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Plea Bargaining as Dialogue

Rinat Kitai-Sangero

College of law and Business, rinat@clb.ac.il

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PLEA BARGAINING AS DIALOGUE

*Rinat Kitai-Sangero**

I.	Introduction	63
II.	Sense of Alienation.....	65
III.	Character Evidence.....	68
	A. Character Evidence in Camus' <i>The Stranger</i>	68
	B. Justifications for the Character Evidence Prohibition	71
	1. Character Evidence Possesses Little Probative Value.....	71
	2. Character Evidence is Prejudicial	72
	3. The Ability to Become Acquainted with a Person's Character.....	73
	4. Shifting the Focus and Consuming Time.....	75
	C. Against Anonymity	75
IV.	Dialogue through Plea Bargaining	77
V.	Restorative Justice Through Plea Bargaining.....	81
VI.	Possible Drawbacks	84
	A. Time-Consuming	84
	B. Harming the Defense	85
	C. Faking Good Character and Repentance.....	85
	D. Exerting Pressures on Innocent Defendants	86
VII.	Conclusion	87

I. INTRODUCTION

This Article proposes turning plea bargaining into a dialogical process, which would result in lessening a defendant's sense of alienation during the progress of the criminal justice procedure.

To say that plea bargaining "is an essential component of the administration of justice"¹ is a trite understatement. Plea bargaining

*Professor of Law, College of Law and Business, Ramat Gan, Israel. I thank Boaz Sangero, A.M. Goldstein and Alexandria Ashley Johnson for their helpful comments.

1. Santobello v. New York, 404 U.S. 257, 260 (1971).

affects every aspect of the criminal justice system;² it constitutes to a large extent the course of criminal justice today.³ Most trials are withdrawn, and the vast majority of convictions are attained through plea bargaining.⁴ It is not surprising then, that the United States Supreme Court attaches procedural protections to the plea bargaining process, such as the right to effective assistance of counsel.⁵

Plea bargaining sparks vehement debate among scholars. Some scholars argue, for various reasons, that plea bargaining should be abolished, and that the criminal justice system can fare better without this practice.⁶ Despite this criticism, the criminal justice system's dependence on plea bargaining to resolve cases implies that it will constitute a mainstay of the criminal justice system for the foreseeable future.⁷ Any attempt to reform the system, therefore, should take into account the significance of the practice of plea bargaining.⁸ Accordingly, this Article accepts plea bargaining as a given and seeks to improve its practice. This Article argues that plea bargaining constitutes an

2. Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 932 (1983).

3. Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992) (stating that "it is the criminal justice system."); Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1150 (2001) (stating that "[o]ur world is no longer one of trials, but of guilty pleas.").

4. John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 9 (1978); Markus Dirk Dubber, *American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure*, 49 STAN. L. REV. 547, 551-52 (1997); Bibas, *supra* note 3, at 1100. *See especially* Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) (stating that "ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.").

5. Hill v. Lockhart, 474 U.S. 52, 59 (1985); Missouri, 132 S. Ct. at 1407-08; Lafler v. Cooper, 132 S. Ct. 1376 (2012). *See generally*, Peter A. Joy & Rodney J. Uphoff, *Systemic Barriers to Effective Assistance of Counsel in Plea Bargaining*, 99 IOWA L. REV. 2103 (2014).

6. Alschuler, *supra* note 2, at 931-34; Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 52 (1968) [hereinafter *The Prosecutor's Role*]; Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L. J. 1179, 1180 (1975) [hereinafter *The Defense Attorney's Role*]; *See generally* Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652 (1981); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?* 97 HARV. L. REV. 1037, 1037 (1984); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1979-80 (1992); Jeff Palmer, Note, *Abolishing Plea Bargaining: An End to the Same Old Song and Dance*, 26 AM. J. CRIM. L. 505, 508 (1999); *See generally* Tina Wan, Note, *The Unnecessary Evil of Plea Bargaining: An Unconstitutional Conditions Problem and a Not-So-Least Restrictive Alternative*, 17 S. CAL. REV. L. & SOC. JUST. 33 (2007). *See also* Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 CARDOZO L. REV. 2295, 2299-300 (2006) (suggesting a ban on plea bargaining in weak cases by prohibiting plea bargains that offer excessive concessions to defendants).

7. Dubber, *supra* note 4, at 552; Joseph A. Colquitt, *Ad Hoc Plea Bargaining*, 75 TUL. L. REV. 695, 700, 706 (2001) (stating, "In fact, some would argue that the battle against plea bargaining has been lost.").

8. Dubber, *supra* note 4, at 552.

opportunity to circumvent the restrictions that exist during a trial or outside a trial, such as the inadmissibility of character evidence, and the need for the victim's consent in restorative justice proceedings. This Article proposes to navigate the plea bargaining process in a way that creates a real dialogue with defendants. Such a dialogue can reduce the sense of alienation that defendants feel from their position as a defendant. To accomplish this dialogue, the prosecutor conducting the plea bargaining negotiations must be a different person than the prosecutor in the trial if negotiations break down.

This Article is presented in seven parts which are described as follows: Part II centers on a defendant's sense of alienation within the criminal justice system in general and within the plea bargaining process in particular. Meursault, the protagonist of Albert Camus' famous novella, *The Stranger* (or *The Outsider*),⁹ serves throughout this Article as an example of a defendant who is excluded from his criminal justice process. Part III discusses the reasons for excluding character evidence from a trial. While justifying this rule, this Part defines its costs, using the figure of Meursault to exemplify the disadvantages of entering character evidence into trial. Part IV suggests making room for dialogue within the plea bargaining process in which a prosecutor, who is not in charge of conducting the trial against the defendant, would communicate the attitude of the prosecution regarding the seriousness of the offense, the harm caused to the victim and to society at large, and the prosecution's initial position on the appropriate sentence. The defendant would then have the opportunity to present reasons for committing the offense, any remorse, and any feelings regarding the victim. In addition, the defendant can maintain innocence, assert that the offense committed or the degree of his culpability is less serious than that of the charge, or point to any mitigating circumstances. Part V explores the possibility of partially securing the ends of restorative justice through mutual prosecutor-defendant dialogue. Part VI comes to grips with possible drawbacks of the dialogue suggestion. Finally, Part VII presents the conclusions.

II. SENSE OF ALIENATION

Empirical studies point to satisfaction with treatment as a key factor in evaluating the performance and legitimacy of legal authorities.¹⁰ The more a person experiences the process as fair, the easier it is to accept

9. ALBERT CAMUS, *THE STRANGER* (Stuart Gilbert trans., 1962).

10. TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 96-97, 103-08 (2006).

the legal decision.¹¹ The criminal justice process should not only give defendants fair treatment, but it should also make them feel that they received fair treatment. Treating defendants with respect has a therapeutic effect: defendants are willing more readily to accept responsibility for their behavior and even to modify it.¹² Research shows that meaningful participation by the accused person in the criminal justice process dramatically increases that individual's sense of fair treatment independently of the final outcome of the trial.¹³ The feeling that one's voice was heard—that there was the opportunity to present arguments and be listened to—bears heavily on a defendant's evaluation of the proceedings.¹⁴ There is a connection between a sense of fair treatment, including having one's views considered, and the sense of control on the final decision.¹⁵ In assessing the fairness of the process, accused persons give weight both to respect for their rights and to respect for them as human beings.¹⁶ The message then conveyed is that one is a member of the community.¹⁷

A full criminal trial is certainly an unattractive option in terms of the defendant's degree of participation. Many defendants do not testify at trial, and as a result, their version of events is rarely heard.¹⁸ Furthermore, defendants sometimes appear isolated because the focus of the trial is on their lawyers.¹⁹

From a normative point of view, defendants want to be listened to, and a defendant should participate in the criminal process “as an active subject, not merely as a passive object.”²⁰ Meursault was frustrated because nobody seemed to be interested in his testimony. After his lawyer advised him not to talk at the trial, he felt that “there seemed to be a conspiracy to exclude me from the proceedings; I wasn't to have

11. TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 130 (2002); TOM R. TYLER, WHY PEOPLE COOPERATE: THE ROLE OF SOCIAL MOTIVATIONS 128-131 (2011).

12. Amy D. Ronner, *Dostoyevsky and the Therapeutic Jurisprudence Confession*, 40 J. MARSHALL L. REV. 41, 101 (2006).

13. *Id.* at 49-50.

14. Stefan Trechsel, *Why Must Trials Be Fair?* 31 ISR. L. REV. 94, 119 (1997); Richard B. Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 PA. L. REV. 111, 122-23 (1978); Bruce J. Winick & David B. Wexler, *Drug Treatment Court: Therapeutic Jurisprudence Applied*, 16 TOURO L. REV. 479, 482 (2002).

15. TYLER, *supra* note 10, at 137.

16. *Id.* at 138.

17. *Id.* at 150.

18. Gordon Van Kessel, *European Perspectives on the Accused as a Source of Testimonial Evidence*, 100 W. VA. L. REV. 799, 800 (1998).

19. *Id.* at 839.

20. R.A. DUFF, TRIALS AND PUNISHMENTS 39 (1986).

any say and my fate was to be decided out of hand.”²¹ Occasionally, he wanted to express his frustration: “But, damn it all, who’s on trial in this court, I’d like to know? It’s a serious matter for a man, being accused of murder. And I’ve something really important to tell you.”²²

It is only natural that representation by a lawyer, who speaks on behalf of the defendant, in a legal language that the latter does not understand, would alienate the defendant from the legal process despite the many advantages of such representation.²³ This sense of alienation then makes it difficult for defendants to recognize the justice of their conviction.²⁴

Jonathan Casper succinctly describes the feelings of the defendant following an encounter with the criminal justice system:

When he does get caught, and “they” punish him, he discovers that they really don’t care very much about him. He is a nuisance, and they treat him as though they would some incidental bother distracting them from going about their lives. His interaction with the law—in which he finds himself an object in the hands of those who simply wish to get rid of him—enforces his own image of himself as an outsider and as a “bad person.”²⁵

When plea bargaining is concerned, defendants often feel that the procedure stems from the needs of the criminal justice system rather than their own personal needs.²⁶ Nevertheless, defendants are not of the opinion that plea bargaining is less fair than a trial.²⁷ It may be that this procedure gives more space to the defendant’s interpersonal concerns.²⁸ The experience of loss of control is difficult, and defendants naturally want to decrease this feeling. Defendants want to affect their sentence in some way. Having no patience to wait for the outcome of a trial, they want their counsel to speak to the prosecutor. But what is the counsel supposed to talk about if the defendant is guilty of the charges against him and does not deny culpability? Is the prosecutor interested in listening to the defendant or to this person’s counsel and in promoting honest dialogue before a trial? Should the prosecutor be interested in

21. CAMUS, *supra* note 9, at 124.

22. *Id.*

23. Raymond Koen, *The Antinomies of Restorative Justice*, 2007 ACTA JURIDICA 247, 253 (2007).

24. DUFF, *supra* note 20, at 142.

25. JONATHAN D. CASPER, *AMERICAN CRIMINAL JUSTICE: THE DEFENDANT’S PERSPECTIVE* 165 (1972).

26. *Id.* at 18.

27. TYLER, *supra* note 10, at 154.

28. *Id.* at 155.

doing so?

It is claimed that one of the advantages of plea bargaining is that “of tailoring sentencing to the needs of individual defendants.”²⁹ Moreover, plea bargaining allows defendants to actively take part in the determination of their sentence and, consequently, engenders in them feelings of dignity and a sense of self-worth.³⁰ Casper posits that most guilty defendants normally recognize the wrongness of their behavior.³¹ They are less willing to participate in determining their sentence, but rather want someone to help extricate them from the cycle of crime and to lead normal lives.³² Plea bargaining as dialogue can promote all these goals.

III. CHARACTER EVIDENCE

A. *Character Evidence in Camus’ The Stranger*

Plea bargaining as dialogue enables the defendant to introduce herself to the prosecutor and to sidestep the almost total lack of reference to positive traits of the accused’s personality during the criminal justice process.

Subject to known exceptions, the common law bars the prosecution from admitting character evidence to prove the charges against the defendant.³³ Albert Camus’ novella, *The Stranger*, illustrates the shortcomings of introducing character evidence.

Meursault, the protagonist, was charged with the murder of an Arab (whose name is not mentioned) at the beach. This Arab had previously attacked Meursault’s friend. After seeing a knife in the Arab’s hand and while blinded by the sun, Meursault fired one bullet, which killed the attacker. Then, in the heat of a trance, he fired four more shots into the

29. CASPER, *supra* note 25, at 93.

30. *Id.* at 94 (citing Arnold Enker, *Perspectives on Plea-Bargaining*, President’s Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts, 116 (1967). See also Talia Fisher, *The Boundaries of Plea Bargaining: Negotiating the Standard of Proof*, 97 J. CRIM. L. & CRIMINOLOGY 943, 944-45 (2007) (stating that “in addition to their attributed efficiency, plea bargaining practices can be normatively anchored in the defendant’s autonomy of will, and in his right to effective control of his fate.”).

31. *Id.* at 97, 146.

32. CASPER, *supra* note 25, at 97.

33. *Michelson v. United States*, 335 U.S. 469, 475 (1948); Martin F. Kaplan, *Character Testimony* 150, 150-51, in *THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE* (Saul M. Kassir & Lawrence S. Wrightsman eds., 1985); Kenneth J. Melilli, *The Character Evidence Rule Revisited*, 1998 B.Y.U. L. REV. 1547, 1547. Rule 404(a) states that “evidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion.” Fed. R. Evid. 404(a).

inert body.

During Meursault's trial, his character and his treatment of his mother, especially the fact that he had not cried at his mother's funeral, became the focal point of the proceedings and was taken as an indication of his guilt as a murderer. The presiding judge, while interviewing Meursault privately in his office, admitted that he strove to get to know the character of the accused: "What really interests me is—you!"³⁴ The judge also asked Meursault whether he had loved his mother³⁵ and whether he believed in God.³⁶

In the Assize court where Meursault's trial was held, the presiding judge asked him questions that "might seem foreign to the case, but actually were highly relevant,"³⁷ such as why had he sent his mother to a home for the elderly and whether parting from his mother hard for him.³⁸ The warden of the home for the elderly testified to Meursault's calmness during his mother's funeral, noting that he had refused to look at his mother's corpse and that he did not even remember his mother's age.³⁹ The doorkeeper of the home testified that Meursault had smoked cigarettes and drank coffee during the night he sat near his mother's coffin.⁴⁰ The old man who had been his mother's friend testified that he did not notice Meursault crying; however, he hardly ever noticed him and could not testify whether he had or had not cried.⁴¹ Meursault's defense counsel remarked on this person's testimony: "That is typical of the way this case is being conducted. No attempt is being made to elicit the true facts."⁴² Céleste, the owner of the restaurant where Meursault used to dine, testified that Meursault was "all right."⁴³ The judge, however, did not allow Céleste to dwell on this testimony.⁴⁴ When Marie, Meursault's lover, testified, the prosecutor tried to prove that her relationship with the accused had begun the day after Meursault's mother's funeral.⁴⁵ Upon the conclusion of her testimony, the prosecutor made the following innuendo: "Gentlemen of the jury, I would have you note that on the next day after his mother's funeral that man was visiting

34. CAMUS, *supra* note 9, at 82.

35. *Id.* at 83.

36. *Id.* at 86.

37. *Id.* at 109.

38. *Id.*

39. *Id.* at 111.

40. *Id.* at 112.

41. *Id.* at 114.

42. *Id.*

43. *Id.* at 115.

44. *Id.* at 116.

45. *Id.* at 117.

the swimming pool, starting a liaison with a girl, and going to see a comic film. That is all I wish to say.”⁴⁶

After that remark, nobody seemed to listen to the next witness on behalf of Meursault.⁴⁷ His defense counsel tried in vain to protest the prosecution’s conclusion, asking, “[I]s my client on trial for having buried his mother, or for killing a man?”⁴⁸ The prosecutor responded to this challenge by insisting that there was “a vital link” between the two events and declaring, “I accuse the prisoner of behaving at his mother’s funeral in a way that showed he was already a criminal at heart.”⁴⁹ As Meursault later related, the prosecutor’s summing up to the jury “stressed my heartlessness, my inability to state Mother’s age, my visit to the swimming pool where a Fernandel film was showing, and finally my return with Marie to my rooms.”⁵⁰ The prosecutor had also stressed Meursault’s education and intelligence to prove premeditation, causing Meursault to wonder how a good trait like intelligence militated against a defendant as proof of guilt.⁵¹ The prosecutor further called Meursault “an inhuman monster wholly without a moral sense”⁵² and depicted him as a person with no soul, inhuman, devoid of “those moral qualities which normal men possess,”⁵³ lacking “every decent instinct,” and constituting “a menace to society.”⁵⁴ The prosecutor’s excessive characterization of the accused reached its peak when he compared Meursault’s callousness to patricide, a crime for which another person was supposed to be brought to trial the next day. “This man, who is morally guilty of his mother’s death,” the prosecutor charged, “is no less unfit to have a place in the community than that other man who did to death the father that begat him. And, indeed, the one crime led on to the other; the first of these two criminals, the man in the dock, set a precedent, if I may put it so, and authorized the second crime.”⁵⁵ The comparison, he made it clear, led to but one conclusion: “I am convinced . . . that you will not find I am exaggerating the case against the prisoner when I say that he is also guilty of the murder to be tried

46. *Id.* at 118.

47. *Id.* at 119.

48. *Id.* at 121.

49. *Id.* at 122.

50. *Id.* at 125.

51. *Id.* at 126.

52. *Id.* at 120.

53. *Id.* at 127.

54. *Id.*

55. *Id.* at 128.

tomorrow in this court, and I look to you for a verdict accordingly.”⁵⁶

It was Meursault’s personality that was on trial, not any purported act. As he described the proceedings: “[A]nd certainly in the speeches of my lawyer and the prosecuting counsel a great deal was said about me; more, in fact, about me personally than about my crime.”⁵⁷ The prosecutor claimed that he had succeeded in penetrating Meursault’s soul,⁵⁸ but the defense counsel used the same tactic: “I, too . . . have closely studied this man’s soul; but, unlike my learned friend for the prosecution, I have found something there. Indeed, I may say that I have read the prisoner’s mind like an open book.” He found Meursault to be “an excellent young fellow, a steady, conscientious worker who did his best by his employer . . . was popular with everyone and sympathetic in other’s troubles . . . a dutiful son”⁵⁹ Actually, no one had made any effort to understand Meursault’s inner world view.⁶⁰ His personality, though it had been the focus of the legal proceedings, was simply eradicated.

The Stranger illustrates how relying on character evidence to decide guilt or innocence is problematic. Numerous justifications have been provided for prohibiting character evidence. This Article analyzes their central arguments with the aid of Camus’ *The Stranger*.

B. Justifications for the Character Evidence Prohibition

1. Character Evidence Possesses Little Probative Value

The United States Supreme Court has excluded character evidence “despite its admitted probative value.”⁶¹ Nevertheless, scholars have found the probative value of character evidence to be doubtful.⁶² Unfaithfulness to a spouse, friends, or one’s place of work, for example,

56. *Id.*

57. *Id.* at 123.

58. *Id.* at 127.

59. *Id.* at 131.

60. Robert Batey, *Literature in a Criminal Law Course: Aeschylus, Burgess, Oates, Camus, Poe, and Melville*, 22 LEGAL STUD. FORUM 45, 71 (1998) (regarding the judge).

61. *Michelson v. United States*, 335 U.S. 469, 475 (1948).

62. Miguel Angel Mendez, *California’s New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies*, 31 UCLA L. REV. 1003, 1005 (1984); Edward J. Imwinkelried, *Use of Evidence of an Accused’s Uncharged Misconduct to Prove Mens Rea: The Doctrines That Threaten to Engulf the Character Evidence Prohibition*, 130 MIL. L. REV. 41, 49 (1990); Chris William Sanchirico, *Character Evidence and the Object of Trial*, 101 COLUM. L. REV. 1227, 1234 (2001).

does not bear on criminal activities.⁶³ Although there are situations in which character evidence is relevant,⁶⁴ character evidence is excluded because its slight probative value does not in the majority of cases justify its costs.⁶⁵

2. Character Evidence is Prejudicial

Character evidence is claimed to be prejudicial to the defendant.⁶⁶ The jury may, in overestimating the evidence, assume that if the defendant had once committed a crime, he may repeat criminal acts.⁶⁷ Based to a large extent on the assumption that “once a criminal, always a criminal,”⁶⁸ character evidence may create a presumption of guilt and weaken the presumption of innocence,⁶⁹ and it violates the defendant’s dignity and autonomy to choose to refrain from committing offenses.⁷⁰ Character evidence that is negative may arouse the jury’s hostility toward the defendant and cause them to decide the case on the basis of the defendant’s character regardless of whether he is guilty of the offense with which he is charged.⁷¹ The jury may simply think that the defendant deserves punishment because of his bad character.⁷² If, moreover, the jury is persuaded that the defendant has committed uncharged crimes, they may feel that justice would be done by a

63. Mendez, *supra* note 62, at 1019.

64. Peter Tillers, *What Is Wrong with Character Evidence?* 49 HASTINGS L.J. 781, 785 (1998) (stating that “a considerable amount of character evidence has a substantial amount of probative value.”).

65. James Landon, Note, *Character Evidence: Getting to the Root of the Problem Through Comparison*, 24 AM. J. CRIM. L. 581, 596 (1997).

66. Mendez, *supra* note 62, at 1006, 1044 (stating that “[p]sychological studies confirm the intuitive belief that character evidence can be highly prejudicial.”); Donald M. Houser, *Reconciling Ring v. Arizona with the Current Structure of the Federal Capital Murder Trial: The Case for Trifurcation*, 64 WASH. & LEE L. REV. 349, 369 (2007).

67. Mendez, *supra* note 62, at 1007, 1042; Imwinkelried, *supra* note 62, at 51.

68. Colin Miller, *Impeachable Offenses?: Why Civil Parties in Quasi-Criminal Cases Should Be Treated Like Criminal Defendants Under the Felony Impeachment Rule*, 36 PEPP. L. REV. 997, 1002 (2009).

69. Landon, *supra* note 65, at 592; Josephine Ross, “*He Looks Guilty*”: *Reforming Good Character Evidence to Undercut the Presumption of Guilt*, 65 U. PITT. L. REV. 227, 228 (2004).

70. Tillers, *supra* note 64, at 795 n. 32; ALEX STEIN, FOUNDATIONS OF EVIDENCE LAW 32 (2005).

71. Mendez, *supra* note 62, at 1006; Jeffrey Omar Usman, *Ancient and Modern Character Evidence: How Character Evidence Was Used in Ancient Athenian Trials, Its Uses in the United States, and What This Means for How These Democratic Societies Understand the Role of Jurors*, 33 OKLA. CITY U.L. REV. 1, 30 (2008); Barrett J. Anderson, Note, *Recognizing Character: A New Perspective on Character Evidence*, 121 YALE L.J. 1912, 1929 (2012).

72. *Old Chief v. United States*, 519 U.S. 172, 181 (1997); Mendez, *supra* note 62, at 1007; Landon, *supra* note 65, at 589.

conviction for the current offense regardless of the evidence.⁷³ Character evidence enhances, therefore, the risk of convicting an innocent person who has a criminal history.⁷⁴ Additionally, the very fact that the defendant has been charged may affect the jury's perception of the defendant's personality: it makes it easier for the jury to believe the bad character evidence rather than the good.⁷⁵ In *The Stranger*, the prosecutor succeeded in depicting Meursault as possessing a criminal mind and persuaded the jury that the accused's indifference toward his mother shed light on his motive to kill. Meursault's indifference toward his mother became more meaningful than the crime he had allegedly committed. He was sentenced to death because of what was viewed as his heartlessness toward his mother. His trial was effectually turned into a case of matricide.

3. The Ability to Become Acquainted with a Person's Character

It is very easy to maneuver character evidence. We can say one thing and its opposite about almost every person. For example, we may know a person in one particular aspect of her life as an employee, as an employer, or as a colleague, but chances are that we do not know how she behaves at home. Additionally, humans are complex. A pleasant person can be a swindler. A pleasant man at work can treat his wife and children abusively. People also may or may not act in conformity with their character.⁷⁶

Moreover, it is very doubtful whether we can become acquainted with a person's character. In regard to Meursault, for example, all readers are given the same information about him; however, scholars have different evaluations of his personality.

Thus, Camus himself views his protagonist as a person whose main problem is that he does not play society's game.⁷⁷ Weisberg views Meursault as a "working man, straightforward and mildly intelligent whose main defects are an inability to use words in a socially acceptable way and a concomitant susceptibility to purely naturalistic influences."⁷⁸

73. Imwinkelried, *supra* note 62, at 48.

74. Katherine J. Strandburg, *Deterrence and the Conviction of Innocents*, 35 CONN. L. REV. 1321, 1339 (2003).

75. Victor J. Gold, *Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence*, 58 WASH. L. REV. 497, 525 (1983).

76. STEIN, *supra* note 70, at 183-84.

77. 8 RAYMOND GAY-CROSIER, LITERARY MASTERPIECES: *THE STRANGER* 66 (2002).

78. RICHARD H. WEISBERG, *THE FAILURE OF THE WORD: THE PROTAGONIST AS LAWYER IN MODERN FICTION* 116 (1984).

According to Richard Weisberg, Meursault is a little bit bizarre, non-conformist, but has no moral aberration, and is certainly not a monster.⁷⁹ Nevertheless, “during the legal process, Meursault’s non-malicious and even admirable economy of sentiment is transformed into a serialized portrait of a ‘monstrous’ individual.”⁸⁰ Weisberg concludes that in an American court, where character evidence is inadmissible, “Meursault might have received a relatively light sentence for manslaughter.”⁸¹

As opposed to Weisberg, Judge Richard Posner estimates differently both Meursault’s character and the outcome of the trial had character evidence been excluded. According to Posner, Meursault is devoid of a conscience⁸² and lacks an inner conversation between the different parts of the self.⁸³ As to the outcome of the trial, Posner believes that since Meursault did not feel threatened by his victim and since the four shots he fired into the inert body is evidence of premeditation, Meursault’s conviction of murder would have remained intact even had his character not been placed as an issue at trial.⁸⁴ Posner treats Meursault as a loathsome and “too dangerous to leave at large” offender.⁸⁵ In his view, extolling Meursault is even immoral: “Indeed, could it not be thought shameful of Camus to invite the reader to take Meursault’s part by depicting him as victim rather than killer and by depersonalizing the real victim? Not only shameful, but incoherent?”⁸⁶

One further point is that a person may also not know himself. Being aware of his complexity, he may not always characterize himself as patient or impatient, generous or stingy. He is aware of the fact of being able to behave in one way or another in the same situation.⁸⁷ Expert character testimony, therefore, would be of no avail to shed light on his personality.⁸⁸

79. Richard H. Weisberg, *Comparative Law in Comparative Literature: The Figure of the “Examining Magistrate” in Dostoevski and Camus*, 29 RUTGERS L. REV. 237, 258 (1976). *See also* WEISBERG, *supra* note 78, at 116, 121.

80. WEISBERG, *supra* note 78, at 121.

81. *Id.* at 121-22.

82. RICHARD H. POSNER, *LAW & LITERATURE* 60 (3d ed., 2009).

83. *Id.* at 64.

84. *Id.*

85. *Id.* at 65.

86. *Id.*

87. *See* Kaplan, *supra* note 33, at 158 (stating that “people are inconsistent in their behavior. Traits change over time, and the same traits operate differently in different contexts.”).

88. For a suggestion on the use of expert character testimony in trials, see Andrew E. Taslitz, *Myself Alone: Individualizing Justice Through Psychological Character Evidence*, 52 MD. L. REV. 1, 4 (1991).

4. Shifting the Focus and Consuming Time

Admitting character evidence may turn this kind of evidence into the centerpiece of the trial, thereby diverting attention away from the offense committed to the defendant's general character.⁸⁹ Another disadvantage is that admitting character evidence can be extremely time and resource consuming;⁹⁰ in fact, entering character evidence into the trial may result in the proceedings becoming a never-ending trial. Every person who met the defendant at one time in his life may offer character evidence as Masson, one of the witnesses in *The Stranger*, actually did. The question of whether the defendant committed, say, a robbery is quite limited. But how can we stop testimony about one's character? Wasting the court's time in this way should be prohibited, not least owing to considerations of efficiency.

C. Against Anonymity

Despite the strong arguments to the contrary, exclusion of character evidence is also problematic. Good character evidence humanizes the defendant.⁹¹ A feeling that character does not matter may create alienation and bitterness toward the criminal justice system. Conducting a trial without any reference to the defendant's character may turn the defendant into a number.

Jeffrey Murphy distinguishes between retributive punishment based on the seriousness of the offense and its circumstances and retributive punishment based on the defendant's character.⁹² The latter assumes the possibility of distinguishing between the offense and the offender,⁹³ and that "an error can be forgiven if it is seen as 'out of character.'"⁹⁴ And, indeed, a person's good character, which includes the absence of a criminal history and contribution to society, is taken into account as a mitigating factor in sentencing.⁹⁵ According to the Sentencing

89. Landon, *supra* note 65, at 594-95.

90. Mendez, *supra* note 62, at 1006; Anderson, *supra* note 71, at 1930.

91. Ross, *supra* note 69, at 270.

92. Jeffrie G. Murphy, *Forgiveness and Resentment* 14, 43 in JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* (1988). See also JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 213-14 (6th ed. 2012).

93. Hagit Benbaji & David Heyd, *The Charitable Perspective: Forgiveness and Toleration as Supererogatory*, 31 CAN. J. PHIL. 567, 571-72 (2001).

94. Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 496 (1997).

95. On taking into consideration the lack of a criminal record, see Andrew von Hirsch, *Doing Justice: The Principle of Commensurate Deserts* 243, 244, in *SENTENCING* (Hyman Gross & Andrew von Hirsch eds., 1981). On considering character evidence in sentencing, see Sanchirico,

Guidelines, acceptance of responsibility is also a mitigating factor.⁹⁶ During the sentencing phase, the judge is exposed to the defendant's character through the probation officer's report.⁹⁷ However, reference to the defendant's character should begin at an earlier stage of the criminal justice process.

Meursault's trial stands in stark contrast to the process that characterized the trial of Galin E. Frye of Missouri.⁹⁸ Frye's case illustrates an extreme situation of excluding the defendant from his own legal proceedings. The defendant was charged with driving with a revoked license.⁹⁹ Because Frye had already been convicted of this offense three times in the past, the State of Missouri now accused him of a class D felony, which is punishable by a maximum of four years in prison.¹⁰⁰ The prosecutor sent a letter to Frye's defense counsel offering the choice of one of two suggestions, both of them a take it or leave it deal. One suggestion was that Frye would admit to a felony offense punishable by a maximum of three years imprisonment and serve "shock" time in jail for ten days. The second suggestion was that Frye would admit to a misdemeanor offense, which is punishable by maximum of one-year imprisonment and serve ninety days in jail.¹⁰¹ The prosecutor added that the offers would expire on a certain date. Frye's lawyer did not inform him of the offers, which were subsequently withdrawn for lack of the defendant's consent.¹⁰²

Frye's story shows how a defendant in a criminal trial could be treated as a number rather as a human being. There was only a letter setting out the offer and a deadline. There was not even a short conversation with the defendant or his defense counsel before the "offer" of imprisonment was made. The prosecutor's suggestions were unheeded of the defendant's concerns. Neither Frye's personality nor the impact of imprisonment on him and his family apparently concerned the prosecutor at all. All that mattered was to get rid of the case and to proceed with other files, hopefully in the same way. Undoubtedly, plea bargaining of this type, if it can be called that, does not lessen but, on the contrary, increases the defendant's feelings of bitterness and frustration

supra note 62, at 1268.

96. Tung Yin, *Not a Rotten Carrot: Using Charges Dismissed Pursuant to a Plea Agreement in Sentencing Under the Federal Guidelines*, 83 CAL. L. REV. 419, 434 (1995).

97. CASPER, *supra* note 25, at 86; Yin, *supra* note 96, at 448.

98. *Missouri v. Frye*, 132 S. Ct. 1399 (2012).

99. *Id.* at 1404.

100. *Id.*

101. *Id.*

102. *Id.*

during the criminal justice process. These feelings are probably felt more keenly when an offer is not even communicated to the defendant.

Some obvious facts should be recalled. The power of the litigating parties is not equal.¹⁰³ “Plea bargain is inherently coercive for the accused; his ambit of choice is determined by the state.”¹⁰⁴ The defendant has no choice; she cannot cut herself off from the proceedings, which are being conducted against her, and is forced to be in some contact with law enforcement agencies.¹⁰⁵

Normally, there are no true negotiations between the prosecutor and the defendant, represented by a defense counsel.¹⁰⁶ The prosecutor is the one who dictates the conditions of the agreement.¹⁰⁷ “‘Plea bargaining’ is in reality the prosecutor’s unilateral administrative determination of the level of the defendant’s criminal culpability and the appropriate punishment for him.”¹⁰⁸ Even when negotiations occur, they often bear the character of a poker game.¹⁰⁹

John Griffiths’ family model suggests that one should think of the relationship between state agents and offenders as a relationship between parents and children, and offenders should be treated accordingly with care.¹¹⁰ Parents, of course, are supposed to speak with their children, communicate to them the wrongness of their conduct, listen to their explanations, and respond to them.

IV. DIALOGUE THROUGH PLEA BARGAINING

As we have seen, character evidence may distort justice. A lack of character evidence, however, strips the defendant of his unique human characteristics. Plea bargaining as dialogue may sidestep the problem of character evidence and suggest a middle path between exploring the defendant’s soul, as illustrated by *The Stranger*, and addressing the defendant as a pure number devoid of personality, as reflected in the

103. Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121, 1134 (1998).

104. Joseph Goldstein, *For Harold Lasswell: Some Reflections on Human Dignity, Entrapment, Informed Consent, and the Plea Bargain*, 84 YALE L.J. 683, 699 (1975).

105. Goldstein, *supra* note 104, at 699; Julian A. Cook, III, *All Aboard! The Supreme Court, Guilty Pleas, and the Railroad of Criminal Defendants*, 75 U. COLO. L. REV. 863, 908 (2004).

106. Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 45 (1983).

107. *Id.* at 38.

108. *Id.*

109. *See, e.g., The Prosecutor’s Role*, *supra* note 6, at 68.

110. John Griffiths, *Ideology in Criminal Procedure or A Third “Model” of the Criminal Process*, 79 YALE L.J. 359, 379 (1970).

kind of plea bargaining offered to Galin E. Frye of Missouri. This intermediate approach is manifested in the conducting of true negotiations between prosecutor and defendant in which the defendant and the defense counsel are given the opportunity to present the defendant's positive traits.

A defendant's ability to take an active part in the proceedings against him maintains the defendant's dignity as a human being.¹¹¹ Scholars view plea bargaining as granting defendants an opportunity to participate in determining their fate. This description of empowerment, however, does not accord with reality, in which "plea bargains often result from a quick phone call or hallway conversation between prosecutor and defense counsel."¹¹² It would be very odd to contend that Frye was empowered as a result of his plea bargaining experience. It is more accurate to say that he experienced a sense of disempowerment. Such an experience also undermines the goals of therapeutic jurisprudence.

Therapeutic jurisprudence strives to use law "to function as a kind of therapist or therapeutic agent."¹¹³ It uses social sciences to examine how law can promote the physical and psychological well-being of an individual.¹¹⁴ However, if the defendant is not involved in the plea bargaining process, no therapeutic effect can be achieved.¹¹⁵

Disparity of power between the prosecutor and the accused is inherent in the criminal process. It is not only the resources available to law enforcement authorities and their ability to gather evidence that lead to the disparity. Even when the defendant is a wealthy person, the imbalance is created from the asymmetry in trial results to the parties. The defendant is the one who is exposed to the dangers of conviction and the deprivation of liberty, a situation that makes him most vulnerable.¹¹⁶ Therefore, no kind of negotiations would cancel the disparity in bargaining power between the prosecutor and the defendant. The defendant, as the one whose life will be affected directly from the

111. STEFAN TRECHSEL, HUMAN RIGHTS IN CRIMINAL PROCEEDINGS 247 (2005) (regarding the right to counsel).

112. John G. Douglass, *Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining*, 50 EMORY L.J. 437, 484 (2001).

113. David B. Wexler, *An Orientation to Therapeutic Jurisprudence*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 259, 259 (1994).

114. Trent Oram & Kara Gleckler, *An Analysis of the Constitutional Issues Implicated in Drug Courts*, 42 IDAHO L. REV. 471, 474 (2006); David B. Wexler, *Two Decades of Therapeutic Jurisprudence*, 24 TOURO L. REV. 17, 24 (2009).

115. Wexler, *supra* note 113, at 261.

116. Bruce A. Green, *Why Should Prosecutors Seek Justice?* 26 FORDHAM URB. L.J. 607, 626 (1999).

outcome of the trial, has simply much more to lose.

Still, negotiations that enable a defendant to express his opinions and wishes places the defendant in a higher status compared to the accused's status during pre-trial investigation and the trial itself.¹¹⁷ Israeli Supreme Court Justice Eliyahu Matza has stated that the adversarial criminal justice system dictates not only a conflict between the rival parties but also a dialogue between them, which could be implemented within the framework of plea bargaining.¹¹⁸ Indeed, the very dialogue between defendant and prosecution can lead to reducing the former's sense of alienation, felt throughout the criminal justice process.

Dialogue will enable the defendant to freely give his version of the events. He would then obtain the opportunity to play a meaningful role during the legal process even if he wanted to waive trial by issuing a guilty plea.

The United States Supreme Court has attached great importance to the role that counsel should play in providing mental support for the defendant. The presence and advice of counsel are supposed to dissipate the coercive impact of any offer of leniency in return for the defendant's guilty plea.¹¹⁹ The Court, in fact, has held that defendants are entitled to the Sixth Amendment right to effective assistance of counsel during plea negotiations.¹²⁰

Since the defense counsel's main work is conducted with the prosecutor to obtain a plea bargain, the former should be an effective negotiator in order to achieve optimal results for the client.¹²¹ During the negotiations, defense counsel can show to the prosecutor the defendant's good traits so that the accused will be able to feel that he is being addressed as a human being, not as a monster.

Obviously, a serious gap exists between the ideal role of defense counsel and the way this function is implemented in practice.¹²² Not only prosecutors but many defense counsel, as well, assume the defendant's

117. 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, 37 (2004).

118. Crim. App. 4722/92 Markovitz v. State of Israel, 47(2) P.D. 45, 57 (1993).

119. Brady v. United States, 397 U.S. 742, 754 (1970).

120. Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010).

121. Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLINICAL L. REV. 73, 74 (1995).

122. *The Defense Attorney's Role*, supra note 6, at 1180; Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 318 (2011) (regarding misdemeanor defense counsel).

guilt to be undisputed.¹²³ Defense counsel may even have incentives to encourage a plea of guilty from the client.¹²⁴ In addition, defense counsel are generally overloaded and may have little or no time to spend trying to understand the defendant's motives or bothering to present the defendant's character and background in the most beneficial way.¹²⁵ There are defense counsel who implicitly convey the message that they are not concerned about their client's guilt or innocence.¹²⁶ No theory can make a lawyer who does not take into account the interests of the client be concerned about their client's guilt or innocence.

Direct dialogue between prosecutor and defendant will enable the defendant to receive direct information from the prosecutor and help sidestep any such problems in representation. The defendant, especially one who does not enjoy zealous representation, could take the opportunity to be introduced directly to the prosecutor without any barriers. Speaking up does not require familiarity with substantive or procedural criminal law. Almost everyone can just relate her side of the case.

That said, most defense counsel do provide competent representation. Generally, the skills of public defenders do not fall short of those of prosecutors.¹²⁷ Moreover, many defense counsel do evince concern about their clients' welfare and perceive their own role also as a kind of social worker.¹²⁸ They understand that the criminal justice process may be a traumatic experience for their clients and are inclined to soften it for them.¹²⁹

Competent defense counsel should present the defendant's personal story to the prosecutor. Having a good character and leading an honest life may—not must, of course—prove that the defendant was unlikely to

123. Gifford, *supra* note 106, at 53. See also BARRY SCHECK, PETER NEUFELD & JIM DWYER, ACTUAL INNOCENCE 190 (2000) (regarding disbelief of many defense counsel in their client's innocence).

124. On these incentives, see Richard Birke, *Reconciling Loss Aversion and Guilty Pleas*, 1999 UTAH L. REV. 205, 238-41; Palmer, *supra* note 6, at 520-21; F. Andrew Hessick III & Reshma M. Saujani, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. PUB. L. 189, 219 (2002); Cook, *supra* note 105, at 901.

125. On overloaded defense counsel who make no effective representation or have only little time for their clients, see CASPER, *supra* note 25, at 106; Joy & Uphoff, *supra* note 5, at 2113-14.

126. *The Defense Attorney's Role*, *supra* note 6 at n. 280.

127. Hon J. Harvie Wilkinson III, *In Defense of American Criminal Justice*, 67 VAND. L. REV. 1099, 1127-28 (2014).

128. Margareth Etienne, *The Declining Utility of the Right to Counsel in Federal Criminal Courts: An Empirical Study on the Diminished Role of Defense Attorney Advocacy under the Sentencing Guidelines*, 92 CAL. L. REV. 425, 483-84 (2004).

129. *Id.* at 483-84.

have engaged in a heinous crime.¹³⁰ Even when not a case of innocence, if the defendant's attorney had functioned effectively as a negotiator and presented to the prosecutor data such as the impact of imprisonment on the defendant and the well-being of his family, there is more of a chance of receiving better results for the defendant.¹³¹

Because plea bargaining is the most common means of satisfying criminal justice, the traditional functions of a trial should be moved into the plea bargaining regime. Indeed, scholars have expressed uneasiness at the current format of negotiating a plea bargain, which offers defendants leniency only in exchange for a guilty plea, impliedly waiving the right to contest the charges and the privilege against self-incrimination. It has been proposed to expand the format of negotiations to include the conduct of the trial so that, for example, the defendant would agree to waive some of the procedural rights granted at trial instead of pleading guilty in exchange for concessions from the prosecutor.¹³²

Bibas suggests the interesting possibility of allowing crime victims to express their feelings and to forgive the offender in appropriate cases through the plea-bargaining process. Additionally, the victim and the defendant should have the opportunity to meet and talk during these proceedings, at which time defendants should have the opportunity to manifest remorse and offer restitution to victims.¹³³ This suggestion leads to the next advantage of plea bargaining as dialogue: securing some of the aims of restorative justice without depending on the victim's attitude toward the defendant.

V. RESTORATIVE JUSTICE THROUGH PLEA BARGAINING

Restorative justice seeks "better ways of doing justice."¹³⁴ Aiming at reconciliation between the parties and repair of the harm caused, it

130. See *Michelson v. United States*, 335 U.S. 469, 476 (1948) (stating that the defendant "may introduce affirmative testimony that the general estimate of his character is so favorable that the jury may infer that he would not be likely to commit the offense charged. This privilege is sometimes valuable to a defendant for this Court has held that such testimony alone, in some circumstances, may be enough to raise a reasonable doubt of guilt.").

131. Gifford, *supra* note 106, at 67.

132. Oren Gazal-Ayal & Avishalom Tor, *The Innocence Effect*, 62 DUKE L.J. 339, 396 (2012); Gregory M. Gilchrist, *Counsel's Role in Bargaining for Trials*, 99 IOWA L. REV. 1979, 1981-82 (2014); Fisher, *supra* note 30, at 945 (suggesting waiving the right to the criminal standard of proof).

133. Bibas, *supra* note 3, at 1184-85.

134. Jennifer J. Llewellyn et al., *Imagining Success for a Restorative Approach to Justice: Implications for Measurement and Evaluation*, 26 DALHOUSIE L.J. 281, 284 (2013).

focuses upon relationships among the victim, the offender, and the community.¹³⁵

Restorative justice allows the defendant to understand the human side of the harm that was caused.¹³⁶ People's attitudes following the offense reflect the importance of the social norm violated.¹³⁷

Undoubtedly, an apology that is attendant upon repentance may have a curative effect on the victim.¹³⁸ Many victims prefer forgiveness over retribution.¹³⁹ Plea bargaining negotiations may provide an excellent opportunity for a remedial offender-victim encounter.¹⁴⁰ The prosecutor could simply enter the victim into the dialogue with the defendant in appropriate cases and at the appropriate time.

The process of restorative justice normally depends on the consent of the victim.¹⁴¹ This is a serious flaw. It is claimed that taking the victim's position toward the defendant into account has nothing to do with the search for justice. The fate of the defendant does not have to be dependent on the position of one individual or another but on the degree of the blameworthiness of the accused.¹⁴²

Nor should the victim determine the proper punishment.¹⁴³ Lacking objectivity, the victim's response is subjective and depends on his personal characteristics, as well as the point in time in his life.¹⁴⁴ As opposed to the prosecutor, the victim does not have to take into account the public interest or the principle of proportionality in inflicting the proper punishment. Hence, taking the victim's view into account might violate the equality requirement, which necessitates that two offenders who committed the same offense with the same degree of culpability

135. *Id.* at 301.

136. Paul H. Robinson, *The Virtues of Restorative Processes, The Vices of "Restorative Justice"*, 2003 UTAH L. REV. 375, 375 (2003).

137. *Id.*

138. Margareth Etienne & Jennifer K. Robbennolt, *Bargaining in the Shadow of the Law—the Relationship Between Plea Bargaining and Criminal Code Structure: Victims, Apology, and Restorative Justice in Criminal Procedure: Apologies and Plea Bargaining*, 91 MARQ. L. REV. 295, 295-97 (2007).

139. Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L. J. 85, 137 (2004).

140. Etienne & Robbennolt, *supra* note 138, at 298.

141. Hadar Dancig-Rosenberg & Tali Gal, *Restorative Criminal Justice*, 34 CARDOZO L. REV. 2313, 2343 (2013).

142. Robinson, *supra* note 136, at 381.

143. Michael Moore, *Victims and Retribution: A Reply to Professor Fletcher*, 3 BUFF. CRIM. L. REV. 65, 67 (1999).

144. John Braithwaite, *A Future Where Punishment Is Marginalized: Realistic or Utopian?* 46 UCLA L. REV. 1727, 1744 (1999); Moore, *supra* note 143, at 75-76.

deserve an identical punishment.¹⁴⁵ Additionally, repentance (of course, by a guilty offender) should be encouraged, given the importance of sincere repentance both to the offender and to society at large.¹⁴⁶ There are victims, however, who are not satisfied by repentance; and occasionally for very justifiable reasons, they are not interested in any contact with the offender. The thought that a reluctant victim has a veto over the fate of the offender, especially if the latter was trying to partially repair the harm through repentance and making amends, may discourage the offender from any attempt at rehabilitation.¹⁴⁷

Dialogue between the prosecutor, who represents society, and the defendant can take place even without the involvement of the victim. Although not every victim—nor, for that matter, every offender—is eligible for restorative justice processes,¹⁴⁸ dialogue between prosecutor and defendant can almost always take place. Victimless offenses, such as importing drugs or tax evasion, are an example. Some of the goals of restorative justice may still be secured without a victim's participation in the process. When the prosecutor communicates to the defendant how society perceives the offense and the harm caused to the victim, the defendant can respond to the criticism. This dialogue may enable the defendant to internalize the prosecutor's perception, accepting responsibility for the misdeed and understanding its wrongness. Direct dialogue with the prosecutor, then, may inspire repentance and modification of the defendant's conduct.

Of course, face-to-face encounters in which the victim relates his feelings about the offense can perhaps more deeply permeate the heart of the defendant. However, the latter can also absorb the harm caused through a third party who reflects the impact of the offense on the victim and on other parties affected by the offense and tries to convey the perspective of society and the victim alike.

Obviously, the plea negotiation process between the prosecutor and the defendant does not rule out a restorative justice process with the victim's participation in appropriate cases.

Normally, it is easier for defendants to communicate their views to a prosecutor outside of the trial process. In conversing with the prosecutor, the defendant does not have to worry about what is said; his

145. Moore, *supra* note 143, at 77.

146. Rinat Kitai-Sangero & Itay Lipschits, *The Place of Repentance in Retributive Sentencing*, 7 *IJPS* 107, 108-09 (2011).

147. *Id.* at 120-21.

148. Cian Logan, *Restorative Justice: Encouraging More Meaningful Engagement with the Criminal Justice System*, 13 *U. C. DUBLIN L. REV.* 39, 40 (2013).

words will not militate against him because negotiations with the prosecutor to establish a plea bargain are confidential. Defendants can simply tell their own story from their own perspective. Even a person with an extensive criminal record has a story; e.g., the circumstances that led up to the offense. By listening, the prosecutor accords the defendant respect. In this way, a dialogue with the prosecutor may empower the defendant and reduce any sense of loss of control that is felt. Being a partner in the dialogue imparts a sense of choice rather than a feeling of coercion.

VI. POSSIBLE DRAWBACKS

The suggestion to establish a true dialogue between the defendant and a representative of the prosecution's office carries some drawbacks. The following subsections will come to grips with them.

A. *Time-Consuming*

The main goal of plea bargaining is to clear dockets. Caseload pressures render the suggestion to make a genuine dialogue with defendants unattractive to prosecutors and defense counsel alike. Overburdened prosecutors and defense counsel have no time for true negotiations.¹⁴⁹ They want to move quickly to the next case. Obviously, the prosecution may see no reason to devote resources to this purpose. Moreover, it can be argued that the willingness of prosecutors to offer plea bargains will be reduced in view of the effort required to conduct a time-consuming dialogue. Many defense counsel, for their part, tend to accept the prosecutor's evaluations as to the appropriate punishment and are not accustomed to, and perhaps are not interested in, negotiating with the prosecutor adversarially.¹⁵⁰ Efficiency is an essential component of the criminal justice system.¹⁵¹ There is not sufficient time to treat every defendant as unique.¹⁵² As Markus Dubber observes, "[O]ffenders and victims alike are irrelevant nuisances, grains of sand in the great machine of state risk management."¹⁵³

However, the time consumed by negotiations to obtain a guilty plea

149. Cf. Gilchrist, *supra* note 132, at 1997.

150. Gifford, *supra* note 106, at 51.

151. Mar Jimeno-Bulnes, *American Criminal Procedure in a European Context*, 21 CARDOZO J. INT'L & COMP. L. 409, 458 (2013).

152. Taslitz, *supra* note 88, at 4, 18.

153. Markus Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 849 (2001).

would be much shorter than the time consumed by cases that go to trial. Communicating a defendant's character and personal circumstances to the prosecutor and communicating the prosecutor's message regarding the offense to the defendant would involve a reasonable expenditure of time. Moreover, it involves neither witness inconvenience nor court time.

B. Harming the Defense

It may be argued that the conduct of a true dialogue within the plea bargaining process would be harmful to the defense in the event that negotiations fail. In this case, the defendant's attempt to claim innocence or to raise arguments in her defense may actually be helpful to the prosecution. Giving the prosecution advance knowledge of the central arguments of the defense may buttress weaknesses in the prosecution's case,¹⁵⁴ and better prepare the prosecutor for trial. Additionally, prior personal acquaintance with the defendant may provide the prosecutor with an advantage in conducting cross-examination.

To ensure the exchange of information without fear of devastating consequences, the plea bargaining negotiations with the defendant ought to be conducted by a different prosecutor from the one who would conduct the trial and should be confidential. Separating the prosecutor who conducts the trial from the prosecutor who conducts the negotiations will also create internal supervision within the prosecution on the conduct and the content of the plea bargain. Concentrating too much power in the hands of one prosecutor is generally not a desirable situation.¹⁵⁵

C. Faking Good Character and Repentance

Scholars argue that one of the justifications for plea bargaining is that it allows prosecutors to take human considerations into account¹⁵⁶ and, hence, to bypass the rigidity of the Sentencing Guidelines.¹⁵⁷

It may be argued, however, that laying stress on a dialogue that provides the defendant with the opportunity to present his good qualities

154. Rebecca Hollander-Blumoff, Note, *Getting to "Guilty": Plea Bargaining as Negotiation*, 2 HARV. NEGOTIATION L. REV. 115, 140 (1997).

155. See generally James Dowden, *United States v. Singleton: A Warning Shot Heard Round the Circuits?* 40 B.C. L. REV. 897, 911 (1999); Langbein, *supra* note 4, at 18.

156. Zacharias, *supra* note 103, at 1136, 1161.

157. On this rigidity, see Stephen Schulhofer & Ilene Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post-Mistretta Period*, 91 NW. U. L. REV. 1284, 1304-08 (1997).

may benefit manipulative defendants who succeed in deceiving with their charm.

The defendant can simply fake repentance in order to gain a milder punishment.¹⁵⁸ It is difficult to identify repentance or to evaluate its sincerity.¹⁵⁹ After all, “if a jurisdiction reduces punishment for convicts who express contrition, it invites a parade of purely instrumental apologies into its sentencing procedures and risks rewarding the best actors rather than the most transformed.”¹⁶⁰ At any rate, it is difficult to assess a defendant’s traits in the short span of time available to become familiar with him.¹⁶¹

Additionally, most of an offender’s personal characteristics are not relevant to sentencing.¹⁶² However, defendants might prompt sympathy for reasons unrelated to the degree of guilt or degree of dangerousness. Sympathy and lack of sympathy for the defendant can be influenced by irrelevant grounds, such as race, gender, religion, and the social class to which the defendant belongs.¹⁶³ The danger that the defendant would fake remorse or be judged by irrelevant criteria is not unique to plea bargaining negotiations; it also exists at a trial.¹⁶⁴ Therefore, this argument fails to undermine the process of a true dialogue with the defendant. Moreover, if expressed repentance is revealed to be insincere, it can hurt the victim and enhance the injury caused by this person in the wake of the offense.¹⁶⁵ Such insincerity would not personally hurt—certainly not to the same degree—the prosecutor who conducts the negotiations with the defendant.

D. Exerting Pressures on Innocent Defendants

Scholars have discussed the danger of innocent defendants making

158. Cheryl G. Bader, “*Forgive Me Victim for I Have Sinned*”: *Why Repentance and the Offender Justice System Do Not Mix—A Lesson from Jewish Law*, 31 *FORDHAM URB. L.J.* 69, 94 (2003).

159. Jeffrie G. Murphy, *Well Excuse Me!—Remorse, Apology, and Criminal Sentence*, 38 *ARIZ. ST. L.J.* 371, 379 (2006).

160. Nick Smith, *Just Apologies: An Overview of the Philosophical Issues*, 13 *PEPP. DISP. RESOL. L.J.* 35 68 (2013).

161. Michael M. O’Hear, *Remorse, Cooperation, and “Acceptance of Responsibility”*: The Structure, Implementation, and Reform of Section 3e1.1 of the Federal Sentencing Guidelines, 91 *NW. U. L. REV.* 1507, 1554-55 (1997).

162. Schulhofer & Nagel, *supra* note 157, at 1305.

163. *Id.* at 1307 (relating to Sentencing pre-Guidelines).

164. Dancig-Rosenberg & Gal, *supra* note 141, at 2343; Kitai-Sangero & Lipschits, *supra* note 146, at 121-28.

165. Lode Walgrave, *Investigating the Potentials of Restorative Justice Practice*, 36 *WASH. U.J.L. & POL’Y* 91, 126 (2011).

false guilty pleas as a result of plea bargaining.¹⁶⁶ Such defendants have lost any confidence in their ability to be acquitted and so welcome any suggestion of leniency.¹⁶⁷ Indeed, the leniency that the prosecution normally offers makes a guilty plea an attractive option for risk-averse defendants. And if, as has happened, the proposed plea bargain is very lenient, the defendant may feel unable to take the risk of going to trial.¹⁶⁸ Innocent defendants may face an even greater temptation to admit guilt than would guilty defendants because in light of the weakness of the incriminating evidence, the prosecutor offers them an attractive plea bargain that seems magnanimous and too good to turn down.¹⁶⁹ Thus, increasing the attractiveness of plea bargains may have the adverse result of pressuring innocent defendants to participate in plea bargaining proceedings, thereby raising the risk of false convictions of innocent defendants.

This concern has merit. However, there is hope that a true dialogue between the defendant and the prosecutor will convince the latter of the defendant's innocence and bring about a dismissal of the indictment.

It should be recalled that defendants need to admit guilt in order to participate in restorative justice processes.¹⁷⁰ In those proceedings, too, there is the fear of a false confession by defendants.¹⁷¹ In plea bargaining negotiations as dialogue, the admission of guilt does not constitute a precondition for participation.

VII. CONCLUSION

Filing charges against a person alienates that individual from society. It makes the individual feel like a child, standing helpless against the greater power of adults. Throughout this Article, the protagonist of Camus' *The Stranger*, Meursault, who is excluded from

166. Gazal-Ayal, *supra* note 6, at 2298; Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1239 (2008).

167. Andrew D. Leipold, *How Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1154 (2005).

168. CASPER, *supra* note 25, at 74; Leipold, *supra* note 167, at 1154.

169. *The Prosecutor's Role*, *supra* note 6, at 61; Gifford, *supra* note 106, at 60; Phil Fennell et al., Book Review, *Craig M. Bradley, The Convergence of the Continental and the Common Law Model of Criminal Procedure*, 7 CRIM. L.F. 471, 474 (1996); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1535 (1981); Langer, *supra* note 117, at n. 240; Gazal-Ayal, *supra* note 6, at 2298-99; Samuel R. Gross, *Pretrial Incentives, Post-Conviction Review, and Sorting Criminal Prosecutions by Guilt or Innocence*, 56 N.Y.L. SCH. L. REV. 1009, 1015-16 (2011-12).

170. Dancig-Rosenberg & Gal, *supra* note 141, at 2320.

171. *Id.* at 2322-23.

both trial and life,¹⁷² has served as an example of this feeling of alienation. To help the defendant overcome this feeling, an accused individual should be treated respectfully, including the ability to reference made to his unique positive characteristics. Most importantly, the defendant should be allowed to take an active part in the criminal proceedings being conducted against him.¹⁷³

In *The Stranger*, everyone has something to say about the defendant except for the defendant himself.¹⁷⁴ When he does speak, his words are seen as irrelevant. No one is listening or trying to understand what he is saying. His explanations are ignored or ridiculed. When Meursault says he killed because of the sun, he is mocked. The defense attorney quickly silences him and forces him to stay passive. No one attempts to find out what he meant. In fact, he does not participate in the trial. The lawyer speaks on his behalf.

According to the adage, if you cannot beat them, join them. Given the ubiquity of plea bargaining and the fact that eradication of this process is not feasible in the foreseeable future, we should strive to derive the utmost benefit from this legal vehicle. Defendants' perception of fairness is crucial to the legitimacy of the legal decision in their eyes. If defendants experience the procedure of plea bargaining as unfair, the legitimacy of legal authorities may be decreased and the defendants' readiness to obey the law attenuated.¹⁷⁵ People need to feel that what they say could have an influence on the outcome of the trial.¹⁷⁶ Plea bargaining can and should be a device for empowerment. Case load pressure notwithstanding, defendants should be key players in the criminal justice proceedings to which they are subjected. Dispute settlement is an important component of doing justice. To this end, plea bargaining offers a unique opportunity to enable defendants participating in the process to bypass the prohibition of introducing character evidence, and to circumvent the need for the victim's consent in restorative justice. Only a dialogic process may be meaningful for defendants if we want them to learn a lesson from their trial and to modify their conduct. Such a dialogue helps decrease the feeling of alienation that defendants normally experience, since it reflects a respect for human dignity. It is worth the price of rendering plea bargaining a bit

172. David Carroll, *Guilt by "Race": Injustice in Camus's The Stranger*, 26 CARDOZO L. REV. 2331, 2340 (2005).

173. Ronner, *supra* note 12, at 50.

174. Carroll, *supra* note 172, at 2340.

175. TYLER, *supra* note 10, at 110.

176. *Id.* at 127.

2016]

PLEA BARGAINING AS DIALOGUE

89

more complex.

The ubiquity and plasticity of plea bargaining gives us the opportunity to shape new rules for the criminal justice process. With the new rules, Meursault's urgent appeal "[i]t's a serious matter for a man, being accused of murder. And I've something really important to tell you,"¹⁷⁷ should receive a significant response during the plea bargaining process. Plea bargaining proceedings should heighten defendants' participation in the process and convey to them an educational message. Waiving one's right to a day in court does not imply waiving being addressed as a human being rather than as a number.

177. CAMUS, *supra* note 9, at 124.