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Gabriel J. Chin

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Do Procedural Claims Drive Out Merits Claims in Plea Bargaining?: A Comment on the Work of the Late Professor William Stuntz

*Gabriel J. Chin**

In his now classic body of work on plea bargaining,[1] the late William Stuntz answered one the of the most disturbing challenges to the institution of plea bargaining: That it promotes conviction of the innocent by putting them to the torturous choice of pleading guilty to a crime they did not commit, or going to trial and facing the possibility of conviction, and thus even more time. Stuntz, like other scholars,[2] persuasively contended that denying innocent defendants the opportunity for a plea bargain could only make them worse off because they would be forced to go to trial where they could receive a higher sentence.[3] Awful as it is, the predicament of the innocent defendant, therefore, is not, standing alone, a reason to eliminate plea bargaining.[4]

But Professor Stuntz also made a subtler and potentially more devastating claim against the practice: That the dynamics of plea bargaining encourage defense counsel not to evaluate and advance merits-based claims, which is to say, that the structure of plea bargaining encourages technical arguments at the expense of innocence. This is an effect of resources allocated to criminal defense, but goes beyond that:

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* Professor of Law, University of California, Davis, School of Law.

1. William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997) [hereinafter *The Uneasy Relationship*]; Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992) [hereinafter *Plea Bargaining as Contract*].

2. *E.g.*, Scott W. Howe, *The Value of Plea Bargaining*, 58 OKLA. L. REV. 599, 632-33 (2005).

3. *Plea Bargaining as Contract*, *supra* note 1, at 1960-61.

4. However, Stuntz suggested a number of procedural reforms to make plea bargaining less likely to convict the innocent, including that the trial penalty be diminished. *Id.* at 1965 ("where the legislature drafts broad criminal statutes and then attaches mandatory sentences to those statutes, prosecutors have an unchecked opportunity to overcharge and generate easy pleas, a form of strategic behavior that exacerbates the structural deficiencies endemic to plea bargaining.").

> In many, perhaps most cases, the existing funding system promotes underlitigation, with defense counsel failing to contest cases as aggressively as they should due to a lack of resources. The second bias is less obvious but may be more problematic. The current regime leads to a different mix of litigation, with constitutional claims displacing factual investigation and argument.[5]

This essay suggests that technical claims do not crowd merits claims—or at least need not—in the way Professor Stuntz hypothesized.

Stuntz's general point about underlitigation is strong and well-known; indigent defense is unquestionably underfunded.[6] Here is Stuntz's illustration of the consequences of that fact:

> Imagine two civil defendants, both sued for $50,000, one of whom has privately paid counsel while the other is given state-appointed counsel paid a modest hourly fee up to a $2000 cap. Three different legal defenses are potentially available to these civil defendants. Any of the defenses would win the case if successful; each is independent of the others; each costs $1000 to raise; and each has a 10% chance of success. In this scenario, the defendant with private counsel will press all three claims, while his counterpart will litigate only two.[7]

His assertion that legal claims drive out merits claims rests on the following observation:

> Now add another piece to the puzzle: Suppose the relevant jurisdiction has just generated a new defense claim. It too costs $1000 to litigate, but it has a slightly higher chance of success--say, 15%. The richer defendant will now raise four claims rather than three. The poorer defendant will substitute the new claim for one of the others, thereby slightly raising

5. *The Uneasy Relationship*, *supra* note 1, at 32.

6. *See, e.g.*, Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994); Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801 (2004); Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427 (2009); Eve B. Primus, *The Illusory Right to Counsel*, 37 OHIO N.U. L. REV. 597 (2011); Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219 (2004).

7. *The Uneasy Relationship*, *supra* note 1, at 36.

> his likelihood of success. But he will still raise only two claims.[8]

This, Professor Stuntz proposes, is a fair model of criminal litigation as well. Defendants with means will invest in a range of claims and arguments that have positive expectancies, i.e., the client expects to gain more than pursuing the claim will cost. Indigent clients, unfortunately, cannot invest more in the case regardless of how important the outcome may be. By definition, their budget is limited to what the state can provide. Counsel for indigent defendants are supposed to select the most promising claims but will do so only to the extent of available resources. For indigent defendants, raising "[a]dditional claims and arguments in one case must mean less aggressive litigation somewhere else."[9]

An important aspect of this model is that it does not posit a bright line between guilt and innocence or between liability and non-liability. To be sure, some people are completely innocent and others unquestionably guilty. However, the guilt of others is in a grey area. To use Professor Stuntz's example, a majority of the civil and criminal litigants possessing three legal and factual claims each with a 10% chance of success are liable, but a substantial number—30% —will nevertheless prevail.[10] The justice system cannot know, for sure, which individuals were treated justly and which were wrongly exonerated or held liable because we cannot directly determine with complete accuracy the character of past events and the contents of past thoughts.

In addition, any given legal or factual claim with a 10% chance of success could represent different underlying states of fact. It could represent a claim that is in truth wholly meritorious but which has only a 10% chance of success because it is supported by only ambiguous evidence or facts, or contradicted by mistaken witnesses or other misleading evidence. Also, the claim could be factually clear but on those facts, only one out of ten juries would acquit or only one in ten judges would find an unconstitutional search and suppress the evidence. Because legal or factual claims are often the product of a series of contingencies like these, out-

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8. *Id.*

9. *Id.* Presumably, however, public defenders have the ability to invest more time in cases where it appears there is more likely to be a successful defense, and less time when there are no plausible avenues of relief. Therefore, the budget for defense of any given case may not be as rigid as this passage suggests.

10. *Id.*

comes in civil and criminal cases are inherently ambiguous. Thus, Professor Stuntz was insightful and correct when he conceived of innocence, at least sometimes and at least practically, to exist on a spectrum rather than being an utterly binary phenomenon.[11]

Thus far, Professor Stuntz's argument is a specific iteration of the general fact that the rich can afford more things than the poor, including legal services. However, the argument goes much beyond that. While Professor Stuntz proposes, rightly, that merits arguments, such as a claim that "the defendant has an alibi, or acted in self-defense, or lacked the requisite mens rea . . . do matter more than other sorts of arguments raised in criminal litigation,"[12] the system, he asserts, makes it harder to raise them than it does to raise procedural claims.

Professor Stuntz contends that merits arguments are disadvantaged for three related reasons. First, procedural "claims are easy to raise; counsel need only file a boilerplate motion. The facts on which they rest usually do not involve much independent digging by defense counsel."[13] "One can file and litigate suppression motions without going to trial. The system is designed to facilitate fast-track pretrial litigation proceedings that can then set the stage for either dismissal or a plea agreement, precisely the kind of process that is least expensive for overburdened defense counsel to invoke."[14]

Second, factual claims are harder to litigate. "If the government fights the suppression motion, the upshot is a brief suppression hearing; if the government fights a self-defense argument, the upshot is a jury trial, and jury trials are more involved and require more preparation than suppression hearings."[15]

Finally, factual claims are harder to uncover and will likely involve substantial digging.[16] "Factual arguments are not merely harder to prepare and pursue than legal claims; they are harder to evaluate."[17] "[C]laims that the defendant did not do the crime, or

11. *Plea Bargaining as Contract*, *supra* note 1, at 1942 n.115 (when bargaining, "prosecutors have an incentive to [consider] innocence (or the possibility of innocence) . . . the analysis holds true even if defendant's claim is only incompletely verifiable—that is, if the prosecutor can know only that there is a higher-than-random likelihood that the defendant is innocent.").

12. *The Uneasy Relationship*, *supra* note 1, at 37.

13. *Id.* at 38.

14. *Id.*

15. *Id.* at 39.

16. *Id.* at 38-39.

17. *Id.* at 40.

acted in self-defense, or lacked the requisite mens rea—tend to require nontrivial investigation simply to establish whether there is any argument to make."[18] Many procedural arguments, by contrast, appear on the face of the police report.[19]

Although it would indeed be a terrible indictment of plea bargaining if it systematically disregarded and submerged the merits, Professor Stuntz has not made the case. Each of the reasons he advances is doubtful.

First, he overstates the ease of making procedural arguments.[20] There is a widely reported practice of prosecutors conditioning plea offers on refraining from filing pretrial motions.[21] Thus, the boilerplate suppression motion may be easy but it is not necessarily cheap. At least in some jurisdictions, filing one is the equivalent of rejecting a plea offer, which can mean that the case will head to trial, or that trial can be avoided only with a naked plea to the charge.[22]

Yet, the fact that it is costly to file a suppression motion does not mean that a plausible suppression issue is irrelevant to the case. A suppression issue can affect the plea bargain even if a motion is never filed.[23] A prosecutor may take the possibility of los-

18. *Id.*

19. *Id.*

20. For example, at least some courts hold that "[h]earings are not automatic or generally available for the asking by boilerplate allegations." People v. Mendoza, 624 N.E.2d 1017, 1019 (N.Y. 1993).

21. *See, e.g.*, Tamara F. Lawson, *Can Fingerprints Lie?: Re-Weighing Fingerprint Evidence in Criminal Jury Trials*, 31 AM. J. CRIM. L. 1, 57 n.201 (2003) ("However, the earliest plea offers are typically the most favorable to defendants, and the prosecution would likely withdraw these favorable negotiations once the defendant began to file evidentiary motions and rigorously challenge the evidence."); Robin Walker Sterling, *Raising Race*, THE CHAMPION, Apr. 2011, at 25 ("Prosecutors have . . . discretion . . . to offer a reasonable plea agreement, the time limit to put on the plea agreement, and whether to condition the plea offer on what motions defense counsel might file."); Stephen G. Valdes, Note, *Frequency and Success: An Empirical Study of Criminal Law Defenses, Federal Constitutional Evidentiary Claims, and Plea Negotiations*, 153 U. PA. L. REV. 1709, 1731-32 (2005) ("One respondent prosecutor stated that 'if I have to bring in witnesses for motions hearings I will withdraw all [plea] offers.' This sentiment was echoed by several other respondent prosecutors.").

22. While conditioning a plea bargain on not filing procedural motions means that many constitutional rights will not be vindicated, perhaps Professor Stuntz's argument provides a reason: It would be unfortunate to prefer procedural arguments to arguments about guilt or innocence. Refusing to bargain when procedural arguments are pursued might be defended on the ground that it puts merits and procedural claims on the same footing.

23. As one experienced attorney suggested to those considering filing a suppression motion:

> unless the element of surprise is relevant to the basis of the motion, counsel should discuss the suppression issues with the deputy district attorney. A good suppression

ing a future suppression hearing into account and compensate the defendant for waiving it. Of course, an airtight suppression motion that will end the case is not likely to be bargained away, nor is a remote longshot argument likely to be worth much consideration by a prosecutor. But, foregoing a reasonably promising claim might well be worth a reduced sentence in the context of a plea.

For precisely this reason—that there is negotiation value of colorable claims which have not been finally determined—factual claims going to the merits are not necessarily more difficult to "litigate" than procedural claims. Professor Stuntz would be right if the only possible venue for consideration of a factual claim was a judge or jury at trial. But, a prosecutor managing a portfolio of cases also has the ability and incentive to consider merits-based claims which are presented in a much less formal manner than would be necessary at a trial.[24] The practice of defendant proffers,[25] i.e., sharing evidence with the prosecution in hopes of avoiding prosecution or obtaining leniency, and the restriction on the use of statements made in plea negotiations,[26] shows that facts can be significant to the defendant even short of a formal trial.[27] Thus, as one defense attorney explained,

> issue may lead to an even better plea agreement. Otherwise, if the "sweet deal" is not offered, yet there is a legitimate suppression issue, it is always best for the attorney to inform the deputy district attorney that he or she intends to file the motion and attempt to get the deputy district attorney to agree not to withdraw the plea offer as a "punishment" for taking the matter to a motions hearing.

Alexander G. Topakas, *A Young Lawyer's Guide to DUI Suppression Motions*, COLO. LAW., Apr. 1996 at 63, 63

24. K. Babe Howell, *Broken Lives From Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 310 n.200 (2009) (noting that some "defense attorneys are able to persuade prosecutors to undercut standard offers in conversations prior to court appearances"); Wade V. Davies, *Can We Talk?: Inadvertent Admissions During Negotiations in Criminal Cases*, TENN. B.J., July 2012, at 24 (stating, in context of criminal representation, "many times counsel may wish to present the other side with either a written packet or an oral proffer of evidence obtained that might cause the other side to want to reassess their position.").

25. *See, e.g.*, Benjamin A. Naftalis, *"Queen for a Day" Agreements and the Proper Scope of Permissible Waiver of the Federal Plea-Statement Rules*, 37 COLUM. J.L. & SOC. PROBS. 1 (2003).

26. *See* FED. R. EVID. 410(a)(4) (rendering inadmissible against a defendant "a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.").

27. Of course, sharing facts with the prosecution may strengthen the prosecution's case for trial. But, the premise of Professor Stuntz's objection concerns a defense lawyer preparing a case for a plea bargain. While a defendant planning to negotiate the best possible offer and accept it has no reason to share incriminating facts; there is no tactical reason to withhold exculpatory or mitigating facts.

> probably the biggest mistake for a defense attorney is not carefully analyzing the evidence, not understanding it, or not carefully analyzing it in a way so one could convince the prosecution that there is a flaw or problem in the case, and either get the case dismissed or get a reduced charge.[28]

Professor Stuntz's final point is that factual claims are more costly to develop than procedural claims. While it may generally be true that factual claims are costly to prepare for trial, it is not necessarily the case that they are costly when developed to the point that they are usable in plea negotiations. In the form of the client, defense counsel has a particularly valuable and inexpensive source of information about potential defenses on the merits. As Professor Stuntz himself explained in *Plea Bargaining as Contract*, "[t]he defendant's knowledge of what he did and thought—that is, his knowledge of whether he is guilty or not—is a good predictor of future evidentiary discoveries, and hence powerfully relevant to whether he will be acquitted or convicted."[29]

There is even some chance that an impoverished defendant could persuade the state to act as one's agent in investigating the merits of the case. While one hopes that prosecutors comply with their discovery obligations as a general matter, it is unlikely that they routinely go far beyond that to discover information that is relevant solely to a suppression claim.

Factual claims going to the merits are of a different nature. Imagine, for example, a street assault case in which a client informs the defense attorney that the alleged victim was the initial aggressor and the client acted in self-defense. The first-best solution might be for the defense lawyer to investigate the claim, by, for example, personally or through an investigator attempting to find witnesses or security camera videos. Well-resourced defendants who can hire private counsel or indigent defendants represented by certain outstanding public defender offices would get this type of appropriate investigation of merits-based claims.

But an overworked public defender unable to actually perform a thorough investigation could still use the factual claim in connection with a plea negotiation. Counsel could put the ball in the

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28. Roger W. Patton, *Understanding and Interpreting Facts and Testimony*, *in* STRATEGIES FOR DEFENDING DUI CASES IN CALIFORNIA LEADING LAWYERS ON UNDERSTANDING THE DMV'S INVOLVEMENT IN THE CASE, REVIEWING SETTLEMENT OPTIONS, AND PREPARING YOUR CLIENT FOR COURT ch. 5 (2008).

29. *Supra* note 1, at 1941.

prosecutor's court by articulating the claim, suggesting that the case has been insufficiently investigated by the police, and explaining that in the absence of a plea, defense counsel will search for the evidence.

Of course, prosecutors could choose to ignore these sorts of factual or evidence-based claims, particularly when raised by counsel whom they have no reason to believe. But ignoring them is not cost-free. First, virtually all prosecutors prefer, all other things being equal, to convict the guilty and not convict the innocent. Therefore, the possibility that they are pursuing a wrongful conviction will be of concern to many or most. Also, the cost of further investigation generally will not fall on the prosecutors as individuals but on police or other investigators who can be asked to do the work. In many cases, the burden of further investigation on the prosecutor will be low.

Another factor suggesting that prosecutors should take these factual or evidence-based claims seriously is that prosecutors and defense attorneys alike know that they cannot be raised by defendants lightly. A defendant who makes an evidence-based claim of innocence that is later disproved—such as by videotapes revealing the defendant's guilt—not only loses whatever plea was available before and is more likely to be convicted based on the new evidence, but also faces a motivated and angry prosecutor. Sending prosecutors or police on a wild goose chase may have much the same effect. Therefore, there are built-in incentives for defense lawyers to discourage their clients from making false claims and presenting claims in ways that preserve their own credibility.[30]

Also, critically, prosecutors who flatly refuse to examine their cases at the suggestion of the defense risk losing at trial in a way that is particularly embarrassing. No matter how much time they are facing, defendants will not accept a plea bargain if an acceptable one is not offered and most defense attorneys, no matter how overworked, will do some preparation when one of their cases is heading to trial. Presumably, they will focus their limited time on issues most likely to prevail, which at trial will generally involve the merits. A prosecutor who loses a case based on a suppression motion suffers no personal rebuke (so long as she was not respon-

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30. Jon May, *Stopping the Train Before it Leaves the Station: Convincing Prosecutors not to Charge Your Client*, THE CHAMPION, Nov. 2012, at 37-38 ("Unless the defense attorney has thoroughly investigated the facts, she should not try to convince the prosecutor that the government has made a mistake.").

sible for the search or interrogation which was suppressed). But a prosecutor who loses a case for apparently prosecuting an innocent person, which fact was brought to her attention and would have been revealed before trial but for her insufficient case preparation, may well be embarrassed.

For these reasons, some prosecutors are likely to respond differently to assertions about exculpatory facts that could be proven through investigation than they are to naked claims of innocence. Prosecutors might well feel comfortable ignoring the latter; after all, cases proceed only if the defendant pleads not guilty. But, defendants and their lawyers pointing to specific evidence of innocence cannot be similarly ignored.

Claims about potential facts or evidence going to the merits of the case that could be relevant at trial are also relevant in plea negotiations, even without being fully investigated. A plausible, potentially demonstrable claim of exculpatory evidence might be worth a concession at a plea, on the principle that prosecutors "must offer different prices to defendants who are fairly likely to win at trial than to defendants who are sure to lose."[31] Both sides may have reason to reduce their risk by settling without determining definitively whether, say, a defense to a criminal charge that has a 15% chance of prevailing is actually worth nothing if it fails or everything if it succeeds.

In some cases, even the defendant may not actually know for certain whether she is guilty—imagine, for example, a self-defense case where the defendant engaged in some provocation but the victim struck first. Even with full knowledge of the law and facts, and considering the presumption of innocence and the burden of proof, some cases will remain difficult to resolve. At trial, the defendant is either acquitted or convicted of every count; a plea bargain can recognize that the defendant is partly innocent and partly not. Stated differently, there are crimes and there are crimes, and not every robbery or burglary should be treated identically.[32] A not-quite defense might be legally irrelevant at trial but com-

31. *Plea Bargaining as Contract*, *supra* note 1, at 1942.

32. Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision not to Prosecute*, 110 COLUM. L. REV. 1655, 1706 (2010) (stating "But when it comes to equitable questions, all is not lost. A slapdash process does not necessarily mean that equities remain unconsidered throughout the life of the case. Rather, the equities may factor in as afterthoughts: Once disposable cases have been sorted into proper boxes, lawyers may discuss what facts differentiate a given case from the usual case. During the bargaining process, defense counsel uses the equities as the last best tool 'to persuade the prosecutor to 'deviate' from the normal course of action.'").

pletely relevant when the prosecutor engages in the discretionary process of sorting a large body of defendants of varying degrees of culpability.

Make no mistake, there is strong evidence that many indigent defendants are railroaded into plea bargains without even the most modest level of representation. But that is a different thing from saying that it is unjust to plead cases without definitively resolving every legal and factual question; to the contrary, a plea in spite of some open questions may well constitute justice. Professor Stuntz's model of innocence as existing on a spectrum may reflect the reality in a substantial category of cases, among them, those most likely to plead, where there is both strong evidence of guilt and some potentially exculpatory evidence. In plea bargained cases, factual claims advanced by a defendant going to innocence are in no better position, but not necessarily any worse, than are procedural claims in that case.