

Counsel’s Role in Bargaining for Trials

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ABSTRACT: This Essay examines how counsel might use plea bargaining to mitigate the harm of plea bargaining: rather than bargaining only for pleas, counsel should bargain for trials.

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INTRODUCTION

Plea bargaining defines our criminal-justice system and counsel's role in most criminal cases. Forty-nine years after *Gideon*,¹ the Supreme Court ruled that a defendant's right to "effective counsel during plea negotiations," can be violated where counsel's deficient performance costs the defendant a favorable plea deal.² In reaching this conclusion, the Court quoted Professors Scott and Stuntz approvingly: "[Plea bargaining] is not some adjunct to the criminal justice system; it *is* the criminal justice system."³ The *Frye* and *Lafler* decisions implicitly reaffirm two principles: first, effective counsel during bargaining is necessary for a fair process; second, plea bargaining is a significant part of the actual process.⁴

Guilty pleas resolve almost all criminal cases. In 2012, in federal court, ninety-seven percent of all criminal convictions resulted from guilty pleas.⁵ The numbers are comparable in state courts.⁶ In almost all cases, those guilty pleas are secured through bargaining.

The fiftieth anniversary of *Gideon*, this Symposium, and the *Frye* and *Lafler* decisions offer an auspicious moment to consider the role of counsel in plea bargaining, and how counsel might work to limit plea bargaining.

Professor Stuntz identified "*Gideon*'s requirement that indigent defendants receive counsel" as one of a very few doctrines in criminal procedure that enjoys near universal support.⁷ The other doctrine he identified as enjoying near universal support is "that the ratio of guilty acquittals to innocent convictions should be high."⁸ Plea bargaining undermines the latter of these doctrines because it has a tendency to shift the balance between wrongful acquittals and wrongful convictions.⁹ But the

1. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

2. *Missouri v. Frye*, 132 S. Ct. 1399, 1407–08 (2012).

3. *Id.* at 1407 (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)). It is worth considering the massive shift over five decades that led to this recognition by the Court. As recently as 1965, the Supreme Court wrote: "Trial by jury has been established by the Constitution as the 'normal and . . . preferable mode of disposing of issues of fact in criminal cases.'" *Singer v. United States*, 380 U.S. 24, 35 (1965) (alteration in original) (quoting *Patton v. United States*, 281 U.S. 276, 312 (1930)).

4. See *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012); *Frye*, 132 S. Ct. at 1407; see also *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010); *Hill v. Lockhart*, 474 U.S. 52, 58 (1985).

5. See U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT, FISCAL YEAR 2012, at 8, available at http://www.justice.gov/usao/reading_room/reports/asr2012/12statrpt.pdf. ("During Fiscal Year 2012, a total of 78,647, or 97 percent, of all convicted defendants pled guilty prior to or during trial.")

6. See *Lafler*, 132 S. Ct. at 1388 ("[N]inety-four percent of state convictions are the result of guilty pleas.")

7. See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 13 (1997).

8. *Id.*

9. See *Lafler*, 132 S. Ct. at 1397 (Scalia, J., dissenting) (plea bargaining "presents grave risks of prosecutorial overcharging that effectively compels an innocent defendant to avoid

first of these doctrines—*Gideon's* promise of counsel—might help restore the balance. Specifically, counsel could decrease the dominance of plea bargaining by *bargaining differently*—counsel could bargain for trials.

This is, admittedly, a counterintuitive proposal. Defendants are entitled to trials, so what would it mean to bargain for something to which one is entitled? It means that defendants could bargain away *limited* trial rights in exchange for leniency. By this mechanism, defendants might preserve adjudication on the merits while still securing some of the leniency normally reserved for those defendants who plead guilty. In a system that only provides trials to a tiny fraction of all defendants, the practice of securing leniency in exchange for limiting the trial rights that are so rarely exercised might fairly be understood as bargaining for trials.

This Essay is part of a larger project exploring the possibility of revitalizing criminal trials through trial bargaining. There are numerous suggestions about how to fix plea bargaining, which one could roughly group into three camps. First, there are proposals to ban or limit the practice of plea bargaining.¹⁰ Second, there are proposals to regulate plea bargaining.¹¹ Finally, there are proposals to import some aspects of the trial into plea bargaining.¹² To the extent trial bargaining fits into the existing

massive risk by pleading guilty to a lesser offense”); Russell D. Covey, *Signaling and Plea Bargaining's Innocence Problem*, 66 WASH. & LEE L. REV. 73, 80 (2009) (describing plea-bargaining's “innocence problem” as referring “not merely to the fact that innocent people plead guilty, but that the economics of plea bargaining drives them to do so”).

10. See Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 935–36 (1983) (exploring “a range of reforms that might be implemented within the American criminal-justice system to end [the] unjust practice [of plea bargaining]”); Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 CARDOZO L. REV. 2295, 2313 (2006) (proposing a partial ban on plea bargaining by limiting “sentence concessions to a certain percentage of the post-trial sentence”).

11. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2528 (2004) (proposing changes to “rules governing defense counsel, pretrial detention, sentencing guidelines, discovery, and plea colloquies . . . to . . . compensate for some of the problems [of plea bargaining]”); Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1151–59 (2011) (proposing regulations based on a consumer-protection model to ameliorate the problems of plea bargaining); Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1242 (2008) (“No defendant could receive a punishment after trial that exceeded the sentence he could have had as a result of a plea offer by more than a modest, predetermined amount.”); Gregory M. Gilchrist, *Plea Bargains, Convictions and Legitimacy*, 48 AM. CRIM. L. REV. 143, 148, (2011) (proposing a formal differentiation between guilty plea convictions and trial convictions and a bar on leniency conditioned on an acknowledgement of factual guilt).

12. Professor Appleman has proposed introducing a plea jury to listen to a defendant's allocution before accepting a guilty plea:

Instead of pleading guilty and explaining his offenses solely to the judge, the defendant would direct his plea and allocution to the plea jury. The jury would then determine whether the facts admitted by the defendant match the original charges; whether the plea was knowing, willing, and voluntary; and whether the proffered sentence was appropriate. Although the court would still need to first

literature, it is most akin to these last proposals. Trial bargaining seeks to revitalize key aspects of the jury trial within a system dominated by bargaining.¹³ Trial bargaining is not without precedent; one can see the contours and possibility of trial bargaining in agreements to stipulate to certain facts as well as in agreements to try a case before a judge rather than a jury.¹⁴ However, as far as I am aware, this is the first proposal that counsel systematically bargain for leniency in exchange for limited waivers of trial rights. Currently, this does not happen, but it ought to.

Counsel are firmly entrenched in a bargain-based system. If juries and trials are going to be more than a curious vestige of the past, counsel will need to function within the bargaining system to preserve adjudication.

My argument builds on premises that, for reasons of space, I take as given and do not directly address in this Essay.¹⁵ First, the present rate of guilty pleas is problematic.¹⁶ Second, more trials would be good for the legal system as a whole.¹⁷ Third, the entire legal system (including, among other things, courts, judges, prosecutors, defense counsel, and crime lab techs) is insufficiently funded to afford every criminal defendant a trial.¹⁸ Fourth, the funding situation is not likely to change.¹⁹ Fifth, in the short term, the

advise the defendant about the nature of his offense, the range of statutory penalties, and the like, the defendant's actual allocution would be addressed to the plea jury.

Laura I. Appleman, *The Plea Jury*, 85 IND. L.J. 731, 749 (2010).

13. The closest analogue may be Stephen Schulhofer's proposal modeled on Philadelphia bench trials. See Stephen J. Schulhofer, *Effective Assistance on the Assembly Line*, 14 N.Y.U. REV. L. & SOC. CHANGE 137 (1986) [hereinafter Schulhofer, *Effective Assistance*]; Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037 (1984) [hereinafter Schulhofer, *Plea Bargaining*].

14. See Schulhofer, *Effective Assistance*, *supra* note 13; Schulhofer, *Plea Bargaining*, *supra* note 13.

15. Which is not to suggest these are obvious or uncontroversial; indeed, at least some of them are neither.

16. See, e.g., *United States v. Gurley*, 860 F. Supp. 2d 95, 116 (D. Mass. 2012) ("Today, however, we have marginalized the American jury as never before in the history of the republic. Actual fact-finding rarely occurs, so a jury is rarely needed. Instead, we have a criminal justice system so rife with charge—and fact—bargaining that the public correctly suspects it has abandoned its quest for 'the whole truth.'" (citations omitted)); Gilchrist, *supra* note 11, at 148 ("[P]lea bargaining reduces the ability of the criminal justice system to avoid convicting the innocent.").

17. See, e.g., Mark Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1272–74 (2005) (describing the diminishing number of trials as "part of a much broader turn from law, a turn away from the definitive establishment of public accountability in adjudication"); see also Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1190–91 (1991) (providing historical support for the contention that jury trials are important to the structure of government, and noting that the infrequency of jury trials has diminished their communal, educational, and political benefits).

18. See, e.g., *Santobello v. New York*, 404 U.S. 257, 260 (1971) ("If every criminal charge were subjected to a full-scale trial, the States and Federal Government would need to multiply by many times the number of judges and court facilities.").

19. Looking only at defense counsel, the Attorney General has recently written:

number of cases on the criminal docket is unlikely to change sufficiently to allow all criminal defendants to have trials.²⁰ To be viable, a proposal must function within these limits.

This Essay proceeds in three parts. Part I describes the mechanism by which trial bargaining could occur. Part II illustrates particular trial bargains that defense counsel should consider during plea negotiations. Part III considers prosecutors as the most prominent barrier to trial bargaining initiated by defense counsel.

I. TRIAL BARGAINING

A. THE GUILTY PLEA

In the popular imagination, a guilty plea involves a defendant admitting guilt. Sometimes defendants do admit guilt, but this is neither necessary nor a core aspect of a guilty plea.²¹ At its core, a guilty plea is a waiver of rights.

There is considerable confusion on this point. For example, one authoritative source states that “[b]y pleading guilty, the defendant admits all elements of the charged crime.”²² However, the cases cited for this proposition, for the most part, do not quite fit. For example, in *United States v. Gonzalez-Alvarez*, the court wrote that “[a] plea of guilty and the ensuing conviction *comprehend* all of the factual and legal elements necessary to

Despite the promise of the court's ruling in *Gideon*, however, the U.S. indigent defense systems—which provide representation to those who cannot afford it—are in financial crisis, plagued by crushing caseloads and insufficient resources. And this year's forced budget reductions, due largely to sequestration, are further undermining this critical work This shameful state of affairs is unworthy of our great nation, its proud history and our finest legal traditions.

Eric H. Holder Jr., *Defendants' Legal Rights Undermined by Budget Cuts*, WASH. POST (Aug. 22, 2013), http://www.washingtonpost.com/opinions/eric-holder-defendants-legal-rights-undermined-by-budget-cuts/2013/08/22/efccbec8-06bc-11e3-9259-e2aaf5a5f84_story.html. Presently, defense counsel is underfunded to handle their cases *with* plea bargaining. Professor Alschuler has been critical of the contention that plea bargaining is a necessary part of the system: “[Those who] contend that the process is inevitable . . . maintain that providing the economic resources necessary to implement the right to trial would be impracticable; their view apparently is that our nation cannot afford to give its criminal defendants their day in court.” Alschuler, *supra* note 10, at 935. I do not doubt that our nation *could* afford to give its criminal defendants their day in court, but I am sure there has been no effort to do so.

20. Overcriminalization and mass incarceration are fundamental parts of the problem. “The American ratio of incarcerated people to total population is about seven times as high as those of other industrialized democracies.” Robert Weisberg, *Reality-Challenged Philosophies of Punishment*, 95 MARQ. L. REV. 1203, 1203 n.1 (2012). Eventually, this will need to change, but there is no imminent legislation that would alter the number of criminal cases on the docket.

21. See *North Carolina v. Alford*, 400 U.S. 25, 38 (1970) (upholding a conviction based on a guilty plea entered by a defendant who maintained his innocence).

22. *Guilty Pleas*, 40 GEO. L.J. ANN. REV. CRIM. PROC. 424, 424 n.1310 (2011).

sustain a binding, final judgment of guilty and a lawful sentence.”²³ While it is true that a valid guilty plea must comprehend—i.e., include—the factual and legal elements necessary for a final judgment, these elements may come from sources other than the defendant’s admission.²⁴

In fairness, courts have added to this confusion. For example, the Supreme Court, citing *North Carolina v. Alford*, has written, “[A guilty plea] is an admission that [the defendant] committed the crime charged against him. By entering a plea of guilty, the accused is not simply stating that he did the discrete acts described in the indictment; he is admitting guilt of a substantive crime.”²⁵ Yet, the complete sentence from which the Court culled the *Alford* quotation does not say that a guilty plea is an admission; it says only: “Ordinarily, a judgment of conviction resting on a plea of guilty is justified by the defendant’s admission that he committed the crime charged against him and his consent that judgment be entered without a trial of any kind.”²⁶ And, of course, *Alford* is the case in which the Supreme Court held that an admission is not a necessary part of a guilty plea, even if it often accompanies a guilty plea.²⁷

Prior to trial, a criminal case rests in stasis. The defendant is presumed not guilty, and the defendant is afforded a series of procedural protections.²⁸ The state has threatened to deprive the defendant of life, liberty, or property, and it can only do so after affording the defendant due process of law.²⁹ The state must notify the defendant of the charges against him.³⁰ He is entitled to a hearing before a jury of his peers.³¹ He is entitled to confront witnesses against him,³² and to compel witnesses to appear in court.³³ He is

23. *United States v. Gonzalez-Alvarez*, 277 F.3d 73, 79 (1st Cir. 2002) (emphasis added) (citing *United States v. Broce*, 488 U.S. 563, 569 (1989)).

24. *See* FED. R. CRIM. P. 11(b)(3).

25. *Broce*, 488 U.S. at 570 (citations omitted) (citing *North Carolina v. Alford*, 400 U.S. 25, 32 (1970)).

26. *Alford*, 400 U.S. at 32.

27. *Id.* at 38; *see also* *Wood v. United States*, 128 F.2d 265, 273 (D.C. Cir. 1942) (“[T]he plea of guilty is not evidence for the Government. . . . It is rather a formal criminal pleading, a waiver of trial and defense, a submission without contest. It does not create, it dispenses with evidence.”).

28. *See* FED. R. CRIM. P. 11(a)(4) (“If a defendant refuses to enter a plea . . . the court must enter a plea of not guilty.”).

29. *See* U.S. CONST. amends. V; XIV, § 1.

30. *See* *Smith v. O’Grady*, 312 U.S. 329, 334 (1941) (“[R]eal notice of the true nature of the charge [is the] first and most universally recognized requirement of due process . . .”).

31. U.S. CONST. amend. VI; *see also* *infra* note 63 and accompanying text.

32. *See* U.S. CONST. amend. VI (guaranteeing the defendant’s right “to be confronted with the witnesses against him”).

33. *Id.* (ensuring the defendant will “have compulsory process for obtaining witnesses in his favor”).

entitled to testify;³⁴ he is equally entitled not to testify, and, should he elect not to testify, he is entitled not to have that fact held against him.³⁵ Prior to a trial affording him these and other rights, the defendant remains not guilty.³⁶ Even if a defendant confesses to the crime of which he is accused, he remains not guilty.³⁷ Just as a guilty plea is not a confession, a confession is not a guilty plea.

To alter the stasis of pretrial not-guilty status, the defendant must allow the court to enter a finding of guilty.³⁸ The court can only do that, absent a trial, where the defendant waives all the trial rights to which he is entitled.³⁹ If he does not waive those rights, then the criminal case proceeds, unalterably, to trial.⁴⁰ By pleading guilty, a defendant waives his trial rights, allowing the court to make a finding of guilt so long as there is a factual basis for the charges.⁴¹ Commonly, a cursory proffer from the prosecutor about what she would be prepared to prove at trial, followed by the defendant's assent to that proffer establishes the factual basis for the plea. However, there is no requirement that the defendant agree or otherwise contribute to the factual basis.⁴² Indeed, a defendant may waive his trial rights and plead guilty even while maintaining his innocence.⁴³

B. PLEA BARGAINING

Plea bargaining is the process by which prosecutors offer something of value to a defendant in exchange for the defendant's agreement to plead

34. See *Rock v. Arkansas*, 483 U.S. 44, 49 (1987) (“[I]t cannot be doubted that a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense.”).

35. See *Carter v. Kentucky*, 450 U.S. 288, 305 (1981).

36. *Coffin v. United States*, 156 U.S. 432, 453 (1895) (“[T]hat there is a presumption of innocence in favor of the accused . . . lies at the foundation of the administration of our criminal law.”). When I practiced in the Office of the Federal Public Defender for the District of Maryland, one of my colleagues would respond to any question about how a pending trial was going with, “Well, we’re still enjoying the presumption. . . .”

37. See *State v. Valentina*, 60 A. 177, 178–79 (N.J. 1905) (finding no inconsistency between a plea of not guilty and a confession); see also *Davis v. United States*, 160 U.S. 469, 485–86 (1895) (“Upon [the plea of not guilty] the accused may stand, shielded by the presumption of his innocence, until it appears that he is guilty . . .”).

38. See FED. R. CRIM. P. 11(a)(4).

39. See FED. R. CRIM. P. 11(b)(1)(F). Before accepting a guilty plea the court must assure that the defendant understands she is waiving her trial rights. *Id.*

40. See FED. R. CRIM. P. 11(a)(4).

41. See FED. R. CRIM. P. 11(b)(3) (“Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.”).

42. See *North Carolina v. Alford*, 400 U.S. 25, 38 (1970); see also FED. R. CRIM. P. 11 advisory committee’s note (stating factual basis may be established by inquiry “of the defendant, of the attorneys for the government and the defense, of the presentence report when one is available, or by whatever means is appropriate in a specific case”).

43. See *Alford*, 400 U.S. at 38.

guilty.⁴⁴ Usually, the prosecution offers some form of leniency that will or might cause the defendant to receive a lesser sentence than if he proceeded to trial and lost.⁴⁵ Leniency can take other forms, too. A prosecutor can offer leniency to the defendant's loved-ones in exchange for the defendant's guilty plea.⁴⁶ One should not underestimate the prosecutor's power in this regard. For example, in one white-collar case, the prosecutor told my client that if he pled guilty she would not only recommend a lenient sentence, but she also would not issue a subpoena to bring his daughter before the grand jury. Such legally permissible threats and offers tend toward coercion.⁴⁷ What would you do if you thought a plea bargain might protect your daughter? Or, what wouldn't you do?

Prosecutors have tremendous power and nearly unbound discretion. Sometimes they have the ability to make offers that a defendant cannot rationally refuse. Not only are there cases where innocent defendants will plead guilty,⁴⁸ there are cases where *well-counseled*⁴⁹ innocent defendants will plead guilty.

44. See MILTON HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS 1 (1978) ("Plea bargaining is the process by which the defendant in a criminal case relinquishes his right to go to trial in exchange for a reduction in charge and/or sentence.").

45. *Id.*

46. See, e.g., *United States v. Pollard*, 959 F.2d 1011, 1021 (D.C. Cir. 1992) (no due process violation where government conditioned favorable deal for defendant's seriously ill spouse on defendant's guilty plea).

47. By law, valid plea bargaining is not coercive and coercive plea bargaining is not valid. See *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (holding it is permissible to "confront[] a defendant with the risk of more severe punishment," even where it has "a discouraging effect on the defendant's assertion of his trial rights" (citations omitted) (internal quotation marks omitted)). However, the law achieves this result by excluding from coercion all threats and leniency that the prosecutor may legitimately act on. I have argued elsewhere that, given the extraordinary power prosecutors wield, the legal standard for coercion departs significantly from what reasonable people might call coercion. See Gilchrist, *supra* note 11.

48. See Covey, *supra* note 9, at 82-83 ("[G]iven the substantial uncertainties inherent in attempting to estimate probabilities of conviction based on the often skeletal pretrial evidentiary record, outcomes negotiated in the shadows of trial likely are a good deal less accurate than trial outcomes themselves.").

49. This contention raises an ethical question that is more difficult in theory than in practice. An attorney who knows her client is innocent faces a dilemma if her client wishes to plead guilty: there is a tension between her duty of candor toward the tribunal and her duties toward her client. See STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION § 5.3, at 163 (1971) ("If the accused discloses to the lawyer facts which negate guilt and the lawyer's investigation does not reveal a conflict with the facts disclosed but the accused persists in entering a plea of guilty, the lawyer may not properly participate in presenting a guilty plea, without disclosure to the court."). In practice this dilemma is rarely encountered for one of two reasons. First, many defense attorneys maintain that they rarely, if ever, "know" anything about the facts of the case. See Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1174 n.288 (2008) ("Many defense attorneys make use of the convenient dodge that they cannot conclusively *know* that clients are factually innocent."). I am less sure that this is always a convenient dodge. In my experience, practice tends to give defense counsel a sort of

Consider, however, what is on the table in a typical plea negotiation. On the prosecutor's side there is an array of possible leniency conditions: leniency in charges to which the defendant will plead; leniency in facts the prosecutor will introduce for purposes of sentencing; leniency in legal arguments the prosecutor will make about sentencing; and leniency about the prosecutor's sentencing recommendation. Moreover, the prosecutor can offer leniency for others or to limit continued investigation in order to secure a guilty plea. On the defendant's side, however, there is little variation in the deal. The prosecutor expects the defendant to waive all trial rights—i.e. enter a guilty plea.⁵⁰ The negotiation proceeds on the assumption—by both parties—that the defendant only has this one thing to offer.

C. TRIAL BARGAINING

This Essay proposes trial bargaining. Trial bargaining upsets the assumption that the negotiations begin with requiring the defendant to waive all trial rights. Trial bargaining allows the parties to contract for the prosecutor to grant leniency in exchange for the defendant's waiver of *limited* trial rights. By this mechanism, the defendant can secure a trial, the prosecutor can limit the scope and nature of the trial, and the defendant can enjoy some insurance about his exposure should he lose at trial.

Prosecutors will often prefer shorter, simpler, less uncertain trials,⁵¹ and they might offer leniency in exchange for such a limited trial.⁵² Of course, the prosecutor's leniency would really be in exchange for the defendant waiving some of his specified trial rights, but in effect the prosecutor would secure a more favorable form of adjudication in exchange for leniency.

epistemic humility borne of too often believing something and having it disproved. The second reason, however, that counsel may avoid this dilemma is that some reject the dilemma by prioritizing duties. This rejection is manifested in a strong commitment to minimizing a client's prison exposure that renders hard questions about allowing "innocent" clients to plead guilty largely moot. *See id.* (describing cases in which the attorney allowed innocent defendants to plead guilty because doing so was in the client's best interest).

50. There are a few exceptions to this broad statement—for example, cooperation between the defendant and the government, retention of appellate rights, and waiver of FOIA rights.

51. Of course, prosecutors would be even more interested in the brevity and certainty of a guilty plea, presenting a practical problem for trial bargaining that is addressed further in Part III.

52. There will, of course, be exceptions: cases where the prosecutor favors a longer trial. Indeed, I have no empirical data on prosecutorial preferences for shorter or longer trials, and given that prosecutors bear the burden, one might hypothesize that prosecutors in many cases will disfavor time limits. The point remains, however, that in some cases a prosecutor will favor limiting the length of trial (and hence the uncertainty produced by a less limited defense), and in those cases the prosecutor may be willing to exchange leniency for the length and scope limitations.

II. TRIAL BARGAINS DEFENSE COUNSEL MIGHT PROPOSE

There are few limits to the plea bargains that creative counsel can reach; trial bargains would be similarly diverse. This Part identifies a few terms that may be of particular interest in trial bargains. Defense counsel's goal would be to secure the defendant some degree of leniency while maintaining some degree of adjudication on the merits. The prosecutor's goal would be to avoid the expense, time, and uncertainty of a full-blown trial. Accordingly, parties should identify terms that simplify or streamline the trial, while maintaining a meaningful form of adjudication. Three possibilities quickly come to mind: time-limited or witness-limited trials; smaller juries; and the opportunity to cross-examine the defendant.

A. TIME-LIMITED OR WITNESS-LIMITED TRIALS

The parties could agree to limit the length of trial. "Few rights are more fundamental than that of an accused to present witnesses in his own defense."⁵³ While this right is not without limit,⁵⁴ defendants have broad discretion to call witnesses in their defense.⁵⁵ Likewise, the right to confront prosecution witnesses is subject to limits,⁵⁶ but defendants must be given wide latitude to cross-examine.⁵⁷ All of this takes time. A plea colloquy is unlikely to last an hour; a trial can last days or weeks. By agreement, the parties could fashion a trial that would take less time.

There are a number of mechanisms by which trials could be shortened. For example, the parties could agree to limit the number of witnesses they call. Alternatively, the parties could agree to a version of trial speed chess: each party would have a certain number of minutes for opening and closing statements, and a certain number of minutes for direct- and cross-

53. *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973).

54. *See United States v. Holmes*, 44 F.3d 1150, 1157 (2d Cir. 1995) ("[T]his right does not preclude a judge from placing reasonable restrictions on the admission of evidence.").

55. *See United States v. Herbst*, 668 F.3d 580, 585 (8th Cir. 2012) ("[T]he arbitrary exclusion of testimony may violate a defendant's right to present a defense where the 'testimony is otherwise admissible under the rules of evidence.'" (quoting *United States v. Turning Bear*, 357 F.3d 730, 733 (8th Cir. 2004))).

56. *See Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) ("[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on . . . cross-examination based on concerns about . . . harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.").

57. *See Alford v. United States*, 282 U.S. 687, 692 (1931) ("It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop.").

examination. Judges already impose such limits in civil cases,⁵⁸ and parties to a criminal case could impose such limits by agreement.⁵⁹

Time limits would, of course, vary with the complexity of the case. However, there is reason to believe many trials could be shorter and nonetheless effective. Experienced trial attorneys Stephen Susman and Thomas Melsheimer have suggested that in a civil trial of moderate complexity, fifteen to twenty hours per side would be “generous.”⁶⁰ Many criminal cases are less complex than a civil trial of moderate complexity. Describing the system of streamlined bench trials in Philadelphia, Stephen Schulhofer notes that most complex felony cases “consume one to three hours or more.”⁶¹ Criminal trials *could* be shorter.

More complex trials may be even more conducive to limits. Counsel could reduce the time needed to try almost any case through fact stipulations and agreements to limit witnesses. This is not to suggest that prosecutors will invariably value these limits. In some cases, prosecutors may want more time; however, where the prosecutor does value a shorter trial, she may be willing to grant leniency in exchange for agreements that will secure brevity.⁶²

B. REDUCED JURY SIZE

A defendant has a right to a jury trial if the state charges him with a crime carrying a maximum punishment over six months.⁶³ While there is no constitutional right to a trial before more than six jurors,⁶⁴ for hundreds of

58. See, e.g., *McClain v. Lufkin Indus., Inc.*, 519 F.3d 264, 282 (5th Cir. 2008) (upholding verdict notwithstanding imposed time limits).

59. The court would need to approve of these agreements because ultimately it is the judge's duty to “exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to . . . make those procedures effective for determining the truth.” FED. R. EVID. 611 (a).

60. See Stephen D. Susman & Thomas M. Melsheimer, *Trial by Agreement: How Trial Lawyers Hold the Key to Improving Jury Trials in Civil Cases*, 32 REV. LITIG. 431, 445 (2013). Indeed, Susman and Melsheimer suggest that short trials might be better trials because more qualified jurors would be available for shorter trials and jurors may be better able to fairly assess evidence presented in a more concise manner. See *id.* at 445-47.

61. See Schulhofer, *Effective Assistance*, *supra* note 13, at 146.

62. See *supra* text accompanying note 52.

63. See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed”); see also *Baldwin v. New York*, 399 U.S. 66, 69 (1970) (“[N]o offense can be deemed ‘petty’ for purposes of the right to trial by jury where imprisonment for more than six months is authorized.”).

64. See *Ballew v. Georgia*, 435 U.S. 223, 245 (1978) (reversing conviction by a five-person jury on Sixth Amendment and Fourteenth Amendment grounds); *Williams v. Florida*, 399 U.S. 78, 103 (1970) (affirming conviction by a six-person jury over Sixth Amendment and Fourteenth Amendment challenge).

years cases were tried to juries of twelve,⁶⁵ and this remains the norm in federal court today.⁶⁶ However, the defendant can waive the right to any particular number of jurors, whether the right is rule-based or constitutional.⁶⁷

Accordingly, parties could simplify trials by stipulating to a trial by fewer jurors.⁶⁸ What benefits could fewer jurors provide? There are at least two benefits that may interest prosecutors. First, fewer jurors would further reduce the length of trial. Whatever time is required for *voir dire* in a twelve-juror case would be decreased in a three-juror case. Fewer jurors would also generally require less time to deliberate. Second, prosecutors may feel a smaller jury is more likely to convict, thus reducing the uncertainty of trial. This is a somewhat delicate point. Prosecutors, of course, are tasked not with winning, but rather with seeing that justice is done.⁶⁹ The suggestion that prosecutors might prefer fewer jurors because they believe it increases the chance of conviction might therefore strike some as inappropriate or offensive. It should be neither. With a few exceptions,⁷⁰ prosecutors bring cases where they believe the defendant is guilty.⁷¹ Secure in this belief, a

65. See *Baldwin*, 399 U.S. at 89 (1970) (“[S]ometime in the 14th century the size of the jury at common law came to be fixed generally at 12.”).

66. See FED. R. CRIM. P. 23(b)(1) (“A jury consists of 12 persons unless this rule provides otherwise.”).

67. See FED. R. CRIM. P. 23(b)(2) (allowing trial by fewer than 12 jurors by stipulation of the parties with the consent of the court); see also FED. R. CRIM. P. 23(a) (allowing waiver of jury trial with consent of the government and approved by the court); *Singer v. United States*, 380 U.S. 24, 35 (1965) (a defendant can waive the right to trial by jury, but does not have a constitutional right to do so unilaterally).

68. In some jurisdictions, this will require consent of the court as well. See, e.g., FED. R. CRIM. P. 23(b)(2)(A) (requiring consent of the court in federal cases before stipulating to fewer than twelve jurors).

69. See *Connick v. Thompson*, 131 S. Ct. 1350, 1362 (2011); see also *Berger v. United States*, 295 U.S. 78, 88 (1935) (“The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.”); MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”).

70. Prosecutors are sometimes accused of bringing charges to satisfy a merely political demand that they do so. See, e.g., Jeffrey Scott Shapiro, *Zimmerman's Not Guilty Verdict Shines Troubling Light on Prosecutor's Decision-Making*, WASH. TIMES (July 13, 2013), www.washingtontimes.com/news/2013/jul/13/shapiro-zimmerman-jurys-verdict-shines-troubling-l/ (suggesting the prosecution of George Zimmerman may be “one of the most meritless and politically motivated prosecutions in history,” and that “during its own presentation, the State actually made a case for the defense”). Of course, in any one case the public has no information about a prosecutor's motives; however, it does not strain credulity to suggest there have been instances in the history of our nation where prosecutors have brought charges not because they believed in the guilt of the defendant, or even in the weight of the evidence, but rather because doing so was politically expedient.

71. See Andrew E. Taslitz, *Wrongful Rights*, CRIM. JUST., Spring 2003, at 4, 11 (“[P]rosecutors come to believe zealously in the guilt of those they accuse, ‘inevitably com[ing] to embrace the virtues of his or her own position.’”) (quoting Daniel Givelber, *The Adversary*

prosecutor will naturally—though unintentionally—tend toward Type I errors (i.e., convictions of the innocent predicated on a false belief the accusation is true).⁷² A well-meaning and ethical prosecutor will, far more often than not, believe that conviction is the just outcome in a case she is prosecuting. If the prosecutor believes that a smaller jury is more likely to convict, she will prefer a smaller jury for this reason, just as she would prefer a guilty plea that provides near-certainty of conviction.

Of course, whether smaller juries actually are more likely to convict is a subject of some controversy. In ruling that a five-person jury could not survive constitutional challenge, Justice Blackmun famously relied on statistical studies to “suggest that the risk of convicting an innocent person (Type I error) rises as the size of the jury diminishes.”⁷³ The truth may be more complicated. One meta-analysis of empirical studies on the impact of jury size suggests that while larger juries increase the likelihood of minority representation, increase deliberation time, enhance memory for evidence, and are more likely to hang, jury size does not have a statistically significant effect on the consistency of verdicts.⁷⁴ Nonetheless, to the extent practitioners perceive that larger juries are more favorable to the defense, that perception is relevant to the negotiation.

C. THE DEFENDANT'S TESTIMONY

The defendant in a criminal case cannot be compelled to testify.⁷⁵ She may elect to testify or not, and if she chooses not to testify that fact cannot⁷⁶ be held against her.⁷⁷ This right too can be waived.

System and Historical Accuracy: Can We Do Better? in *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* 253, 261 (Saundra D. Westervelt & John A. Humphrey eds., 2001) (alteration in original).

72. Contrast with Type II errors—i.e. acquittals of the guilty (a false belief the accusation is false).

73. *Ballew v. Georgia*, 435 U.S. 223, 234 (1978).

74. See Michael J. Saks & Mollie Weighner Marti, *A Meta-Analysis of the Effects of Jury Size*, 21 *LAW & HUM. BEHAV.* 451 (1997); see also J. Clark Kelso, *Final Report of the Blue Ribbon Commission on Jury System Improvement*, 47 *HASTINGS L.J.* 1433, 1491–92 (1996) (citing a review in Los Angeles concluding that “smaller juries (1) decreased diversity on the jury, (2) had no measurable impact upon plaintiff/defendant verdicts, (3) resulted in higher damage awards in those cases where the verdict was for the plaintiff, (4) had no significant, measurable impact upon the time required for impanelment, trial and deliberations, and (5) resulted in a 27% decrease in costs”).

75. U.S. CONST. amend. V.

76. Here, law and practice diverge. As a matter of law, the defendant's decision to invoke the privilege against self-incrimination in a criminal case cannot be held against her in that case. Judges can and do instruct juries that they should not consider the defendant's failure to testify against her. Juries, of course, are free to do what they want, and many attorneys proceed on the assumption that jurors will hold a defendant's failure to testify against her. See Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 *STAN. L. REV.* 1477, 1534 (1999) (“[J]urors often infer guilt from the defendant's refusal to take the stand, even though they are told not to draw any inference of guilt from such a refusal.”).

While there are numerous mechanisms by which the defendant might waive her privilege against self-incrimination, the easiest would be simply to agree to testify. Once the defendant testifies, she may not claim the privilege and is subject to cross-examination on matters reasonably related to her testimony.⁷⁸ Accordingly, a defendant could promise to testify in exchange for leniency. Were she to invoke the Fifth contrary to her promise, the government would be relieved of its obligations under the trial agreement.

There are potential problems with this arrangement. A defendant might invoke her Fifth Amendment privilege after the prosecution rested, thus reaping at least some of the negotiated benefits in the form of a time-limited prosecution case. Were that to happen, however, the prosecution could move to reopen its case, and the trial court would have wide discretion to grant the motion.⁷⁹ Alternatively, the parties could introduce terms to minimize this risk. One nice thing about trial bargaining is that, as with plea bargaining, it follows the basic rules of contract. Therefore, the parties are free⁸⁰ to create terms to fit the case. If the prosecutor wanted to assure the defendant's testimony on a particular topic, she could write that demand into the agreement. Indeed, the parties could go further and have the defendant affirm a statement outlining her testimony at trial. Such measures might make the offer of testimony more valuable to the prosecutor in particular cases.

D. THE VALUE OF SHORTER, SIMPLER, LESS UNCERTAIN TRIALS

The trials resulting from negotiated waivers could represent a significant improvement over the status quo. So long as some of these trial bargains arose in cases that otherwise would be resolved by plea,⁸¹ the

77. See *Carter v. Kentucky*, 450 U.S. 288, 289 (1981) (finding reversible error where the defendant requested and the trial court refused to give the following jury instruction, "[t]he [defendant] is not compelled to testify and the fact that he does not cannot be used as an inference of guilt and should not prejudice him in any way"). Judge Posner is one of many who have questioned the efficacy of these instructions:

Judges who want jurors to take seriously the principle that guilt should not be inferred from a refusal to waive the privilege against self-incrimination will have to come up with a credible explanation for why an innocent person might fear the consequences of testifying. I am not sure there *is* a credible explanation

Posner, *supra* note 76, at 1534-35.

78. See *Brown v. United States*, 356 U.S. 148, 155-56 (1958).

79. See *United States v. Hugh*, 236 F. App'x 796, 798-99 (3d Cir. 2007); *United States v. Boone*, 437 F.3d 829, 837 (8th Cir. 2006); *Duong v. McGrath*, 128 F. App'x 32, 34-35 (9th Cir. 2005); *United States v. Mojica-Baez*, 229 F.3d 292, 300 (1st Cir. 2000); *United States v. Blankenship*, 775 F.2d 735, 741 (6th Cir. 1985); *United States v. Wilcox*, 450 F.2d 1131, 1143 (5th Cir. 1971).

80. The parties are free to negotiate in a literal sense; however, there is usually, of course, a massive disparity in leverage between the prosecution and the defense.

81. See *infra* note 88.

primary benefit would be an increased number of trials. More trials would introduce costs to the legal system because even limited trials require more prosecutorial, defense, and judicial resources than guilty pleas. However, I am working from the assumption that a legal system that resolves ninety-seven percent of its criminal cases through pleas does so at significant cost to the system's perceived legitimacy and the democracy-enhancing aspects of jury trials.⁸² The resources required to support trial bargaining would be well spent to support the legal system and our system of governance generally.

Some might question whether the foreshortened trials generated by waiving trial rights would have any value at all. I believe they would. In some cases, shorter trials would be better trials.⁸³ Smaller juries pose more serious concerns. Scholars have criticized the fact that juries are now so rarely used.⁸⁴ Judge William Young has written and ruled extensively on the importance of juries and the costs of removing most cases from the view of a jury.⁸⁵ Juries protect against governing norms becoming too far removed from societal norms; they reflect a general distrust of government and insulate against government becoming too powerful.⁸⁶ Accordingly, juries

82. See *supra* text accompanying notes 16–17.

83. See *supra* note 60.

84. See, e.g., Laura I. Appleman, *The Lost Meaning of the Jury Trial Right*, 84 IND. L.J. 397, 400 (2009) (“Now that we have finally expanded the jury franchise to almost all members of our society—all genders, all races, all classes—why do we choose to curtail it?”); Appleman, *The Plea Jury*, *supra* note 12, at 742 (explaining how the dominance of guilty pleas “has given short shrift to the Sixth Amendment jury trial right”).

85. See, e.g., *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 89 (D. Mass. 2005) (“[T]he American jury, that most vital expression of American democracy, the New England town meeting writ large, ‘is dying out—more rapidly on the civil than on the criminal side of the courts and more rapidly in the federal than in the state courts—but dying nonetheless.” (quoting *United States v. Reid*, 214 F. Supp. 2d 84, 98 n.11 (D. Mass. 2002))); William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 69 (2006) (“The most stunning and successful experiment in direct popular sovereignty in all history is the American jury.”). Fundamentally, juries legitimize the law in our democratic society:

Like all government institutions, our courts draw their authority from the will of the people to be governed. The law that emerges from these courts provides the threads from which all our freedoms are woven. It is through the rule of law that liberty flourishes. Yet, “there can be no universal respect for law unless all Americans feel that it is *their* law.” Through the jury, the citizenry takes part in the execution of the nation’s laws, and in that way each can rightly claim that the law belongs partly to her.

In re Acushnet River & New Bedford Harbor, 712 F. Supp. 994, 1005 (D. Mass. 1989) (quoting Kaufman, *A Fair Jury—The Essence of Justice*, 51 JUDICATURE 88, 91 (1967)).

86. See Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1177 (1995) (finding the analogy between voting and jury service useful for “shifting analysis from a litigant’s right to be tried by a jury to a citizen’s right to serve and vote on a jury”); Appleman, *The Lost Meaning of the Jury Trial Right*, *supra* note 84, at 415 (describing “the jury’s key role in dispensing not only the law to the community, but also in its role maintaining the community’s centrality to politics and the polity”); Jenny E. Carroll, *The Jury’s Second Coming*,

are a benefit to and a right of the community, not only the parties to a case.⁸⁷ Reducing jury size risks reducing the democracy-enhancing benefits of juries. While this is a fair concern, it may be misplaced in this case. The goal of my proposal is that the smaller juries resulting from trial bargaining replace guilty pleas, not full trials before larger juries.⁸⁸ Smaller juries are an improvement from no juries.⁸⁹

To the extent trial bargaining caused more defendants to testify, it might be beneficial. The privilege against self-incrimination has always been controversial. There are “profound disagreements over the right to silence, considered by some a pernicious impediment to the discovery of truth and by others ‘one of the great landmarks in man’s struggle to make himself civilized.’”⁹⁰ The best justifications for the right stem from the conclusion that “government compulsion to force admissions is inhumane.”⁹¹ Yet, there

100 GEO. L.J. 657, 658 (2012) (“Juries offer a unique opportunity for the citizenry to redeem a system of law confronted and confounded by competing community values and narratives.”); Jason Mazzone, *The Justice and the Jury*, 72 BROOK. L. REV. 35, 55 (2006) (describing a participatory view of juries according to which juries are “an important component of American democracy”); Meghan J. Ryan, *The Missing Jury: The Neglected Role of Juries in Eighth Amendment Punishments Clause Determinations*, 64 FLA. L. REV. 549, 589 (2012) (suggesting that juries “act as a bulwark of liberty by protecting individuals from overreaching legislatures and unrepresentative judges”).

87. See Appleman, *The Lost Meaning of the Jury Trial Right*, *supra* note 84, at 398 (“[E]ven the Sixth Amendment jury trial right, which sounds grammatically like a right of the accused, is actually a restatement of the collective right in Article III.”).

88. Whether this would happen is open to question. It could be that if trial bargaining were more prevalent, it would not be at the expense of guilty pleas, but rather at the expense of full-blown trials only. Likely, however, some cases that would have resulted in guilty pleas would instead result in trial bargains, and some cases that would have resulted in full trials would result in trial bargains.

89. In Part III, *infra*, I address the fact that prosecutors may lack an incentive to engage in wide-spread trial bargaining, and this may be especially so in cases that absent trial bargaining would result in guilty pleas. Accordingly, to achieve the desired balance of trial bargains in cases that otherwise would result in guilty pleas, it will probably be necessary to get institutional players beyond the prosecution and defense invested in trial bargaining. This is the subject of my next article.

90. R. Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15, 16–17 (1981); see also Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 858 (1995) (“Because courts and commentators have been unable to deduce what the privilege is for, they have failed to define its scope in the most logical and sensible way.”).

91. Greenawalt, *supra* note 90, at 39. Greenawalt helpfully expands on this idea:

Though articulation of the grounds of this intuitive judgment is not easy, the broader principle within which it falls is the cruelty of forcing people to do serious harm to themselves, even when infliction of the same harm by others is warranted. That the right to silence rests on this basic moral perception is suggested by judicial talk of our unwillingness to subject those suspected of crime to the cruel dilemma of self-accusation, perjury or contempt. When most witnesses feared damnation if they lied under oath and the penalty for felonies was death, the

is less coercion where the defendant voluntarily waives the privilege.⁹² Moreover, to the extent the defendant's testimony helps the jury discern the truth, that is an affirmative benefit.⁹³ Finally, defendants may actually benefit from the opportunity to tell their story.⁹⁴ Defendants' expressive participation in the adjudication of their guilt or innocence will impact "their views on the fairness or unfairness of the procedures by which they are adjudicated, and, ultimately, their acceptance or rejection of the process and its outcome."⁹⁵ There is strong empirical evidence on the value of a respectful and inclusive process.⁹⁶ One factor that influences a defendant's view of the fairness of the process is whether he believes he "had an opportunity to take part in the decision-making process."⁹⁷ A system in which more defendants testify might be a better system.

The foreshortened trials that trial bargaining generates could therefore be beneficial in two ways. First, some of the factors leading to shorter and simpler trials might themselves be beneficial in their own right. For example, a trial in which the defendant testifies before a five-member jury might actually be *better* than a trial in which the defendant asserts the privilege against self-incrimination before a twelve-member jury. It might be better in terms of accuracy, and it might even be better in terms of fairness. To be clear, this claim is not that it *would always* be better; rather, these altered forms of adjudication would not necessarily and in all cases be worse, and they may provide their own benefits. Beyond this, however, to the extent the shortened trials replace guilty pleas then they generate a clear benefit by raising the number of adjudicated cases.

choice was particularly excruciating, but it remains cruel for the government to force people to help convict themselves, lie, or be confined for contempt.

Id. (footnotes omitted) (internal quotation marks omitted).

92. Some would contend that, where the defendant voluntarily waives the privilege, there is *no* coercion. Indeed, voluntary waiver would seem to be incompatible with coercion. However, as I have argued elsewhere, while the law does not deem waivers induced through threats and leniency as coercive, there is something disturbingly close to coercion when a government induces a waiver in these ways. See Gilchrist, *supra* note 11, at 144-45 ("Guilty pleas routinely are secured by something akin to coercion.").

93. See, e.g., Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 922 (1995) ("Truth is a preeminent criminal procedure value in the Bill of Rights: most procedures were designed to protect innocent defendants from *erroneous* conviction.").

94. See Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1450-51 (2005) (describing the "personal, dignitary, and democratic import" of a defendant's testimony during trial).

95. *Id.* at 1451.

96. See Tom R. Tyler, *Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority*, 56 DEPAUL L. REV. 661, 663 (2007) (finding "that people are more interested in how fairly their case is handled than they are in whether they win").

97. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 163 (2006).

III. PRACTICAL CONCERNS WITH TRIAL BARGAINING

There are a few obvious objections to trial bargaining. First, it is unrealistic to expect counsel, already overburdened, to negotiate deals waiving select rights and creating novel forms of trial from whole cloth. Second, prosecutors will be reluctant to engage in trial bargaining, except at the margins. The first of these concerns is correct, but easily addressed. The second presents a real challenge for trial bargaining, and suggests that defense counsel alone may not be able to implement the practice. Each objection is addressed in turn.

A. COUNSEL CANNOT BE EXPECTED TO DEVELOP TRIAL BARGAINS

In some ways, defense counsel are best positioned to begin trial bargaining. Defendants in the criminal-justice system often have few options: they can accept what the prosecutor feels is leniency in exchange for a complete waiver of trial rights, or they can defend the case at trial and remain exposed to the often draconian trial penalties. Most defendants would welcome additional options. More options would bolster defendants' sense of autonomy in the process and might even enhance their perceptions of the legitimacy of the legal system.

Yet defense counsel may lack the resources to engage in trial bargaining. Stephanos Bibas has suggested that counsel might be best "suited to experiment with a range of ways to convey, explain, and document plea offers," in the wake of *Lafler* and *Frye*,⁹⁸ but he is quick to note that defense counsel are notoriously overburdened.⁹⁹ Accordingly, it is probably not realistic to expect counsel to radically reimagine the contours of negotiations and to take on the burden of structuring new forms of adjudication. The steps involved in trial bargaining under the present system would be extensive and laborious. First, counsel would need to identify trial limits that would be of interest to the prosecutor. Second, counsel would need to assess how these trial limits would alter the adjudication and educate her client about the possible waivers. Third, counsel would need to "sell" the proposal to the prosecution. Fourth, counsel would need to draft an agreement that correctly waived limited trial rights. The first and the second steps alone are beyond the scope of most active defense lawyers with busy dockets.¹⁰⁰

98. Stephanos Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms*, 126 HARV. L. REV. 150, 174 (2012).

99. *Id.* ("Right now, everything rests on defense counsel's shoulders, but defense lawyers are overburdened, underfunded, and of course fallible.").

100. None of this should be understood to denigrate the efficacy, ability, commitment or work ethic of defense counsel. Indeed, I spent my entire practice as a defense attorney working with extraordinary lawyers, both in public defense and in private practice. My point is merely one about resources. Systemically, indigent defense is insufficiently funded to handle cases

The solution is to develop and publicize off-the-shelf trial bargains. This Essay has briefly outlined a few terms that counsel might negotiate. In a future article I will identify specific forms of limited adjudication that defendants could request, and I will draft template waivers that would achieve those simplified trials were counsel to agree. Counsel need not reinvent the wheel in every case. Indeed, the only reason that plea bargaining is not unduly burdensome is that counsel have done it for a long time. The players know the terms and largely work from forms. Trial bargain templates will reduce the inertia that otherwise would prevent defense counsel from widely adopting the practice.

B. PROSECUTORS WILL NOT BARGAIN FOR TRIALS

The real problem with trial bargaining is that prosecutors generally lack an incentive to engage in it. Prosecutors already obtain guilty pleas in over ninety percent of cases.¹⁰¹ True, prosecutors will often prefer a shorter, simpler, less-uncertain trial to an unrestricted trial, but this may not be the correct comparison. A ninety-seven percent conviction by plea rate suggests that prosecutors almost always succeed in securing guilty pleas.¹⁰² The proper comparison in most cases, therefore, is between the simpler, shorter, and less uncertain trial promised by trial bargaining and a guilty plea. Given this choice, prosecutors will likely favor the continued dominance of guilty pleas.

Yet, prosecutors would likely engage in trial bargaining in cases where they lack confidence in their ability to secure a conviction by plea. Although this is a relatively small subset,¹⁰³ defense counsel might nonetheless consider the possibility of trial bargaining to the extent it will expand the options for some defendants. Unfortunately, much of the value of trial bargaining is its potential to reinvigorate the jury trial. If trial bargains develop only in cases where guilty pleas were unlikely anyway, then trial bargaining will not increase the number of jury trials. While this Essay envisions that there are potential benefits from the limited trials, much of

without significant innovation; that many public defenders innovate anyway is a tribute to their dedication and excellence, but it cannot be expected as the norm.

101. See *supra* note 5 and accompanying text.

102. This is not to suggest a one to one ratio between the percentage of convictions by guilty plea and the rate at which prosecutors succeed in securing conviction by guilty plea. The former is a subset of convictions, while the latter is a subset of all cases (including acquittals, declinations and dismissals). By way of example, in 2012 the Department of Justice secured about 81,000 convictions in district court; that same year there were approximately 5000 dismissals and 350 acquittals in district court. See U.S. DEP'T OF JUSTICE, *supra* note 5, tbl. 2. Charged cases resulted in convictions about ninety-three percent of the time, and of those, ninety-seven percent were secured by plea. See *id.* at 8. Still, that means that in more than ninety percent of charged cases, federal prosecutors not only get convictions, they do so through plea.

103. See *supra* text accompanying note 102.

the benefit is the promise of more trials.¹⁰⁴ Indeed, my primary reply to those who object to the possibility of smaller juries, even by agreement, is that these smaller juries will more often than not replace guilty pleas, not full trials.¹⁰⁵ If that turns out not to be the case—that is, if more bargained-for trials arise in cases that would otherwise have resulted in complete, unbargained trials—then my reply to the objection fails. But, our system of plea bargains is problematic, and trial bargaining just might improve it. It's certainly worth thinking about, and it's probably worth trying. It might be, however, that trial bargaining will work best if institutional actors, beyond counsel, are involved.

CONCLUSION

As bargained-for guilty pleas resolve so many cases, the jury trial is beginning to look like a historical curiosity. Yet, trials are critical to our legal system and even to our government and society. Both the public and the defendant perceive trials as lending legitimacy to the outcome of a criminal prosecution. Trials enhance legitimacy if only through the reflexive idea that just procedures are the product of just systems. And it's not only trials—juries play a critical role in the legitimacy-enhancing aspect of trials. Citizen participation in the normal operation of the criminal-justice system serves as a check on the government, educates people otherwise uninvolved with criminal justice, and enhances democracy. We ought to have more jury trials than we do.

Trial bargaining is a mechanism that might revitalize jury trials. To the extent counsel can use trial bargaining to give defendants more options at the margins, defense counsel ought to consider it. Realistically, however, the incentives for prosecutors to deviate from the status quo are limited, and if trial bargaining is to gain wider acceptance, institutional actors other than counsel will need to be involved. The Department of Justice, the U.S. Sentencing Commission, and possibly even judges could play a role in generating more trial bargains. I will address these possibilities in a forthcoming article. For now, it's worth considering that the function of counsel is as important as ever. Fifty years after *Gideon's* guarantee, the Supreme Court has acknowledged that plea bargaining dominates our legal system and that any meaningful promise of effective counsel must extend to the practice. Plea bargaining generates significant costs in the name of efficiency, but it appears to have stood the test of time. Perhaps through trial bargaining, we might turn the principles of negotiated waivers to a different end and improve our system from within.

104. See *supra* Part II.D (describing the benefits of shorter trials with greater participation from the defendant).

105. See *supra* Part II.D.