

2013

## Plea Bargaining in the Shadow of the Constitution

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### Recommended Citation

Richard L. Lippke, *Plea Bargaining in the Shadow of the Constitution*, 51 Duq. L. Rev. 709 (2013).  
Available at: <https://dsc.duq.edu/dlr/vol51/iss3/11>

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# Plea Bargaining in the Shadow of the Constitution

*Richard L. Lippke\**

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## I. INTRODUCTION

In two recent decisions, the United States Supreme Court moved further in the direction of at least limited constitutionalization of plea bargaining.<sup>1</sup> A majority on the Court held that criminal defendants must be given “effective assistance” by their attorneys as they contemplate whether to waive important legal rights and enter guilty pleas. Fortunately for the Court, the defense attorneys in the two cases had almost comically failed to do their jobs and thus the majority could, as it acknowledged, avoid addressing in any very thorough way the parameters of effective assistance in the plea bargaining context.<sup>2</sup> In spite of this, the Court struggled with identifying a remedy for defendants whose attorneys falter, a point made quite effectively by the dissenting justices. Given the fluidity of plea negotiations, it was difficult for the Court to say with any certainty what sentences the defendants would have received if not for the missteps of their attorneys. The Court assigned the task of discerning the remedy to

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1. *Missouri v. Frye*, 132 S. Ct. 1399 (2012); *Lafler v. Cooper*, 132 S. Ct. 1376 (2012). These are not the first cases in which the Court has held that defendants who enter guilty pleas are entitled to “effective assistance” of counsel. See *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). For an illuminating discussion of the earlier case, see Stephanos Bibas, *Regulating the Plea Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117 (2011).

2. See Stephanos Bibas on the role of “prevailing professional norms” in defining “effective assistance.” Bibas, *supra* note 1, at 1144.

the lower courts, a solution that, as Justice Scalia caustically noted, would require those courts to engage in considerable guesswork.<sup>3</sup> Worse than this, the majority conceded that the lower courts might determine that no remedy whatsoever is necessary, though the defendants had not received effective assistance during their plea negotiations.

If the two cases constitute victories for criminal defendants, then they are modest ones. Indeed, the dissenting justices may have won the rhetorical fight if the Court is prepared to do no more than take such tepid steps toward the regulation of plea bargaining. If plea bargaining persists in its current form—one that grants prosecutors enormous power to pressure defendants for guilty pleas—then it does seem that defendants ought to be given competent advice in deciding what to do in the face of such pressure. But the majority of the Court is strangely silent about the ways in which plea bargaining is currently structured and practiced in the United States, a silence made all the more noticeable by the dissenting justices' taunts that plea bargaining is not in the Constitution and so not appropriately dealt with by the Court at all. The impression left is that the majority did not quite know what to say about the "system of pleas" that it acknowledges has almost entirely replaced criminal trials.

My aim in this discussion is the bold (some will say audacious) one of showing how the Court might have argued that plea bargaining, as it currently exists in the United States, is contrary to well-established and broadly-accepted constitutional values respecting the adjudication of criminal charges. By "constitutional values" I mean ones that any plausible reading of the Constitution, along with its history of interpretation, establishes as basic to the operations of the U.S. criminal justice system. Most prominent among these values are the presumption of innocence, the burden of proof on the government in criminal cases, the high standard of proof the government must meet to convince factfinders of the guilt of criminal defendants, the right to an orderly and public trial by an impartial tribunal, and the necessity of protecting those accused of crimes from measures designed to coerce admissions of guilt from them. Contrary to what Justice Scalia claims, I contend that plea bargaining is *in the Constitution*, if being in it means that salient constitutional values have implications for how it should be structured and regulated. Current plea

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3. Frye, 132 S. Ct. at 1413 (Scalia, J., dissenting).

bargaining practices are contrary to those values. Rather than tinkering further with what effective assistance requires of defense counsel in plea cases, the Court should take the bold step of indicating that the existing plea system is constitutionally defective. Fortunately, the Court could, at the same time, articulate a set of principles for the reform of plea bargaining. Though such principles might not entirely dictate the acceptable contours and limits of plea bargaining, they would point toward ways in which it should be significantly restrained. In particular, these principles would tell us to find ways to reduce the discretion prosecutors have to induce guilty pleas from defendants independently of the evidence they can adduce to demonstrate their guilt.

The discussion proceeds as follows. In the first section, I identify the constitutional values that underlie criminal trials. Again, my aim will be to identify substantive values that have, if not indisputable constitutional pedigrees, are well-founded within the mainstream of constitutional thinking. In the second section, I show how current forms of plea bargaining are deeply at odds with those values. Specifically, as it is currently structured, plea bargaining makes the state's evidence against criminal defendants of marginal significance, permits prosecutors, mostly by themselves, to determine the cogency and reliability of the evidence against defendants, and tolerates the use of coercive tactics by prosecutors to obtain guilty pleas. In the third section, the lessons of the first two sections are put to use in developing principles for the reform of plea bargaining. We need not provide full-on criminal trials for all individuals charged with crimes, or even for many of them. But we should require states and the federal government to substantially reform plea practices so that they are aligned with constitutional values. Various challenges to and problems with doing so are addressed. In the final section, limitations in the reforms I advocate are discussed. It is conceded that restrained plea bargaining practices will not suffice, all by themselves, to bring such practices fully in line with important constitutional values.

## II. TRIALS AND CONSTITUTIONAL VALUES

Any suggestion that there is a set of widely accepted, substantive constitutional values with respect to the adjudication of criminal charges will be met with considerable skepticism. Those familiar with the deep and abiding controversies concerning consti-

tutional interpretation will believe that such a claim is preposterous on its face.<sup>4</sup> In particular, there has been long-lasting and divisive debate about all of the provisions of the Bill of Rights dealing with criminal procedure. More than this, a stingy reading of the Constitution suggests that certain widely accepted features of criminal procedure—the presumption of innocence, the burden of proof, and the reasonable doubt standard foremost among them—are nowhere to be found in it.<sup>5</sup> How, then, can I appeal to a set of core constitutional values with respect to criminal charge adjudication and hope to gain many adherents?

For one thing, several of the most significant requirements of appropriate charge adjudication are widely accepted, even if they are not specifically inscribed in the words of the Constitution. Among these requirements are that criminal defendants are entitled to a presumption of innocence, the burden of proof is on the government in criminal trials, and the government has to meet a high standard of proof in public trials before impartial fact-finders should be prepared to convict defendants.<sup>6</sup> Granted, what any of these provisions means is open to dispute, especially at the margins.<sup>7</sup> But that mere suspicions on the part of government officials that individuals are guilty of crimes is not sufficient to warrant their punishment, that it is up to government officials to discover and produce convincing evidence of their guilt, and that the evidence must be powerfully persuasive of their guilt, are claims unlikely to be gainsaid by many. Likewise, few will dispute the value of having some tribunal independent of the government officials who initially investigate and charge individuals with crimes evaluate the probative force of the evidence against defendants. The right to trial by jury has long been understood as a vital safe-

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4. Any list of significant texts on constitutional interpretation will appear biased and incomplete. For a sampling of views, the following list will suffice: ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990); RONALD DWORKIN, *LAW'S EMPIRE* (1986); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990); MARK TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* (1988).

5. See Justice Hugo Black's dissent in *In re Winship*, 397 U.S. 358, 377 (1970) (Black, J., dissenting), in which he argues that the reasonable doubt standard is not in the Constitution. As Stephanos Bibas notes, the Sixth Amendment text says little about the character of criminal trials. Stephanos Bibas, *Two Cheers, Not Three, for Sixth Amendment Originalism*, 34 HARV. J.L. & PUB POL'Y 45, 46 (2011).

6. See *Taylor v. Kentucky*, 436 U.S. 478 (1978); *Estelle v. Williams*, 425 U.S. 501 (1976); *In re Winship*, 397 U.S. 358; *Speiser v. Randall*, 357 U.S. 513 (1958); *Coffin v. United States*, 156 U.S. 432 (1895).

7. See, e.g., LARRY LAUDAN, *TRUTH, ERROR, AND CRIMINAL LAW: AN ESSAY IN LEGAL EPISTEMOLOGY* (2006).

guard against mistaken or malicious prosecutions precisely because it serves as a check on the actions of government officials.<sup>8</sup> Its public and orderly character, its provision of opportunities for defendants to confront and challenge the evidence produced by state officials against them, and the right of defendants to have the assistance of counsel during this process, were all conceived by the nation's founders to be crucial in balancing the government's formidable powers to arrest, charge, and convict. Only charge adjudication processes of this kind attain the legitimacy to which exercises of government power should aspire.

Admittedly, some provisions of the Bill of Rights, especially as they have been interpreted by the Supreme Court, are hugely controversial. Fortunately, they can either be ignored for my purposes or aspects of them that are not in dispute can be incorporated into my argument. For instance, I can safely sidestep most of the controversy concerning searches and seizures and the appropriate remedies when state officials conduct improper ones.<sup>9</sup> Even if we had very different rules governing searches and seizures, as well we might, I doubt that they would lead us to abandon or significantly modify other key constitutional provisions governing criminal procedure. With regard to the Fifth Amendment right against self-incrimination, though some question the value or scope of the right against self-incrimination, especially as it has been interpreted by the Supreme Court, I doubt that anyone thinks it constitutionally permissible for state officials to torture or directly coerce (via threats) criminal suspects in order to gain confessions from them.<sup>10</sup> The unreliability of such confessions is too patent to be tolerated, not to mention the ways in which such methods of extracting information assault the dignity of persons. Hence that

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8. See *Duncan v. Louisiana*, 391 U.S. 145 (1968); see also AKHIL REED AMAR, *THE BILL OF RIGHTS* ch. 5 (1998); LEONARD W. LEVY, *THE PALLADIUM OF JUSTICE: ORIGINS OF TRIAL BY JURY* (1999); Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867 (1994); Douglas A. Berman, *Making the Framers' Case, and a Modern Case, for Jury Involvement in Habeas Adjudication*, 71 OHIO ST. L.J. 887, 893 (2010); John H. Langbein, *On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial*, 15 HARV. J.L. & PUB. POL'Y 119 (1992).

9. Though concerns have been raised that prosecutors might use improperly obtained evidence in plea negotiations. See Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 82 (1968).

10. See *Griffin v. California*, 380 U.S. 609 (1965); *Brown v. Mississippi*, 297 U.S. 278 (1936). For useful discussion of the right against self-incrimination, see the essays in R. H. HELMHOLZ ET AL., *THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT* (1997).

part of the provision might be folded into my argument without too much difficulty.

It is worth noting that the nation's founders appear to have put much more faith in juries than we do, permitting them to determine both facts and law, and thus to refuse to enforce laws which they deemed to be unjust or unconstitutional.<sup>11</sup> Also, the right to trial was not viewed as the defendant's alone to exercise or not.<sup>12</sup> Jury trials were viewed as serving important public values, in ensuring the integrity of charge adjudication procedures against suspicions of corruption or tyranny, and in educating the public by bringing them into contact with more learned judges and involving them in debates about public affairs. Most striking of all, given current practices, guilty pleas by those accused of crimes were for a long time strongly discouraged, so significant were the perceived purposes served by jury trials.<sup>13</sup> Trials were esteemed as adversarial contests in which defendants, aided by counsel, vigorously challenged the government's case, rather than forums in which defendants passively acceded to the government's accusations.

Times have changed, of course. It is not my aim to reject guilty pleas or insist that all defendants be given jury trials. The criminal law is considerably more complicated than it was at the time of the nation's founding and the volume of cases with which the criminal justice system must contend is enormously greater. So too the existence of standing police forces, armed with sophisticated technologies to detect and prove crimes, has likely increased the number of cases in which there is overwhelming evidence of defendant guilt. Trials might not be as necessary as they once were to determine guilt, but many of the reasons why the founders were so devoted to jury trials continue to have implications for contemporary charge adjudication procedures.

It will be useful to press beyond the history of court decisions and constitutional text affirming these constitutional values to consider, if only briefly, what view about the state and its power over its citizens organizes and makes sense of these values. Doing so will help us to appreciate what anyone who wishes to reject such values is up against. Two plausible accounts have emerged concerning why the Constitution makes it so difficult for state offi-

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11. AMAR, *supra* note 8, at 100; Alschuler & Deiss, *supra* note 8, at 903.

12. AMAR, *supra* note 8, at 104.

13. Alschuler & Deiss, *supra* note 8, at 922.

cially to convict individuals of crimes. The first account emphasizes the fallibility of our procedures for determining criminal guilt or its absence. We know that such procedures sometimes produce mistaken convictions and mistaken acquittals. As between these two undesirable outcomes, we have a preference, and some would stay a strong one, for avoiding the former kinds of mistakes more than the latter kinds.<sup>14</sup> By granting criminal defendants the presumption of innocence, insisting that the government bear the burden of proof and meet a high standard in order to convince an impartial tribunal, all the while shielding defendants from risks of forced confessions, we express the societal preference for not punishing the innocent at the expense of punishing all of the guilty. If mistakes cannot be avoided, it is better to err on the side of letting the guilty go unpunished than to punish the innocent.<sup>15</sup>

The second account is not at odds with the first account, but suggests that there is more to these constitutional values than a concern with error distribution.<sup>16</sup> The second account begins by noting the awful character of legal punishment, especially in its more severe forms. Legal punishment authoritatively condemns individuals, thereby stigmatizing them. It also deprives them of goods (life, liberty, or property) to which they are otherwise entitled. Moreover, its effects linger, with lengthy imprisonment having the potential to sharply diminish the quality of peoples' lives.<sup>17</sup> At the same time, legal punishment's collateral consequences affect others who are largely innocent of wrongdoing. In the face of these sobering facts about legal punishment, it might be claimed that we must strive for moral certainty, if not epistemic certainty, in its infliction. The combination of the presumption of innocence—understood robustly, as a presumption on the part of fact-

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14. See Justice Harlan's concurring opinion in *In re Winship*, 397 U.S. 358, 372 (Harlan, J., concurring). For a sophisticated defense of the view that trial procedures are set up to distribute errors of different kinds, see also LAUDAN, *supra* note 7, at ch. 3.

15. I am not denying, of course, that considerable room for debate exists about both how strong the preference for letting the guilty go unpunished to punishing the innocent should be and how best to structure trial rules to achieve that degree of preference. For further discussion of these issues, see Richard L. Lippke, *Punishing the Guilty, Not Punishing the Innocent*, 7 J. MORAL PHIL. 462 (2010).

16. In developing this account, I draw on 3 ANTONY DUFF ET AL., *THE TRIAL ON TRIAL: TOWARDS A NORMATIVE THEORY OF THE CRIMINAL TRIAL* ch. 3 (2007).

17. For an illuminating account of the psychological effects of imprisonment, see CRAIG HANEY, *REFORMING PUNISHMENT: PSYCHOLOGICAL LIMITS TO THE PAINS OF IMPRISONMENT* (2006). For an equally illuminating account of the effects of imprisonment on the economic prospects of offenders, see BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* (2006).

finders that those charged with crimes are factually innocent of them—along with the burden of proof and the high standard of proof is, according to this line of argument, a complex moral assurance procedure.<sup>18</sup> Though we can never be epistemically certain that those we punish are factually guilty, we can set things up so that it is difficult for the government to convict individuals of crimes and punish them. Trials are ordeals for government officials, and should be. If we arrange things so that, in spite of the odds set against them, government officials can convince fact-finders of the guilt of defendants, then we will have acted reasonably and fairly in meting out legal punishment to those duly convicted of crimes.

I shall make no effort to privilege one of these accounts over the other. Either will suffice for my purposes. The Supreme Court, in some of its rulings, seems to favor the first, error distribution account.<sup>19</sup> But the second account might have better resonated with the framers and ratifiers of the Constitution and Bill of Rights. As legal scholars have shown, eighteenth century criminal trials emerged from earlier trials in which jurors had to be convinced to render guilty verdicts in spite of their fears of adverse divine judgment should they make mistakes.<sup>20</sup> Judging others and thereby being instrumental in the infliction on them of sometimes spectacularly cruel criminal sanctions was viewed by inhabitants of the sixteenth and seventeenth centuries as a morally freighted task. The reasonable doubt standard may well have evolved not to protect criminal defendants so much as to ensure fact-finders that they would not be condemned by God for their mistaken verdicts, if indeed such verdicts were the outcomes of trials. Though such concerns might have ebbed by the time the Constitution and Bill of Rights were adopted, the notion that considerable care (along with a good dose of humility) must be exercised in rendering verdicts in criminal trials likely persisted. Without this, it seems hard to explain the disproportionate emphasis in the Bill of Rights on the rights of criminal suspects and defendants.

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18. So, too, the requirement of jury unanimity, or near-unanimity, promotes moral assurance in the infliction of punishment.

19. Again, see Justice Harlan's concurring opinion in *In re Winship*, 397 U.S. 358 (Harlan, J., concurring); see also *Ballew v. Georgia*, 435 U.S. 223 (1978).

20. See JAMES Q. WHITMAN, *THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL* (2008); Anthony A. Morano, *A Reexamination of the Development of the Reasonable Doubt Rule*, 55 B.U. L. REV. 507 (1975).

In any event, I hope it is apparent that the constitutional values on which I draw in subsequent sections of this paper are solidly in the mainstream of plausible thinking about the Constitution and its history of interpretation.<sup>21</sup> In a nutshell, these values point unmistakably in the direction of having charge adjudication procedures that are public, orderly, and adversarial. Such procedures should produce determinations of guilt or its absence by an independent tribunal that is capable of putting its suspicions about defendants aside and willing to convict only if the evidence presented to it is powerfully persuasive of the guilt of the accused. We now turn to an examination of the ways in which contemporary plea bargaining practices in the United States are at odds with such values.

### III. PLEA BARGAINING AND CONSTITUTIONAL VALUES

The story I tell in this section is familiar, though some of the details are slightly different.<sup>22</sup> Plea bargaining in the United States has evolved in ways that give prosecutors vast and largely unchecked power to pressure those they charge with crimes into entering guilty pleas. The pressure exerted on defendants derives primarily from prosecutorial manipulation (sometimes with the tacit cooperation of judges) of the sentencing differential—the difference in punishment received by defendants who plead guilty and defendants who go to trial and are convicted. Prosecutorial ability to manipulate the sentencing differential depends on their considerable charging discretion and their authority to make sentencing recommendations.<sup>23</sup> It is widely believed that prosecutors routinely over-charge defendants in order to increase the pressure

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21. It is worth noting that the presumption of innocence, along with the rights to be promptly informed of criminal charges, to confront and challenge the evidence in support of those charges, and to have all of this occur before an impartial tribunal that adheres to the reasonable doubt standard have been incorporated into the law of the European Union. For discussion of these provisions and their continued interpretation and refinement, see ANDREW ASHWORTH & MIKE REDMAYNE, *THE CRIMINAL PROCESS* 33-34 (4th ed. 2010), and elsewhere in the text.

22. See, e.g., Albert W. Alschuler, *supra* note 9; John H. Langbein, *Torture and Plea Bargaining*, 58 *PUB. INT.* 43 (1980); Langbein, *supra* note 8; Stephen Schulhofer, *Plea Bargaining as Disaster*, 101 *YALE L.J.* 1979 (1992).

23. Though prosecutors' sentencing recommendations are not binding upon judges, the evidence suggests that judges are loath to reject prosecutors' recommendations. See Note, *The Unconstitutionality of Plea Bargaining*, 83 *HARV. L. REV.* 1387, 1394 (1970).

on them to plead guilty.<sup>24</sup> Since most jurisdictions in the United States do not have concurrent sentencing schemes, the more charges individuals face, the longer are their potential sentences. Offers to drop charges in exchange for guilty pleas can thus open up significant sentencing differentials. So can offers to make sentencing recommendations significantly below the statutorily available maximums. Depending on the kinds of crimes in question, there is evidence that prosecutors routinely proffer sentence reductions of from thirty-three percent to seventy-five percent below the statutory maximums in order to attract guilty pleas.<sup>25</sup> Needless to say, the combination of offers to drop charges and make favorable sentencing recommendations can make guilty pleas extremely enticing.

But that is not the end of the story, for it seems clear that defendants who refuse plea bargains and are instead convicted at trials risk post-trial sentencing recommendations by prosecutors that are designed, in part, to punish them for having exercised their constitutional right to trial adjudication. Though they are hard to detect, let alone prove, so-called “trial penalties” appear to be more than theoretical possibilities. Prosecutors do not appreciate defendants who reject plea deals and force them to do their jobs.<sup>26</sup> Neither, apparently, do some judges.<sup>27</sup>

The distinction between the rewards defendants might receive for waiving their constitutional right to trial, and with it the right against self-incrimination and to appeals of their convictions, and the extra measure of punishment they might receive for exercising such rights, is crucial, though often glossed over in analyses of plea bargaining.<sup>28</sup> Simply put, there is a clear difference between offering to reduce a defendant’s punishment in exchange for a guilty plea and increasing it (or threatening to do so) if she declines the offer, goes to trial, and is convicted. The former might plausibly be cast as offering defendants less than their deserved

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24. See Albert W. Alschuler, *The Trial Judge’s Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1144 (1976); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 519 (2001).

25. See Schulhofer, *supra* note 22, at 1993; see also Josh Bowers, *Punishing the Innocent*, 156 U. PENN. L. REV. 1117, 1143-45 (2007).

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

27. For discussion of the ways in which prosecutors and judges might seek to impose extra punishment on defendants whom they believe are wasting everyone’s time with “needless trials,” see MILTON HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS chs. 5-6 (1977).

28. I develop this distinction in greater detail in RICHARD L. LIPPKE, THE ETHICS OF PLEA BARGAINING ch. 1 (2011).

punishment. Of course, it will do this only if two further conditions are satisfied: first, defendants must not have been strategically over-charged in order to put additional pressure on them to plead guilty. Second, the sentencing scheme in place must be both ordinally and cardinally proportionate—that is, such that it can plausibly be characterized as tending to assign offenders deserved punishments.<sup>29</sup> Assuming that both of these conditions are satisfied, which they often will not be, rewards for waiving crucial rights reduce the punishment that defendants might lawfully be assigned and probably cannot accurately be characterized as “coercive.”<sup>30</sup>

Trial penalties, by contrast, are added sanctions assigned to offenders not for their crimes but to discourage or punish them for the exercise of their constitutional rights. I have argued elsewhere that such penalties cannot be justified and are, as a result, illicit.<sup>31</sup> Unlike offers to reduce charges or sentences, the threat of such penalties cannot plausibly be held to make defendants better off.<sup>32</sup> The Supreme Court would likely condemn the use of threats of bodily harm by the police to induce suspects held in custody to incriminate themselves. Yet it tolerates threats of enhanced punishment when it is the right to trial that is at issue. Part of the problem, I believe, is that we lack an institutional mechanism for disentangling waiver rewards and trial penalties, and thus for distinguishing the contributions they make to sentencing differentials.<sup>33</sup> Subsequently, I describe such a mechanism. Supposing

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29. On ordinal versus cardinal proportionality, see ANDREW VON HIRSCH, *CENSURE AND SANCTIONS* 18 (1993).

30. Robert E. Scott and William J. Stuntz’s claim that “the choice to plead guilty is too generous to the offender” makes sense against this backdrop. See Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 *YALE L.J.* 1909, 1920 (1992). Yet Scott and Stuntz fail to distinguish rewards for pleading guilty, which might not be deserved, from trial penalties, which are likewise not deserved.

31. LIPPKE, *supra* note 28, at ch. 2.

32. Oddly, the Court worried that the imposition of a longer sentence at a second trial (after the earlier conviction of a defendant had been overturned on appeal) would be perceived as “vindictive” by defendants and thus discourage appeals in *North Carolina v. Pearce*, 395 U.S. 711 (1969). However, the Court refused to see the actions of the prosecutor in *Bordenkircher* as similarly vindictive in appearance, a point sharply made by Malvina Halberstam in *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, 8 (1982).

33. Also, the majority in *Bordenkircher* reasoned that the prosecutor in the case could have initially charged Hayes as a habitual offender and warned Hayes that if he refused to accept the initial plea offer, he would go back and do so. *Bordenkircher v. Hayes*, 434 U.S. 357, 370-71 (1978). The Court seemed to commit the error of thinking that warning some-

that we adopted it, or something like it, would plea bargaining have more solid constitutional footing? In other words, is the only problem with plea bargaining practices in the U.S. that they mask threats by state officials to punish defendants who insist on exercising their constitutional rights?

Far from it. We should also be concerned about the magnitude of the sentencing differentials that prosecutors can create independently of whether they can threaten, and with the cooperation of the courts, impose, trial penalties. Prosecutors' abilities to overcharge, to add and drop charges, and determine sentence reductions enable them to exert enormous pressure on defendants to enter guilty pleas. Defendants who face the difference between custodial and non-custodial sentences, or between lengthy custodial sentences and relatively short ones, have powerful incentives to decline to put the government's case against them to the test. Crucially, the larger these sentencing differentials are permitted to become, the less important will be the actual evidence state officials can produce concerning the guilt of the individuals whom they have charged with crimes.<sup>34</sup> Defendants who face formidable sentencing differentials might be advised by their attorneys that the state's evidence against them is unlikely to convince a jury of their guilt beyond a reasonable doubt. But such defendants will understandably be reluctant to risk trials, especially if convictions will yield disastrous sentencing outcomes.

Here we reach the nub of the matter: current plea bargaining practices in the U.S. make it all too easy for state officials to inflict punishment on individuals regardless of the evidence they have against them. The jury, which in the Founders' view was a critical bulwark against government corruption or overreaching, is effectively excised from charge adjudication by large sentencing differentials. And though judges are supposed to verify in plea colloquies that a "factual basis" exists for any pleas entered, it does not appear that they do so with any rigor.<sup>35</sup> This then means that prosecutors' assessments of probable guilt do the bulk of the work.

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one that you will be vindictive if he does not act as you desire makes it all right to subsequently behave vindictively toward him.

34. The "fast-tracking" of guilty pleas, whereby defendants are encouraged to enter pleas quickly in order to get maximum discounts, likewise dilutes the impact of the evidence on their decisions. As Bibas, *supra* note 1, at 1132, points out, defendants are thereby induced to plead before they know much about the evidence the government has against them.

35. See Jenia I. Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 212-23 (2006).

Moreover, prosecutors need not actually go very far toward assuring themselves that they have charged individuals correctly or have sufficient evidence against them. They can instead rely on their charging discretion and abilities to influence final sentencing outcomes to do most of the work of bringing defendants to heel. It is hard to believe that the architects of the Constitution would have felt comfortable establishing a system that placed so much power over the lives of citizens in the hands of government officials operating without much real oversight. Whether one believes that the proof structure of criminal trials is designed to express a strong societal preference for avoiding errors of mistaken conviction at the expense of errors of mistaken acquittal, or is a moral assurance device for the justified infliction of legal punishment, plea procedures that are so indifferent to the strength of the evidence are worrisome.

Some members of the Supreme Court comfort themselves with the notion that defendants who are willing to plead guilty simply must be, in fact, guilty.<sup>36</sup> Why else would defendants be willing to plead in the first place? But this facile assumption ignores the complexity of the defendant pool. Some, perhaps a substantial majority of the defendants willing to plead, are guilty more or less as charged. Since we cannot expect or require perfection in charging from prosecutors, the fact that they might, at times, mischaracterize offenders' conduct in their charging decisions is something we just have to accept. Defendants' attorneys presumably have some ability to work with prosecutors to refine charges so that they more accurately reflect the crimes their clients are willing to concede that they committed. However, other defendants facing the pressure of the sentencing differential might plead guilty though they have been strategically and significantly overcharged by prosecutors eager to resolve cases. Plea bargaining in such cases might produce excessive punishment, or significant errors in convictions in the sense that the crimes of which individuals are convicted bear scant resemblance to the crimes which they actually committed. Other defendants who are cowed into pleading might believe that they are innocent, either because they believe that they did not cross the line between legal and illegal conduct, or because they believe they have valid defenses to the charges against them. Of course, some of these kinds of defendants will be mistaken—they did cross the line or juries would have

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36. Bibas, *supra* note 1, at 1126-27.

found their defenses unconvincing. But some might have gained acquittals or convictions on reduced charges if seeking them was not so risky. Finally, some defendants—and nobody knows how many—will actually be innocent of all of the charges against them. Many of the innocent who accede to guilty pleas, as Josh Bowers has convincingly shown, will be individuals with criminal records.<sup>37</sup> They will accept another mark on their records as the price to pay for avoiding the process costs of trials or the significantly worse sentences they might receive if they exercised their right to trial and were convicted. A few, and one suspects that here the numbers are small, will be innocents without criminal records. They are the unfortunate victims of such things as misidentification by witnesses or the police, or misapprehension of the nature of their conduct by the authorities.

A properly designed and functioning plea adjudication system would be sensitive to these differences among the defendants who indicate a willingness to enter guilty pleas. It would not be set up to discourage all of them from exercising their right to trial, which is not to say, of course, that it would infallibly process all who have legitimate claims to partial or full exoneration. More than this, it is far from obvious that a plea bargaining system should be set up to discourage the guilty-as-charged from going to trial. Nothing in the wording of the Fifth or Sixth Amendments, for instance, suggests that the rights they describe apply only to individuals factually innocent of crimes. We might hope that those guilty of crimes and against whom the state has amassed considerable evidence will not put us through the costly ritual of criminal trials. But it is an altogether different matter to take steps to sternly discourage exercise of such fundamental rights—and in the case of imposed trial penalties, punish them for it in seeming violation of due process of law, since no jurisdiction with which I am familiar openly and explicitly makes the “superfluous exercise” of a constitutional right a crime.<sup>38</sup>

#### IV. BRINGING PLEA BARGAINING INTO LINE WITH THE CONSTITUTION

Summarizing, the Constitution and the history of interpretation of several of its key provisions set up elaborate and formidable

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37. Bowers, *supra* note 25, at 1124-32.

38. I assume that having prior notice that an act constitutes a crime is at least a necessary condition of due process.

protections for individuals formally accused of crimes by government officials. These protections bar government efforts to force or coerce confessions. They also establish a presumption of innocence for the accused before the members of an impartial tribunal. The government then has the responsibility to produce persuasive evidence of the accused's guilt in a public forum, and that evidence must be convincing beyond a reasonable doubt. Jury trials, as we have seen, serve vital power-checking and legitimacy functions. They force government officials to put their cards on the table, allowing other citizens to see what proof they have against those suspected of crimes. Plea bargaining substitutes for this elaborate public ritual an occluded one in which government officials convince individuals accused of crimes to admit their guilt based on the creation of a plea versus trial outcome sentencing differential. The nature of the evidence in cases resolved by guilty pleas and its role in convincing defendants to plead is thus murky. No one other than police, prosecutors, and judges need be convinced by the evidence that the government has against defendants, and judges seem too often convinced because police and prosecutors are.

It is tempting to conclude from this that plea bargaining in any form is unconstitutional. However, I am not convinced that such a move is either practicable or necessarily compelled by the logic of the relevant constitutional provisions. A more feasible (though, admittedly, not much more likely) approach would be for the Supreme Court to indicate its deep unease with plea bargaining in its current form and articulate a set of constitutional principles according to which reform of the plea system must be made to conform. The Court could then give states and the federal government a time-frame within which they must bring their plea practices into line with the relevant principles. What might these principles look like, and what plea practices would they sanction?

The answer to the first question is implicit in much of the analysis so far. First and foremost, any acceptable non-trial charge adjudication system must give prominence to the evidence that the police and prosecutors have accumulated against those they have charged with crimes. It will not work to say, simply, that a plea system must be set up so that it is the evidence amassed against defendants that does the primary work of convincing them to admit their guilt, though this way of putting things is not too wide of the mark. Those charged with crimes might admit their guilt for all kinds of reasons that have little to do with the evidence against them and there will often be little that we can do to

discourage them from doing so. In the face of this variety of defendants, the key principle governing the state and its evidentiary responsibilities is more like this: non-trial adjudication procedures must be designed and structured so that we have reasonable assurance that the evidence the state has against defendants is sufficient, all by itself, to convince them to enter guilty pleas. If plea procedures are set up in this way, then it will not matter that some defendants choose to enter guilty pleas for their own reasons, ones having little to do with the evidence. Manifestly, however, current plea procedures do not give us this reasonable assurance. Given the rules governing such procedures, we can never be sure whether it is the evidence that convinces defendants to enter guilty pleas or sizeable sentencing differentials that do most of the work of convincing them.

Second, we must structure non-trial charge adjudication systems so that some agent or agents independent of prosecutors and police, in a formal public setting, carefully scrutinize the evidence against defendants and have the authority to call a halt to all further legal proceedings on some or all of the charges. This, in effect, is the traditional role of the jury of one's peers.<sup>39</sup> Regardless of what government officials suspect or believe about individuals' crimes, and in spite of the evidence they can produce concerning those crimes, the jury can acquit defendants if it is not convinced of their guilt beyond a reasonable doubt.<sup>40</sup> The role of the jury is not merely advisory in nature, nor should it be. If trials in which juries play the decisive role in limiting the power of public officials to mete out punishment do not occur, then some suitable substitute for them must be found. Current forms of plea bargaining, as we have seen, place too few constraints on the decisions of police and especially prosecutors to assign legal punishment to individuals whom they suspect of crimes. Again, though judges in plea colloquies are supposed to independently review the evidence in support of charges, few observers believe that they do so.

Third, the plea system must offer reasonable assurance to the public that criminal charges are being resolved appropriately and reliably. Current forms of plea bargaining render charge adjudication

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39. See Justice Scalia's claim in *Blakely v. Washington* that jury trials are "circuitbreakers" in the government's machinery of justice. 542 U.S. 296, 306 (2004).

40. The Fifth Amendment ban on double jeopardy makes acquittals by juries effectively final, even if such acquittals are in error or if more evidence subsequently emerges that strongly suggests the guilt of defendants.

cation largely opaque.<sup>41</sup> Charges are filed, negotiations about facts, charges, and possible sentences take place off the record, and the outcomes, effectively fait accompli, are presented to judges at plea colloquies for ratification. Judges presiding over plea colloquies might have crucial evidence bearing on the crimes committed, or the culpability of the agents who committed them, withheld from them or shaped by mutual consent of the interested parties.<sup>42</sup> The public, including the victims of the crimes in question, have little ability to monitor this process or discern why it yielded the outcomes that it did. Granted, criminal trials also involve some shaping of the evidence by exclusionary or procedural rules. But compared with plea bargaining, trials are much more transparent charge adjudication procedures. Charges are laid out, evidence is presented by the state, the defense has opportunities to confront and rebut the evidence, and summations are heard. Afterwards, juries deliberate and announce their verdicts. Members of the public might scratch their heads over verdicts, but at least they are in a position to know what the charges were, what the supporting evidence was for them, and what the procedure was for accepting or rejecting them as proof of defendants' guilt.<sup>43</sup> In plea bargaining, by contrast, little is fixed or publicly accessible—not charges, facts, nor the real process (versus the “show” process of the plea colloquy) that produced the final outcome.

Fourth, non-trial plea adjudication procedures must seek to detect and eliminate trial penalties. Again, trial penalties are additional increments of punishment assigned post-trial, the purpose of which is to punish defendants for exercising the right to trial. In my view, we must distinguish such penalties from lost or foregone waiver rewards. Suppose that a modest waiver reward scheme is consistent with the three principles articulated above. Individuals who opt to enter guilty pleas might be granted slight reductions in their deserved sentences in recognition of their having spared the public the expense of trials. Individuals who go to trial and are convicted would not receive these rewards but would receive their deserved sentences. They would not be made to suf-

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41. Cf. Langbein, *supra* note 8, at 124.

42. See Bibas, *supra* note 1, at 1142; Nancy J. King, *Judicial Oversight of Negotiated Sentences in a World of Bargained Punishment*, 58 STAN. L. REV. 293 (2005).

43. In fact, persuasive reasons exist for requiring jurors to give reasons for their verdicts in criminal cases. See Richard L. Lippke, *The Case for Reasoned Criminal Trial Verdicts*, 22 CANADIAN J.L. & JURISDICTION 313 (2009). Doing so would, among other things, increase the transparency with which juries acted in reaching verdicts.

fer further punishment over and above what their crimes merit. Of course, this account presupposes that we have some way of determining the sentence merited by each individual and thus the means to distinguish lost waiver rewards and trial penalties. One of the signal failings of the current system of plea bargaining is that it makes no effort to distinguish the two, and thus permits the courts (and some of plea bargaining's supporters) to lump the two together and say that defendants who elect trial adjudication risked longer sentences despite important differences in the bases for those longer sentences.

What might a plea system that satisfies these four principles look like? Various possible systems might do so. I will do no more than sketch one of them. There is not the space, here, to defend it against the alternatives that might be proposed.<sup>44</sup> If we are to have reasonable assurance that it is the evidence amassed against them that is sufficient to convince defendants to plead guilty, then it seems clear that we must adopt measures that strictly limit the abilities of prosecutors (or other state officials) to manipulate the sentencing differential. Setting aside trial penalties for the time being, my view is that waiver rewards should be kept small—something in the range of 10% reductions from deserved sentences. There is room for debate about whether such modest waiver rewards should be fixed or capped, with room under the cap for prosecutors and defense attorneys to negotiate.<sup>45</sup> For the record, I prefer fixed discounts in order to minimize the impact of the many extraneous factors affecting sentencing outcomes when reductions are negotiated.<sup>46</sup> For now, it suffices to insist that waiver rewards must be strictly limited. Doing so will considerably reduce the abilities of prosecutors to attract guilty pleas if they cannot produce substantial evidence of defendants' guilt. Assuming the elimination of trial penalties, modest waiver rewards will not offer much sentencing lenity to defendants against whom the state's evidence is weak. Such rewards will therefore be much less likely to convince them to waive their right to trial and enter guilty pleas. We will have set things up so that the evidence has to do most of the work of convincing them, as it should.

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44. For more elaborate defense of the position I adumbrate here, see LIPPKE, *supra* note 28.

45. For the view that rewards for pleading guilty should be capped, see Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 CARDOZO L. REV. 2295 (2006).

46. For discussion of these extraneous factors, see Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004).

To the preceding, some will object that any proffer of a waiver reward, no matter how modest or fixed, puts pressure on defendants to waive their constitutional rights. If we want to devise a scheme that fully values and honors those rights, it must be one that offers those who admit their guilt nothing in exchange for doing so. At the margins, so to speak, any waiver reward might be sufficient to convince defendants against whom the evidence is substantial, but not compelling beyond a reasonable doubt, to forgo trials.

Though I am troubled by this objection, I do not find it quite convincing. First, even a scheme offering defendants no waiver reward might not eliminate all of the incentives, extraneous to the evidence, defendants have to plead guilty. There are well-known process costs of trials.<sup>47</sup> These too might convince some defendants, against whom the evidence is thin, to cave in and enter guilty pleas—defendants who might have escaped convictions had they pressed forward with trials. Granted, there might be little we can do to fully eliminate or substantially reduce some of these process costs. In this way they are unlike waiver rewards, which we could entirely eliminate. Although process costs are different in this respect, they are not different in putting some pressure on defendants to admit their guilt and forego trials. Second, and more to the point, so long as waiver rewards are kept small, I am not persuaded that they would be significant enough to render the evidence in a case moot. Substantial waiver rewards coupled with trial penalties clearly tend to do so. Modest waiver rewards in the absence of trial penalties seem unlikely to convince all but the most timid innocents or partial innocents to enter guilty pleas.

The much more significant problem, in my view, concerns how to discourage prosecutorial over-charging and its corollary, charge-bargaining. Any scheme that aims to keep sentence discounts modest in order to maintain the salience of the evidence in defendants' incentive structures will be thwarted if prosecutors can routinely over-charge and then offer defendants charge reductions in exchange for guilty pleas.<sup>48</sup> One type of over-charging, so-called, charge-stacking, is facilitated by the lengthy and complex criminal codes that have evolved in the United States. These

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47. MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* (1979).

48. For discussion of the different types of over-charging, see Alschuler, *supra* note 9, at 86-87.

codes contain redundant and overlapping offenses and sometimes define crimes in ways that make it easier for prosecutors to convict suspected offenders of something, even if not the crimes prosecutors suspect that they have committed.<sup>49</sup> It seems doubtful that simplifying revisions of such conviction-facilitating criminal codes will be undertaken voluntarily by state or federal legislators, or that the courts would be willing to demand such revisions. Prosecutorial codes of ethics could be revised so that they emphatically forbid strategic over-charging—that is, over-charging with a view to putting pressure on individuals to plead guilty—and charge bargaining. But the crafting and enforcement of such ethical provisions will prove difficult, especially since we would not want them to discourage charge adjustments by prosecutors, understood as alterations in charges by prosecutors in response to emerging evidence in cases.

One possibility would be to require prosecutors to keep records of all charges initially filed and any subsequent changes made to them and to provide brief, written rationales for the changes. But who would examine this written record for signs of over-charging or charge bargaining? This question brings us to the second part of my proposal for reforming plea bargaining. Following the lead of others, I have proposed that defendants willing to enter guilty pleas should request hearings before a judge.<sup>50</sup> Before such “settlement hearings” occur, prosecutors would be required to submit case dossiers in which all charges initially filed and subsequently altered are detailed. Also, the case dossiers would provide summaries of the evidence supporting any remaining charges. At the settlement hearing, prosecutors would give brief presentations of the evidence in support of the charges and defense attorneys would have the opportunity to challenge that evidence. Settlement hearing judges would also question defendants, who would be expected to answer, since they have indicated a willingness to admit their guilt.<sup>51</sup> The point of such questioning would be to find out not only whether defendants fully understand the implications of guilty pleas but also, and more importantly, whether their

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49. See Stuntz, *supra* note 24, at 518.

50. LIPPKE, *supra* note 28, at 16; see also Alschuler, *supra* note 24, at 1122; Note, *Restructuring the Plea Bargain*, 82 YALE L.J. 286 (1972).

51. To protect defendants who subsequently elect to go to trial instead of pleading guilty, we could adopt a rule according to which any testimony offered by defendants at settlement hearings would be excluded from trials.

characterizations of their conduct match the charges to which they are prepared to plead.

Crucially, such settlement hearings would not be understood as serving to ratify plea agreements already in place between prosecutors and criminal defendants (or their attorneys). Such agreements would be strictly prohibited, not only because they might conceal illicit forms of fact, charge, and sentence bargaining, but also because they would have been arrived at through confidential, and therefore non-public, negotiations. Instead, settlement hearings would have two primary purposes. First, they would require judges, as agents independent of prosecutors, to evaluate the evidence (including defendant testimony) and charges in cases, to see whether or how well they match up. Judges would thereby ensure that there is an adequate factual basis for the charges.<sup>52</sup> Judges could be encouraged to drop redundant or overlapping charges, as well as to ask questions about any dropped charges or charges not filed by prosecutors. In that way they could attempt to ferret out and discourage over-charging and charge bargaining.<sup>53</sup> They might also advise defendants that though there is some evidence supporting the charges against them, it nonetheless is, in their opinion, well short of convincing beyond a reasonable doubt. Hearing that from a judge might embolden some defendants to reject guilty pleas and opt for trial adjudication—an option I would leave open for defendants who have requested settlement hearings.

Why believe that judges presiding over such hearings would scrutinize the evidence in support of charges any more closely than they appear to do during existing plea colloquies? The answer is that such hearings would not be conducted in a context in which judges were simply affirming agreements already worked out between prosecutors and defendants' attorneys. Our current plea bargaining system makes judges passive actors in the charge adjudication process. When prosecutors and defense attorneys reach plea agreements ahead of time, judges come onto the scene

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52. I would concede that there is room for debate about the evidence sufficiency standard that should be employed by judges at settlement hearings. See LIPPKE, *supra* note 28, at 19.

53. A more radical solution, one that is not without its own problems, would be to move toward concurrent sentencing schemes according to which those who pled guilty to multiple crimes would have to serve only the sentence associated with the most serious offense. Such an approach would substantially reduce the incentives prosecutors have to engage in charge-stacking.

rather late in the process. It is understandable why judges might then be reluctant to upset carefully worked-out settlements by asking too many questions about the evidence. However, in a plea system in which there would be no such prior negotiations, only charges filed and evidence dossiers compiled, judges would be confronted with different tasks. They would not be asked to ratify agreements, but to serve as independent checks on the exercise of the government's prosecutorial powers.

The active role of judges would be further strengthened by their second crucial role during settlement hearings. Once they determined which, if any charges, were supported adequately by the evidence, settlement hearing judges would be required to set presumptive sentences on those charges.<sup>54</sup> Such presumptive sentences would be the ones defendants could expect to receive if, instead of pleading guilty, they went to trial and were ultimately convicted of the charges.<sup>55</sup> Post-trial alterations in presumptive sentences would have to be justified in writing by the sentencing judge and would be subject to appeal by both defendants and prosecutors. Such presumptive sentences would make it difficult for prosecutors or judges to impose trial penalties. Moreover, defendants would know the worst outcomes they faced if they decided to put the state's case to the test of trial adjudication. Defendants who decided to go ahead with guilty pleas at the termination of their settlement hearings would receive modest and fixed sentence discounts on each charge.<sup>56</sup> Also, once charges were upheld by a settlement hearing judge and presumptive sentences announced for them, I would prohibit prosecutors from dropping charges without a further hearing at which the prosecutor would be expected to explain and justify the decision to do so. This would discourage charge bargaining by prosecutors subsequent to settlement hearings.

We might also consider giving the victims of crimes, or in their absence, the general public, some direct role in settlement hear-

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54. The sentences would be presumptive because trials might reveal defendants' criminal behavior to have been more or less serious than the evidence initially suggested.

55. In England and Wales, at so-called "plea and case management hearings," judges set upper limits on the sentences that defendants will receive if convicted at trials. See ASHWORTH & REDMAYNE, *supra* note 21, at 303.

56. There are difficult issues that I shall have to elide concerning whether sentences for defendants convicted of multiple crimes should be concurrent, consecutive, or something in-between. For discussion, see Richard L. Lippke, *Retributive Sentencing, Multiple Offenders, and Bulk Discounts*, in *RETRIBUTIVISM: ESSAYS ON THEORY AND POLICY* 212 (Mark D. White ed., 2011).

ings. The victims of alleged crimes could be invited to such hearings and questioned by the presiding judge to see whether and to what extent their accounts of what happened to them correspond with the charges brought by prosecutors.<sup>57</sup> This would discourage illicit forms of fact and charge bargaining. Since many crimes lack direct victims, we might appoint (or elect) individuals to serve as public interest advocates at settlement hearings. Such advocates could be provided full dossiers of the cases to be heard and given opportunities to speak. Their presence would help ensure the integrity of the process, again by discouraging the shaping of facts and charges by prosecutors and defense attorneys (and in some cases, cooperative judges).<sup>58</sup> Settlement hearings would thus offer the public greater assurance that criminal charges were being adjudicated in a reliable and accountable fashion.

## V. OBJECTIONS AND REMAINING PROBLEMS

Various objections to the proposed reforms can be anticipated. It will be claimed that that the plea regime I describe will be “inefficient,” in the sense that it will complicate and slow the charge adjudication process and thereby increase its costs to prosecutors, judges, and the public that ultimately foots the bill for their offices. The Supreme Court has, at times, extolled the cost savings of plea bargaining, though there is some debate about whether they view those savings as a positive good in its own right or a saving grace to what is otherwise a lamentable process.<sup>59</sup> Though I do not advocate the elimination of guilty pleas nor insist that all defendants be given full-on jury or bench trials, I do not deny that the settlement hearings that I propose would slow the plea process somewhat. Also, frank judicial assessments of the evidence at settlement hearings and limitations on waiver rewards might increase the demand for jury trials. Though some Supreme Court justices might regard this increased demand as an alarming prospect, it is hard to see how such a view squares with the devotion

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57. However, I would not permit crime victims a role in determining presumptive or final sentences for defendants.

58. Pre-charge bargaining would also have to be strongly discouraged. This might be most effectively done by requiring any correspondence between prosecutors and defendants or their attorneys to be documented and then reviewed by judges at settlement hearings.

59. See *Brady v. United States*, 397 U.S. 742, 752 (1970). But see Justice Scalia’s remarks in *Lafler v. Cooper*, that though we have “plea bargaining a-plenty” it has, until the decision in this case “been regarded as a necessary evil.” 132 S. Ct. 1376, 1397 (2012) (Scalia, J., dissenting).

of the Founders to jury trials. In particular, more jury trials would educate the public about the criminal law and introduce more popular sovereignty into the criminal justice system, both of which are values that the Founders held dear. Further, it is hard to take seriously any "resource savings" argument for the current plea scheme in a society that arguably squanders huge sums on the imprisonment of too many of its citizens for too lengthy periods of time. We could allocate more funds to the adjudication of criminal charges without expanding our criminal justice outlays simply by reducing our excessive reliance on imprisonment. Finally, though "efficiency" is an important value, it is hardly on a par with the values of procedural and substantive justice, values that are given much more than lip service in our constitutional tradition.

It might also be objected that so long as judges can be convinced to take more active roles in ensuring that there is an adequate factual basis for guilty pleas, we need not limit the abilities of prosecutors to manipulate the sentencing differential. If the concern about contemporary forms of plea bargaining is that it makes charge adjudication too insensitive to the evidence government officials have against individuals, then the solution is simply to make sure that the evidence is sufficiently probative. This could be done by having judges closely scrutinize it; reducing prosecutors' abilities to induce guilty pleas is not needed.

However, I am not convinced that the two parts of my proposal can be so easily separated. First, if we permit prosecutors to manipulate sentencing differentials, it seems that we would have to counter the pressure to plead that this creates by having judges determine that the evidence meets a higher standard of proof—something approaching the reasonable doubt standard. Otherwise, there will be cases in which, though the evidence is "adequate," it is far from convincing beyond a reasonable doubt and it will be the sentencing differential that convinces defendants to plead. Yet this is precisely the kind of situation that we were attempting to avoid. The weaker evidentiary standard is defensible only if sentencing differentials are kept small enough that they exert little pressure on defendants to plead.

Second, suppose that the standard was not changed but that prosecutors were allowed to manipulate sentencing differentials. Suppose also that a judge determined that there was not an adequate factual basis for a plea in a given case. What then? Presumably the judge would decline to accept the defendant's guilty

plea, thereby forcing the defendant to go to a trial at which the defendant would, if convicted, receive the presumptive sentence set by the judge. True, the defendant might not receive an inappropriate sentence for her crime, but she might receive one that is considerably longer or otherwise more burdensome than the one proffered by the prosecutor. This would create a situation in which some, perhaps many, defendants would reluctantly go to trial when they would much rather plead. It is not apparent why we would want to create such a system, one that is a more or less inevitable byproduct of permitting prosecutors to manipulate sentencing differentials. It seems much better to have a system in which we have good reason for believing that defendants who insist on trial adjudication do so because they perceive the state's case against them to be weak.

It might also be objected that what I propose does not go far enough in certain respects. There are tools that prosecutors have been provided, beyond manipulation of the sentencing differential, that can be exploited to induce guilty pleas. For instance, excessively harsh sentencing schemes will make those accused of crimes desperate to avoid the worst sentencing outcomes to which such schemes expose them.<sup>60</sup> Even modest sentence discounts might be preferred to risking trials at which the full force of such sentencing schemes will be felt—and this in spite of the flimsy character of the evidence the state might be able to muster against defendants. Likewise, the changes I propose will do nothing about the kinds of “prosecution-friendly” provisions of the criminal code that William Stuntz has shown facilitate convictions for conduct that is only tangentially related to the real misconduct of which individuals are suspected.<sup>61</sup> Assuming that such provisions are over-inclusive in criminalizing conduct that the state has no legitimate business regulating except for its serving as a proxy for conduct that is appropriately criminalized, my proposal will

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60. See William J. Stuntz, *Plea Bargaining and the Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2558 (2004).

61. Stuntz, *supra* note 24, at 531; see also STUNTZ, *THE COLLAPSE OF THE AMERICAN CRIMINAL JUSTICE SYSTEM* 260-63 (2011). One of Stuntz's illustrative examples is the “crime” of possessing burglar's tools. If prosecutors cannot prove that defendants committed or attempted a burglary, they might nonetheless be able to prove that they possess the equipment for doing so. Stuntz also argues that *mens rea* requirements have gradually been elided from the criminal law, making it easier for prosecutors to prove offenses because they do not have to prove that defendants acted with criminal intent.

not prevent or discourage prosecutors from charging individuals pursuant to them.<sup>62</sup>

It is possible to concede these two points but nonetheless stick with my proposal. It should be apparent that even a properly devised plea system can only do so much to limit unjust punishment in a criminal justice system that over-criminalizes the conduct of its citizens. Nonetheless, a plea system that considerably reduces prosecutorial discretion, provides more judicial scrutiny of the evidence, and makes the plea process more transparent accords with important constitutional values. It cannot nor should not be expected to fix all of the problems with the criminal justice system.

## VI. CONCLUDING REMARKS

The founding generation was wary of government power, having directly experienced abuses of it during the Colonial period. The framers and ratifiers of the Constitution thus conceived of the jury trial as a critical bulwark against arbitrary or excessive exercises of government power, though they did not spell out, in detail, how such trials should be structured or conducted. Fortunately, succeeding generations have honored and extended their wisdom, creating a proof structure for criminal trials designed to put the government's accusations against its citizens to a formidable test. Contemporary plea bargaining practices enable the government to sidestep that test. They substitute charge adjudication by prosecutorial discretion for charge adjudication by public, independent tribunals. The argument of this paper has been that we should have little faith that existing plea practices honor key constitutional values. But we need not abandon guilty pleas in order to honor them, only restructure the conditions under which they are obtained and entered.

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dgcs might advise them that the state's case against them is weak.