten someone with life imprisonment (!) for a minor crime (i.e. forging an $88.30 check) in an effort to strong-arm him into forfeiting his right to a jury trial.54 How many reasonable people, when faced with the ‘double bind’ alternative between a potential life sentence and a guaranteed 5-year sentence, would feel meaningfully free to ‘accept or reject the prosecution’s offer’ and risk exercising her or his constitutional right to due process?55 Cognizant of systemic racial disparities, like the steeply higher rate of criminal conviction and disproportionate severity of criminal sentences meted out to subjects of color,56 reasonable people of color are especially unlikely to feel the freedom of choice that would distinguish a relation of equal exchange from a relation of domination. Seen in the light of these unconscionable information deficits and distributional inequities, the coercive and pervasive prosecutorial practice of charge-stacking and overcharging, and the sharply asymmetrical negotiating positions of the state and the accused; furthermore, considering the massive under-representation of people of color among criminal prosecutors (e.g. on average, 86 per cent of judges and prosecutors in federal districts are white),57 and the enormous over-representation of people of color among those incarcerated (i.e. roughly 70 per cent, and nearly 50 per cent Black):58 we ought to hear this multitude of pleas not as a chorus of guilty confessions singing in synch with the expediently fine-tuned orchestra of American criminal justice (playing the melody of the Law and Order theme song); and we surely ought not to view it as an expression of prosecutorial ‘leniency’ or procedural justice. Rather, we ought to conceptualize this throng of pleas, massively and predominantly, as the procedural entrapment of the impoverished and racially oppressed.

## Underview