

# Trial Bargaining

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*ABSTRACT: Jury trials are rare. Almost all criminal cases are resolved by guilty plea, and almost all guilty pleas are secured by prosecutorial offers of leniency. Our system of criminal procedure was developed around the norm of trials, so the shift to resolution-by-plea represents a massive change to the structure of the system.*

*The dominance of plea bargaining can best be explained by reference to a constitutionalized criminal procedure that renders formal adjudication too costly to provide in most cases. Plea bargaining dramatically enhances the efficiency of our system, serving as a safety valve against costly trials. The transformation of an adjudicatory system of criminal justice to a confessional one, however, generates severe costs for the legal system as a whole.*

*This Article proposes trial bargaining as a new safety valve to mitigate the costs of an excessive reliance on plea bargaining. Through the mechanism of waiver—the very tool that makes plea bargaining possible—trial bargaining allows the defendant to waive limited trial rights in exchange for limited leniency. As such, it promises to reinvigorate the jury trial, mitigate the costs of an excessive reliance on plea bargains, and allow a more vibrant and experimental approach to criminal justice than has been realized under our constitutionalized system.*

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## I. INTRODUCTION

Last year, almost everyone charged with a crime pled guilty.<sup>1</sup> The same thing happened the year before,<sup>2</sup> as it has for decades. In courtrooms around the country, more than nine out of every ten defendants surrendered any chance of acquittal, abandoned the constitutional right to a jury trial, and asked courts to enter judgments against them. Many thousands of these defendants acquiesced knowing that by doing so they would be sentenced to lengthy prison terms.

To one unfamiliar with our legal system, this pattern might suggest that only the guilty are charged, and that those people charged with crimes are, on the whole, highly self-aware and penitent. Of course, penitence is not the reason most defendants plead guilty—they plead guilty because, depending on one’s perspective, they are either paid to do so or threatened if they do not.<sup>3</sup> The payment takes the form of leniency in sentencing for those who plead guilty; the threat takes the form of harshness in sentencing for those who demand a trial.<sup>4</sup> That’s plea bargaining, and it’s entirely legal.

Plea bargaining has come to completely dominate our system of criminal justice, and for good reason. Crowded dockets and unwieldy trial procedures

1. See U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ ANNUAL STATISTICAL REPORT: FISCAL YEAR 2013, at 9 (2013), <http://www.justice.gov/sites/default/files/usao/legacy/2014/09/22/13statrpt.pdf> (“During Fiscal Year 2013, a total of 73,397, or 97 percent, of all convicted defendants pled guilty prior to or during trial.”). Of all federal criminal cases terminated in 2013, over 92% ended in conviction, and only 3% went to trial. *Id.* The numbers are similar in state courts. See *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012).

2. See U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ ANNUAL STATISTICAL REPORT: FISCAL YEAR 2012, at 8 (2012), <http://www.justice.gov/sites/default/files/usao/legacy/2013/10/28/12statrpt.pdf> (“During Fiscal Year 2012, a total of 78,647, or 97 percent, of all convicted defendants pled guilty prior to or during trial.”).

3. The traditional view, captured in the name of the practice itself, is that plea bargains represent a concession to the defendant in the form of leniency. Since almost all criminal matters are resolved by bargained-for pleas, it may be that the bargained-for sentence is the “baseline of fair and just treatment,” while sentences after entail a penalty. Richard S. Frase, *Recurring Policy Issues of Guidelines (and Non-Guidelines) Sentencing: Risk Assessments, Criminal History Enhancements, and the Enforcement of Release Conditions*, 26 FED. SENT’G REP. 145, 149 (2014).

4. 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.”).

necessitate a bureaucratic fix.<sup>5</sup> This is not to suggest that plea bargaining was intentionally developed to remedy a congested and costly trial system, but congestion and cost have rendered efforts to ban or restrict plea bargaining untenable.<sup>6</sup> Extensive procedural protections make trials expensive, while prosecutorial discretion and negotiation tactics are cheap and unregulated.<sup>7</sup> Given limited resources and a strong demand for prosecutions, plea bargaining represents the cost-effective alternative to trial.

The dominance of plea bargaining, however, generates significant costs. Hefty trial penalties empower prosecutors to secure guilty pleas in almost all cases, in turn effectively nullifying the procedural protections of trial.<sup>8</sup> Outcomes are determined through a process less reliant on evidence and more reliant on the risk tolerance of individual prosecutors and defendants.<sup>9</sup> Plea bargaining introduces a systemic incentive for innocent defendants to plead guilty. It undermines, to the point of negating, the role of the jury. It strays from the rule of law toward the authority of discretion. It silences those subject to the criminal justice system. And it threatens the very legitimacy of that system.

Unfortunately, the obvious alternatives face obvious hurdles. Right now, there are simply more defendants than the system can afford to give trials.<sup>10</sup> It would be possible to dramatically increase funding for the entire criminal justice system (courts, prosecutors, defense attorneys, court reporters, marshals, courtrooms, etc.); however, there is limited political will for this

5. See William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 836 (2006) (“Elaborate trial procedures have produced not better trials, but bigger criminal codes and more guilty pleas.”).

6. The history of how plea bargaining came to dominate our justice system is undoubtedly more complex and beyond the scope of this Article. George Fisher provides perhaps the most detailed history of the development of plea bargaining, in which he concludes that “[p]lea bargaining’s triumph was manifestly the work of those courtroom actors who stood to gain from it.” George Fisher, *Plea Bargaining’s Triumph*, 109 YALE L.J. 857, 859 (2000). Among the factors playing a critical role in the rise of plea bargaining are the breadth of criminal law, the complexity of criminal procedure, and prosecutorial incentives. See Albert W. Alschuler, *The Prosecutor’s Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 50–52 (1968). Changes to sentencing guidelines, most notably mandatory minimums, have also played a significant role. See Rachel E. Barkow, *Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 85–102 (2003).

7. Stuntz, *supra* note 5, at 802.

8. *Id.* at 802–03; see also Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 106 (2005) (“Guilty plea negotiations have crowded out other alternatives, taking the heaviest toll on acquittals.”).

9. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2470 (2004) (noting that while “plea bargains should depend only on the severity of the crime, the strength of the evidence, and the defendant’s record and need for punishment[,] . . . [t]he reality is much more complex”).

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

solution.<sup>11</sup> It would also be possible to decrease the number of defendants subject to the criminal justice system. While there is much to be said in favor of fundamentally altering the way we use our criminal justice system (i.e., to use it less), it remains unlikely that in the near term there will be sufficient decriminalization to render plea bargaining unnecessary.<sup>12</sup>

Many have asked how to address a criminal justice system that has become so reliant on plea bargaining that “[i]f the system is doing justice now it is by accident—the accident that particular prosecutors bargain prudently and humanely.”<sup>13</sup> Presently, there is no clear effort to address the problem; instead, the Supreme Court continues “increasing constitutional procedural entitlements in the hope of mitigating the excesses of the substantive criminal law.”<sup>14</sup> One alternative would be for courts to reduce procedural protections in hopes that legislatures would respond with more rational substantive criminal law.<sup>15</sup> Or, courts might develop a jurisprudence of constitutional substantive criminal law to limit the excesses of the current system.<sup>16</sup> Plea bargaining might be limited or banned by limiting prosecutorial discretion or limiting defendants’ ability to waive procedural protections.<sup>17</sup> Or, it might be

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11. Al Alschuler takes exception to the contention that “our nation cannot afford to give its criminal defendants their day in court.” Albert W. Alschuler, *Implementing the Criminal Defendant’s Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 935 (1983). For this reason, I want to be clear: Our nation could *afford* to give criminal defendants their day in court; we just haven’t been willing to do so.

12. See John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 193–94 (1991). Substantive criminal law has broadened to the point where it is indistinguishable from tort law, and it has done so at significant cost to its own efficacy; yet, “implementation of the crime/tort distinction is today feasible only at the sentencing stage.” *Id.* at 194.

13. Donald A. Dripps, *Overcriminalization, Discretion, Waiver: A Survey of Possible Exit Strategies*, 109 PENN ST. L. REV. 1155, 1159 (2005).

14. See *id.* at 1161.

15. See *id.* at 1165–66 (concluding in part that there are compelling “reasons to doubt that judicial retreat from current safeguards would cause *the repeal* of duplicative or draconian legislation”).

16. See *id.* at 1167–70.

17. See *id.* at 1170, 1176. There are a variety of proposals to ban or limit plea bargaining. See, e.g., Alschuler, *supra* note 11, at 935–36 (analyzing “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”).

regulated.<sup>18</sup> Finally, some have suggested importing aspects of the trial into the bargaining process.<sup>19</sup>

This Article concerns a new possibility: experimenting, within the present bargaining system, with lower cost, and streamlined trial procedures. Justice Scalia recently wrote that “[t]he ordinary criminal process has become too long, too expensive, and unpredictable.”<sup>20</sup> The viable solution to the ills of plea bargaining may lie in reducing the length, cost, and uncertainty of criminal trials.<sup>21</sup> This Article proposes trial bargaining as a mechanism to achieve this result within the current legal framework.

Plea bargaining involves defendants waiving all trial rights, and allowing the court to enter a judgment of guilt in exchange for leniency. Practitioners and scholars generally envision this waiver as singular: a guilty plea. But the guilty plea actually consists of an array of individual waivers: a waiver of the right to a jury, a waiver of the right to confront witnesses, a waiver of the right to hold the prosecution to its burden of proof, a waiver of the right to compel witnesses, et cetera. Trial bargaining occurs where the defendant waives only limited trial rights, thus preserving a trial that is shorter, cheaper, less uncertain, or some combination thereof, in exchange for limited leniency.

This Article is particularly indebted to the work of three others. In the early 1980s, Al Alschuler and Stephen Schulhofer studied the bench trials of Pittsburgh and Philadelphia as cost-effective examples of meaningful adjudicatory procedures that avoided the worst aspects of plea bargaining.<sup>22</sup>

18. See, e.g., Bibas, *supra* note 9, at 2528 (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) (“[N]o 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.”).

19. See Laura I. Appleman, *The Plea Jury*, 85 IND. L.J. 731, 748 (2010) (proposing a “plea jury” to review negotiated pleas and assess not only whether the proffered plea was “knowing and voluntary,” but also whether the negotiated sentence was appropriate); see also Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1725 (2010) (proposing a lay jury for petty cases to “address only normative questions of whether charges equitably ought to be filed”).

20. *Lafley v. Cooper*, 132 S. Ct. 1376, 1391 (2012) (Scalia, J., dissenting).

21. Cf. Bruce A. Green, *The Right to Plea Bargain with Competent Counsel After Cooper and Frye: Is the Supreme Court Making the Ordinary Criminal Process “Too Long, Too Expensive, and Unpredictable . . . in Pursuit of Perfect Justice”?*, 51 DUQ. L. REV. 735, 736–37 (2013) (challenging “Justice Scalia’s assumption that defendants take refuge in plea bargaining as an alternative to criminal trials because of the intricacies of constitutional procedures”).

22. See generally Alschuler, *supra* note 11; Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037 (1984). Taking a more theoretical approach, Talia Fisher has suggested changing the standard of proof in criminal cases to a mere default rule of beyond a reasonable doubt, allowing parties to negotiate over standards of proof and leniency. See Talia Fisher, *The Boundaries of Plea Bargaining: Negotiating the Standard of Proof*, 97 J. CRIM. L. &

Those studies establish that alternative trial systems *can* work as an alternative to plea bargaining. More recently, Bill Stuntz articulated a theory of the relationship between constitutional criminal law and the politics of crime.<sup>23</sup> That theory points to the need for criminal law to “be more flexible[,] . . . open to innovation, . . . and more experimentalist,” while identifying the significant challenges any such effort faces.<sup>24</sup> Trial bargaining answers Stuntz’s call for experimentalism by offering to expand, in both method and scope, the models described by Alschuler and Schulhofer.<sup>25</sup>

Generally, the idea of streamlining trials runs into the objection that much of our criminal procedure is constitutionalized.<sup>26</sup> It is therefore difficult to alter.<sup>27</sup> This Article suggests that the mechanism of waiver—the very thing that renders plea bargains possible and thus eliminates trials—might allow the sort of experimentation in adjudication that could revitalize the jury trial. And herein lies perhaps the greatest strength of trial bargaining: It can be done now, legally and constitutionally, without changes to the rules, the funding, or the structure of our criminal justice system.

What would bargained-for trials look like? As befits an experimentalist agenda, there is no single answer. The rights a defendant would waive would vary, depending on the case, the defendant, and the prosecutor. It is a matter of negotiation: case-specific and imperfect. Counsel would assess the value of alternative trial procedures and bargain away defense protections in exchange for conditional leniency should the defendant be convicted. The defense might waive the right to a certain number of jurors, agree to limits on witness testimony, submit to cross examination, or any other combination of waived trial rights. These agreements and waivers would generate a simpler,

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CRIMINOLOGY 943, 945 (2007). Fisher’s proposal thus suggests a form of trial bargaining, albeit one achieved through a rule change rather than directly through waiver.

23. See generally Stuntz, *supra* note 5, at 791–818; William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1 (1996) [hereinafter Stuntz, *Substance*]; William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997) [hereinafter Stuntz, *The Uneasy Relationship*].

24. See Stuntz, *supra* note 5, at 785; see also Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 953–54 (1965) (“[T]he Supreme Court should not regard these declarations of fundamental principles as if they were a detailed code of criminal procedure, allowing no room whatever for reasonable difference of judgment or play in the joints.”). For more on the tangled relationship between complexity of trial procedures and Judge Friendly’s warning, see generally Green, *supra* note 21.

25. Whereas the Pennsylvania models described by Alschuler and Schulhofer involved a system aimed at rewarding those who elected bench trials, trial bargaining relies on individual waivers and, as such, is limited only by the time and creativity of counsel. Of course, these limits are, as a systemic matter, very real. See *infra* Part V.B.

26. See Stuntz, *supra* note 5, at 789 (“Constitutional law governs the most important [trial] procedures: the scope of the right to trial by jury and jury selection, burdens of proof, the finality of verdicts, the right to confront opposing witnesses, and so on.” (footnotes omitted)).

27. See *id.* at 836 (“[T]he current law of trial procedure has stifled innovation.”).

sometimes shorter, sometimes less uncertain trial; but they would preserve a trial of some form.<sup>28</sup>

Of course, there is good reason to be skeptical about trial bargaining on a large scale.<sup>29</sup> The institutional players generally lack an incentive to engage in trial bargaining. Prosecutors prevail in all but a fraction of their cases without any adjudication because plea bargaining is so effective. Opening the gates to trial bargaining would threaten to dilute that success. Courts too are unlikely to be fond of a proposal that would, to the extent it succeeds, further crowd dockets. And defense counsel is so notoriously overworked as to have little time to craft novel forms of adjudication. The systemic barriers are substantial and real, but that is not reason to dismiss trial bargaining.

The important fact is that trial bargaining *can* happen. Given the sheer number of cases and prosecutors and defense lawyers, there will be cases in which trial bargaining will happen, if counsel are aware of the possibility. Indeed, to the extent counsel presently negotiate over stipulations, they are engaged in a type of trial bargaining. This Article suggests not that we ought to expect that criminal counsel will begin crafting new trial formats in most cases, but rather that we ought to recognize the possibility of doing so and allow the practice to develop incrementally. As trial bargaining becomes more prevalent, forms and practices will develop that will simplify and streamline the process. After all, today, it is the exceptional plea bargain that is not copied verbatim from boilerplate; counsel know the terms they care about, negotiate over those, and formulaically memorialize the deal. Trial bargaining could be done in the same manner.

This Article proceeds as follows. Part II introduces trial bargaining and offers concrete examples of what might be involved in these bargains. Part III justifies the need for trial bargaining by developing, in some detail, the harms and costs of a legal system that is over-reliant on plea bargaining. Part IV, in turn, addresses why our system is reliant on plea bargaining, and why it is likely to remain so. Part V considers possible objections to trial bargaining and suggests the path forward.

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28. Nancy Jean King provides a compelling description of the increasing breadth of stipulations and waivers by which “defendants can make trials more economical or less risky for prosecutors,” while cautioning that “courts should be self-conscious about the extent to which they allow contract law to swallow the criminal process.” Nancy Jean King, *Priceless Process: Nonnegotiable Features of Criminal Litigation*, 47 UCLA L. REV. 113, 118, 180 (1999). King has plainly anticipated the eventual development of plea bargaining into something like trial bargaining and she identifies the risks inherent in allowing contract rules to overwhelm criminal procedure. However, the present rate of bargained-for guilty pleas suggests that eventuality is here. Trial bargaining is a small step back in the direction of trials, away from a system that relies almost exclusively on bargained confessions. See Alschuler, *supra* note 11, at 1016–17 (discounting concerns about reducing certain trial protections because the alternative to simplification is generally a guilty plea, not a trial).

29. See *infra* Part V.B.



I first introduced trial bargaining in *Counsel's Role in Bargaining for Trials*.<sup>30</sup> Already, the idea has gained traction in legal scholarship.<sup>31</sup> The next step will be to broadcast the possibility of trial bargaining to practicing lawyers, thus allowing this experiment in revitalizing trials to begin.

## II. TRIAL BARGAINING

### A. A DEFINITION

The concept of trial bargaining arises from the recognition that a guilty plea is an array of waivers. In a typical plea negotiation, the prosecutor and defense lawyer proceed on the assumption that the defendant basically has one thing to offer: a guilty plea.<sup>32</sup> Trial bargaining occurs where the parties reject the premise that the defendant's offer is a singular, unified thing. By trial bargaining, the defendant, through counsel, offers limited trial waivers in exchange for limited leniency.<sup>33</sup> Trial bargaining thus relies on the mechanics of plea bargaining to secure leniency while retaining some form of adjudication on the merits.

#### 1. The Mechanics of Guilty Pleas and Plea Bargaining

The guilty plea is a waiver of all trial rights.<sup>34</sup> Prior to trial and prior to entering a plea of guilty, the defendant is presumed innocent,<sup>35</sup> the prosecution bears the burden of proof,<sup>36</sup> and judgment of conviction cannot be entered unless and until the prosecution meets that burden at a trial where the defendant is afforded the full array of trial rights.<sup>37</sup> By pleading guilty, the

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

31. See John Rappaport, *Unbundling Criminal Trial Rights*, 82 U. CHI. L. REV. 181, 183 & n.3, 189 (2015) (agreeing that trial bargaining is practically feasible and normatively desirable); see also Raymond J. McKoski, *Betting Against the (Big) House: Bargaining Away Criminal Trial Rights*, 100 IOWA L. REV. BULL. 125 (2015). In the latter piece, Judge McKoski anticipates and addresses some of the concerns about trial bargaining, including its constitutionality and practicability. These issues are further addressed below. See *infra* Part V.

32. There are exceptions to this singularity at the margins. For example, plea negotiations do address issues such as whether the defendant will cooperate, whether he will contest restitution, which facts he will admit or assent to, whether and the degree to which he will waive appellate rights, and whether he will relinquish Freedom of Information Act rights. These matters, however, are usually far less significant than the basic matter of whether the defendant will plead guilty.

33. See Gilchrist, *supra* note 30, at 1987 (“[Plea bargaining] proceeds on the assumption—by both parties—that the defendant only has this one thing to offer. . . . Trial bargaining upsets [this] assumption [and] allows the parties to contract for the prosecutor to grant leniency in exchange for the defendant's waiver of *limited* trial rights.”).

34. See *United States v. Andrades*, 169 F.3d 131, 132 (2d Cir. 1999) (“A criminal defendant's plea of guilty is perhaps the law's most significant waiver of constitutional rights. . . .”).

35. See *In re Winship*, 397 U.S. 358, 362 (1970).

36. See *id.*

37. See, e.g., *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938) (noting that where the constitutional right to counsel is neither complied with nor waived, the Constitution “stands as a

defendant waives those rights, including the right to have the prosecution meet its burden of proof.<sup>38</sup> Once these rights are voluntarily waived, the court, upon finding a factual basis for guilt, may enter a judgment against the defendant.<sup>39</sup>

Plea bargaining is merely the process by which the prosecution incentivizes the defendant's waiver of trial rights by promising leniency. The leniency takes many forms, including not bringing additional charges,<sup>40</sup> recommending a particular sentence,<sup>41</sup> foregoing sentencing arguments,<sup>42</sup> and favorably resolving cases against the defendant's loved ones.<sup>43</sup> If prosecutors can give leniency to induce waivers of all trial rights, it seems they also ought to be able to give leniency to induce waiver of select trial rights. Counsel ought to be able to trial bargain, thereby securing shorter, less uncertain trials, in exchange for some lesser amount of leniency than would be available in exchange for a guilty plea.

## 2. Bargaining for Trials

By trial bargaining, I am not referring to an existing practice. Trial bargaining does not occur in any systematic way. Counsel in criminal cases do not routinely bargain for the waiver of limited trial rights in exchange for limited leniency. And, as will be addressed further, below, there is reason to be skeptical about whether trial bargaining could ever approach anything like the dominance of plea bargaining.<sup>44</sup> The practice, however, *could* occur; and if defense lawyers and prosecutors begin to recognize the possibility of trial bargaining, it will occur in at least some cases.

The rationale for trial bargaining in a particular case is that it could generate favorable options for the defendant. The systemic rationale for trial bargaining, however, is that it could offset the considerable problems associated with an excessive reliance on plea bargaining. The costs of plea bargaining are multifold,<sup>45</sup> yet the practice continues because our justice system—as presently funded and in its current form—requires a safety valve to avoid full constitutional trials for all defendants.<sup>46</sup> Trial bargaining provides a different safety valve, while mitigating some of the costs of plea bargaining.

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jurisdictional bar to a valid conviction"); *see also* FED. R. CRIM. P. 32(k)(1) (stating that there can be no judgment absent a plea, a jury verdict, or, in the case of a bench trial, judge's findings).

38. *See* George E. Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 TEX. L. REV. 193, 194 (1977).

39. FED. R. CRIM. P. 11(b)(3).

40. *Id.* 11(c)(1)(A).

41. *Id.* 11(c)(1)(B).

42. *Id.*

43. *See infra* note 112 and accompanying text.

44. *See infra* Part IV.B.

45. *See infra* Part III (cataloguing the costs of an excessive reliance on plea bargaining).

46. *See infra* Part IV (describing the necessity of plea bargaining as a safety valve).

As such, trial bargaining represents a compromise measure that will satisfy neither the strongest opponents of plea bargaining nor the most adamant advocates for efficiency. It might, however, improve upon the status quo.

### 3. Simplified Trials Can Be Real Trials

A common concern about foreshortened trials of any form is that the limited process does not allow for meaningful adjudication; rather, these show trials are little more than “slow pleas of guilty.”<sup>47</sup> For example, one study of Philadelphia’s use of streamlined bench trials in the 1960s and 1970s suggests that defense counsel would frequently implicitly or explicitly admit guilt, thus rendering these trials in nothing but name.<sup>48</sup> While it is true that abbreviated trials can become show trials, this outcome is not inevitable.

Bargained-for trials can still be real trials. Trial bargaining is no more aimed at generating “slow pleas of guilty,” than full constitutional criminal procedure is. Any sort of trial mechanism can be undermined; but real adjudications *can* occur with less than the full panoply of constitutional procedures, as they have elsewhere.<sup>49</sup> The bargained-for procedures and available evidence in each case would dictate whether, and to what degree, the defendant stands a real chance of acquittal in the bargained-for trial. But that is true of full constitutional trials also. Some cases are hard for the prosecution, and others leave little doubt that the end result will be a conviction. Trial bargaining cannot improve the evidence for the defendant, and it will almost necessarily limit some procedural protections that tend to inure to the defendant’s benefit. Still, it is capable of generating a meaningful trial on the merits.

#### B. IMAGINING THE CONTOURS OF TRIAL BARGAINING

Trial bargaining relies on the mechanism of waiver. The viability of trial bargaining thus hinges on the defendant’s ability to waive limited trial rights.

When the Supreme Court first began exploring the concept of waiver, it held that a waiver of a constitutional right is only valid if it is “an intentional relinquishment or abandonment of a known right or privilege,”<sup>50</sup> that was

47. See Schulhofer, *supra* note 22, at 1046–50 (cataloguing studies of abbreviated adjudications that concluded the adjudications were little more than slow guilty pleas).

48. See Welsh S. White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439, 441–42 (1971) (“[M]any cases recorded as ‘waivers’ (trials before a judge without a jury) can be more accurately characterized as ‘slow pleas of guilty.’ That is, the defendant’s counsel facilitates the presentation of evidence and implicitly or explicitly admits that the defendant is guilty of some offense, but does not enter a formal plea.”).

49. See, e.g., Schulhofer, *supra* note 22, at 1050 (finding “the ‘slow plea’ concept was largely inapplicable to Philadelphia procedure in 1982” in which defendants opted for speedy bench trials). Indeed, summary jury trials and other streamlined forms of adjudication have been widely and successfully deployed in the civil context. See, e.g., Thomas D. Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461 (1984).

50. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

made “competently and intelligently.”<sup>51</sup> Moreover, the Court explained that “‘courts indulge every reasonable presumption against waiver’ of fundamental constitutional rights and that we ‘do not presume acquiescence in the loss of fundamental rights.’”<sup>52</sup>

In the criminal context, however, these standards have eroded considerably. A suspect can waive her Fourth and Fourteenth Amendment rights against unreasonable searches by consent, even if she does not know she has the right to refuse.<sup>53</sup> A defendant can waive all trial rights through a guilty plea, even if she is unaware that the prosecution is in possession of evidence impeaching its own witnesses.<sup>54</sup> As Bill Stuntz described it: “One of the major problems of American criminal procedure is the seeming tension between the breadth of the constitutional rights that protect defendants and the ease with which those rights may be waived.”<sup>55</sup> This problem is also the opportunity that makes trial bargaining possible.<sup>56</sup>

Of course, there may be limits on the defendant’s right to waive certain rights in the context of bargaining. Some courts, for example, have held that waiver of appellate rights post-trial in exchange for a reduced sentence is invalid as contrary to public policy.<sup>57</sup> Post-trial waiver is distinguishable from pretrial waiver. First, the state has no legitimate interest in preserving a conviction secured through trial errors, and second, “disparity in bargaining power between the defendant and the state increases significantly after the defendant has been convicted.”<sup>58</sup> Still, courts may impose limits on the defendant’s right to waive certain trial rights in a trial bargaining posture. Generally, it would seem that the power to waive all trial rights inherent in

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51. *Id.* at 469; *see also* John R. Kroger, *The Confrontation Waiver Rule*, 76 B.U. L. REV. 835, 871 (1996).

52. *Zerbst*, 304 U.S. at 464 (footnotes omitted); *see also* *Edwards v. Arizona*, 451 U.S. 477, 482 (1981).

53. *See* *Schneekloth v. Bustamonte*, 412 U.S. 218, 226–27 (1973).

54. *See* *United States v. Ruiz*, 536 U.S. 622, 629 (2002) (“We must decide whether the Constitution requires that preguilty plea disclosure of impeachment information. We conclude that it does not.”). It remains unclear whether, or under what circumstances, a guilty plea where nondisclosure causes the defendant to be unaware of *Brady* evidence (directly exculpatory, as opposed to impeaching the prosecution witnesses) might be deemed valid. For examples, *see* Samuel R. Wiseman, *Waiving Innocence*, 96 MINN. L. REV. 952, 992 (2012).

55. *See* William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761, 762 (1989); *see also* *Dix*, *supra* note 38, at 195 (“[W]aiver is an effective device for reaffirming the existence of procedural rights in the abstract while finding them inapplicable to particular cases, courts have pressed it into service with increasing frequency.”).

56. *See* *Dix*, *supra* note 38, at 194 (“Even those who are actually tried may waive some trial rights, such as the rights to have a jury trial, to confront and cross-examine witnesses, to avoid testifying, or rights based upon local rules rather than federal constitutional law.”).

57. *See, e.g., State v. Ethington*, 592 P.2d 768, 769–70 (Ariz. 1979) (en banc); *People v. Harrison*, 191 N.W.2d 371, 375 (Mich. 1971); *Spann v. State*, 704 N.W.2d 486, 494–95 (Minn. 2005). State courts are split on this issue. *See* *People v. Nichols*, 493 N.E.2d 677, 680 (Ill. App. Ct. 1986).

58. *See* *Spann*, 704 N.W.2d at 493.

plea bargaining includes the power to waive limited trial rights on trial bargaining. However, certain waivers—for example, waiving the right to a certain number of jurors—may be deemed beyond the defendant’s authority.<sup>59</sup>

For this reason, this Article does not contend that all negotiated pretrial waivers would be deemed valid in all circumstances. Given the diversity of possible bargains, there will be controversy and litigation about whether certain waivers are valid. But generally, defendants have been given broad authority to waive their own rights, and this favors trial bargaining.<sup>60</sup>

The basic idea behind trial bargaining—“that simpler trial procedures lead to increased trial use and to reduced pressure for self-conviction”<sup>61</sup>—is neither new nor untested. Decades ago, Stephen Schulhofer and Al Alschuler described something similar to trial bargaining occurring regularly in Philadelphia and Pittsburgh.<sup>62</sup> In those cities, the jury waivers were secured through case assignments and perceptions of judicial sentencing styles;<sup>63</sup> both Schulhofer and Alschuler suggested the possibility of a model based on negotiated waivers.<sup>64</sup> The difference with trial bargaining, however, is that it broadens the scope of possibilities.

So what would a trial bargain look like? There are many possibilities. Waiving the right to a jury is one possible trial bargain,<sup>65</sup> but there are others that will preserve the value of jury trials, or, as it may be, help reinvigorate the jury trial. Trials could be streamlined through various waivers, while maintaining the legitimizing effect of jury verdicts. This Part considers a few such possibilities. My goal is not to provide an exhaustive list; as with plea bargaining, trial bargains would take many forms to fit the circumstances of different cases. The ideas below are just that: some ideas about matters counsel could begin considering when looking for alternatives to the binary system of guilty plea or trial.

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59. For more on the argument that the defendant may lack the power to waive jury size, see *infra* notes 101–04 and accompanying text.

60. To whom each constitutional right belongs is a slightly more difficult question. See *infra* notes 101–04 and accompanying text.

61. See Alschuler, *supra* note 11, at 1024.

62. See *id.* at 1026–43; Schulhofer, *supra* note 22, at 1050–86.

63. See Alschuler, *supra* note 11, at 1029.

64. See *id.* at 1046; Schulhofer, *supra* note 22, at 1088.

65. Indeed, this type of trial bargaining does seem to occur in at least some jurisdictions. See Nancy J. King et al., *When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States*, 105 COLUM. L. REV. 959, 961, 964, 989 (2005) (describing “the intermediate option of bench trial as a compromise between the efficient guilty plea and prohibitively expensive jury trial,” and suggesting that one explanation for “process discounts” is “that they are deliberately maintained by prosecutors and by judges in order to provide defendants with an incentive to forgo expensive procedural protections”).

### 1. Time Limits, Witness Limits, and Evidentiary Concessions

One way to streamline trials—and potentially diminish the uncertainty of trial from the prosecutor’s perspective—would be for the parties to agree to limits on the presentation of evidence. The most generic forms of such limits would be agreements to limit the number of witnesses each party could call, or to limit the total time for direct and cross examination. An agreement to limit time or witnesses would, in some cases, be of value to the prosecutor. After all, the defendant in a criminal case has a fundamental right to present witnesses in his defense.<sup>66</sup> While the court can impose reasonable restrictions on the defense’s ability to call witnesses,<sup>67</sup> court-imposed restrictions run the risk of being deemed unreasonable on appeal.<sup>68</sup> In a case where the prosecutor foresaw a lengthy, complex, or problematic defense, she might be willing to offer leniency in exchange for limiting the scope of the defense.

Exchanging leniency for evidentiary concessions may have a precedent in other countries’ legal systems. Richard Frase suggested as much in his comparative study of criminal justice systems in the United States and France.<sup>69</sup> Frase noted that French and other European criminal trials are relatively non-adversarial compared to those in the United States, leaving many “basic issues of a case . . . uncontested,”<sup>70</sup> and he hypothesized that an informal type of trial bargaining may be the cause.<sup>71</sup> French courts are permitted to consider the “defendant’s cooperation as a mitigating factor in sentencing,” and it may be that recognition of their willingness to do so incentivizes defendants not to contest many aspects of the case.<sup>72</sup> Taking this informal procedure a step further, Frase suggested the possibility of a prosecutor making a “request[] for admission[s]” regarding particular facts in a case, while offering leniency or threatening a harsher penalty for each admission that the defendant admits or denies, respectively.<sup>73</sup> The defendant would thus be incentivized to admit facts not seriously in dispute, both to secure leniency and to maintain credibility on other matters at trial.<sup>74</sup>

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

67. See *United States v. Holmes*, 44 F.3d 1150, 1157 (2d Cir. 1995) (“Absent a clear abuse of discretion, a trial judge retains a wide latitude to exclude irrelevant, repetitive, or cumulative evidence.”); see also *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986); *United States v. Echols*, 346 F.3d 818, 821 (8th Cir. 2003); *United States v. Wilson*, 160 F.3d 732, 742 (D.C. Cir. 1998); *Roussell v. Jeane*, 842 F.2d 1512, 1516 (5th Cir. 1988); *Watkins v. Callahan*, 724 F.2d 1038, 1044 (1st Cir. 1984).

68. See, e.g., *United States v. Goodman*, 633 F.3d 963, 966 (10th Cir. 2011).

69. See Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 CALIF. L. REV. 539, 641–44 (1990).

70. *Id.* at 637.

71. *Id.* at 639.

72. *Id.* at 638–39.

73. *Id.* at 641–43.

74. *Id.* at 643.

Counsel might consider negotiating with more specific evidentiary limits as well. Courts have permitted waiver of confrontation rights in exchange for evidentiary concessions by the prosecution.<sup>75</sup> A trial bargain involving evidentiary concessions is largely the same, except that the prosecutorial concession would take the form of conditional leniency rather than evidentiary concessions.<sup>76</sup> Such an agreement might appeal to the prosecutor in order to avoid tedious and unnecessary testimony (such as forensic analysis on essentially uncontested issues), or to avoid difficult testimony (such as that by child witnesses or victims). Hybrid testimony based on waivers might also be possible, such as allowing a child-witness to testify by video, outside the presence of the defendant and the jury. Each case differs, but to the extent counsel can identify ways of streamlining the trial, or even making the trial less burdensome on the prosecution or particular witnesses, doing so can be exchanged for leniency.

It's worth noting also that shorter trials need not be worse trials. Indeed, sometimes shorter trials will be better trials. Civil trial attorneys have more experience with time-limited trials, and some of those who have tried cases under time limits argue brevity actually made for better adjudications.<sup>77</sup>

## 2. Waiving Fourth Amendment Violations

In some cases, the prosecution values avoiding a hearing on whether evidence should be excluded for having been secured in violation of the Fourth Amendment. Consider a case in which the defense has a strong motion to suppress evidence that is necessary to securing a conviction (for example, a motion to exclude the firearm in an unlawful possession of a firearm prosecution). Perhaps the evidence was secured based on an alleged consent search, and the defendant has compelling evidence that there was no valid consent.<sup>78</sup> The prosecution would be interested in avoiding the possible exclusion of necessary evidence. Prosecutors routinely predicate favorable

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75. See, e.g., *Commonwealth v. Leng*, 979 N.E.2d 199, 205 (Mass. 2012).

76. This Article does not fully address the related and important question of how trial bargains ought to be reviewed by the trial court. Many courts have “declined to treat inculpatory stipulations of fact as equivalent to guilty pleas for Rule 11 purposes.” *Adams v. Peterson*, 968 F.2d 835, 840 (9th Cir. 1992). Treating stipulations that concede the entirety of the prosecution burden as different from guilty pleas is problematic. See generally Maurita Elaine Horn, *Confessional Stipulations: Protecting Waiver of Constitutional Rights*, 61 U. CHI. L. REV. 225 (1994). Trial bargains are less problematic because the idea would be to craft real trials, not slow pleas of guilty. Generally, courts have required only that the defendant knowingly and voluntarily agreed to the stipulations. See *Adams*, 968 F.2d at 843.

77. See David Bissinger & Erica Harris, *Working on the Clock: The Advantages of Timed Trials*, TEX. LAW., Apr. 2, 2012; see also 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, 445-47 (2013).

78. See, e.g., *United States v. Gilmer*, 814 F. Supp. 44, 45 (D. Colo. 1992) (“Moreover, the atmosphere in which consent was elicited was riddled with duress and coercion.”).

plea offers on waiver of Fourth Amendment claims.<sup>79</sup> Trial bargaining simply adds the possibility that the prosecution could offer conditional leniency in exchange for the withdrawal of the motion to suppress,<sup>80</sup> without compelling the defendant to plead guilty.

### 3. Waiving the Privilege Against Self-Incrimination

The defendant in a criminal case enjoys the right to remain silent.<sup>81</sup> He cannot be compelled to testify, and, if he chooses not to testify, the jury cannot consider his silence as evidence of guilt.<sup>82</sup>

This is not always a popular right, either during a particular trial or systemically. Where a particular defendant elects not to testify, jurors will wonder why the defendant is not speaking on his own behalf.<sup>83</sup> Instructions that the jury may not consider the defendant's silence against him are of dubious value, and may only serve to draw more attention to the fact that the defendant did not testify.<sup>84</sup> Systemically, allowing defendants not to testify may render the adjudicative process less accurate because, in many cases, the person who knows the most about the allegations remains silent.<sup>85</sup> Indeed, many have struggled to justify the defendant's Fifth Amendment privilege against self-incrimination.<sup>86</sup> Costs aside, the right is real.

79. See, e.g., *Byars v. United States*, No. 1:11-cv-644, 2011 WL 6130415, at \*2 (W.D. Mich. Dec. 8, 2011); *id.* at \*2 n.1 (“By pleading guilty, the Defendant also gives up any and all rights to pursue any affirmative defenses, Fourth Amendment or Fifth Amendment claims, and other pretrial motions that have been filed or could be filed.”).

80. Withdrawing the motion to suppress should, in most jurisdictions, end the issue. Generally, courts will not permit a Fourth Amendment objection to evidence at trial that has not been litigated pretrial. See 6 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.1(a), at 3–4 (5th ed. 2012) (“[I]n the great majority of jurisdictions an objection comes too late if it is made for the first time at the trial; a motion to suppress must be made and adequately pursued at some pretrial stage.” (footnotes omitted)). For those jurisdictions that allow Fourth Amendment objections at the introduction of evidence, the waiver could be secured by written agreement not to object, and the government promise of leniency at sentencing would itself be void should that agreement be breached. And in no event can a Fourth Amendment objection to evidence be raised for the first time on appeal. See *United States v. Ibarra-Zelaya*, 465 F.3d 596, 604 (5th Cir. 2006); *United States v. Lampton*, 158 F.3d 251, 259 (5th Cir. 1998); *United States v. Smith*, 80 F.3d 215, 218 (7th Cir. 1996); *United States v. Martinez-Hidalgo*, 993 F.2d 1052, 1057–58 (3d Cir. 1993); *United States v. Whitten*, 706 F.2d 1000, 1012 (9th Cir. 1983); see also FED. R. CRIM. P. 12(b)(3)(C).

81. U.S. CONST. amend. V.

82. See *Carter v. Kentucky*, 450 U.S. 288, 289, 305 (1981) (finding as reversible error to refuse to give a jury instruction that “[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”).

83. Christopher Slobogin, *Lessons from Inquisitorialism*, 87 S. CAL. L. REV. 699, 727 (2014).

84. See, e.g., 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.”).

85. See Slobogin, *supra* note 83, at 727.

86. See R. Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARYL. REV. 15, 16–17 (1981); see also Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles*:



The right to testify or not testify is solely held by the defendant;<sup>87</sup> counsel cannot waive the right on her client's behalf.<sup>88</sup> And, the right to remain silent renders criminal trials more complex and uncertain than they could otherwise be.<sup>89</sup> This is not to suggest the right to silence is a bad thing; rather, it has costs. In cases where those costs are borne by the prosecution—or, more precisely, those cases where the prosecution perceives itself as bearing the costs of the defendant's right not to testify—the defense has a bargaining tool: The defendant can agree to testify and be subject to cross examination.

The mechanism for waiving the privilege against compelled testimony is subject to some uncertainty. There is no precedent for a defendant entering a pretrial waiver of the right not to testify.<sup>90</sup> Courts have found waivers based on the defendant's selective testimony,<sup>91</sup> but such waivers are disfavored and narrowly construed.<sup>92</sup> Were a defendant to agree with the prosecution that she would testify during the trial, and subsequently change her mind, it is unlikely that a court would compel her testimony; doing so would likely violate the privilege against self-incrimination. While constitutional rights are subject

*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.”).

87. 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.”); see also *Harris v. New York*, 401 U.S. 222, 225 (1971) (“Every criminal defendant is privileged to testify in his own defense, or to refuse to do so.”).

88. See *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (“[T]he accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.”). The authority whether or not to testify is exclusive to the defendant such that it cannot be overcome even in cases where the defendant's decision is irrational, or a “suicidal trial strategy.” See *Cannon v. Mullin*, 383 F.3d 1152, 1171 (10th Cir. 2004); see also *United States v. Curtis*, 742 F.2d 1070, 1076 (7th Cir. 1984) (holding that counsel cannot waive a defendant's right to testify). “The principle behind these holdings is that certain rights are personal to the defendant—a matter of ‘dignity’ and ‘autonomy’ rather than ‘strategy’ or ‘tactics’—which only the defendant, not his lawyer, can waive, and then only if knowingly and voluntarily.” Daniel J. Capra & Joseph Tartakovsky, *Why Strickland Is the Wrong Test for Violations of the Right to Testify*, 70 WASH. & LEE L. REV. 95, 103 (2013).

89. See Greenawalt, *supra* note 86, at 46 (“Insofar as a very expansive right to silence before and at trial impedes efficient ascertainment of guilt, it contributes to a guilty plea alternative that treats an accused with little respect and concern.”).

90. Indeed, the decision whether the defendant will testify or not is generally not made until the prosecution has rested. See *United States v. Character*, No. CRIM. 98CR20080DT, Civ. 04CV74175DT, 2005 WL 2090891, at \*1, \*3 n.1 (E.D. Mich. Aug. 30, 2005) (“[W]hether a defendant will testify is often a last-minute decision which is not conclusively determined until after the government rests.”).

91. *Rogers v. United States*, 340 U.S. 367, 373 (1951) (“[W]here criminating facts have been voluntarily revealed, the privilege cannot be invoked to avoid disclosure of the details.”).

92. See, e.g., *Hashagen v. United States*, 283 F.2d 345, 353 (9th Cir. 1960) (“When this right is coupled with the admonition that ‘[w]aiver of constitutional rights . . . is not lightly to be inferred,’ a necessary corollary is that the doctrine of waiver should be confined in its operation to narrow limits and charily applied else the constitutional guarantee would be effectively nullified by a mere expedient.” (alteration in original)).

to waiver, it is difficult to imagine that a negotiated contract, in which the defendant agreed to testify in exchange for leniency should she be convicted, would be construed as the waiver. Rather, the testimony itself would be the waiver.<sup>93</sup>

Accordingly, some breaches may not be completely remedied. A prosecutor who crafted a trial strategy assuming that the defendant would testify because the defendant *agreed* to testify, might find that strategy less effective when the defendant reneged on the agreement. Obviously, the prosecution would not be bound to provide the leniency under the trial bargain were the defendant to breach, but that remedy might prove insufficient. In such cases, the trial court could exercise its relatively broad discretion to allow the prosecution to re-open its case in order to cure any prejudice.<sup>94</sup> But some breaches would be more difficult to remedy, such as where the prosecution previously put forward affirmative evidence, the only purpose of which was to undermine the anticipated testimony of the defendant; in such a case, the cost in confusion, or lost credibility, could not be resolved simply by permitting the prosecution to re-open its case.

This problem illustrates one of the very basic facts about the trial bargaining project: it's large and potentially unwieldy. It is no more possible to identify all possible permutations of bargains, breaches, and remedies, than it is to identify all possible permutations of plea bargains. At its core, trial bargaining is simple: the defense makes concessions about the form of trial that the prosecution favors, in exchange for lenience should the defendant be convicted. This simplicity is elegant, because it functions within the current legal system, with no formal reliance on changes to rules or statutes. However, the simplicity of mechanism masks the complexity of implementation. Should counsel begin bargaining for trials, there will be hard cases. The possibility of hard cases, however, is not a problem; it is a basic aspect of a legal system.

#### 4. Waiving the Right to a Certain Number of Jurors

When charged with an offense for which the maximum penalty is greater than six months, the defendant is entitled to a jury trial.<sup>95</sup> The Constitution

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93. See *Brown v. United States*, 356 U.S. 148, 155-56 (1958) (explaining defendant's testimony waives the privilege and subjects the defendant to cross examination on matters reasonably related to her testimony); Note, *Testimonial Waiver of the Privilege Against Self-Incrimination*, 92 HARV. L. REV. 1752, 1752 (1979) ("[A]n individual may consciously choose not to assert a right he knows exists, acknowledging the decision openly—the classic intelligent waiver.").

94. See *United States v. Hugh*, 236 F. App'x 796, 798-99 (3d Cir. 2007); *United States v. Boone*, 437 F.3d 829, 836-37 (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, 299-300 (1st Cir. 2000); *United States v. Blankenship*, 775 F.2d 735, 741 (6th Cir. 1985); *United States v. Wilcox*, 450 F.2d 1131, 1143-44 (5th Cir. 1971).

95. See U.S. CONST. amend. VI; 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.").

requires that at least 6 jurors compose a jury, and most courts require 12 jurors.<sup>96</sup> Prosecutors may favor smaller juries, if only because they believe a smaller jury is less likely to hang. The actual empirical data on this perception is inconsistent.<sup>97</sup> However, conventional wisdom holds that a smaller jury is less likely to hang,<sup>98</sup> perhaps because of the simple fact of group dynamics that it would be more difficult for a lone dissenting juror to stand up to five, than for two dissenting jurors to stand up to ten.<sup>99</sup> If prosecutors prefer smaller juries, they will, in some instances, be willing to offer leniency for a waiver of a larger jury.

Some will bristle at the notion of further empowering the parties to reduce the size of juries (by allowing prosecutors to induce such agreements through offers of leniency). Strong supporters of the role of the jury will see this as yet another way of undercutting the influence of juries. It is not. Comparing the value of a 6 person jury to that of a 12 person jury ignores just how very rarely the system turns to 12 person juries. If juries are of value, then smaller juries that actually get used are better than larger juries that exist mostly in movies and textbooks.<sup>100</sup>

It might be argued that the right to a jury does not rest with the defendant alone; rather, it is a collective right of the people to be on, and be represented

96. 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); see also FED. R. CRIM. P. 23(b)(1) (“A jury consists of 12 persons unless this rule provides otherwise.”); Barbara Luppi & Francesco Parisi, *Jury Size and the Hung-Jury Paradox*, 42 J. LEGAL STUD. 399, 402 (2013) (“A total of 11 states currently use juries composed of fewer than 12 jurors in felony and misdemeanor trials. An additional 29 states allow juries of fewer than 12 in misdemeanor cases.” (citations omitted)).

97. Since the Supreme Court’s decision in *Ballew v. Georgia* and Justice Blackmun’s controversial reliance on empirical data therein, numerous empirical studies have been conducted on the effects of jury size. See Michael J. Saks & Mollie Weighner Marti, *A Meta-Analysis of the Effects of Jury Size*, 21 LAW & HUM. BEHAV. 451, 451–52 (1997). The studies vary in their conclusions about whether smaller juries hang less often than larger juries. See Luppi & Parisi, *supra* note 96, at 403 (“Most [empirical studies] conclude that there are no detectable differences between six-person and 12-person juries with respect to mistrial rates.”); Saks & Marti, *supra*, at 459 (“[I]n 11 of [15] studies the large juries produced more hung verdicts than did the small juries.”).

98. See Luppi & Parisi, *supra* note 96, at 408 (“In theory, mistrials should arise more frequently with larger juries than with smaller juries.”).

99. Saks & Marti, *supra* note 97, at 459 (“[T]he juror who is a minority of 1 on a jury of 6 is in a much weaker psychological position to resist the majority than the juror who has one ally with whom to confront a majority of 10.”).

100. See Alschuler, *supra* note 11, at 1016–17 (“To debate the niceties of jury dynamics amidst the ruins of a system that strains to avoid using juries of any size is myopic. On the assumption that criminal justice resources will remain inadequate, the issue is not twelve versus six. It is twelve for a small number of defendants versus six for a larger number. Moreover, this issue of resource allocation does not seem extraordinarily difficult; although six jurors may not be as good as twelve, they are far better than none.” (footnote omitted)).

by, a jury.<sup>101</sup> The Supreme Court has suggested as much in the context of *Batson* challenges.<sup>102</sup> Generally, however, courts have not explicitly located the jury right with the public, allowing defendants to waive the right with consent of the court.<sup>103</sup> Perhaps consent of the court is required *because* the public has an interest in the jury (although this does not appear to have been the rationale in *Singer v. United States*).<sup>104</sup> Still, agreements to reduce the size of the jury would as a matter of the rules, if not the Constitution, require consent of the court.<sup>105</sup>

### III. THE SYSTEMIC HARMS OF PLEA BARGAINING

Trial bargaining represents a novel endeavor. While it would not require any formal changes to the law or legal system, if trial bargaining is going to work it will require the attention of numerous institutional actors. This effort can only be justified by reference to the various dangers of a system that has become overly reliant on plea bargaining. There is an extensive literature criticizing plea bargaining in our criminal justice system.<sup>106</sup> Broadly speaking,

101. See U.S. CONST. art. III, § 2, cl. 3 (“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury”); Laura I. Appleman, *The Lost Meaning of the Jury Trial Right*, 84 IND. L.J. 397, 405 (2009) (“[T]he right to a jury trial, particularly in the criminal context, was viewed almost exclusively as the people’s right, not as a right of the accused . . .”); Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183, 196–97 (2005) (“[The Article III requirement of a jury trial] was meant to be a right of We the People to administer justice, not simply a right of defendants to waive (or be coerced into waiving).”).

102. See *Powers v. Ohio*, 499 U.S. 400, 406 (1991) (observing how “a prosecutor’s discriminatory use of peremptory challenges harms the excluded jurors and the community at large.”).

103. See FED. R. CRIM. P. 23(b)(2) (stating that trial by fewer than 12 jurors is permitted by stipulation of the parties with the consent of the court); see also *id.* 23(a) (allowing waiver of a jury trial with consent of the government and court approval); *Singer v. United States*, 380 U.S. 24, 34–36 (1965) (finding that a defendant can waive the right to trial by jury but does not have a constitutional right to do so unilaterally).

104. See *Singer*, 380 U.S. at 34–35 (denying the right to unilaterally waive a jury trial based on the absence of historical precedent).

105. See FED. R. CRIM. P. 23(b)(2).

106. See, e.g., Alschuler, *supra* note 11; Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1 (1979) [hereinafter Alschuler, *Plea Bargaining*]; Albert W. Alschuler, *The Trial Judge’s Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059 (1976); Oren Bar-Gill & Oren Gazal Ayal, *Plea Bargains Only for the Guilty*, 49 J.L. & ECON. 353 (2006); Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361 (2003); Bibas, *supra* note 9; Russell D. Covey, *Longitudinal Guilt: Repeat Offenders, Plea Bargaining, and the Variable Standard of Proof*, 63 FLA. L. REV. 431 (2011) [hereinafter Covey, *Longitudinal Guilt*]; Russell Covey, *Reconsidering the Relationship Between Cognitive Psychology and Plea Bargaining*, 91 MARQ. L. REV. 213 (2007) [hereinafter Covey, *Cognitive Psychology*]; Lucian E. Dervan, *Bargained Justice: Plea-Bargaining’s Innocence Problem and the Brady Safety-Valve*, 2012 UTAH L. REV. 51; Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant’s Dilemma: An Innovative Empirical Study of Plea Bargaining’s Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1 (2013); Gazal-Ayal, *supra* note 17; Oren Gazal-Ayal & Avshalom Tor, *The Innocence Effect*, 62 DUKE L.J. 339 (2012); Schulhofer, *supra* note 22; William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004).

the most serious problems can be described as the innocence problem, the jury problem, and the narrative problem.

#### A. THE INNOCENCE PROBLEM

Plea bargaining generates an institutional incentive to plead guilty, and the incentive applies equally to the innocent and the guilty. Accordingly, plea bargaining systematically induces the innocent to plead guilty.

##### 1. Plea Bargaining Incentivizes the Guilty and the Innocent to Plead Guilty

Plea bargaining is the process by which the prosecution formally offers something of value to the defendant in exchange for the defendant pleading guilty.<sup>107</sup> The entire purpose of these offers is to induce the defendant to waive her trial rights and enter a plea of guilty. Prosecutors benefit from guilty pleas in obvious ways: they avoid the cost—in time and resources—of preparing for trial, and they secure the desired conviction without the uncertainty of a trial.<sup>108</sup>

For a defendant, absent plea bargaining, there are fewer reasons to favor a guilty plea.<sup>109</sup> Granted, there can be personal and idiosyncratic reasons to plead guilty: for example, a particular defendant may feel remorse for her crime and wish to atone for it by admitting the conduct and pleading guilty; similarly, a defendant might prefer to avoid the embarrassment of a public trial. In most cases, however, there is little reason for a defendant to plead guilty unless the prosecution gives something in exchange. Assuming the defendant would rather be acquitted than convicted, and assuming the absence of a contravening desire like avoiding trial, the defendant is always better off maintaining a not-guilty plea and enjoying the full panoply of trial rights. After all, on any given day a jury might acquit, whereas a plea of guilty is all but certain to result in a conviction.<sup>110</sup>

Prosecutors secure guilty pleas through a wide array of inducements. Among other things, prosecutors make offers to recommend a particular

107. See Alschuler, *Plea Bargaining*, *supra* note 106, at 3 (“Plea bargaining consists of the exchange of official [concessions] for a defendant’s act of self-conviction.”).

108. See *Brady v. United States*, 397 U.S. 742, 752 (1970).

109. Sentencing regimes can provide benefits directly to those who plead guilty without relying on a concession from the prosecutor. For example, the federal sentencing guidelines provide a reduction in the guideline sentence for those defendants who “demonstrate[] [an] acceptance of responsibility for [their] offense[s].” See U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(a) (U.S. SENTENCING COMM’N 2013). In practice, the defendant has control over this particular benefit of pleading guilty regardless of the prosecutor’s position on the matter. Other leniency, however, remains squarely in the control of the prosecutor.

110. Because the court can only accept a guilty plea after finding a factual basis for the conviction, there is some chance that a guilty plea will not be accepted. 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.”). In practice, the factual basis requirement rarely hinders an effort to plead guilty.

sentence, to forego certain arguments at sentencing, to remain silent at sentencing, to dismiss charges, to forego adding charges, to agree to self-surrender, to recommend a certain amount of restitution, and to recommend particular terms of probation.<sup>111</sup> They also make offers of comparable leniency for people other than the defendant, such as the defendant's spouse or child (so-called "wired" pleas).<sup>112</sup> These offers are contingent on the defendant pleading guilty because the very purpose of the offers is to convince the defendant to plead guilty.

Importantly, these intentionally and systematically generated incentives to plead guilty apply equally to the guilty and the innocent. This is not to suggest, of course, that prosecutors intend the incentives or the offers to apply to the innocent. But, the stimulus to plead guilty introduced by these offers is the same, whether the defendant is guilty or not. It may be that the innocent defendant has a reason not to plead guilty that the guilty defendant lacks; but it remains true that whatever incentive is generated by the offer applies equally to the innocent and the guilty.<sup>113</sup>

## 2. Plea Bargaining Effectively Reduces the Quantum of Evidence Required for Conviction

Plea bargaining changes which cases are prosecuted and the set of convictions secured. Prosecutors have limited resources, and while there is not a clear consensus about what motivates prosecutors to charge certain cases and not others,<sup>114</sup> prosecutors generally do not want to bring cases they will lose.<sup>115</sup> Accordingly, absent plea bargaining, prosecutors would have an incentive to concentrate their resources on the cases where they have the greatest chance of winning at trial, or, alternatively, on those cases the

111. See 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 21.1(a), at 520–22 (3d ed. 2007).

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

113. Al Alschuler describes the problem with plea bargaining, in part, as the disintegration of guilt and evidence. See Alschuler, *supra* note 11, at 932 ("Plea bargaining makes a substantial part of an offender's sentence depend, not upon what he did or his personal characteristics, but upon a tactical decision irrelevant to any proper objective of criminal proceedings.").

114. See Stuntz, *The Uneasy Relationship*, *supra* note 23, at 46 n.159 ("[The] literature has done little to address the question of why prosecutors charge in some cases rather than in others.").

115. See *id.* ("[W]hatever else prosecutors are seeking to do (and there is no doubt a good deal else), they are indeed seeking to maintain high conviction rates and to avoid needless labor. . . . That is, I assume prosecutors prefer winning to losing, and prefer less litigation to more."); see also Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43, 50 (1988) ("In choosing what charges to file, what cases to drop, what pleas to offer, and which cases to steer toward trial, the prosecutor will be influenced by desires to enhance his office's batting average, to avoid the risk of an embarrassing trial loss, to gain credit for a dramatic trial victory, to cultivate good relationships with influential private attorneys, and any of a host of other factors.").

prosecution of which will generate the most significant impact.<sup>116</sup> Plea bargaining disrupts this incentive. It allows prosecutors to vastly increase the range of cases in which they can be confident they will secure a conviction.<sup>117</sup>

*i. Plea Bargaining Is Coercive*

Fundamentally, plea bargaining is coercive. Langbein famously likened the coercive impact of plea bargaining to that of medieval European torture, where for all cases that meet the threshold requirement of probable cause, adjudication gives way to coerced confession.<sup>118</sup> The analogy will seem overwrought to some—it is not. Continental criminal procedure countenanced torture as a way of securing convictions after the procedural protections against wrongful convictions rendered the normal process too burdensome for all but the strongest cases.<sup>119</sup> As Langbein describes it, the shift to torture as a means of securing convictions was not undertaken lightly.<sup>120</sup> Torture was only permitted in those cases where an initial burden of proof was met, and the law maintained that the confession under torture was itself involuntary—allowing the conviction to stand only if the defendant repeated the confession at a hearing separated from the torture “a day or so later.”<sup>121</sup> These procedural safeguards surrounding the use of torture parallel safeguards that exist in plea bargaining: no one is subjected to the plea bargaining process where there is not at least probable cause to convict,<sup>122</sup> and the law maintains that the defendant’s waiver of a jury trial is valid only if voluntary.<sup>123</sup> The strain in our plea bargaining jurisprudence is the contention

116. See, e.g., Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 295–96 (1983) (“[P]rosecutors do not (because they cannot) bring more prosecutions until, at the margin, the gains from prosecution equal the costs.”). Of course, as with any question of incentives there will be conflicting goals. For example, a particular type of prosecution might net the greatest impact on community safety, while another type of prosecution might net the greatest impact on a prosecutor’s individual career. Putting aside the tangled questions of the relative influence of various factors, it remains the case that absent plea bargaining, prosecutors would be more circumspect in deciding how to allocate resources.

117. See Gazal-Ayal, *supra* note 17, at 2307–13 (describing how the prevalence of plea bargaining eliminates the need for rigorous screening); see also Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 876–77 (2009) (“[A] prosecutor’s decision about what charges to bring and what plea to accept amounts to a final adjudication in most criminal cases.”).

118. See John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 13–14 (1978).

119. See *id.* at 4–5 (noting that procedural protections effectively only allowed convictions “in cases involving overt crime or repentant criminals” and “[b]ecause society cannot long tolerate a legal system that lacks the capacity to convict unrepentant persons who commit clandestine crimes, something had to be done to extend the system to those cases”).

120. See *id.* at 5–7.

121. See *id.*

122. See *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

123. See *Brady v. United States*, 397 U.S. 742, 748 (1970) (“Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.”).

that the waiver in a negotiated guilty plea is voluntary. This conclusion is premised on a refusal to consider the promises and threats inherent in the plea agreement when assessing voluntariness.<sup>124</sup>

Plea bargaining jurisprudence requires voluntary pleas, but it can only maintain the illusion of voluntariness by formally excluding the single-most-salient information about whether the plea is voluntary. The same is true of medieval torture law identifying voluntariness by requiring repeated confessions, absent torture, while ignoring the fact that those who refused to “voluntarily” confess did so at risk of being further tortured. Plainly, plea bargaining is not torture; the coercive effect of torture is greater,<sup>125</sup> and there is arguably a moral distinction in kind. Still, Langbein demonstrates real similarities in form (limited to select cases with some threshold of proof), function (revitalizing a system made stagnant by procedures), and obfuscation (finding voluntariness based on limited information) between the two procedures.<sup>126</sup> And, as with torture, plea bargaining can be coercive.<sup>127</sup>

*ii. Given Sufficient Differentials Between Plea and Trial Penalties, Plea Bargaining Can Reduce the Effective Burden of Proof*

By generating strong incentives for most defendants to plead guilty, plea bargaining replaces an adjudicative system with a confessional one. The mechanism for securing confessions can be employed only where there is probable cause, but if that mechanism is sufficiently strong to induce confessions in all cases where there is probable cause, then the quantum of proof required for conviction is reduced to the threshold requirement of probable cause. One might object to this on the basis that a court may not accept a guilty plea except on a finding “that there is a factual basis for the plea,”<sup>128</sup> but the protection inherent in this requirement is usually circumscribed to the point of being nonexistent.<sup>129</sup>

In order to consistently secure guilty pleas, prosecutors require sufficiently strong incentives to make the risks of trial unpalatable.<sup>130</sup>

124. See FED. R. CRIM. P. 11(b)(2) (“Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (*other than promises in a plea agreement*).” (emphasis added)).

125. See Langbein, *supra* note 118, at 12–15.

126. *Id.*

127. *Id.* at 15.

128. See FED. R. CRIM. P. 11(b)(3).

129. See *infra* text accompanying notes 159–60.

130. The disparity between the sentence after pleading guilty and the sentence after being convicted at trial provides the incentive to plead guilty in most cases. Where this incentive is too strong, plea bargaining is coercive. Were the disparity not too great, however, the innocence problem would be mitigated. See Frase, *supra* note 69, at 639–40 (“Indeed, rewards for [pleading guilty] may be appropriate so long as they are not so large that they risk conviction of the innocent, unfair coercion, distortion of criminal records, or major disparities in sentencing.”)



Sometimes this point is made with economic precision; but the truth is that prior to trial uncertainty prevails. Even in a case with a known quantum of evidence, there often remains an unknown, and largely unknowable, set of possible trial outcomes. Experienced counsel can assess the relative merits of cases, and routinely distinguish between strong cases and weak cases.<sup>131</sup> Still, there is always uncertainty.<sup>132</sup> As recent plea bargaining literature has emphasized, the uncertainty can be exacerbated by cognitive biases.<sup>133</sup>

This uncertainty, coupled with sufficient disparity between the likely plea sentence and the likely trial sentence, effectively allows prosecutors to convict defendants based on mere probable cause.<sup>134</sup>

The question remains, however, whether prosecutors are able to generate sentencing differentials large enough to induce guilty pleas with low quanta of evidence. Langbein imagines a differential of “death versus a fifty-cent fine,” which would seem to settle the issue.<sup>135</sup> The choice to plead guilty in exchange for a 50-cent fine cannot be described as meaningfully voluntary if the refusal to plead guilty is met with a credible threat of death.<sup>136</sup> But is this realistic?

Specifically, no. There are no cases in which the defendant is able to avoid the death penalty by paying a small fine. However, there are plenty of cases with sufficient disparities to induce all but the most risk-tolerant defendants to plead guilty. It is not unusual for a prosecutor to be able to credibly threaten a post-trial sentence of many decades, while offering a plea-sentence of a few years.<sup>137</sup> Many would find it difficult to reject an offer to

(footnotes omitted)); *see also* Gazal-Ayal, *supra* note 17, at 2335 (proposing a “partial ban system [that] relies on courts to review the bargained-for sentences, requiring them to reject exceedingly lenient bargains” as a means to mitigate the innocence problem).

131. *See* Gazal-Ayal, *supra* note 17, at 2310 (“If trials have anything to do with revealing guilt, the strength of a case is necessarily correlated with the probability that the defendant is guilty.”).

132. Langbein captures this uncertainty in a slightly different light when he writes: “If trials were perfectly accurate, plea bargaining would be perfectly accurate, since no innocent person would have an incentive to accuse himself.” Langbein, *supra* note 118, at 14 n.24.

133. *See* Bibas, *supra* note 9, at 2465–67. *See generally* Covey, *Cognitive Psychology*, *supra* note 106.

134. *See* Russell D. Covey, *Signaling and Plea Bargaining’s Innocence Problem*, 66 WASH. & LEE L. REV. 73, 80 (2009) (“In short, as long as the prosecutor is willing and able to discount plea prices to reflect resource savings, regardless of guilt or innocence, pleading guilty is the defendant’s dominant strategy. As a result, non-frivolous accusation—not proof beyond a reasonable doubt—is all that is necessary to establish legal guilt.”).

135. *See* Langbein, *supra* note 118, at 13 n.24.

136. *See* Gazal-Ayal, *supra* note 17, at 2304 (“Only very rarely is the highest acceptable sentence of a defendant zero; in fact many innocent defendants are willing to accept minor punishment in return for avoiding the risk of a much harsher trial result.”).

137. For example, federal prosecutors often refrain from charging possession of a firearm during a drug trafficking crime, *see* 18 U.S.C. § 924(c)(1)(A) (2012), or refrain from providing notice as required, *see* 21 U.S.C. § 851 (2012), in order to impose a longer sentence based on prior convictions, reserving the option to do so as a threat against those who will not plead guilty. Such threats are significant, as the additional charge or notice under § 851 can easily multiply

plead guilty for a three-year sentence in order to avoid the risk of decades or life in prison.

The real impact of plea bargaining is not, however, that defendants who would likely be acquitted will nonetheless plead guilty; the real impact is in who gets charged.<sup>138</sup> Oren Gazal-Ayal describes how the practice of plea bargaining systematically changes the set of cases charged.<sup>139</sup> Confident they can secure convictions in relatively weak cases, prosecutors are emboldened to bring charges in relatively weak cases.<sup>140</sup> Prosecutorial screening of cases is critical to a well-functioning legal system,<sup>141</sup> but the screening function is undermined where the risk associated with bringing weak cases is diminished by the practice of plea bargaining.<sup>142</sup> One might argue that since trial bargains entail fewer procedural protections than full trials, they too will reduce prosecutorial incentive to screen effectively.<sup>143</sup> This is correct if we consider full trials to be the baseline that informs charging decisions; however, since almost all charged cases are resolved by negotiated plea, the threat of trial is no longer motivating the screening process.<sup>144</sup> Indeed, the possibility of trial bargaining is unlikely to alter whatever considerations currently inform prosecutorial screening, because trial bargaining will only be available in those cases where the prosecutor and the defendant can agree to terms. To the extent extensive plea bargaining renders screening less rigorous,

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the likely sentence and increase any mandatory minimums many times over. See Gregory M. Gilchrist, *Plea Bargains, Convictions and Legitimacy*, 48 AM. CRIM. L. REV. 143, 154–55 (2011).

138. See Dripps, *supra* note 13, at 1159 (“[I]f the prosecutor dominates plea bargaining, and plea bargaining simply is the criminal justice process, the real trial is the one, quite informal and necessarily based mostly on hearsay, at which the prosecutor decides what charges to file and what plea to accept.”).

139. See Gazal-Ayal, *supra* note 17, at 2312 (“[P]lea bargaining increases the number of prosecutions in weak cases and probably also increases the proportion of weak cases among cases prosecuted.”).

140. See *id.* at 2308 (“The three major factors that are likely to affect prosecutors are the conviction’s value, the probability of conviction, and the cost of trying the case.”). Plea bargaining enhances the probability of conviction. See Darryl K. Brown, Essay, *The Perverse Effects of Efficiency in Criminal Process*, 100 VA. L. REV. 183, 186 (2014) (“Plea bargaining and a range of related, doctrinally authorized practices for making criminal process more efficient can perversely increase demand for criminal prosecutions, rather than serving as a means to meet demand for enforcement that is driven by crime rates.”).

141. See Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 84 (2002) (“[S]creening improves the honesty and accessibility of criminal justice.”).

142. See Stuntz, *The Uneasy Relationship*, *supra* note 23, at 46 (“[P]rosecutors are likely to screen well only if criminal litigation encourages them to do so; otherwise, successful sorting of criminal defendants depends on nothing more than prosecutorial good will.”). Plea bargaining allows prosecutors to routinely avoid the challenge, cost, and risk of criminal litigation—even in relatively weak cases; this undermines the screening function. *Id.* at 46 n.159.

143. See Frase, *supra* note 69, at 640 (“[R]elaxation [of evidentiary or procedural standards] would presumably make it easier for the prosecution to allege a prima facie case; this in turn, would tend to encourage prosecutors to file some of the weak cases they now dismiss.”).

144. See Gazal-Ayal, *supra* note 17, at 2310.

prosecutors will likely assess the likelihood of securing a conviction the same whether trial bargaining is a factor or not.

*iii. Reducing the Effective Burden of Proof Increases the Risk of Wrongful Convictions*

Securing convictions in more relatively weak cases increases the number of wrongful convictions. Of course, there are many reasons a case can be weak, most of which only weakly correlate to the likelihood of guilt. Some cases are weak because of the poor quality or quantity of evidence; and the absence of good evidence can be a factor of the type of crime, the nature of investigation, the weather, or any number of fortuities. But, actual innocence is one of the many factors that can contribute to a case being weak. Accordingly, while some weak cases will be weak because of factors entirely unrelated to actual innocence, other weak cases will be weak because the defendant is not guilty. The net result of broadening the pool of prosecutions to include weaker cases is that the number of wrongfully prosecuted defendants is enhanced. In a system that maintains a conviction rate of well over 90%, the vast majority of which are secured through negotiated pleas, more wrongfully prosecuted defendants means more wrongful convictions.

There is, however, no way to know how large the problem of wrongful convictions is, because there is no method by which wrongful convictions can be identified systematically.<sup>145</sup> DNA exonerations offer a narrow but compelling window into the problem,<sup>146</sup> and there is reason to be concerned about the scope of wrongful convictions in our system.<sup>147</sup> Where unregulated plea bargaining allows prosecutors to make offers that cannot rationally be refused, we ought to worry that plea bargaining systemically broadens the scope of wrongful convictions.<sup>148</sup>

Increasing the number of wrongful convictions decreases the perceived legitimacy of the legal system.<sup>149</sup> People value accuracy in criminal

145. See Samuel R. Gross & Barbara O'Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases*, 5 J. EMPIRICAL LEGAL STUD. 927, 928 (2008) ("The fundamental problem with false convictions is also one of their defining features: they are hidden from view.")

146. See BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 6 (2011) (describing how "DNA exonerations have changed the face of criminal justice in the United States," by confirming the fact of wrongful convictions).

147. See *id.* at 12 ("[W]e will never know how large the iceberg is—but we have good reasons to worry that intolerable numbers of innocent people have been convicted.")

148. One recent empirical study—outside the criminal context—"demonstrated that more than half of the innocent participants were willing to falsely admit guilt in return for a perceived benefit." Dervan & Edkins, *supra* note 106, at 4.

149. Or, perhaps more accurately, as we increase the number of wrongful convictions *and* awareness of those wrongful convictions, then we decrease the perceived legitimacy of the legal system. This distinction between wrongful convictions and awareness of wrongful convictions is relatively unimportant; some wrongful convictions will be detected, so more wrongful convictions

adjudications, and wrongful convictions are almost universally condemned.<sup>150</sup> Plea bargaining lubricates the machinery of criminal justice,<sup>151</sup> and at least in some cases, the proper calculus for an innocent defendant will be to plead guilty to avoid the greater risks posed by trial.<sup>152</sup>

### 3. The Process of Bargaining and Pleading Guilty Does Little to Prevent Wrongful Convictions

Plea bargaining is not designed to induce the innocent to plead guilty; to the contrary, plea bargaining always involves procedures specifically designed to limit this risk. Chief among them are the requirements of voluntariness and factual basis.<sup>153</sup> However, in practice neither requirement offers assurance that innocent defendants are not pleading guilty.<sup>154</sup>

The voluntariness requirement is of little or no prophylactic value, because voluntariness is considered only after excluding the very thing that may render the plea involuntary: the terms of the agreement.<sup>155</sup> The requirement of a factual basis is likewise unhelpful in practice.<sup>156</sup>

First, no admission is necessary; a defendant may plead guilty even while maintaining her innocence.<sup>157</sup> Still, while so-called *Alford* pleas remain common in many state courts, they are relatively uncommon in federal

will correlate with a greater awareness of wrongful convictions. Moreover, blissful ignorance is hardly a sound foundation on which to lay the legitimacy of a legal system.

150. See, e.g., *Herrera v. Collins*, 506 U.S. 390, 419 (1993) (O'Connor, J., concurring) (“[T]he execution of a legally and factually innocent person would be a constitutionally intolerable event.”); *Bibas*, *supra* note 106, at 1384 (“One should recoil at the thought of convicting innocent defendants.”).

151. See *Santobello v. New York*, 404 U.S. 257, 261 (1971) (listing the fact that plea bargaining “leads to prompt and largely final disposition of most criminal cases” as the first reason the practice is desirable).

152. See *Laffer v. Cooper*, 132 S. Ct. 1376, 1397 (2012) (Scalia, J., dissenting) (observing that plea bargaining “presents grave risks of prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense”); see also *Covey, Longitudinal Guilt*, *supra* note 106, at 450; *Gilchrist*, *supra* note 137, at 148; *Stuntz, The Uneasy Relationship*, *supra* note 23, at 5 (“Ever since the 1960s, the right has argued that criminal procedure frees too many of the guilty. The better criticism may be that it helps to imprison too many of the innocent.”).

153. In discussing these ideas with others, I have received substantial resistance to the idea that many innocent persons are pleading guilty. Much of the basis for the resistance seems to stem from the idea that by pleading guilty, the defendant himself is confessing, and this is strong proof. *Langbein*, *supra* note 118, at 14 (“[C]onfessio est regina probationum, confession is the queen of proof.”). This Part addresses the error in valuing a guilty plea as a confession.

154. See *Wright*, *supra* note 8, at 82 (“[The] standard that courts use to evaluate guilty pleas at the individual case level is anemic, since the facts supporting guilty pleas can be remarkably thin, and many ‘knowing’ and ‘voluntary’ guilty pleas are nevertheless coercive and unjust.”).

155. See *supra* text accompanying notes 122–27.

156. See *United States v. Andrades*, 169 F.3d 131, 136 (2d Cir. 1999) (“The court may rely on defendant’s own admissions, information from the government, or other information appropriate to the specific case.”).

157. See *North Carolina v. Alford*, 400 U.S. 25, 37 (1970).

court.<sup>158</sup> In most cases, the factual basis for the plea does come from defendant.

The requirement of a factual basis—even one that comes from the defendant—is of little practical effect.<sup>159</sup> These supposed admissions of guilt are rendered anodyne because the admission itself is so ritualized that it offers little or no protection against dishonesty. Frequently, the judge or prosecutor reads the statement of facts that is included in the plea agreement, after which the judge asks the defendant something like, “[do] you agree that [the] statement of facts is correct and that you did what it says in there you did?”<sup>160</sup> The defendant must answer in the affirmative, but for a defendant fearing the consequences of foregoing the benefits of a plea agreement, this may not be a significant step. There are exceptions to this practice: some courts require a defendant more formally to allocute, describing the conduct that constitutes the basis for his guilty plea.<sup>161</sup> But in many cases, the “admission” component of a guilty plea is thin, formulaic, and coached.<sup>162</sup>

Where the defendant feels coerced to give an “admission,” that admission does little to ensure the accuracy of the guilty plea; rather, the admission becomes part of the calculus about whether to enter a guilty plea. Where the admission is little more than an affirmation that a statement is true, then the defendant may put little value on uttering “yes, Judge,” (or, just “yes”).<sup>163</sup> This is likely all the more true where that statement is written and read by the government official who is actively engaged in an effort to deprive the defendant of life or liberty.

Plea bargaining does involve procedures intended to guard against wrongful convictions; however, those procedures are of little functional value.

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158. Indeed, the Department of Justice strongly opposes *Alford* pleas. See OFFICES OF THE U.S. ATTORNEYS, U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-16.015 (2008), <http://www.justice.gov/usam/usam-9-16000-pleas-federal-rule-criminal-procedure-11#9-16.015>.

159. See Brandon L. Garrett, *Why Plea Bargains Are Not Confessions*, 56 WM. & MARY L. REV. (forthcoming 2015) (describing the thinness of most allocutions).

160. See, e.g., Rearrangement at 13, *United States v. Shaw*, No. CCB-10-489 (D. Md. May 25, 2011); see also Change of Plea Hearing at 24, *United States v. Tyus*, No. 1:10-cr-10084-JDB-1 (W.D. Tenn. June 30, 2011) (describing a judge who asks, after prosecutor gives a brief summary of what the government would have proven had the case proceeded to trial, “Mr. Tyus, is that your understanding, or is that information about the facts and the proof in this matter, is that basically correct, sir?”).

161. See, e.g., Transcript of Change of Plea Hearing at 31, *United States v. Reyes*, No. 2:10-CR-109 (N.D. Ind. Mar. 14, 2013). In this case, the judge asked the defendant, “Mr. Reyes, I want you to take a moment, get your thoughts together, and then I want you to tell me what happened and why are you guilty of Count One of the third superseding indictment.” *Id.* The result is a free-ranging series of questions and answers between the judge and the defendant, in which the defendant describes his conduct in his own words. The exchange spans nearly seven pages on the official transcript. See *id.* at 31–38.

162. See generally Garrett, *supra* note 159.

163. See Rearrangement, *supra* note 160, at 13.

## B. THE JURY PROBLEM

### 1. The Decline of the Jury

Plea bargaining has very nearly killed the jury trial.<sup>164</sup> As of 2012, 97% of all federal criminal convictions resulted from guilty pleas.<sup>165</sup> State criminal convictions are comparable.<sup>166</sup> The vast majority of these pleas are secured through bargaining. As George Fisher described it more than a decade ago, plea bargaining has “driven our vanquished jury into small pockets of resistance.”<sup>167</sup>

The significance of shifting from an adjudicative system to a confessional system is difficult to overstate. And the most notable shift is the transfer of power, from the bench and the jury, to the prosecutor.<sup>168</sup>

### 2. The Costs of Vanishing Juries

We ought to mourn and resist the loss of the jury trial. Jury trials are a critical component of our government, or at least our government as it was meant to be.<sup>169</sup> Most obviously, juries represent a check on executive power, but they serve other functions as well.<sup>170</sup>

164. See, e.g., Appleman, *supra* note 101, at 400 (“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, *supra* note 19, at 742 (explaining how the dominance of guilty pleas “has given short shrift to the Sixth Amendment jury trial right”); see also *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))).

165. See U.S. DEP’T OF JUSTICE, *supra* note 2, at 8.

166. See *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012) (“[N]inety-four percent of state convictions are the result of guilty pleas.”).

167. Fisher, *supra* note 6, at 859.

168. See Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CALIF. L. REV. 1585, 1589 (2005) (describing how the dominance of plea bargaining undermines the balance of power between the executive, the judicial, the defendant, and the jury); see also Barkow, *supra* note 117, at 878 (“In most cases, then, the prosecutor becomes the adjudicator—making the relevant factual findings, applying the law to the facts, and selecting the sentence or at least the sentencing range.”); Gerard E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off?*, 55 STAN. L. REV. 1399, 1403–04 (2003) (“[T]he prosecutor, rather than a judge or jury, is the central adjudicator of facts (as well as replacing the judge as arbiter of most legal issues and of the appropriate sentence to be imposed).”).

169. See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 84 (2011) (describing extensive powers attributed to jurors around the time of the Founding).

170. See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1190 (1991) (“The jury summed up—indeed embodied—the ideals of populism, federalism, and civic virtue that were the essence of the original Bill of Rights.”).

The jury may be understood as serving at least two distinct functions. The first is as a buffer between the government and the people.<sup>171</sup> The buffering function is a check on the government, and more specifically perhaps a limit on executive discretion.<sup>172</sup>

If this buffering function can be understood as the effect of the jury on the government, the other functions are better understood as the effect of the jury on the people. Jury trials provide an ongoing civic education.<sup>173</sup> When a juror sits through a trial, she learns about her government. She learns how the executive exercises its discretion in criminal cases; she learns how the legal system handles an accusation of criminal wrongdoing; and, ultimately, she learns something about her government's *values*. Moreover, jury service may serve to motivate citizens to engage with government if only by exposing people to the machinery of criminal justice.<sup>174</sup> Jurors who witness and participate in one aspect of their government may be more engaged in civic life as a result. While many of these jury functions have been lost through disuse and obfuscation,<sup>175</sup> an exciting body of scholarship is pushing to reinvigorate the citizen juror.<sup>176</sup>

The arc of the jury as a democratic institution is well documented. In colonial times and in our nation's early years, the jury was a powerful and central component of the government.<sup>177</sup> The jury's function extended well

171. See Barkow, *supra* note 6, at 51 ("Even before the Constitution was ratified, it appears that the jury was esteemed precisely because it could provide a key check on the government by the people in order to protect individual liberty.").

172. See generally STUNTZ, *supra* note 169.

173. See Andrew Guthrie Ferguson, *The Jury as Constitutional Identity*, 47 U.C. DAVIS L. REV. 1105, 1120 (2014) (stating that in the early days of this nation "it was recognized that the jury would serve as a place of continuing education about legal and constitutional matters necessary for that active citizenry").

174. See NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* 346 (2007) (describing research finding "that meaningful participation on a jury increases the juror's likelihood of voting in subsequent elections").

175. See Amar, *supra* note 170, at 1190 ("If the foregoing picture of the jury seems somewhat unconventional, perhaps the reason is that the present day jury is only a shadow of its former self.").

176. See, e.g., Appleman, *supra* note 101, at 405; Barkow, *supra* note 6, at 61–62; Jenny E. Carroll, *The Jury's Second Coming*, 100 GEO. L.J. 657, 672 (2012); Ferguson, *supra* note 173, at 1136; Meghan J. Ryan, *The Missing Jury: The Neglected Role of Juries in Eighth Amendment Punishments Clause Determinations*, 64 FLA. L. REV. 549, 550 (2012). Josh Bowers also recognizes the democracy-enhancing role of jury participation in his proposal to radically expand the role and power of grand juries. See Josh Bowers, *The Normative Case for Normative Grand Juries*, 47 WAKE FOREST L. REV. 319, 349 (2012) (noting that empowered grand juries would "make criminal justice not only more transparent but also more democratic").

177. See Appleman, *supra* note 101, at 405 (describing a communal understanding of the right to a jury trial in which the right belongs to the people, not the accused); Barkow, *supra* note 6, at 61–62 (describing a colonial and early American view of the jury as an "equitable safety valve," necessary to protect the citizenry against overinclusive laws); Carroll, *supra* note 176, at 672 (describing the Founders' vision of the jury as a necessary component of the legal system, "creating a living body of law that embraced and was embraced by the population it governed"); Ferguson, *supra* note 173, at 1136 (describing a broadly conceived role of the jury as civic

beyond applying law to the facts.<sup>178</sup> The jury function was to impose the law in criminal cases—or, in some cases, not to impose it as it deemed fit.<sup>179</sup> Jury nullification existed before the founding and after, and it was often celebrated.<sup>180</sup> Indeed, Professors Brown and Carroll take the concept of jury nullification even further, suggesting that it is not only desirable, but it may actually be *consistent with* or *inherent in* the concept of law.<sup>181</sup> This step is novel in that the most common criticism of the jury's power to nullify is that it undermines, or even is contrary to, the rule of law.<sup>182</sup> By defining law to include the process of application by a properly comprised jury, Carroll offers a response to this common concern.<sup>183</sup> Still, the dominant view remains that nullification is contrary to the law, regardless of whether it is desirable or just.<sup>184</sup> Today, the jury function is conceived of in the narrowest possible terms.<sup>185</sup>

Whether nullification is envisaged as part of the law or contrary to the law, however, concern about nullification remains very real. Broadly empowered juries will apply law differently in similar cases because of their own biases or because of matters that the positive law deems irrelevant or

constitutional actor, expanding beyond a single case or the courthouse); *see also* WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830*, at 20–30 (1975).

178. *See* Barkow, *supra* note 6, at 55 (“The Framers continued to believe that the criminal jury was much more than ‘a utilitarian fact-finding body.’”); *cf.* Sparf v. United States, 156 U.S. 51, 102 (1895) (“We must hold firmly to the doctrine that in the courts of the United States it is the duty of juries in criminal cases to take the law from the court and apply that law to the facts as they find them to be from the evidence.”).

179. *See* Barkow, *supra* note 6, at 38, 61 (“Juries, by design, with their unreviewable power to acquit, can act as a check on overinclusive or overrigid criminal laws.”); Carroll, *supra* note 176, at 662 (“The Constitution’s guarantee of a right to a jury trial in criminal cases can also be read as creating a forum to redefine the law itself.”).

180. *See* Carroll, *supra* note 176, at 663–75 (describing the history of jury nullification in England, the colonies, and early America).

181. *See* Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149, 1169 (1997) (stating “the contemporary reconception of the rule of law accepts that law application is inevitably a broadly interpretive task” and this “opens the door for understanding how jury nullification can occur within the rule of law”); Carroll, *supra* note 176, at 663 (“Law under this theory is not only what has been written but also what has been embraced by the community.”).

182. *See* Brown, *supra* note 181, at 1150 (“Jury nullification, defined as a jury’s ability to acquit a criminal defendant despite finding facts that leave no reasonable doubt about violation of a criminal statute, is disfavored in large part because it seems to undermine the rule of law.” (footnotes omitted)); Paul Butler, Essay, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 705 (1995) (same).

183. *See* Carroll, *supra* note 176, at 693–98 (proposing a reconceptualization of the nature of law pursuant to which “[t]he definition of what is law is shifted from the static text alone to the enforcement and endorsement of that text within the community”).

184. *See, e.g.,* KENT GREENAWALT, *CONFLICTS OF LAW AND MORALITY* 363–64 (1987) (“Nullification is logically incompatible with applying the law.”).

185. *See* Ferguson, *supra* note 173, at 1144 (noting modern jurors identify themselves exclusively as fact finders, obligated to apply the law as given by the court).



improper. Carroll suggests that the Founders were aware of and concerned about this risk, but concluded that the benefits of democratic affirmation of the application and executive power in specific cases was worth the cost of uniformity.<sup>186</sup> There is no question that the jury represents—even today—a compromise between uniformity and flexibility.<sup>187</sup> Still, democratic or communal affirmation is a heady ideal, and enthusiasm for flexibility will dim in the face of unpopular or offensive nullifying.<sup>188</sup> The history of nullification is decidedly diverse, and not always for the good: while it has freed those who harbored escaped slaves, so too it has freed those who beat or killed the descendants of slaves.<sup>189</sup>

So nullification will not always be popular and it will not always be celebrated. It is, however, necessary. The power to nullify is inherent in the double jeopardy clause and the rule against reviewing jurors' basis for an acquittal.<sup>190</sup> The unreviewable power to acquit belongs to jurors, and the jury may, without consequence, acquit for any reason, including reasons contrary to the law and their oath of service.

Despite the fact that courts rejected any effort to enhance the extent of the jury's power,<sup>191</sup> the jury's power remains unabated; jurors *can* still provide a check against unreasonable prosecutions. And by participating in the legal system, jurors are educated about their government and laws; and jurors engage as citizens with our government in a way that can broaden their civic activism generally.<sup>192</sup> That plea bargaining has all but eliminated trial by jury is a problem for our legal system and a problem for our democracy.

186. See Carroll, *supra* note 176, at 672 (“[The Founders] expressed fear that allowing jurors to interpret laws would result in inconsistent enforcement and seemingly arbitrary verdicts. But, in the end, [they] seemed to conclude that uniformity for uniformity’s sake was not as lofty a goal as creating a living body of law that embraced and was embraced by the population it governed.” (footnotes omitted)).

187. See *McCleskey v. Kemp*, 481 U.S. 279, 311 (1987) (“[I]t is the jury’s function to make the difficult and uniquely human judgments that defy codification and that ‘buil[d] discretion, equity, and flexibility into a legal system.’” (second alteration in original) (quoting HARRY KALVEN, JR. & HANS ZIESEL, *THE AMERICAN JURY* 498 (1966))).

188. See Carroll, *supra* note 176, at 681 (identifying among the defendants who seek the benefit of nullification, “abolitionists and racists, Prohibition-era moonshiners and Vietnam protestors, anarchists and Marion Barry, and, most recently, Guantanamo Bay detainees and other War-on-Terror suspects”).

189. See VIDMAR & HANS, *supra* note 174, at 225.

190. See *United States v. Ball*, 163 U.S. 662, 671 (1896) (“The verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting him twice in jeopardy, and thereby violating the Constitution.”).

191. See *Sparf v. United States*, 156 U.S. 51, 102–03 (1895).

192. Professor Ferguson has been compiling juror commentary on their service and has found that “[i]n dozens of articles or op-eds, citizens took the time to explain that this civic moment meant something to them and should be valued by others.” Andrew Guthrie Ferguson, *The Juror Voices Project*, HUFFINGTON POST (Aug. 4, 2014, 5:59 AM), [http://www.huffingtonpost.com/andrew-guthrie-ferguson/the-juror-voices-project\\_b\\_5440573.html](http://www.huffingtonpost.com/andrew-guthrie-ferguson/the-juror-voices-project_b_5440573.html).

## C. THE NARRATIVE PROBLEM

Trials allow defendants to tell their stories and be judged accordingly.<sup>193</sup> This narrative process can serve to legitimize both the outcome and the punishment in the eyes of the defendant, thereby enhancing the prospect of rehabilitation and reentry into society. Plea bargaining, on the other hand, systematically silences defendants. Instead of telling their story, defendants usually just affirm a negotiated statement of facts.<sup>194</sup> Often, this statement is read by the prosecutor and sometimes the defendant herself need not say anything at all.<sup>195</sup>

Defendants' silence weakens our legal system and our democratic society, undermining the perceived legitimacy of the legal system, and limiting compliance with the law.

The most obvious harm from the systemic silencing of defendants is the loss of their voices.<sup>196</sup> Alexandra Natapoff has described the effects of a system in which “[o]ver ninety-five percent [of criminal defendants] never go to trial, only half of those who do testify, and some defendants do not even speak at their own sentencings.”<sup>197</sup> Criminal defendants are no one's natural constituency; they have no political champions.<sup>198</sup> As such, they generally lack voice in our democracy. The disenfranchising consequences of criminal

193. Indeed, Langbein argues that for much of history, the opportunity to answer against an accusation, not the privilege to remain silent, was the most important procedural protection for the accused. See John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1047 (1994).

194. See *supra* note 159 and accompanying text.

195. See *supra* note 159–60 and accompanying text.

196. See Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1450 (2005) (considering the systemic silencing of defendants, of which plea bargaining is one component).

197. *Id.* at 1450 (footnotes omitted).

198. See Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After Gideon v. Wainwright*, 122 YALE L.J. 2150, 2172 (2013) (“[T]he criminal courts are not a concern of most people because they deal primarily with racial minorities and the poor. As Attorney General Robert F. Kennedy observed at the time of *Gideon*, ‘the poor person accused of a crime has no lobby.’”); see also Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1081 (1993) (“Legislatures [predictably and consistently] undervalue the rights of the accused at both the investigatory and adjudicatory stages of the criminal process.”); Stuntz, *Substance*, *supra* note 23, at 20 (“A lot of constitutional theory has been shaped by the idea, made famous by *Carolene Products* footnote four, that constitutional law should aim to protect groups that find it hard or impossible to protect themselves through the political process. If ever such a group existed, the universe of criminal suspects is it.” (footnote omitted)).

convictions, such as the loss of the right to vote<sup>199</sup> or serve on a jury,<sup>200</sup> further silence defendants. What is really incredible is the degree to which defendants are silenced even in their own cases: even in the forum created to adjudicate the question of the defendant's guilt and, if necessary, impose punishment, the defendant is routinely not heard.<sup>201</sup> As a group, the set of persons who are charged with crimes share some commonality of experience, if only through their contact with the criminal justice system, and the marketplace of ideas is weaker for their absence.<sup>202</sup> Moreover, the set of persons who are charged with crimes is disproportionately comprised of "racial minorities, the poor, the undereducated or illiterate, juveniles, the unemployed, or people with criminal histories, mental health or substance abuse problems."<sup>203</sup> Silencing people on these bases—regardless of whether that is the intent—will lead to obvious biases in a democratic society. In jurisdictions where a significant portion of a particular demographic has been, are, or will be criminal defendants, these biases may become extreme.<sup>204</sup>

Aside from systemically depriving our democracy of defendants' voices, the silence of defendants harms the very legitimacy of our legal system.<sup>205</sup> There is strong empirical support for the proposition that people's perception of procedural fairness influences judgments about the legitimacy

199. See THE SENTENCING PROJECT, FACT SHEET: FELONY DISENFRANCHISEMENT LAWS 1 (2014), [http://sentencingproject.org/doc/publications/fd\\_Felony%20Disenfranchisement%20Laws%20in%20the%20US.pdf](http://sentencingproject.org/doc/publications/fd_Felony%20Disenfranchisement%20Laws%20in%20the%20US.pdf); George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLAL. REV. 1895, 1898 (1999) (cataloguing states that limit felons' voting rights).

200. See Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, 98 MINN. L. REV. 592, 596 (2013) ("In forty-seven states and the federal system, disqualification from jury service of those with a felony record is provided for by statute."); see also Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 150–58 (2003).

201. See Natapoff, *supra* note 196, at 1459–75 (cataloguing ways in which defendants are systematically silenced in their own cases).

202. See *id.* at 1488 ("[D]efendants are experts in the system, with unique experiences that could cast light on the central efficiencies and inefficiencies of the criminal process, as well as its various claims to fairness. Indeed, defendants are the subjects of the system itself: Laws and punishments are aimed centrally at *their* minds and behaviors. If defendants are ignorant of the law and their obligations, it may mean that the system does not convey its message well.").

203. See *id.* at 1452.

204. The Children's Defense Fund estimates that "a Black boy born in 2001 has a 1 in 3 chance . . . of going to prison in [his] lifetime." See CHILDREN'S DEF. FUND, AMERICA'S CRADLE TO PRISON PIPELINE<sup>SM</sup> 4 (2007), <http://www.childrensdefense.org/library/data/cradle-prison-pipeline-report-2007-full-howres.pdf>. Similarly, the Department of Justice projected in 1997 that if incarceration remained at its 1991 rate then 28.5% of Black men would go to prison in their lifetimes. See THOMAS P. BONCZAR & ALLEN J. BECK, U.S. DEP'T OF JUSTICE: BUREAU OF JUSTICE STATISTICS, LIFETIME LIKELIHOOD OF GOING TO STATE OR FEDERAL PRISON 1 (1997), <http://bjs.gov/content/pub/pdf/Llgsfp.pdf>. Natapoff writes that "[i]n low-income urban communities in cities such as Baltimore and Washington D.C., fifty percent or more of the African American male population between the ages of 18 and 35 is under criminal justice supervision at any given time." Natapoff, *supra* note 196, at 1486 n.146.

205. See STUNTZ, *supra* note 169, at 29 (discussing the importance of legitimacy).

of the legal system, and even whether to comply with its rules.<sup>206</sup> Tom Tyler has identified “[f]our critical factors [that] dominate evaluations of procedural justice,” the very first of which is the opportunity to be heard.<sup>207</sup> People want to have an opportunity to state their case to legal authorities.<sup>208</sup> They want to have a forum in which they can tell their story; they want to have a “voice” in the decisionmaking process. Defendants who are not heard perceive the process as less fair and the system as less legitimate.<sup>209</sup>

There is less empirical support for the affirmative proposition that where criminal defendants have an opportunity to tell their story they view the system or the process as more legitimate.<sup>210</sup> Indeed, one controlled study on the effect of pretrial settlement conferences before guilty pleas found no change in the defendants’ attitude toward the fairness of the process compared with those who did not attend settlement conferences.<sup>211</sup> However, the result may be explained by the cursory nature of the settlement conferences involved in the study.<sup>212</sup> Indeed, in noncriminal settings there is

206. See Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127, 132–39 (2011) (summarizing psychology research into the justice system and perceived fairness).

207. 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, 664 (2007) [hereinafter Tyler, *American Public*]; see also TOM R. TYLER, WHY PEOPLE OBEY THE LAW 163–65 (2006) [hereinafter TYLER, WHY PEOPLE OBEY THE LAW].

208. The value of stating one’s case is in the expression and what it represents:

The opportunity to state one’s case is valued not because it is linked to favorable outcomes but because of its “value expressive” function. In this sense, representation or voice allows a person to have a sense of being a full and valued member of the group. Having been treated in a way that indicates one’s views are valuable, one is much more likely to view authorities positively and to support and comply with their decisions, even if the outcome is personally unfavorable.

Raymond Paternoster et al., *Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault*, 31 LAW & SOC’Y REV. 163, 167 (1997) (citation omitted).

209. See Slobogin, *supra* note 83, at 728 (citing Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871, 887–89 (1997)) (“Research indicates that defendants often resent proceedings that do not allow them to tell their story.”).

210. See Paternoster et al., *supra* note 208, at 171–72 (“[W]e do not yet know if fairness judgments are important within a criminal context, where the outcomes imposed by legal authorities are particularly unfavorable (i.e., someone is arrested), and whether fair procedures in this context will affect compliance with serious legal norms.”).

211. See Anne M. Heinz & Wayne A. Kerstetter, *Pretrial Settlement Conference: Evaluation of a Reform in Plea Bargaining*, 13 LAW & SOC’Y REV. 349, 362–63 (1979).

212. The conferences—to which the defendant, defense attorney, prosecutor, police officer, victim and judge were invited—lasted an average of ten minutes, and “[d]iscussion was very superficial.” *Id.* at 358. The defendant was generally assumed to be guilty and discussion of facts was minimal, leaving the defendant little opportunity to tell his story in a meaningful way. *Id.*

clearer empirical evidence that the opportunity to tell one's story influences a person's satisfaction with the process.<sup>213</sup>

The perception of procedural fairness—bolstered by the opportunity to be heard, and hindered by its absence—serves a function beyond enhancing legitimacy: it may also enhance compliance. “Citizens who view legal authority as legitimate are generally more likely to comply with the law.”<sup>214</sup> Since having a voice in the process is a “critical factor” in evaluating procedural justice and hence legitimacy,<sup>215</sup> and perceived legitimacy fosters compliance, it follows that the opportunity to be heard, or its absence, will correlate with compliance. In one fascinating empirical study, the authors found “at least moderate support for the prediction that spouse assaulters’ perceptions of procedural justice and fair treatment by the police are important determinants of the propensity for future conduct.”<sup>216</sup> Though it does so through the lens of police conduct rather than court conduct, the study does suggest that procedural fairness—which includes the opportunity to be heard—will influence future compliance. On the other hand, status quo plea bargaining often feels coercive to the defendant;<sup>217</sup> few who plead guilty in order to avoid the credible threat of much more serious harm to themselves or their loved ones will feel they were given a meaningful “opportunity to state their case to legal authorities.”<sup>218</sup>

#### IV. THE NECESSITY OF PLEA BARGAINING

Plea bargaining undermines accuracy, juries, and procedural justice; all of which undermines the legitimacy of the legal system. So why allow it at all? There would be no need for an innovation like trial bargaining if plea bargaining were barred. Plea bargaining persists for one reason: efficiency.

Plea bargaining is permitted because it is necessary to the functioning of our criminal justice system. This is not to suggest plea bargaining is necessary to the functioning of every justice system, nor is it to suggest plea bargaining is, on the whole, desirable; however, a peculiar combination of factors makes our justice system particularly reliant on the efficiency generated by plea bargaining. Specifically, our justice system processes too many cases with too few resources, and the constitution limits our ability to simplify trials. Plea

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213. See, e.g., William M. O’Barr & John M. Conley, *Litigant Satisfaction Versus Legal Adequacy in Small Claims Court Narratives*, 19 *LAW & SOC’Y REV.* 661, 662 (1985) (“[T]he opportunity to tell a story in everyday terms to an authoritative decision maker enhances litigant satisfaction with small claims courts.”).

214. TYLER, WHY PEOPLE OBEY THE LAW, *supra* note 207, at 62.

215. See Tyler, *American Public*, *supra* note 207, at 664.

216. See Paternoster et al., *supra* note 208, at 192.

217. See *supra* Part III.A; see also Gilchrist, *supra* note 137, at 156–57 (cataloguing the extent of threats and inducements to generate guilty pleas that courts have found neither coercive nor improper).

218. See Tyler, *American Public*, *supra* note 207, at 664.

bargaining is the safety valve that allows the court dockets to keep moving as they do.<sup>219</sup> Of course, it is also the accelerant that allowed our courts to begin processing the number of cases they do. Plea bargaining is necessary to the status quo, but it also caused the status quo.

#### A. THE CASES

The Supreme Court first sanctioned plea bargaining as a legitimate part of our legal system in *Brady v. United States*.<sup>220</sup> Forty-two years later, the Supreme Court wrote that “[plea bargaining] is not some adjunct to the criminal justice system; it *is* the criminal justice system.”<sup>221</sup> When *Brady* was decided, few could have imagined the Supreme Court would one day make such a statement;<sup>222</sup> but the intervening decades made the truth of the statement unavoidable.<sup>223</sup>

The *Brady* decision itself was, arguably, rather narrow. As Lucian Dervan has written,<sup>224</sup> the *Brady* decision was originally narrowly tailored around the assumption that plea bargaining would not generate an innocence problem.<sup>225</sup> The assumption proved resilient, reappearing when the Supreme Court next considered plea bargaining in *Bordenkircher v. Hayes*.<sup>226</sup> While in *Brady* the Court considered whether a plea was invalid where it was secured

219. Plea bargaining may not have been developed intentionally to remedy a congested and costly trial system, but congestion and cost have rendered efforts to ban or restrict plea bargaining untenable. See Fisher, *supra* note 6, at 859 (“Plea bargaining’s triumph was manifestly the work of those courtroom actors who stood to gain from it.”). Among the factors playing a critical role in the rise of plea bargaining are the breadth of criminal law, the complexity of criminal procedure, and prosecutorial incentives. See Alschuler, *supra* note 6, at 50–52. Changes to sentencing guidelines, most notably mandatory minimums and sentencing guidelines, have also played a significant role. See Barkow, *supra* note 6, at 85–102.

220. *Brady v. United States*, 397 U.S. 742, 755–58 (1970).

221. *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)).

222. In 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)).

223. See *infra* Part IV.B (describing the dominance of plea bargaining today).

224. See Dervan, *supra* note 106, at 57 (“The *Brady* safety-valve limits the amount of pressure that may be asserted against defendants by prohibiting prosecutors from offering incentives in return for guilty pleas that are so coercive as to overbear defendants’ abilities to act freely.”); see also Dervan & Edkins, *supra* note 106, at 46–47 (explaining the decision in *Brady* was predicated on the Court’s belief that innocent defendants would not be induced to plead guilty, and “the Court reserved the ability to reexamine the entire institution should it become evident it was mistaken”).

225. See *Brady*, 397 U.S. at 758 (“We would have serious doubts about this case if the encouragement of guilty pleas by offers of leniency substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves.”).

226. See *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) (“Defendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion, and unlikely to be driven to false self-condemnation.”).

under threat of a more serious penalty following trial,<sup>227</sup> in *Bordenkircher*, the Court considered whether re-indicting the defendant on more serious charges, as threatened during plea negotiations, when the defendant refused to plead guilty, amounted to vindictive action in violation of due process.<sup>228</sup> To be sure, both cases presented significant bargain discounts that ought to give concern about the innocent being coerced to plead guilty.<sup>229</sup> Yet in both cases, the Court expressly rejected that possibility.

The idea that people will not falsely incriminate themselves is a powerful and longstanding one. Brandon Garrett explores the history of this belief in the context of false confessions, where the idea is at least equally as strong as in the context of negotiated pleas; and yet, as he explores at length, the idea is wrong: people *do* falsely incriminate themselves.<sup>230</sup> Still, this empirical data has not yet caused the Court to revisit the propriety of negotiated guilty pleas.<sup>231</sup>

The word “bargaining” implies a negotiation, or a back-and-forth, between the parties. And, to some extent this is correct. Indeed, courts routinely reference the *mutuality* of benefit in plea bargaining when sanctioning the practice.<sup>232</sup> However, notwithstanding to the mantra-like invocation of the phrase “mutuality of advantage,” the playing field between the prosecution and defense is rarely level. Hence, bargaining often looks less like a negotiation, and more like decree.<sup>233</sup>

#### B. THE NUMBERS (DOCKETS, MONEY, AND THE DEMAND FOR JUSTICE)

Plea bargaining has always been about money. As Chief Justice Burger wrote:

227. See *Brady*, 397 U.S. at 749.

228. See *Bordenkircher*, 434 U.S. at 365.

229. In *Brady*, the defendant may have pled to avoid the possibility of the death penalty. *Brady*, 397 U.S. at 750. In *Bordenkircher*, the defendant was threatened with mandatory life if he did not accept a five year sentence for forging a check for \$88.30. See *Bordenkircher*, 434 U.S. at 358–59. The fact that Mr. Hayes *rejected* this offer might help explain the resilience of the idea that the innocent would not falsely convict themselves. After all, Mr. Hayes turned down a five year deal in the face of a mandatory life penalty—why do this unless one is convinced of his own innocence? *Id.* at 359. Yet, as I’ve argued above, such anecdotal comfort is cold; that one innocent person rejected a compelling deal does not establish all would do the same. Moreover, that a jury convicted Mr. Hayes suggests he is not the innocent person electing trial, but rather the guilty person demanding trial because he refuses to accept a five year prison sentence for what amounts to attempted theft of less than \$90. *Id.*

230. See GARRETT, *supra* note 146, at 18–19.

231. Dervan and Edkins argue, based on this empirical data, that this is exactly what should happen: the Court *should* revisit *Brady* and its progeny because the assumptions on which those decisions are based have been proven erroneous. See Dervan & Edkins, *supra* note 106, at 48.

232. See, e.g., *Bordenkircher*, 434 U.S. at 363 (“Plea bargaining flows from ‘the mutuality of advantage’ to defendants and prosecutors, each with his own reasons for wanting to avoid trial.” (quoting *Brady*, 397 U.S. at 752)).

233. See *supra* Part III.A.2.

The consequence of what might seem on its face a small percentage change in the rate of guilty pleas can be tremendous. A reduction from 90 per cent to 80 per cent in guilty pleas requires the assignment of twice the judicial manpower and facilities—judges, court reporters, bailiffs, clerks, jurors and courtrooms. A reduction to 70 per cent triples this demand.<sup>234</sup>

Part of the numbers problem stems from our demand for criminal justice. The United States is exceptional in the way it employs its criminal justice system. No country imprisons a higher proportion of its population, and most don't even come close.<sup>235</sup> Prisons are crowded<sup>236</sup> and court dockets are similarly crowded. Our system works as a conveyor belt, efficiently processing defendants toward incarceration.<sup>237</sup>

This demand has been caused, in significant part, by plea bargaining. As described above, plea bargaining empowers prosecutors to broaden the pool of chargeable cases.<sup>238</sup> Cases that would be too burdensome and costly to charge in an adjudicatory system become routine in a confessional system. Indeed, plea bargaining has become so ingrained that Congress now legislates with explicit recognition of the prosecutorial power generated by the practice.<sup>239</sup> Every year in this country there are a staggering number of criminal cases. At least part of the reason we have so many criminal cases can be found in the practice of plea bargaining; at the same time, only by plea bargaining can we handle such a large volume of cases.

### C. THE CONSTITUTION

Simpler, more streamlined trials might serve some of the efficiency functions of plea bargaining, while maintaining the values of jury trials identified in Part II. However, much of our criminal procedure is constitutionalized and cannot easily be altered by legislatures or courts.<sup>240</sup>

234. Warren E. Burger, *The State of the Judiciary—1970*, 56 A.B.A.J. 929, 931 (1970). Not all agree with the Chief Justice's analysis. See Alschuler, *supra* note 11, at 938 (finding the analysis "in some respects . . . fallacious").

235. John Conyers, Jr., *The Incarceration Explosion*, 31 YALE L. & POL'Y REV. 377, 377 (2013) ("We now have the highest incarceration rate in the world, with more than 700 out of every 100,000 Americans behind bars. Our nation's incarceration rate is roughly 5 times the international average." (footnotes omitted)).

236. *See id.*

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

238. *See supra* Part III.A.2.

239. *See Barkow, supra* note 117, at 880 (describing legislative decisions made expressly to maintain or enhance prosecutors' bargaining power).

240. *See, e.g., Stuntz, supra* note 169, at 196; Slobogin, *supra* note 83, at 714 ("The Constitution ensures that certain components of the American criminal process are immutable."); *see also* Stephen F. Smith, *Activism as Restraint: Lessons from Criminal Procedure*, 80



Constitutionalized criminal procedure is problematic.<sup>241</sup> It is designed according to court application of vague principles like “due process,” “speedy and public trial,” and “impartial jury,” to specific facts, without the benefit of legislative findings, democratic accountability, and public comment. Moreover, the flaws in this odd method of designing criminal procedure are exacerbated by the inherent inflexibility and anti-experimentalism of constitutional law.

Much of our constitutional criminal procedure comes from the Warren Court, at a time when “it seemed possible that the United States Supreme Court might hold the practice [of plea bargaining] illegal.”<sup>242</sup> And the Supreme Court continues to favor procedural protections over substantive limits on criminal law.<sup>243</sup> Yet the constitutionalization of criminal procedure added to the cost of trials and the necessity of plea bargaining.<sup>244</sup> “Methods of proof are far more formal, more expensive, and more time-consuming in Anglo-American justice than on the continent, and our elaboration of safeguards for the trial process has produced enormous pressure for plea bargaining.”<sup>245</sup> Complicated processes are expensive, and the system will seek a simpler, cheaper resolution.<sup>246</sup> The obvious solution, if one is troubled by

TEX. L. REV. 1057, 1057 (2002) (“By now it is common knowledge that almost the entire field of criminal procedure, formerly within the more or less exclusive province of the several States, has been constitutionalized.”).

241. See Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: “Here I Go Down That Wrong Road Again,”* 74 N.C. L. REV. 1559, 1637 (1996) (“Constitutional criminal procedure is a mass of contradictions.”); see also Akhil Reed Amar, *The Future of Constitutional Criminal Procedure*, 33 AM. CRIM. L. REV. 1123, 1129 (1996) (“Legislative solutions can be adjusted in the face of new facts or changing values far more easily than can rules that have been read into the Constitution.”). See generally Stuntz, *Substance*, *supra* note 23.

242. See Alschuler, *Plea Bargaining*, *supra* note 106, at 6. Alschuler provides a compelling argument that it may have been only a strategic decision by the Solicitor General or someone in the Department of Justice that prevented the Supreme Court from holding plea bargaining illegal in 1958. *Id.* at 35–37 (describing the case of *Shelton v. United States*, 356 U.S. 26 (1958)).

243. See Dripps, *supra* note 13, at 1155 (“The Supreme Court, even in this conservative political period, continues to require costly procedural safeguards that go beyond what elected legislatures have provided by statute,” while showing “great deference to the choices these same legislatures make about what conduct may be made criminal and how severely it may be punished.”).

244. See Alschuler, *Plea Bargaining*, *supra* note 106, at 6 (“At the same time, many of [the Court’s] decisions exacerbated the pressures for plea bargaining by increasing the complexity, length, and cost of criminal trials.”); see also Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 780 (1997) (“[T]he [Warren Court’s] revolution in criminal procedure has raised the cost to the government of using the criminal process.”).

245. Alschuler, *Plea Bargaining*, *supra* note 106, at 42; see also Greenawalt, *supra* note 86, at 46 (describing our reliance on plea bargaining as “largely the product of the complexity and difficulty of the fuller criminal process”).

246. Alschuler, *Plea Bargaining*, *supra* note 106, at 42 (“[T]he more formal and elaborate the trial process, the more likely it is that this process will be subverted through pressures for self-incrimination. The simpler and more straightforward the trial process, the more likely it is that the process will be used.”).

the costs inherent in widespread plea bargaining, is to identify a less complicated, cheaper method of adjudication than our current trial system. The difficulty comes from the fact that the complex rules that ought to be changed are constitutionalized, and thus not easily subject to change.

Three decades ago, Albert Alschuler—pointing to the famous language of *Duncan v. Louisiana*—suggested that simplification could be achieved within our constitutional structure, at least by the states.<sup>247</sup>

[T]he current Supreme Court would be extremely unlikely to condemn a simplification of American trial procedures, including a major restriction of the use of criminal juries, simply on the theory that the sixth amendment and other provisions of the Bill of Rights automatically apply to the states by virtue of the fourteenth amendment.<sup>248</sup>

This may be correct, but it still has yet to happen. States have not developed less-onerous-yet-constitutionally sound means of adjudication because they have no incentive to do so. The Supreme Court all-but eliminated any such incentive in *Brady*<sup>249</sup> and its progeny<sup>250</sup>: if efficiency is the only concern, then plea bargaining is working.<sup>251</sup> Trial bargaining represents a new way to achieve some of the simplification proposed by Alschuler: bargain for it.<sup>252</sup>

After all, there is little reason to think our constitutional rules describe the best possible justice system. Indeed, there is little reason to think a single system is necessarily the best system for all parts of our nation at all times. Or that what was best in 1950, 1960, 1970, or 1980 is best today. One need only read a bit of comparative law literature,<sup>253</sup> or Alschuler's daring proposals for alternative procedural rules,<sup>254</sup> to wonder at the diversity of possible systems

247. See Alschuler, *supra* note 11, at 997 (citing *Duncan v. Louisiana*, 391 U.S. 145, 150 n.14 (1968)).

248. *Id.* Alschuler does note that this eventuality is “probably a pipe dream,” adding that state constitutional guarantees would provide their own impediments. See *id.* at 1010.

249. See *Brady v. United States*, 397 U.S. 742 (1970).

250. See *supra* Part IV.A.

251. Of course, efficiency is not the only concern, as documented in Part II, *supra*. But efficiency differs from the harms identified in Part III in that it directly impacts state budgets. If a state cannot process its criminal dockets, it will either cease administering criminal sanctions, or it will be forced to increase spending on courts, prosecutors, defense counsel, and all other components of a criminal justice system. Either of these courses is likely to generate negative political consequences for those in positions of power. On the other hand, the delegitimizing effects of convicting a few more innocents through coercive bargaining, disempowering juries, and silencing those subjected to criminal justice are bound to generate less attention and have a more defuse impact, where they are even noticed.

252. See generally Alschuler, *supra* note 11, at 1024–43.

253. See, e.g., Frase, *supra* note 69.

254. See Alschuler, *supra* note 11, at 995–1011 (suggesting consideration be given to, among other things, juries comprised of lay persons and judges, a less adversarial process, and mandated testimony from the defendant).

and procedures, and to recognize the hubris in imagining that the procedure described in your Criminal Procedure casebook is the ideal.

Let alone allowing flexibility in criminal procedure seem too radical, consider the contrast between our constitutional criminal procedure and civil procedure. “While there are constitutional restraints [on civil procedure], they are few in number and most of them rarely matter in practice.”<sup>255</sup> And, in civil fora “there is a nonconstitutional ‘out,’ in the form of summary judgment and other devices by which merits judgments are taken out of the jury’s hands.”<sup>256</sup> Criminal law also has a nonconstitutional “out,” in the form of bargained for guilty pleas. Plea bargaining releases criminal cases from the constraints of an unwieldy criminal procedure. Since that procedure is constitutionalized, it does so in the only way it can: by waiver. The defendant agrees to waive his constitutionally guaranteed procedural rights and allow a judgment of guilt to be entered.

Plea bargaining serves as a safety valve for the system, but it need not be so binary. Plea bargaining—the nonconstitutional “out”—could itself serve to generate not just guilty pleas, but also nonconstitutional trials were parties to bargain limited trial rights for limited leniency. In this way, plea bargaining could be the mechanism by which we undo some of the harms generated by constitutionalized criminal procedure, while at the same time, counter-intuitively, limiting the harms of plea bargaining. At its best, trial bargaining promises to mitigate the harms of plea bargaining while opening the door to a better criminal procedure: one that gets used.

## V. THE PATH FORWARD

Trial bargaining offers an alternative to the now binary choice of trial or guilty plea. Trials are too complex and unwieldy for our system, and the sheer impossibility of providing trials has caused courts to ignore the dangers of plea bargaining. The system is crying out for a simplified mode of adjudication, but the constitution frowns on experimentation. Trial bargaining allows experimentation, notwithstanding the constitution.

### A. TRIAL BARGAINING IS CONSTITUTIONAL

One might question whether trial bargaining is constitutional.<sup>257</sup> Allowing a prosecutor to induce waivers of select trial rights by promises of leniency may appear to be in tension with the doctrine of unconstitutional conditions, which provides “that even if a state has absolute discretion to grant or deny a privilege or benefit, it cannot grant the privilege subject to

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255. See Stuntz, *Substance*, *supra* note 23, at 4; see also Stuntz, *The Uneasy Relationship*, *supra* note 23, at 12 (“Constitutional criminal procedure limits trial judges’ flexibility; it restricts a kind of discretionary trial management that is routine in civil cases.”).

256. Stuntz, *Substance*, *supra* note 23, at 4.

257. See *supra* note 31.

conditions that improperly ‘coerce,’ ‘pressure,’ or ‘induce’ the waiver of constitutional rights.”<sup>258</sup> Moreover, “on at least some occasions receipt of a benefit to which someone has no constitutional entitlement does not justify making that person abandon some right guaranteed under the Constitution.”<sup>259</sup> Trial bargaining directly involves the state inducing a waiver of constitutional rights by offering the considerable benefit of leniency in sentencing.<sup>260</sup> Closely related to the doctrine of unconstitutional conditions, in the criminal context, are the prosecutorial vindictiveness cases, holding “it impermissible for prosecutors or judges to deploy their charging and sentencing authority to ‘punish’ defendants for exercising procedural rights.”<sup>261</sup>

These rules—that benefits cannot be conferred to induce the waiver of rights and that harsher sentences may not be imposed to punish defendants for exercising procedural right—are in tension not only with trial bargaining, but also with the long-sanctioned practice of plea bargaining. The Supreme Court has not entirely ignored this tension, maintaining that plea bargaining does not constitute prosecutorial vindictiveness because it is not done with punitive or retaliatory intent.<sup>262</sup> The Court’s answer, of course, is unsatisfactory insofar as there is really no basis for any assertion about the intent of the hundreds of thousands of prosecutorial decisions made in plea negotiations every year. The Court also notes that with plea bargaining the accused is free to accept or reject the offer,<sup>263</sup> but this assertion both fails to distinguish plea bargaining from prosecutorial vindictiveness cases and assumes, without support, that offers of leniency are not coercive.<sup>264</sup> Notably, the Supreme Court has not directly addressed the applicability of the doctrine

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258. Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 6–7 (1988); see also Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989) (“The doctrine of unconstitutional conditions holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether.”).

259. Epstein, *supra* note 258, at 7.

260. See, e.g., Schulhofer, *supra* note 22, at 1063.

261. *Id.* at 1090.

262. See *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978).

263. See *id.*

264. For a more fulsome analysis of plea bargaining and the vindictiveness cases, see Schulhofer, *supra* note 22, at 1091 n.178. For a *much* more fulsome analysis, see generally Malvina Halberstam, *Towards Neutral Principles in the Administration of Criminal Justice: A Critique of Supreme Court Decisions Sanctioning the Plea Bargaining Process*, 73 J. CRIM. L. & CRIMINOLOGY 1 (1982).

of unconstitutional conditions to plea bargaining; perhaps because the two are not easily reconciled;<sup>265</sup> perhaps for other reasons.<sup>266</sup>

Whatever the reason, plea bargaining has evaded the challenges that might appear in the form of unconstitutional conditions and prosecutorial vindictiveness.<sup>267</sup> Trial bargaining would seem to enjoy the same protection. It would occur in the same procedural stance, and there would be the same degree of “give-and-take” and “mutuality of advantage,” as plea bargaining. Moreover, the prosecutorial decision to impose greater penalties on those who refuse trial bargains is no more punitive or retaliatory than imposing greater penalties on those who refuse plea bargains. To the extent plea bargaining does not violate the Constitution, trial bargaining ought to be similarly protected.

It might be argued that leniency in exchange for a complete waiver of trial rights is constitutionally unproblematic because they are paired with a factually based finding of guilt; trial bargains, on the other hand, would involve a prosecutor inducing a defendant to waive trial rights where the defendant maintained the presumption of innocence and contested the allegation of guilt. Of course, the distinction here cannot be the absence of an admission or even maintaining one’s innocence, because both are compatible with plea bargaining.<sup>268</sup> There remains, however, a difference between plea bargaining and trial bargaining in that the latter is not accompanied by any factual basis to enter a judgment of guilt.<sup>269</sup> Many are undoubtedly comforted by this requirement, as it suggests there will be an independent judgment as to the sufficiency of the evidence. As described above,<sup>270</sup> this comfort is almost surely misplaced given the sparse inquiry that is actually conducted in most guilty pleas. While I would not suggest that the factual basis for entering a finding of guilt is an analytically meaningless

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265. See Thomas R. McCoy & Michael J. Mirra, *Plea Bargaining as Due Process in Determining Guilt*, 32 STAN. L. REV. 887, 914 (1980) (“It is simply not possible in terms of any rationale suggested by the Supreme Court to date to reconcile the Court’s approach to plea bargaining with its continued commitment to the modern unconstitutional conditions doctrine.”).

266. See Sullivan, *supra* note 258, at 1415–16 (“[R]ecent Supreme Court decisions on challenges to unconstitutional conditions seem a minefield to be traversed gingerly. Just when the doctrine appears secure, new decisions arise to explode it.”).

267. See Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 801 (2003) (“The Court does not recognize the waiver of criminal protections through plea bargains to entail a form of the unconstitutional conditions problem.”). The oddity of this difference without a distinction has not gone unnoticed. See *id.* at 802 (“Therein lies the waiver paradox. We have two distinct doctrines (and two distinct academic literatures), but these two doctrines involve exactly the same fundamental issue. Both deal with governmental efforts to entice individuals to yield their constitutional rights in exchange for some benefit.”).

268. 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).

269. 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.”).

270. See *supra* Part III.A.3.

difference, it is a thin reed on which to distinguish the constitutionality of each practice.

Therefore, while trial bargaining may initially appear to be at odds with both the doctrine of unconstitutional conditions and prosecutorial vindictiveness, the same could be said of plea bargaining. Ultimately, the two will likely stand or fall together, and there is almost no possibility plea bargaining will be banned. Trial bargaining, accordingly, should withstand constitutional challenge.

*B. TRIAL BARGAINING CAN SUCCEED ON A CASE-BY-CASE BASIS*

The key problem with trial bargaining is probably obvious: The institutional forces in the criminal justice system are not exactly clamoring for a fix to the plea bargaining problem. And the institutional force that matters most, prosecutors, are the least likely to perceive a plea bargaining problem. The status quo allows prosecutors to secure guilty pleas in well over 90% of their cases. This makes prosecutors jobs easier, and, generally, adds to the perception that they are doing their jobs well.

For many, the radically high incidence of guilty pleas, even those secured through bargaining, represents success. Indeed, the Department of Justice routinely touts the number of convictions secured through plea.<sup>271</sup> This fact should not shock; these are defendants who are mostly conceding guilt, and who are all affirmatively waiving their rights and allowing a judgment of guilty to be entered. So long as one ignores the structural problems with substantive criminal law and sentencing law that would cause innocent defendants to plead guilty,<sup>272</sup> then there is no more comforting conviction than that secured through a guilty plea.<sup>273</sup> A jury might make mistakes, but many think that an innocent defendant would not condemn himself.<sup>274</sup> As discussed above,<sup>275</sup> the conventional wisdom is wrong about this, and judges and scholars increasingly recognize as much.<sup>276</sup>

271. U.S. DEP'T OF JUSTICE, *supra* note 2, at 8 ("During Fiscal Year 2012, a total of 78,647, or 97 percent, of all convicted defendants pled guilty prior to or during trial.").

272. *See supra* Part III.A.

273. The argument that plea bargaining's innocence problem is exaggerated "rests, in part, on a perception that innocent defendants will reject prosecutors' plea offers and instead will proceed to trial backed by the belief that their factual innocence will protect them from conviction." Dervan & Edkins, *supra* note 106, at 18–19.

274. *See* United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923) ("Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream.").

275. *See supra* Part III.A.2.a.

276. *See* Lafler v. Cooper, 132 S. Ct. 1376, 1397 (2012) (Scalia, J., dissenting) (observing that plea bargaining "presents grave risks of prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense"); John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157, 161–62 (2014) (examining factors that "create a system in which innocent defendants can be coerced to plead guilty"); Covey, *Longitudinal Guilt*, *supra* note 106, at 450 ("When the deal is good enough, it is rational to refuse to roll the dice, regardless of whether one believes the evidence

It remains true, however, that prosecutors are unlikely to champion the cause of trial bargaining. From their perspective, trial bargains may be preferable to trials, but they are not preferable to guilty pleas. Given the power wielded by prosecutors in our criminal justice system, prosecutorial disfavor will cause some to conclude the enterprise of trial bargaining is doomed. It is not. There are a great number of cases, a great number of lawyers in the prosecutorial role, a great number of defendants, and a great number of judges. Some cases go to trial even though the prosecutor, the judge, and the defense lawyer would prefer otherwise. Other cases are resolved through creative bargains that refuse to fit into the supposed institutional dynamics. With so many cases and so many players, there is tremendous room for experimentation.

This diversity of possible iterations does mean that the “cost” of trial bargaining cannot be predicted with any precision. Most guilty pleas require less than one in-court hour to complete: that means an hour of the prosecutor’s time, the judge’s time, the defense lawyer’s time, the bailiff’s time, and the court reporters time. An hour of in-court overhead—electricity, plumbing, flags, et cetera. Bargained-for trials would generally take less time than full, constitutional trials, but more time than a guilty plea. The differential depends. It depends on the facts of the case, and the terms of the trial bargain. Indeed, one of the terms suggested—an agreement that the defendant will testify—can only *increase* the time of trial. Theoretically, one could imagine using time-limits and evidentiary stipulations to turn what would otherwise be a five-week trial into a one-day trial. But every case would differ. One near-constant would remain: bargained-for adjudications would almost always take longer than a guilty plea. There *is* a cost.

This uncertainty about the real cost of trial bargaining is less problematic than some might suggest, however, because there is a market that will control the cost. Bargained-for trials will only occur where, and to the degree, that the prosecutor and the defendant value the exchange. Perhaps a prosecutor feels that a certain set of waivers can transform a one-week trial into a one-day trial. Perhaps she is also willing to offer to recommend a one-year prison sentence for a guilty plea and can credibly threaten a five-year prison sentence after trial: she can decide how much she values the foreshortened trial. Plainly, from her perspective it is less desirable than a guilty plea, but it’s more desirable than the full trial. Maybe she offers to recommend a three-year sentence in a trial bargain, should the defendant be convicted. She has thereby calculated the cost of the trial bargain over the cost of a guilty plea. It

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establishes guilt beyond a reasonable doubt, and regardless of whether one is factually innocent.”); Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), <http://www.nybooks.com/articles/archives/2014/nov/20/why-innocent-people-plead-guilty> (“[T]here is some evidence that the pressure of the situation may cause an innocent defendant to make a less-than-rational appraisal of his chances for acquittal and thus decide to plead guilty when he not only is actually innocent but also could be proven so.”).

only then remains for the defendant to value her options. Of course, none of this is precise or even measured, and in that way, it's much the same as plea bargaining.

As befits an experimentalist agenda, trial bargaining begins with a grassroots effort. Trial bargaining should be introduced to practicing lawyers, who are in a position to identify the particular case where it represents a viable option for negotiation. This Article describes the method and suggests it would be normatively beneficial. The next step is to start bargaining. One could question whether overworked counsel—prosecutors and the defense—can realistically be counted on to develop novel trial bargains. That concern could equally be leveled at plea bargaining—counsel do not have time to hash out all the waiver details in every case. And the remedy is the same in both instances: model language and forms. Just as pleas bargains are routinely memorialized using well tested boilerplate agreements, so too trial bargain templates will serve the cause of efficiency in bargaining. In a forthcoming article, I introduce a template, including sample trial bargain forms, by which actual trial bargains can be generated.<sup>277</sup>

## VI. CONCLUSION

Plea bargaining—as critical as it is to our legal system—presents grave dangers as it resolves an ever-increasing portion of the criminal docket. Trial bargaining offers a remedy. Much work remains to be done, and much of that work will be done in the courts. But the time to begin this experiment has come.

This Article is not a mere thought experiment. Trial bargaining should be happening, and it's not. At a systemic level, trial bargaining will mitigate the harms of excessive reliance on plea bargaining (ironically, by using the very tools of plea bargaining). In individual cases, trial bargains will generate better outcomes for prosecutors, defense lawyers, and defendants. The seemingly zero-sum game of criminal litigation would be improved for all parties by shifting the binary calculus of guilty pleas and trials to something more nuanced, and trial bargaining promises to do just that.

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<sup>277</sup>. See generally Gregory M. Gilchrist, *Bargaining for More Trials*, CHAMPION (forthcoming 2016).