

# SECOND-BEST CRIMINAL JUSTICE

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## ABSTRACT

Criminal procedure reform can be understood as a “second-best” enterprise. The general theory of second best applies where an ingredient necessary for a “first-best” ordering is unattainable. That’s an apt description of the contemporary criminal process. Our normative ideals of criminal justice require fair and frequent trials to judge guilt or innocence, but the criminal trial rate has been falling for at least a century; today it is vanishingly close to zero. What may be even worse is *how* we’ve eliminated trials—by endowing prosecutors with enough leverage to coerce guilty pleas. Excessive prosecutorial leverage is the source of some of criminal procedure’s deepest pathologies.

This Article asks the reader to accept—as a thought experiment—that a negligible trial rate is a constraint on criminal procedure reform in the near term. From that starting point, the crucial question becomes whether there is a less destructive way to ensure a negligible trial rate. There is: inefficiency. The road to a more just, humane, and rational criminal process could begin with making formal criminal litigation more inefficient. In matters of institutional design, the general theory of the second best counsels using unseemly practices, like inefficient procedure, to offset fixed constraints, like the absence of criminal trials. If the formal process of criminal litigation could be made unreasonably expensive for both parties, both would want to settle to avoid it. Policymakers would then be free to dismantle the tools of prosecutorial leverage—overlapping offenses, draconian sentencing laws, punitive pre-trial detention, and more—without worrying about increasing the trial rate. The result would not achieve our criminal justice ideals—no second-best solution can—but it could be better than the status quo. Without more trials, it may be the best we can do.

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## INTRODUCTION

We have mourned the criminal trial for a long time. In 1928, Raymond Moley wrote in one of the first academic treatments of plea bargaining that the criminal trial was “vanishing.”<sup>1</sup> In the nine decades since, countless writers have echoed Moley’s observation.<sup>2</sup> The time has come to consider

1. See generally Raymond Moley, *The Vanishing Jury*, 2 S. CAL. L. REV. 97 (1928).

2. See Frank O. Bowman, III, *American Buffalo: Vanishing Acquittals and the Gradual Extinction of the Federal Criminal Trial Lawyer*, 156 U. PA. L. REV. PENNUMBRA 226, 226 (2007) (“[The] number and percentage of civil and criminal cases that go to trial are now so small that a cottage industry has arisen to study the ‘vanishing trial.’”); see also SUJA THOMAS, *THE MISSING AMERICAN JURY 2* (2016) (“Despite frequent highlights in media and pop-cultural displays in movies and television, juries have come to play almost no role in the American Legal System.”); Marc Galanter, *A World Without Trials?*, 1 J. DISP. RESOL. 7, 7–12 (2006); Malcolm M. Feeley, *Plea Bargaining and the Structure of the Criminal Process*, 7 JUST. SYS. J. 338, 339 (1982); John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 9 (1978). See generally GEORGE FISHER, *PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* (2004).

the possibility that the criminal trial is not dying, but, for practical purposes, dead.

If the criminal trial is dead, the question confronting criminal procedure reform becomes this: what's the best system we can have *without* trials? The economists have a term for this scenario—it is a “second best,” in which one of the inputs required for an optimal ordering is unavailable. And they have a theory—the general theory of second best—with insights about how to design institutions under second-best conditions.<sup>3</sup> This paper deploys that theory to plot a thought experiment about criminal procedure reform in a “post-trial” world.<sup>4</sup>

Part I sets out the thought experiment's premise. Trial rates have been declining basically since plea bargaining began ascending. During that same period of time, however, nearly every other important feature of criminal justice—incarceration rates, crime rates, etc.—moved both up *and* down. From the juxtaposition of these two facts, I draw the tentative hypothesis that plea bargaining, once introduced, operates like a one-way ratchet on the criminal trial rate. This hypothesis cannot be proven, but the circumstantial evidence is strong. If it is right, it implies that a low trial rate is a stable feature of our criminal procedure, not some transitory characteristic. That has an important, though unhappy, corollary—that criminal procedure reforms that would require more trials are not likely to be adopted. I call this the “trial constraint.” The paper explores the trial constraint's implications.

Part II provides some background on the trial's vanquisher—plea bargaining. It first explains the trial penalty, the mechanism that propels plea bargaining.<sup>5</sup> Next it examines the scholarly debate about plea bargaining.<sup>6</sup> Part II concludes by identifying two core objections to status quo plea bargaining. Plea bargaining today transpires in the shadow of overlapping offenses, draconian sentencing laws, and punitive pre-trial detention, facets of our criminal law that add up to enormous prosecutorial leverage. The result is a system where defendants are coerced to convict themselves,<sup>7</sup> and where, in many criminal cases (though not all), uncertainty about guilt is irrelevant to punishment.<sup>8</sup>

Part III confronts the extant literature on plea bargaining reform. Spurred on by a pair of 2012 Supreme Court decisions taking courts deeper into the regulation of plea bargaining than they had gone before,<sup>9</sup> that literature has

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3. See *infra* Section IV.A.

4. See Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2177 (2014) (coining the phrase “post-trial world”).

5. See *infra* Section II.A.

6. See *infra* Section II.B.

7. See *infra* Section II.B.1.

8. See *infra* Section II.B.2.

9. See *Missouri v. Frye*, 566 U.S. 134 (2012); *Lafler v. Cooper*, 566 U.S. 156 (2012).

flourished in recent years. That's a good thing. But many prominent proposals for fixing plea bargaining would, if implemented, increase the trial rate.<sup>10</sup> Sometimes that's the express goal of a proposal, but often it is an unstated yet predictable consequence. If the trial constraint described in Part I is real, it implies that reforms that would increase the trial rate are less likely to be adopted than they should be on their merits.<sup>11</sup>

Taken together, Parts I, II, and III form a conundrum. We know what is wrong with contemporary plea bargaining (Part II) and, in theory, how to fix it (Part III). But we do not know how to reform plea bargaining without violating the trial constraint (Part I). Part IV turns to the general theory of second best for help.

The general theory of second best, which originated in welfare economics, provides that when one "ingredient" required for a first-best optimum cannot be realized, it is generally unwise to keep the remaining first-best ingredients at the levels they would take in the optimum.<sup>12</sup> That sounds abstract, but the theory's implications are profound. When applied to questions of institutional design, the theory often recommends practices that are unseemly, as a matter of first principles, on the grounds that they offset other unseemly practices. In a second-best environment, two wrongs sometimes do make a right, or more precisely they make things less wrong.

The contemporary criminal justice system uses prosecutorial leverage to eliminate trials. The general theory of second best invites us to ask whether there is a better way to avoid trials. There is, and it is right in front of us.

In American courts, civil trial rates are about as low as criminal trial rates.<sup>13</sup> Yet in civil cases (generally speaking), no party is imbued with unilateral leverage sufficient to compel settlement. How does civil justice pull this off? Seeing a civil case through to judgment is enormously expensive. While no one thing compels civil litigants to settle, the desire to avoid the high costs of motions practice, discovery, pre-trial hearings, trial, and appeal is a key driver.<sup>14</sup> The result is a system without many trials and, in general, without one-sided leverage.

Part IV argues that the plea bargaining reforms discussed in Part III could be made feasible by "logrolling" them with measures that make formal criminal litigation more expensive.<sup>15</sup> If criminal trials can be avoided because they are too expensive *for both sides*, then policymakers could

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10. See *infra* Sections III.A–III.C.

11. This is certainly not to say that existing proposals to reform plea bargaining are bad ideas. Many, perhaps all, of the reforms discussed in Part III would make plea bargaining more just, rational, and humane.

12. See *infra* Section IV.A.

13. See *infra* note 192 and accompanying text.

14. See *infra* notes 208, 211–212 and accompanying text.

15. See *infra* Section IV.B.2.

eliminate prosecutorial leverage while maintaining a low trial rate. And while it would be difficult to make the criminal trial itself more expensive, inefficiencies could be added on both the front end (with beefed-up motions practice and discovery) and the back-end (by liberalizing interlocutory appeals). The core idea of the thought experiment is to remake American criminal justice in the image of American civil justice, not because American civil justice is “first best,” but because it would be better than the coercive plea bargaining status quo.

The civil justice model is not the only possible path to “second-best” criminal justice. Part IV also briefly considers a second approach, one more analogous to enforcement in administrative law than to civil justice.<sup>16</sup> If prosecutors could formally determine that a defendant is guilty, then they would not need leverage to coerce pleas. And while such unchecked prosecutorial power would (obviously) be problematic, it’s plausible that even an administrative enforcement-style second best would, in many cases, be superior to the status quo.<sup>17</sup>

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In the end, this paper offers a thought experiment built from the premise that a negligible trial rate is a fixed feature of our criminal justice system. It then explores how we might improve our criminal process while working within this basic constraint. Lest there be any misunderstanding, I acknowledge that the reform packages this paper describes will not be attractive to reformers in the real world of criminal justice. They are not really meant to be. So what *is* their point?

The visions of criminal adjudication this paper sketches are—judged from first principles—unattractive. Yet, I will argue, they are the best systems possible if we are stuck with the trial constraint, and they are at least plausibly better than the status quo. If this is correct, either a pessimistic or a constructive interpretation is possible. That a rotten second best could be better than the status quo reflects very poorly on the status quo, and offers (yet another) avenue for criticizing it. That is the pessimistic reading.

The second-best models lay bare the shortcomings of *any* criminal justice reform that conforms to the trial constraint. If the models are normatively unacceptable—and I believe they are—the implication is that the way to get to an acceptable criminal justice system is by shedding the trial constraint

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16. See *infra* Section IV.C.

17. See *infra* Section IV.C.1. Even if the administrative enforcement approach is better than the status quo, however, it falters in a head-to-head comparison with the civil justice approach. See *infra* Section IV.C.2.

itself. Fortunately, the trial constraint stems from politics, not some natural order. The thought experiment's constructive reading—and its ultimate ambition—lies in the hope that understanding the limitations of second-best criminal justice will help ease the path towards resuscitating the criminal trial.

### I. THE TRIAL CONSTRAINT

For as long as we have the data to know, plea bargaining has relentlessly chipped away at the criminal trial rate. After developing sub-rosa in the second half of the nineteenth century,<sup>18</sup> plea bargaining was “discovered” by criminal justice commissions and scholars in the 1920s.<sup>19</sup> In 1928, Raymond Moley examined the guilty plea rate in twenty-four urban jurisdictions.<sup>20</sup> He found that guilty pleas accounted for between 33% and 95% of criminal convictions, with seventeen jurisdictions registering guilty plea rates between 70% and 90%.<sup>21</sup> From that starting point, guilty pleas continued to rise (and trials to vanish) over most of the twentieth century.<sup>22</sup> Albert Alschuler reported federal guilty plea rates of 77% in 1936, 80% in 1938, and 86% in 1940.<sup>23</sup> Though the federal trial rate ticked up briefly during the middle of the twentieth century, it reverted to its usual direction by the early 1980s.<sup>24</sup> In the closing decades of the twentieth century, the trial rate inched ever downwards, with trials accounting for about 14% of convictions in 1990, and 5% in 2000.<sup>25</sup> We lack similarly definitive statistics for the state courts but the same basic trends appear there as well.<sup>26</sup>

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18. See William Ortmann, *Probable Cause Revisited*, 68 STAN. L. REV. 511, 552–53 (2016) (collecting sources).

19. See FISHER, *supra* note 2, at 6–7.

20. Moley, *supra* note 1, at 105.

21. *Id.*

22. See Stephen J. Schulhofer, *Criminal Justice, Local Democracy, and Constitutional Rights*, 111 MICH. L. REV. 1045, 1064 (2013) (“Guilty plea rates have been rising, more or less steadily, since the Civil War or earlier . . .”).

23. Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 33 (1979).

24. See Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 89 (2005).

25. See Patrick E. Higginbotham, Jr., *Judge Robert A. Ainsworth, Jr. Memorial Lecture, Loyola University School of Law: So Why Do We Call Them Trial Courts?*, 55 SMU L. REV. 1405, 1414 (2002).

26. See Galanter, *supra* note 2, at 9 (“[Available data on state courts] provides a picture of trends in the state courts that, overall, bear an unmistakable resemblance to trends in federal courts.”); see also T. Ward Frampton, Comment, *The Uneven Bulwark: How (and Why) Criminal Jury Trial Rates Vary by State*, 100 CALIF. L. REV. 183, 191 n.48 (2012) (collecting sources). These aggregate figures mask variation between jurisdictions, *id.*, and between offenses. See generally Kyle Graham, *Crime, Widgets, and Plea Bargaining: An Analysis of Charge Content, Pleas, and Trials*, 100 CALIF. L. REV. 1573 (2012). But the aggregate picture is enough for present purposes.

Criminal trials continued to disappear over the last decade, as criminal justice took a turn towards reform.<sup>27</sup> According to data from the Administrative Office of the U.S. Courts, trials accounted for 3.1% of federal convictions in 2008, 2.5% in 2012, and 2.4% in 2016.<sup>28</sup> Again we lack precise measures for the states, but it is revealing that the three states that decreased their imprisonment rates the most between 2006 and 2014—California, Hawaii, and New Jersey—each had *lower* felony trial rates in 2014 than the three states that raised their imprisonment rates the most—West Virginia, Nebraska, and Arkansas.<sup>29</sup> Though there are surely complicated stories to be told about the trial and imprisonment rates in each state, it seems that recent criminal justice reform has not meant more trials.<sup>30</sup>

Meanwhile, much else about the criminal justice system moved cyclically. Since the 1920s (when extensive data on trial rates begins), criminal justice has moved through periods of punitiveness and periods of reform.<sup>31</sup> Incarceration has gone up, and, very recently, it has started to

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27. On the reform turn in criminal justice in the last decade, see generally Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 814 (2017) (“Thanks to the dedicated efforts of so many in my Administration, the bipartisan push for reform from federal, state, and local officials, and the work of so many committed citizens outside government, America has made important strides.”). See also sources cited *infra* note 30. But see Lynn Adelman, *Criminal Justice Reform: The Present Moment*, 2015 WIS. L. REV. 181, 183 (2015).

28. See U.S. District Courts—Criminal Defendants Disposed of, by Type of Disposition and Major Offense (Excluding Transfers), During the 12-Month Period Ending December 31, 2008, FEDERAL JUDICIAL CASELOAD STATISTICS, [https://www.uscourts.gov/sites/default/files/statistics\\_impourt\\_dir/D04Dec08.pdf](https://www.uscourts.gov/sites/default/files/statistics_impourt_dir/D04Dec08.pdf); U.S. District Courts—Criminal Defendants Disposed of, by Type of Disposition and Major Offenses, During the 12-Month Period Ending December 31, 2012, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY, <https://www.uscourts.gov/statistics/table/d-4/statistical-tables-federal-judiciary/2012/12/31>; U.S. District Courts—Criminal Defendants Disposed of, by Type of Disposition and Offense, During the 12-Month Period Ending December 31, 2016, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY, [https://www.uscourts.gov/sites/default/files/data\\_tables/stfj\\_d4\\_1231.2016.pdf](https://www.uscourts.gov/sites/default/files/data_tables/stfj_d4_1231.2016.pdf).

29. For changes to state imprisonment rates from 2006 to 2014, see LAUREN-BROOKE EISEN & JAMES CULLEN, BRENNAN CTR. FOR JUSTICE, UPDATE: CHANGES IN STATE IMPRISONMENT (2016), <https://www.brennancenter.org/sites/default/files/analysis/UpdateChangesinStateImprisonment.pdf>.

Trial rate information comes from the National Center for State Courts. *Criminal Caseloads – Trial Courts*, COURT STATISTICS PROJECT, [http://popup.ncsc.org/CSP/CSP\\_Intro.aspx](http://popup.ncsc.org/CSP/CSP_Intro.aspx) (last visited Jan. 21, 2019). The 2014 felony trial rates for the states that decreased prison populations the most were 2.5% in California, 4.7% in Hawaii, and 1.6% in New Jersey. The equivalent rates for the states that increased their prisoner rates the most were 12.1% for Arkansas, 8% for Nebraska, and 6% for West Virginia. *Id.*

30. The decline of trial rates over the last decade is consistent with a rhetoric of criminal justice reform that has emphasized spending less on the criminal justice system, not more. See Mary D. Fan, *Beyond Budget-Cut Criminal Justice: The Future of Penal Law*, 90 N.C. L. REV. 581, 634 (2012) (arguing that criminal justice reform has been “made possible by the social meaning shift in viewing harshness-mitigating measures as cost savings”); see also Jessica M. Eaglin, *Against Neorehabilitation*, 66 SMU L. REV. 189, 205 (2013); David Cole, *Turning the Corner on Mass Incarceration?*, 9 OHIO ST. J. CRIM. L. 27, 33 (2011); Roger A. Fairfax, Jr., *Searching for Solutions to the Indigent Defense Crisis in the Broader Criminal Justice Reform Agenda*, 122 YALE L.J. 2316, 2327 (2013); Ashley T. Rubin, *The Unintended Consequences of Penal Reform: A Case Study of Penal Transportation in Eighteenth-Century London*, 46 L. & SOC’Y REV. 815, 845 (2012).

31. See Bryant S. Green, *As the Pendulum Swings: The Reformation of Compassionate Release to Accommodate Changing Perceptions of Corrections*, 46 U. TOL. L. REV. 123, 146 (2014) (“Criminal justice scholars compare the historical shifts in justifications for imposing criminal sentences

come down.<sup>32</sup> Crime itself rose and fell.<sup>33</sup> Impervious to these ebbs and flows in the broader world of criminal justice, the trial rate continued marching towards zero.

An uncomfortable hypothesis presents itself. Could it be that once plea bargaining takes root, declining trial rates become an inexorable feature of criminal justice? The hypothesis has a corollary—that whatever reforms criminal justice policymakers might be persuaded to try, measures that would materially increase the trial rate are not likely to be among them. I call this the “trial constraint” on criminal procedure reform.

The trial constraint is a hypothesis about the behavior of criminal justice policymakers. It conjectures that they will not be inclined to adopt reform measures that would materially increase the trial rate. The hypothesis cannot be proven, and I make no attempt to do so. The circumstantial evidence that supports it is about a century of nearly uninterrupted declines in the trial rate while much else in the criminal justice system fluctuated. This paper’s thought experiment proceeds on the premise that the trial constraint is real, at least in the short- and medium-terms.<sup>34</sup>

To identify a political constraint on criminal procedure reform is emphatically not to endorse the constraint as a matter of normative justice. As Part IV explains, a criminal justice system with a negligible trial rate is relegated to what the economists call “second best,” but which we might, without economic jargon, simply call unjust. But condemning it does not make the trial constraint any more or less real.<sup>35</sup>

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to a figurative pendulum that swings between retributive and utilitarian theories of punishment.”). *But see generally* PHILIP GOODMAN, JOSHUA PAGE, & MICHELLE PHELPS, *BREAKING THE PENDULUM: THE LONG STRUGGLE OVER CRIMINAL JUSTICE* (2017). For a history of criminal justice reform movements, see generally Roger A. Fairfax, Jr., *From “Overcriminalization” to “Smart on Crime”: American Criminal Justice Reform—Legacy and Prospects*, 7 J. L. ECON. & POL’Y 597 (2011).

32. See EISEN & CULLEN, *supra* note 29, at 1.

33. See, e.g., PATRICK SHARKEY, *UNEASY PEACE: THE GREAT CRIME DECLINE, THE RENEWAL OF CITY LIFE, AND THE NEXT WAR ON VIOLENCE* 1–7 (2018); Carissa Byrne Hessick, *Mandatory Minimums and Popular Punitiveness*, 2011 CARDOZO L. REV. DE NOVO 23, 24 (2011) (“Although the United States experienced a dramatic increase in crime rates in the last half of the twentieth century, more recent decades have seen reductions in those rates.”); Elizabeth S. Scott & Laurence Steinberg, *Social Welfare and Fairness in Juvenile Crime Regulation*, 71 LA. L. REV. 35, 51 (2010) (“Historical reviews indicate that crime rates fluctuate over time and that many factors contribute to the variations.”); David Cole, *As Freedom Advances: The Paradox of Severity in American Criminal Justice*, 3 U. PA. J. CONST. L. 455, 462 (2001) (“But as the discussion above illustrates, that account is difficult to square with the findings that our incarceration rates have mushroomed while crime rates have fluctuated and that they have not stopped climbing even as crime rates have experienced a sustained decline.”).

34. *But see* William H. Riker, *Implications from the Disequilibrium of Majority Rule for the Study of Institutions*, 74 AM. POL. SCI. REV. 432, 446 (1980) (“[I]n the long run, nearly anything can happen in politics.”).

35. Some readers may wonder whether the recently enacted First Step Act of 2018, Pub. L. No. 115-391, is inconsistent with the trial constraint hypothesis. For the reasons noted in the text, I wish that it were. But while the First Step Act is indeed a valuable “first step” in the overhaul of federal criminal justice, it seems unlikely that it will have a material impact on the federal criminal trial rate. Although, as I explain below, significant reform of mandatory minimum sentencing *would* likely increase the trial

If the trial constraint plausibly exists, then its implications for criminal justice reform are worth considering, and that is my task. For the most part, I will bracket a related question—*why* American criminal justice policymakers are (apparently) allergic to trials. Answering that question will require another paper. Still, because the trial constraint’s origins may bear on the remedy, it is worth briefly identifying some possibilities.

One obvious root cause is that trials are expensive.<sup>36</sup> As John Langbein notes, “[i]n the two centuries from the mid-eighteenth to the mid-twentieth, a vast transformation overcame the Anglo-American institution of criminal jury trial, rendering it absolutely unworkable as an ordinary dispositive procedure.”<sup>37</sup> Because the government must supply the prosecutorial, judicial, and (often) defense resource for trials,<sup>38</sup> policymakers’ revealed allergy to trials may be simply about saving money. If so, then perhaps the real fixed constraint on criminal procedure reform is not about trials, but costs.

Yet costs may not fully explain the allergy to trials. In every case where a defendant enters a guilty plea, the state gets a conviction; it “wins.”<sup>39</sup> Trials, on the other hand, expose the government to losing, and the public embarrassment that comes with it. Perhaps policymakers constructed a system for processing criminal cases (effectively) without trials in part because that ensures that the government (effectively) never loses. James Whitman argues that there is a relationship between the comparatively weak American state and the harshness of American carceral practices.<sup>40</sup> Only a strong state, Whitman explains, can show mercy.<sup>41</sup> Likewise, perhaps only a strong state can permit the prosecution to lose a non-trivial percentage of criminal cases. If so, the “harsh procedure” of coercive American plea bargaining has a similar source as Whitman’s “harsh punishment.”

There is obviously much more to be said about these—and other—explanations for the trial constraint. Yet medical doctors do not postpone treating disease until they have a complete understanding of a malady’s

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rate, *see supra* at Part III.A, the First Step Act’s mandatory minimum reforms were incremental and modest. *See* Pub. L. No. 115-391 § 401 (2018) (reducing an existing mandatory minimum of twenty years to fifteen years and an existing mandatory life imprisonment to twenty-five). Another piece of criminal justice reform introduced during the 115th Congress, The SAFE Justice Act, H.R. 4261, 115th Cong. (1st Sess. 2017) *did* have measures aimed at plea bargaining reform, but it perished in committee.

36. *See, e.g.,* Feeley, *supra* note 2, at 350.

37. Langbein, *supra* note 2, at 9. *See* JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 9 (2005).

38. *See* Steven Duke, *The Right to Appointed Counsel: Argersinger and Beyond*, 12 AM. CRIM. L. REV. 601, 626 (1975).

39. *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2471 (2004) (“[Prosecutors] may further their careers by racking up good win-loss records, in which every plea bargain counts as a win but trials risk being losses.”).

40. JAMES Q. WHITMAN, HARSH JUSTICE 6 (2003).

41. *Id.* at 11–15.

origin. In the same spirit, I focus on the trial constraint's consequences for reforming criminal procedure, leaving its root causes for another day.

## II. PLEA BARGAINING AND ITS DISCONTENTS

In order to analyze the trial constraint's implications for reform, we need firm footholds in the existing law and literature. Part II.A provides an overview of contemporary plea bargaining. Part II.B then explores the scholarly debate about plea bargaining's virtues and vices.

### A. *Plea Bargaining Today*

The Supreme Court and criminal justice scholars agree: plea bargaining “is not some adjunct to the criminal justice system; it *is* the criminal justice system.”<sup>42</sup> The numbers tell the story. Take the three largest states—according to data from the National Center for State Courts, in 2015 the felony trial rates for California, New York, and Texas were 2.3%, 4.0%, and 2.1%.<sup>43</sup> Trials are even rarer in misdemeanor cases. The 2015 trial rate for misdemeanors in Texas was 1.4%; in California it was 0.9%.<sup>44</sup> The same patterns hold in the federal criminal justice system. In 2016 only 2.8% of federal convictions resulted from trials.<sup>45</sup> Although defendants sometimes plead guilty without an agreement—called an “open plea”—most guilty pleas are products of some sort of agreement.<sup>46</sup>

Defendants who plead guilty give up valuable rights, as judges explain to them daily in colloquies.<sup>47</sup> Why do the vast majority of defendants waive

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42. *Missouri v. Frye*, 566 U.S. 133, 144 (2012) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)) (emphasis in original).

43. The reported data is available from *2015 Criminal Caseloads – Trial Courts*, COURT STATISTICS PROJECT, [http://popup.ncsc.org/CSP/CSP\\_Intro.aspx](http://popup.ncsc.org/CSP/CSP_Intro.aspx) (last visited Jan. 21, 2019). If anything, these percentages overstate the number of trials, as the National Center for State Courts instructs jurisdictions to report a case as having been tried if a jury is empaneled or, for bench trials, if evidence is received. See *State Court Guide to Statistical Reporting*, COURT STATISTICS PROJECT 38 (last updated Mar. 20, 2017), <http://www.courtstatistics.org/~media/Microsites/Files/CSP/State%20Court%20Guide%20to%20Statistical%20Reporting%20v%20point1point2.ashx>. Thus, if a plea bargain is reached during trial, the case is still counted as a trial.

44. See *2015 Criminal Caseloads – Trial Courts*, COURT STATISTICS PROJECT, [http://popup.ncsc.org/CSP/CSP\\_Intro.aspx](http://popup.ncsc.org/CSP/CSP_Intro.aspx) (last visited Jan. 21, 2019). New York misdemeanor data is not available.

45. *U.S. District Courts—Criminal Defendants Disposed of, by Type of Disposition and Offense, During the 12-Month Period Ending December 31, 2016*, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY, [https://www.uscourts.gov/sites/default/files/data\\_tables/stfj\\_d4\\_1231.2016.pdf](https://www.uscourts.gov/sites/default/files/data_tables/stfj_d4_1231.2016.pdf).

46. Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 912 n.1, 957 (2006) (“While not all guilty pleas result from plea bargains, most felony guilty pleas do.”).

47. See FED. R. CRIM. P. 11; *United States v. Vonn*, 535 U.S. 55, 78 (2002) (Stevens, J., concurring in part and dissenting in part) (“The very premise of the required Rule 11 colloquy is that, even if counsel is present, the defendant may not adequately understand the rights set forth in the Rule unless the judge explains them.”); see also Pierre N. Leval, *Judging Under the Constitution: Dicta About*

their right to have a judge or jury adjudicate their guilt under the favorable beyond a reasonable doubt standard? One explanation is that the vast majority of defendants are unambiguously guilty, and waiving a preordained trial outcome is not much of a concession. This account has a tough time explaining trial rates that approach zero. Trials are, after all, unpredictable.<sup>48</sup> Even for the unambiguously guilty defendant, a trial means some chance of acquittal resulting from a prosecutor's blunder, a sympathetic (i.e., nullifying) jury, or the discovery of a previously unnoticed constitutional problem during the investigation of the case.

The better explanation for a near-zero trial rate is the existence of large trial penalties—i.e., large differences between the sentences defendants can expect after trials and the sentences they receive after guilty pleas.<sup>49</sup> Without some trial penalty, plea bargaining would probably not happen in any significant numbers.<sup>50</sup> As trial penalties rise, guilty pleas become more likely. A defendant who faces a fifteen-year mandatory minimum prison sentence if he is convicted at trial is likely to accept a plea for time served, even if the evidence against him is less than overwhelming. Indeed, he is likely to take the plea even if he is, in fact, not guilty.<sup>51</sup>

In assessing plea bargaining as a method of criminal adjudication, understanding the size of trial penalties is critical. Unfortunately, the true size of trial penalties is effectively unobservable.<sup>52</sup> Prosecutors and defendants negotiate over both the offense of conviction (“charge bargaining”), and the sentence (“sentence bargaining”). Charge bargaining is invisible to everyone but the participants, making it impervious to

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*Dicta*, 81 N.Y.U. L. REV. 1249, 1272–73 (2006) (“Numerous states have followed suit [with Fed. R. Crim. P. 11], requiring their courts to establish a defendant’s understanding of the rights mentioned in *Boykin* before accepting a guilty plea.”).

48. Gregory M. Gilchrist, *Trial Bargaining*, 101 IOWA L. REV. 609, 633 (2016) (“Even in a case with a known quantum of evidence, there often remains an unknown, and largely unknowable, set of possible trial outcomes.”).

49. See Russell D. Covey, *Plea Bargaining and Price Theory*, 84 GEO. WASH. L. REV. 920, 961–62 (2016) (“The mechanism of inducement is the plea discount/trial penalty. Abolish plea bargaining, and the trial penalty necessarily disappears.”).

50. See Albert W. Alschuler, *The Trial Judge’s Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1124 (1976) (“If we are truly committed to a bargaining system that can maintain the current level of guilty pleas, we are also committed to a system in which defendants convicted at trial will be sentenced more severely than defendants who plead guilty.”).

51. See generally Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant’s Dilemma: An Innovative Empirical Study of Plea Bargaining’s Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1 (2013).

52. Likewise, strictly speaking, empirical evidence cannot confirm that the difference between post-trial and plea bargained sentences represents a “penalty” for going to trial rather than a “discount” for pleading guilty. See Ben Grunwald, *The Fragile Promise of Open-File Discovery*, 49 CONN. L. REV. 771, 804–05 (2017). That said, in a world where more than 95% of convictions are the result of guilty pleas, it seems farfetched to suppose that post-trial sentences provide the appropriate normative baseline. See Albert W. Alschuler, *Lafler and Frye: Two Small Band-Aids for a Festering Wound Plea Bargaining after Lafler and Frye*, 51 DUQ. L. REV. 673, 702 (2013).

quantitative research.<sup>53</sup> Still, we can get some perspective on the size of trial penalties by looking at studies on sentence bargaining. Using data on federal sentencing from 2006 to 2008, Andrew Kim found a trial penalty (attributable to sentence bargaining) of 64%.<sup>54</sup> Nancy King and a team of researchers found that the size of trial penalties in five states varied with the type of crime and between bench and jury trials, but for most crimes and in most states, defendants convicted at trial were more likely to be incarcerated and for longer periods.<sup>55</sup> For many crimes in King's study, moreover, post-trial sentences were multiples of post-plea sentences. In Maryland, for example, defendants convicted of heroin distribution at jury trials received sentences 350% longer than defendants who pled guilty to heroin distribution.<sup>56</sup> Other studies suggest that the trial penalty assessments in the Kim and King et al. analyses are far too low.<sup>57</sup>

Even before we get to charge bargaining, then, trial penalties appear to be significant. But the limitations of quantitative research notwithstanding, there is every reason to believe that with charge bargaining, trial penalties go from significant to overwhelming. Substantive criminal codes at the state and federal levels, William Stuntz observed, "are filled with overlapping crimes, such that a single criminal incident typically violates a half dozen or more prohibitions."<sup>58</sup> The point of overlapping offenses and mandatory sentences, Stuntz explained, is to present the prosecutor with "a menu from which [she] may order as she wishes."<sup>59</sup> A prosecutor's discretion to choose what charges to file, and what charges to threaten to file, is a principal source of her control over criminal adjudication.<sup>60</sup> Charging menus typically

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53. Andrew Chongseh Kim, *Underestimating the Trial Penalty: An Empirical Analysis of the Federal Trial Penalty and Critique of the Abrams Study*, 84 MISS. L.J. 1195, 1202 n.22 (2015).

54. *Id.* at 1254.

55. Nancy J. King et al., *When Process Affects Punishment: Differences in Sentences after Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States*, 105 COLUM. L. REV. 959, 973–75 (2005).

56. *Id.* at 973.

57. See Russell Covey, *Police Misconduct as a Cause of Wrongful Convictions*, 90 WASH. U. L. REV. 1133, 1169 (2013) (finding that trial penalties in two mass exoneration matters were between 400% and 1300%); Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 50 CRIM. L.Q. 67, 89–90 (2005).

58. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 507 (2001).

59. William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2549 (2004).

60. Anne R. Traum, *Using Outcomes to Reframe Guilty Plea Adjudication*, 66 FLA. L. REV. 823, 858 (2014) ("The prosecutor has wide latitude to add, reduce, dismiss, or substitute charges during plea-bargaining with little oversight."); Carrie Leonetti, *When the Emperor Has No Clothes III: Personnel Policies and Conflicts of Interest in Prosecutors' Offices*, 22 CORNELL J.L. & PUB. POL'Y 53, 54 (2012) ("Through their charging decisions, choices among case-ending options [including dismissal and plea offers], and sentencing recommendations, they often become adjudicators of guilt and punishment, with courts simply confirming their underlying decisions."); Lucian E. Dervan, *Bargained Justice: Plea-Bargaining's Innocence Problem and the Brady Safety-Value*, 2012 UTAH L. REV. 51, 61 (2012) ("The key element of this machine, of course, is prosecutorial discretion and the ability to select among various

include offenses with (relatively) lenient sentences at one end, and offenses with severe sentences, often with mandatory minimums, at the other.<sup>61</sup> In all but the most serious or high-profile cases, the prosecutors' incentive is not to seek the most severe punishment available—an option that would require a trial—but to threaten the harsh punishment to procure a guilty plea to an offense lower on the menu.<sup>62</sup> As John Pfaff explains, a prosecutor who threatens a thirty-year mandatory minimum for using a gun in a drug deal but promises to “make the gun disappear” in exchange for a guilty plea can “terrify most defendants into agreeing.”<sup>63</sup> The full trial penalty in the case is the difference between the thirty-year mandatory minimum the defendant faced after trial and the—presumably much lower—plea bargained sentence for unarmed drug dealing.<sup>64</sup> This dynamic explains why mandatory minimums, though rarely actually imposed, loom large over plea bargaining.<sup>65</sup>

### B. The Debate

Plea bargaining has spawned a vigorous scholarly debate, which this subsection explores. This subsection also develops the claim that two deep pathologies blight status quo plea bargaining—it coerces defendants to

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criminal statutes with significantly different sentences.”); Stuntz, *supra* note 59, at 2588 (“But given the array of weapons the law provides, prosecutors are often in a position to dictate outcomes, and almost always have much more to say about those outcomes than do defense attorneys.”).

61. See Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. REV. 802, 857 (2015) (“Prosecutors benefit from having a menu of broad laws with mandatory sentences from which to choose because it gives them greater control over the bargaining process and makes it more likely that defendants will cooperate with them to avoid the mandatory term.”); see also Stephanos Bibas, *Prosecutorial Regulation versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 971 (2009) (“Even in the majority of states that retain indeterminate sentencing, statutory mandatory penalties and menus of overlapping crimes give prosecutors the dominant role in setting sentences.”); Ronald F. Wright & Rodney L. Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, 84 N.C. L. REV. 1935, 1939–40 (2006) (proposing analytical distinction between depth and distance in criminal codes).

62. Stuntz, *supra* note 59, at 2554. In homicide cases, Stuntz explains, prosecutors generally pursue every case they can, which is why the acquittal rate in such cases is so much higher than for felonies generally. Cases cannot be dropped out of fear that the defendants might win at trial; voters may forgive an acquittal, but they surely won't forgive blowing off a homicide.

*Id.* at 2563.

63. JOHN PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* 132 (2017).

64. See Darryl K. Brown, *The Perverse Effects of Efficiency in Criminal Process*, 100 VA. L. REV. 183, 188 (2014) (“While the federal sentencing guidelines fix a comparable discount for ‘acceptance of responsibility,’ the size of plea discounts in federal as well as state practice is in fact effectively unregulated, because no law meaningfully limits prosecutors’ discretion to add or dismiss charges depending on a defendant’s willingness to plead guilty.”).

65. PFAFF, *supra* note 63, at 132.

convict themselves,<sup>66</sup> and, in some cases, it makes factual, legal, and normative uncertainty effectively irrelevant to punishment.<sup>67</sup>

### 1. *Plea Bargaining Defended*

Plea-dominated criminal justice has its defenders. The basic defense of plea bargaining points to its efficiency.<sup>68</sup> Efficiency is sometimes cast in moral terms—a defendant who is willing to preserve government resources by admitting his crime, on this approach, deserves less punishment than one who insists on trial.<sup>69</sup> More often efficiency is invoked to argue that plea bargaining is welfare-enhancing in the same manner (and for the same reasons) as ordinary contracts. Frank Easterbrook explained the welfare-maximizing benefits of trade in the context of criminal cases thusly:

The parties save the costs of trials. Defendants presumably prefer the lower sentences to the exercise of their trial rights or they would not strike the deals. Prosecutors also prefer the agreements; they may put the released resources to use in other cases, thus increasing deterrence. If defendants and prosecutors (representing society) both gain, the process is desirable.<sup>70</sup>

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66. See *infra* Section II.B.2.a.

67. See *infra* Section II.B.2.b.

68. See Gilchrist, *supra* note 48, at 645 (“Plea bargaining persists for one reason: efficiency.”); Traum, *supra* note 60, at 860 (“Champions of plea-bargaining view it as an efficient and cost-effective system that affords defendants an important choice.”); Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 38 (2002) (“Most discussions of plea bargaining begin with the observation that plea bargaining makes the prosecutor more administratively efficient.”); John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157, 163 (2014) (“Once thought to be a ‘necessary evil,’ plea bargaining is now applauded as an efficient means of disposition.”). Of course, one can believe that plea bargaining *is* efficient without believing that this fact constitutes a *defense* of plea bargaining. As Darryl Brown points out, the efficiency gains from plea bargaining “can perversely increase demand for criminal prosecutions, rather than serving as a means to meet demand for enforcement that is driven by crime rates.” Brown, *supra* note 64, at 186 (emphasis omitted).

69. See James Q. Whitman, *Presumption of Innocence or Presumption of Mercy: Weighing Two Western Modes of Justice*, 94 TEX. L. REV. 933, 957 (2016) (“Indeed, we might believe that a manifestly guilty defendant who insists on putting the state to the expense of a trial deserves to pay the ‘trial penalty’ that American criminal judges notoriously impose—the harsh sentence, usually the maximum, visited on obviously guilty defendants who refuse to submit to a plea bargain.”); Gerard V. Bradley, *Plea Bargaining and the Criminal Defendant’s Obligation to Plead Guilty*, 40 S. TEX. L. REV. 65, 71 (1999) (“The pleading defendant also acts directly for the benefit of many individuals. In so doing, he further evidences a changing character—a change for the better.”); see also Alschuler, *supra* note 50, at 1083 n.82 (“Leniency for defendants who plead guilty is sometimes rationalized on the ground that a guilty plea manifests . . . a willingness to accept responsibility for one’s conduct, on the ground that a defendant deserves consideration for making conviction certain in a doubtful case.”).

70. Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 309 (1983).

In their oft-cited article on plea bargaining as a form of contract,<sup>71</sup> Robert Scott and William Stuntz emphasized that plea-bargained justice serves both efficiency and autonomy ends.<sup>72</sup> Both parties to a criminal case enter with entitlements. The defendant is entitled to a trial, and the prosecutor is entitled to seek the maximum sentence legally available.<sup>73</sup> Sometimes, Scott and Stuntz explained, “each party values the other’s entitlement more than his own.”<sup>74</sup> When that happens, “the conditions exist for an exchange that benefits both parties and harms neither.”<sup>75</sup>

Scott and Stuntz’s contractual defense of plea bargaining depends on the invisible-hand rationality of self-interested negotiation.<sup>76</sup> Another sophisticated defense of institutionalized plea bargaining depends on the guided-hand rationality of prosecutors. Gerard Lynch argues that our criminal justice system relies on an “administrative” approach, by which he means that for “most defendants the primary adjudication they receive is, in fact, an administrative decision by a state functionary, the prosecutor, who acts in an inquisitorial mode.”<sup>77</sup> A “Martian anthropologist,” Lynch postulates, “sent to observe criminal justice” on Earth would have “relatively little to say about trials,” but would identify the “substantive evaluation of the evidence and assessment of the defendant’s responsibility” as being done in the prosecutor’s office.<sup>78</sup> Lynch acknowledges that prosecutorial adjudication departs from the “idealized model of adversary justice described in the textbooks,”<sup>79</sup> but stresses that it is nonetheless a reasonable mechanism to process criminal cases.<sup>80</sup>

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71. Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1969 (1992) (identifying Scott and Stuntz as having provided the “best defense in the literature” of “plea bargaining based on autonomy and efficiency”).

72. Scott & Stuntz, *supra* note 42, at 1913.

73. *Id.* at 1914.

74. *Id.*

75. *Id.*

76. See generally Adrian Vermeule, *The Invisible Hand in Legal and Political Theory*, 96 VA. L. REV. 1417, 1422 (2010) (“The common ground [of invisible hand arguments] is that in every case some good arises as an unintended byproduct of decentralized action.”).

77. Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2120 (1998).

78. *Id.* at 2121, 2123.

79. *Id.* at 2121.

80. *Id.* at 2121, 2141–42. Maximo Langer agrees in part, arguing that prosecutors sometimes adjudicate unilaterally (which he calls the Prosecutorial Adjudication System), but departs from Lynch’s normative assessment. See Maximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 225–26 (2006).

## 2. *Plea Bargaining Attacked*

Easterbrook, Scott and Stuntz, and Lynch notwithstanding, attacks on plea-fueled criminal justice outpace defenses in the criminal law academy.<sup>81</sup> Many commentators have focused on implementation problems. For example, critics point to cognitive biases and heuristics that prevent plea bargaining participants (defendants, prosecutors, and defense lawyers) from negotiating the sort of deals supposed by the “plea bargain as contract” model.<sup>82</sup> Many highlight the principal-agent problems stemming from underfunded indigent defense.<sup>83</sup> No matter how well-intentioned, overwhelmed public defenders have strong incentives to plead cases in order to move dockets along.<sup>84</sup> Principal-agent problems are not limited to the defense, moreover. Line prosecutors may have interests not perfectly aligned with their politically accountable superiors, and their superiors’ interests may not align perfectly with the public they represent.<sup>85</sup>

Other critiques of plea bargaining center less on questions of implementation than on questions of design. One such criticism, already alluded to, is that excessive trial penalties lead innocent defendants to plead guilty. As Darryl Brown notes, “[t]here is little debate that pleading guilty in spite of one’s innocence can be a *rational* decision under the right conditions, and the rules of plea bargaining aggravate those conditions.”<sup>86</sup> The “innocence problem” is among the most common complaints about plea bargaining.<sup>87</sup> On one level, this is understandable. No matter that false guilty pleas are typically rational, they are deeply unsettling.<sup>88</sup> On another level,

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81. See Joseph A. Colquitt, *Ad Hoc Plea Bargaining*, 75 TUL. L. REV. 695, 706 (2001) (noting the “lackluster support plea bargaining garners and the intense criticism it attracts”).

82. See generally Bibas, *supra* note 39.

83. *Id.* at 2476 (“In some ways, defense representation is even more variable and vulnerable to skewing than is the prosecution. One of the main culprits is funding.”).

84. *Id.* at 2477 (“To put it bluntly, appointed or flat-fee defense lawyers can make more money with less time and effort by pushing clients to plead.”).

85. Covey, *supra* note 49, at 958 (“Prosecutors’ interest in resolving cases do [sic] not neatly align with those of the ‘general public,’ and are influenced by a wide variety of factors, including political considerations, professional advancement, and the desire to minimize workload.”); see also Bibas, *supra* note 61, at 963 (“Prosecutors are agents who imperfectly serve their principals [the public] and other stakeholders [such as victims and defendants].”).

86. DARRYL K. BROWN, *FREE MARKET CRIMINAL JUSTICE: HOW DEMOCRACY AND LAISSEZ FAIRE UNDERMINE THE RULE OF LAW* 92 (2016).

87. See Gregory M. Gilchrist, *Plea Bargains, Convictions and Legitimacy*, 48 AM. CRIM. L. REV. 143, 148 (2011) (“The objections that have been leveled against plea bargaining are numerous and diverse, but most stem from a common problem: plea bargaining reduces the ability of the criminal justice system to avoid convicting the innocent.”); Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1119 (2008) (“Much has been made of an ‘innocence problem’ in plea bargaining.”).

88. See Oren Gazal-Ayal & Avishalom Tor, *The Innocence Effect*, 62 DUKE L.J. 339, 393 (2012) (“The argument against false pleading is based in part on society’s moral obligation to prevent wrongful convictions.”); James W. Diehm, *Pleading Guilty While Claiming Innocence: Reconsidering the Mysterious Alford Plea*, 26 U. FLA. J. L. & PUB. POL’Y 27, 42–43 (2015) (“Most would probably prefer

assessing plea bargaining is, like all questions of institutional design, a comparative endeavor. The question is not whether innocent people plead guilty, but whether innocence is necessarily a *bigger* problem in a criminal justice system dominated by pleas than it would be in a criminal justice system dominated by trials. While there are good reasons to believe that it is, we do not—and cannot—know with certainty.<sup>89</sup>

The innocence problem may not provide a firm foundation for preferring criminal adjudication by trial to criminal adjudication by plea, but two further objections to plea bargaining do. They are explored in the subsections below.

#### *a. Coercing Defendants to Convict Themselves*

Plea bargaining, when conducted under the thumb of hefty trial penalties, coerces defendants (innocent and guilty alike) to convict themselves.<sup>90</sup> The problem is two-fold: coercion and *self*-conviction. Trial penalties, and thus plea bargains, are coercive when maximum penalties are inflated to ensure that going to trial will be irrational from the defendant's perspective.<sup>91</sup> The defendant who can take a plea for time served or chance a fifteen-year sentence after trial lacks a meaningful alternative to pleading guilty, and it is hard to imagine (given the prosecutor's willingness to accept time served) that the fifteen-year post-trial sentence on the books serves any purpose other than to induce pleas.<sup>92</sup> The pressure on the defendant to take the deal

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to take the moral and ethical position that they will not in any way be involved in a situation where an innocent client pleads guilty." Cf. Josh Bowers, *The Unusual Man in the Usual Place Response*, 157 U. PA. L. REV. PENNUMBRA 260, 261 (2008) ("No doubt, it would be a moral horror to permit innocent defendants to plead guilty in a well-functioning and transparent criminal justice system.").

89. See Bowers, *supra* note 87, at 1159 ("After all, trials are imperfect, particularly for recidivist defendants who cannot so easily challenge wrongful charges."); see also RICHARD L. LIPPKE, *THE ETHICS OF PLEA BARGAINING* 225 (2011) ("There are, in fact, numerous reasons to doubt that adversary trials, as they are structured and conducted in the United States, are more reliable mechanisms for producing truthful verdicts and sentences than robust plea bargaining.").

90. See, e.g., Albert W. Alschuler, *A Nearly Perfect System for Convicting the Innocent*, 79 ALB. L. REV. 919, 928 (2015) ("Plea bargaining induces many innocent defendants to convict themselves."); Donald A. Dripps, *Guilt, Innocence, and Due Process of Plea Bargaining Plea Bargaining Regulation: The Next Criminal Procedure Frontier Symposium*, 57 WM. & MARY L. REV. 1343, 1347 (2016) ("From that baseline, current law tolerates what seems to be increasingly common: plea offers that are functionally coercive."); Daniel Epps, *Adversarial Asymmetry in the Criminal Process*, 91 N.Y.U. L. REV. 762, 766 (2016) ("But because prosecutors do not inevitably desire to maximize punishment, plea bargaining becomes a coercive process in which prosecutors use the threat of overly harsh sentences as weapons for extracting guilty pleas from defendants."); Langer, *supra* note 80, at 250 ("When the prosecutor makes her final coercive plea proposal, the prosecutor effectively convicts the defendant of a specific charge or charges.").

91. Concerns about the coerciveness of plea bargaining are widespread. See Ortman, *supra* note 18, at 555–56 (collecting sources). Not all agree. See, e.g., Easterbrook, *supra* note 70, at 311.

92. See Rachel Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1034 (2006) ("[T]hose who do take their case to trial and lose receive longer sentences than even

is amplified, moreover, if he is incarcerated pending trial.<sup>93</sup> As John Langbein memorably argued, the coercive logic of plea bargaining is different in degree, but not in kind, from the medieval continental practice of securing confessions by torture.<sup>94</sup>

Of course, governments act coercively in many contexts that most find unobjectionable, from taxes to compulsory military service to eminent domain. Plea bargaining is different because it uses coercion to compel a defendant to do the state's work for it. That the accused must convict himself is a strike against his autonomy distinct from, though amplified by, state coercion.<sup>95</sup> As Albert Alschuler explains, hinging a "substantial portion of a defendant's punishment on a single tactical decision [to go to trial or not]. . . assign[s] to the defendant a responsibility that he cannot fairly be required to bear."<sup>96</sup> Langbein makes a similar point in comparing the coerciveness of trial to the coerciveness of pleas: "Coercing people to stand trial is different from coercing them to waive trial and to bring upon themselves sanctions that should only be imposed after impartial adjudication."<sup>97</sup>

*b. Suppressing Uncertainty*

There is a second deep objection to the plea bargaining status quo. With outsized prosecutorial leverage, plea bargaining makes uncertainty about whether a defendant is guilty less relevant—and sometimes irrelevant—to punishment. That is because in a range of cases, the prosecutor can unilaterally set the price of a plea without having to take uncertainties about a defendant's guilt or innocence into account. This objection, which draws on a point made by Stuntz,<sup>98</sup> is less intuitive than the first and requires more explanation.

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Congress or the prosecutor might think appropriate, because the longer sentence exists on the books largely for bargaining purposes.").

93. Several recent empirical studies have found that "pretrial detention causally increases a defendant's chance of conviction, as well as the likely sentence length." Megan T. Stevenson & Sandra G. Mayson, *Bail Reform: New Directions for Pretrial Detention and Release*, in ACADEMY FOR JUSTICE, A REPORT ON SCHOLARSHIP AND CRIMINAL JUSTICE REFORM 2 (Erik Luna, ed. 2017); *id.* at n.5 (collecting studies).

94. Langbein, *supra* note 2, at 12–13.

95. David Lynch, *The Impropriety of Plea Agreements: A Tale of Two Counties*, 19 L. & SOC. INQUIRY 115, 133 (1994) (describing plea bargains as the defendant's "safe but dehumanizing" option).

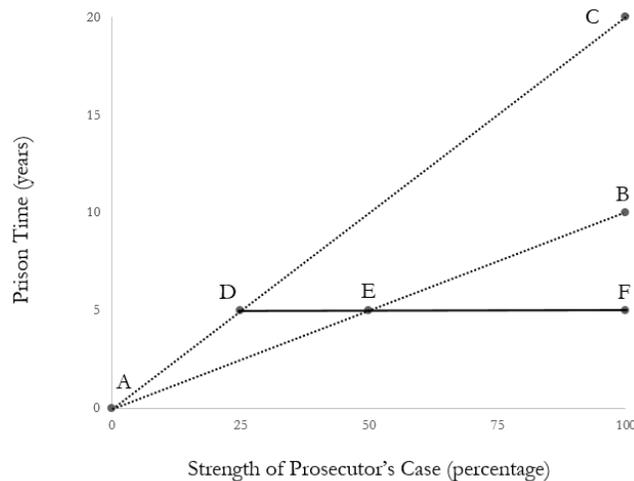
96. Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652, 668 (1981).

97. Langbein, *supra* note 2, at 13 n.24.

98. Stuntz makes appearances on both sides of the debate. *Compare* text accompanying this note with text accompanying notes 72–75. Indeed, Stuntz was responsible for one of the most influential defenses of plea bargaining, Scott & Stuntz, *supra* note 42, and for one of the most sophisticated critiques, Stuntz, *supra* note 59. To his enormous credit, Stuntz was open-minded and candid enough to

Stuntz argued that when criminal codes are stacked with overlapping offenses, pleas are not negotiated “in the shadow of the law.”<sup>99</sup> The point can be illustrated graphically with an example borrowed (with some modifications) from Stuntz.<sup>100</sup> Assume a jurisdiction in which armed robbery carries a mandatory ten-year sentence and unarmed robbery a five-year sentence. Assume further that prosecutors in the jurisdiction believe that five years is the appropriate sentence for armed robbery, and that they have discretion to charge armed robbery as unarmed robbery.

Figure 1



In Figure 1, the horizontal axis represents the probability that the government would prevail at an armed robbery trial and the vertical axis represents the sentence. Dotted line AB shows expected settlement values if plea bargaining outcomes were determined in the shadow of trial outcomes. The greater the government’s chances of winning at trial, the higher the expected punishment. Because prosecutors have determined that five years is the appropriate sentence for armed robbery, however, the expected settlement values for our jurisdiction are not shown by AB, but by the solid line EF. So long as the government has sufficient evidence to bring a charge, we expect a five-year plea deal.<sup>101</sup> For any “strength of case” value

reconsider his published views. *Id.* at 2549 n.4 (“Even so, I think we [Scott & Stuntz] overemphasized the role trials play—and hence the role law plays—in plea bargains.”).

99. Stuntz, *supra* note 59, at 2550.

100. *Id.* at 2551.

101. Here, my model differs slightly from Stuntz’s. Stuntz assumed that prosecutors only file charges when they have at least a 75% chance of winning if the case went to trial. Stuntz justified this

higher than 50% (point E), both the prosecutor and the defendant prefer a five-year sentence to the expected outcome of trial, represented by AB. In the terminology of negotiation theory, both sides have a BATNA (best alternative to negotiated agreement) worse than settlement, implying (setting aside barriers to negotiation) that they will settle.<sup>102</sup>

Now assume that the jurisdiction changes the penalty for armed robbery from ten years to twenty. Dotted line AC shows the new expected settlement values if plea bargaining worked in the shadow of trial outcomes, while solid line DF shows the new expected settlement values for our jurisdiction. Despite the change in substantive law we *still* anticipate that all armed robbery defendants will receive five-year plea deals. From this, Stuntz concluded that for many crimes, the details of substantive law are unlikely to affect plea outcomes.

Stuntz's point is important, but notice another feature of Figure 1: the expected settlement values for our jurisdiction (DF and EF) are horizontal lines. That means that so long as the strength of the government's case gets to the threshold starting point (D or E, depending on the maximum punishment for armed robbery), the strength of the government's case ceases to be relevant to the plea outcome. If the strength of the government's case does not reach D or E, the government will not file charges, but beyond these points, it does not matter.

Now in plain English. In some criminal cases, the prosecutor is a price setter, not a price negotiator.<sup>103</sup> And in setting plea prices (unlike when negotiating them) the prosecutor does not need to take into account the strength of her case.<sup>104</sup>

Several caveats are in order. Prosecutors can unilaterally set plea prices only when substantive law supplies large punishment differentials between available charges, and even then, only when prosecutors believe that the lesser punishment level fits the crime. But is this generally true? (More formally, do the Stuntzian conditions accurately describe American

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restriction on the theory that "prosecutors in this jurisdiction operate under severe resource constraints." *Id.* at 2552. The restriction, however, is unnecessary. There are many ways in which a prosecutor might deal with resource constraints, and it is far from inevitable that dismissing robbery cases in which the prosecutor could easily extract a plea would be a preferred strategy. I assume instead that prosecutors will only bring cases in which they can secure a plea to their preferred sentence. Thus, if the strength of the government's case would entail a settlement in the AE range, my assumption is that prosecutors would decline to charge.

102. See FISHER, *supra* note 2, at 102; Rebecca Hollander-Blumoff, *Getting to Guilty: Plea Bargaining as Negotiation Notes*, 2 HARV. NEGOT. L. REV. 115, 121–22 (1997).

103. Anne R. Traum, *Fairly Pricing Guilty Pleas*, 58 HOW. L.J. 437 (2015) ("In the guilty plea state, prosecutors set the 'price' for plea-bargaining through charging decisions.").

104. See Wright, *supra* note 24, at 93 ("When a defendant faces a possible life sentence after conviction at trial and the prosecutor offers to reduce charges, making possible a sentence of only a few years, the resulting guilty plea is considered voluntary so long as the defendant says the magic words at the guilty plea hearing. The strength of the defendant's available defense does not figure at all.").

criminal practice?) Certainly not always. There are two categories of cases in which plea prices surely are negotiated between the parties, not set by prosecutors unilaterally, and thus where uncertainty does affect prices. The first consists of criminal cases with high stakes, where the prosecutor's objective is more likely to be maximizing the sentence.<sup>105</sup> In high-stakes cases—think homicides and serious white collar offenses—the prosecutor is unlikely to believe that the lower level of punishment associated with a less serious charge fits the crime. When prosecutors seek to maximize sentences, they cannot set the plea price unilaterally, as defendants have no reason to voluntarily accept the maximum punishment. Thus, when the stakes are high, plea prices must be negotiated in the shadow of probable trial outcomes.

Second, the Stuntzian conditions may not apply (regardless of the stakes) when the government's case is very weak. Consider once more the jurisdiction depicted in Figure 1, where the statutory punishment for armed robbery is thirty years but prosecutors believe that the appropriate punishment is five years. Take the case of a defendant whose probability of conviction at trial is only 10%. Perhaps prosecutors filed charges believing the odds of conviction were much better, but subsequent developments hurt their case. The “expected outcome” of a trial for the defendant is three years—thirty years multiplied by the ten percent probability of conviction. The prosecutor will be unable to insist on her preferred five-year plea price, and will have to give the defendant an extremely favorable plea offer, dismiss the case, or (least likely) go to trial. This is the sort of scenario that gives rise to the “half a loaf is better than none” sentiment that Alschuler found endorsed by an “overwhelming majority of prosecutors.”<sup>106</sup> “When we have a weak case,” Alschuler reports a prosecutor telling him, “we’ll reduce to almost anything rather than lose.”<sup>107</sup>

High-stakes and very weak cases aside, there is good reason to believe that across a wide range of criminal matters, prosecutors can and do set plea prices. As Stuntz explained, “[p]lea bargains do not always, maybe not even usually, involve haggling over a surplus as in negotiated settlements in civil cases.”<sup>108</sup> Gerard Lynch makes a similar point in more vivid language. The “rules” in criminal cases, Lynch observes, “are more like those of the supermarket than those of the flea market: there is a fixed price tag on the case, and you will get no farther ‘bargaining’ with the prosecutor than you

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105. See Epps, *supra* note 90, at 826 (“For example, murder is a particularly reprehensible crime, and so prosecutors tend to have strong incentives to enforce homicide laws to their full limits. And for this reason, the written law closely matches the law actually applied.”).

106. Alschuler, *supra* note 50, at 223.

107. Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 59 (1968).

108. Stuntz, *supra* note 59, at 2554.

will by making a counteroffer on the price of a can of beans at the grocery.”<sup>109</sup> And, as we have seen, when a prosecutor has sufficient leverage to set the price of a plea, she need not take the strength of her case into account.

The “strength of the government’s case” is the mirror image of uncertainty about whether the defendant is guilty or innocent. Such uncertainty takes several forms: legal, where there is doubt about how the law applies to the facts; factual, for example in cases of mistaken identity; or normative, where there is doubt as to whether and to what degree a defendant who is factually and legally guilty deserves to be punished. When the “Stuntzian conditions” apply, uncertainty about the defendant’s guilt or innocence has no effect on the price of pleas.<sup>110</sup> An obviously guilty robber in the jurisdiction represented by Figure 1 will receive the same level of punishment (five years) as a person accused of robbery with a good, but less than ironclad, mistaken identity defense, notwithstanding the latter’s superior prospects of an acquittal if his case went to trial.

Thus in a range of cases, plea prices do not take uncertainty into account.<sup>111</sup> But is that a problem? On one account, it would be useful if plea prices *never* incorporated uncertainty.<sup>112</sup> If prosecutors could not give favorable plea offers to defendants who might be innocent, those defendants would be more likely to take their cases to trial, where some would be acquitted. A system in which uncertainty *never* impacted plea prices would

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109. Lynch, *supra* note 77, at 2130.

110. At least, not once the probability crosses the prosecutor’s threshold for filing a case. Depending on the magnitude of the most severe punishment available, that threshold might be below 50%.

111. A recent study by criminologists Shawn Bushway, Allison Redlich, and Robert Norris might be seen as evidence against this claim. Shawn D. Bushway, et al., *An Explicit Test of Plea Bargaining in the Shadow of Trial*, 52 CRIMINOLOGY 723 (2014). Bushway et al. asked judges, prosecutors, and defense lawyers to evaluate the probability of conviction, the sentence the defendant would receive if convicted at trial, and the plea price that they would find acceptable for a robbery scenario. *Id.* at 733–35. To test the relationship between the probability of conviction and the expected plea sentences, the authors varied both the quantity and quality of evidence against the defendant. They found that for prosecutors and defense lawyers (the story was more complicated for judges), as the probability of conviction increased, so did the price of a plea. *Id.* at 739–49. While the study is intriguing and offers many insights, it does not disprove the claim that uncertainty about guilt can become irrelevant to plea outcomes under contemporary conditions. This is because the scenario did not incorporate tools of prosecutorial leverage. The defendant in the scenario was charged with only one crime—first degree armed robbery, carrying a maximum penalty of twenty-five years. See Shawn D. Bushway, et. al, *Supporting Information for “An Explicit Test of Plea Bargaining in the ‘Shadow of the Trial.’”* WILEY ONLINE LIBR. 9 (2014), <http://onlinelibrary.wiley.com/doi/10.1111/crim.2014.52.issue-4/issuetoc>. To more closely mimic plea bargaining under contemporary conditions, the scenario could have included a more serious charge—e.g., attempted murder—that a prosecutor could bring or threaten to induce an armed robbery plea at the sentencing level that she preferred. Because the study omitted tools of prosecutorial leverage, it cannot reveal whether a “shadow of trial” model fits a plea bargaining regime overrun by such leverage.

112. This is the premise of proposals to fix the size of trial penalties, discussed *infra* at notes 137–144 and accompanying text.

thus convict fewer innocent defendants than does a system where prosecutors can reduce a plea to almost nothing rather than risk acquittal at trial. This logic, however, supposes that plea bargaining exists to sort cases that can be resolved without trial from those cases that should be tried. And perhaps that is how plea bargaining should work. But it is not how plea bargaining *does* work. American plea bargaining is about processing cases as quickly as possible, not correctly sorting defendants deserving punishment from those who do not.<sup>113</sup> If the trial constraint identified in Part I is real, that is not going to change.

To avoid convicting the innocent—or to minimize it, as errors are inevitable regardless—would require adjudication. But our criminal justice system’s commitment is to minimizing trials, not errors. This is the awful reality of “post-trial” criminal justice. In a post-trial world, the relevant question is whether the innocent—or the plausibly innocent—should be punished *less* than the unambiguously guilty? My view—that they should—is based on a decidedly second-best morality. Of course it is “wrong to convict the innocent.”<sup>114</sup> But conditional on doing that, it is better to punish the innocent less. On *that* logic, the suppression of uncertainty counts as a deep pathology of the plea-bargaining status quo.

### III. THE TRIAL CONSTRAINT AND PLEA BARGAINING REFORM

As noted in Part II, plea bargaining has many critics in the criminal law academy.<sup>115</sup> It should be no surprise, then, that ideas about how to fix plea bargaining have proliferated. Reform has been on the agenda since at least the late 1960s, when plea bargaining came under intense scrutiny.<sup>116</sup> Early reform efforts focused on abolishing plea bargaining,<sup>117</sup> or, alternatively, streamlining trials to make them cheaper and more accessible.<sup>118</sup> The trial

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113. Alschuler, *supra* note 90, at 922–23.

114. *Id.* at 922.

115. *See supra* note 81 and accompanying text.

116. *See* Alschuler, *supra* note 107, at 51 (“Most of these observers recognize that the guilty-plea system is in need of reform, but the legal profession now seems as united in its defense of plea negotiation as it was united in opposition less than a half-century ago.”); *see also* Ortman, *supra* note 18, at 551.

117. During the last quarter of the twentieth century, Albert Alschuler and Steven Schulhofer each argued that plea bargaining should be rejected root and branch. *See, e.g.,* Albert W. Alschuler, *Implementing the Criminal Defendant’s Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 937–48 (1983); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037 (1984). John Langbein likewise employed comparative analysis to show the feasibility of criminal justice without plea bargains. *See* John H. Langbein, *Land without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204, 225 (1979).

118. Proposals to substantially curb plea bargaining by reimagining the criminal trial as shorter and less expensive were offered by some of the leading abolitionists. *See* Alschuler, *supra* note 117, at 995–1023; Schulhofer, *supra* note 117, at 1082–86. More recently, Gregory Gilchrist has argued that the proportion of criminal cases resolved by plea could be reduced (and the proportion resolved by trial

rate's continued decline in the late twentieth-century confirms that neither sort of reform gained any real-world traction.<sup>119</sup> Over time, the emphasis shifted to smaller, more incremental reform. The pace accelerated when, in 2012, the Supreme Court issued a pair of decisions confirming that a defendant may assert that his counsel's plea bargaining performance was constitutionally ineffective.<sup>120</sup> Many observers saw these cases as "game changers,"<sup>121</sup> and, since 2012, dozens of books and law review articles on plea bargaining have generated a large array of reform strategies.<sup>122</sup>

The academy's renewed attention to plea bargaining reform is cause for celebration, but an obstacle may be lurking within this growing literature. Many prominent proposals to reform plea bargaining would, if implemented, likely increase the proportion of criminal cases resolved by trial rather than plea. Sometimes increasing the trial rate is the reformer's explicit goal. Often, as we will see, it is the unstated but predictable consequence of a proposal. Yet if the trial constraint is real, reforms that would increase the trial rate will, at least in the near term, run straight into it. That may not make the reforms impossible, but it means that they will be more difficult than they should be on their merits.

This Section shows that scholarship on plea bargaining reform often does not account for plea bargaining's seemingly unidirectional effect on the trial rate. The implication is that the aggregate plea bargaining literature (or parts of it) may have fallen prey to what Eric Posner and Adrian Vermeule call the "inside/outside" fallacy.<sup>123</sup> The fallacy, which Posner and Vermeule believe is common in public law scholarship,

occurs when the theorist equivocates between the external standpoint

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increased), if prosecutors and defendants negotiate over specific trial rights. See Gilchrist, *supra* note 48; Gregory M. Gilchrist, *Counsel's Role in Bargaining for Trials Essays*, 99 IOWA L. REV. 1979 (2014). Along similar lines, John Rappaport explained that "defendants can, and sometimes do, 'unbundle' their jury trial rights and trade them piecemeal, consenting to streamlined trial procedures to reduce their sentencing exposure." John Rappaport, *Unbundling Criminal Trial Rights*, 82 U. CHI. L. REV. 181, 181 (2015).

119. See, e.g., MILTON HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS 162 (1978) ("[T]o speak of a plea bargaining-free criminal justice system is to operate in a land of fantasy."). Reflecting in 2013, Alschuler observed that "[t]he time for a crusade to prohibit plea bargaining has passed." Alschuler, *supra* note 121, at 706.

120. See *Missouri v. Frye*, 132 S. Ct. 1399 (2012); *Lafler v. Cooper*, 132 S. Ct. 1376 (2012).

121. I. Bennett Capers, *The Prosecutor's Turn*, 57 WM. & MARY L. REV. 1277, 1278 (2016). Not all observers, however, were so enthused. See Russell D. Covey, *Plea-Bargaining Law After Lafler and Frye*, 51 DUQ. L. REV. 595, 608 (2013) ("In one sense, the Lafler and Frye cases are 'no big deal.'"); Alschuler, *supra* note 52, at 679 ("These remarks [lauding Lafler and Frye] bring to mind some notable words of Justice Holmes: 'Oh bring in a basin.'").

122. A partial list of these pieces can be compiled from the footnotes in this Section. Given the volume of reform proposals and my inclination to keep this literature review relatively brief, my coverage is illustrative, not exhaustive.

123. Eric Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1745 (2013).

of an analyst within the constitutional order, such as a political scientist, and the internal standpoint of an actor within the system, such as a judge . . . . In a typical pattern, the diagnostic sections of a paper draw upon the political science literature to offer deeply pessimistic accounts of the ambitious, partisan, or self-interested motives of relevant actors in the legal system, while the prescriptive sections of the paper then turn around and issue an optimistic proposal for public-spirited solutions.<sup>124</sup>

Posner and Vermuele's sketch of the inside/outside fallacy fits the (aggregate) literature on plea bargaining. At the level of description, the literature demonstrates that criminal justice policymakers constructed a system of plea bargaining that ensures that only a tiny percentage of criminal cases make it to trial.<sup>125</sup> But at the level of prescription, the literature argues that these same policymakers should adopt measures that would produce more trials. Combining the outsider's perspective for description with the insider's perspective for prescription has helped to obscure a fundamental point—the revealed preference of criminal justice policymakers to avoid criminal trials.<sup>126</sup>

The subsections that follow offer a taxonomy of prominent plea bargaining reform proposals that would likely increase trial rates. I divide these reforms into three categories: (i) proposals to change the coercive background environment of plea bargaining, (ii) proposals to inject adjudication into plea bargaining, and (iii) proposals to detect outlier plea deals.<sup>127</sup> Within each category, we will see proposals that would likely—by design or as an incidental consequence—increase the trial rate.

To be clear, when I argue that a plea-bargaining reform proposal would lead to more trials, I am *not* objecting to the proposal's normative merits. Many—perhaps all—of the reform proposals discussed in this section would, if implemented, lead to a fairer, more rational, less punitive, and ultimately more just process for adjudicating criminal cases. My protest

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124. *Id.* at 1745.

125. *See supra* Section II.B.2.

126. *See supra* Part I. My critique applies to the plea bargaining literature as a whole. I do not mean to suggest that any of the individual pieces discussed in this Part is necessarily subject to an inside-outside objection.

127. The taxonomic exercise is reductionist (like all lumping exercises), but it reveals family resemblances between reform proposals that may at first glance seem unrelated. *Cf.* Bradley C. Karkkainen, "New Governance" in *Legal Thought and in the World: Some Splitting As Antidote to Overzealous Lumping*, 89 MINN. L. REV. 471, 479 (2004) ("It is sometimes said that the two most basic intellectual moves are 'lumping' and 'splitting'—that is, finding relevant common characteristics that allow us intelligently and usefully to group apparently distinct phenomena into a single category ('lumping'), and finding relevant distinguishing characteristics that allow us intelligently and usefully to separate otherwise similar phenomena into distinct classes ('splitting').").

goes only to their prospects in a world where (as I have asked the reader to assume) the trial constraint exists.

### A. Making the Environment Less Coercive

The first set of reforms seek to change the coercive environment in which plea bargaining happens. Reforms targeting coercion include:

a. *Eliminate Overlapping Offenses and Mandatory Sentencing.* We have already seen the effect of overlapping offenses and draconian sentencing laws (including but not limited to mandatory minimums) on plea bargaining. These are the driving forces behind large trial penalties, which are in turn the driving forces behind the deep pathologies of status quo plea bargaining.<sup>128</sup> Many in the criminal law academy have argued that narrowing overlapping offenses and repealing draconian sentencing laws are crucial, even necessary, steps in making plea bargaining a responsible way of doing criminal adjudication.<sup>129</sup> They get no quarrel here.<sup>130</sup>

But such proposals come with a complication. Precisely because overlapping offenses and severe post-trial sentencing laws are the principal source of prosecutorial leverage in plea bargaining, eliminating them *ceteris paribus* would lead to more—perhaps many more—trials. Overlapping offenses and draconian sentencing ensure that a guilty plea will (almost) always be the dominant option for defendants.<sup>131</sup> Take out these features of the substantive law and criminal adjudication would return to regular order, where going to trial is sometimes better than negotiating a plea. An increase in the trial rate is thus a predictable consequence of eliminating overlapping offenses and repealing draconian sentencing laws.

b. *Bail Reform.* Next to overlapping offenses and mandatory sentencing, pretrial detention may be the leading source of coercion in plea bargaining, particularly in low-level cases involving defendants who cannot afford to post bail.<sup>132</sup> As Alexandra Natapoff observes, “many arrestees

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128. See *supra* notes 58–65 and accompanying text.

129. See, e.g., Darryl K. Brown, *Prosecutors and Overcriminalization: Thoughts on Political Dynamics and A Doctrinal Response*, 6 OHIO ST. J. CRIM. L. 453, 465 (2009) (proposing reinvigorated merger doctrine as a check against overlapping offense); Cynthia Alkon, *An Overlooked Key to Reversing Mass Incarceration: Reforming the Law to Reduce Prosecutorial Power in Plea Bargaining*, 15 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 191, 194 (2015) (“Legislative change alone will not reverse mass incarceration, but targeted legislative reform could help to change the overly coercive atmosphere of plea bargaining.”); Covey, *supra* note 49, at 968 (“Undoubtedly, a major source of plea-market distortion stems from the oversupply of penal leniency that is a product of draconian sentencing laws and prosecutorial discretion. Reducing this oversupply is critical to establishing a fairer plea market equilibrium.”); Langer, *supra* note 80, at 287 (“Commentators and policy-makers have made important proposals to advance these goals that include clarifying definitions and reducing the number and overlap of criminal offenses . . .”).

130. See *infra* Part IV.

131. In the language of negotiation theory, they ensure that prosecutors and defendants in many cases have BATNAs worse than settlement. See *supra* text accompanying note 102.

132. See Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 715 (2017) (“For misdemeanor defendants who are detained pretrial, the worst punishment may come before conviction. Conviction generally means getting out of jail; people detained

plead guilty to petty offenses in exchange for a sentence of time served as a way of terminating what might otherwise be a longer period of incarceration than the offense carries.<sup>133</sup> Reformers have proposed reducing or even eliminating the use of monetary bail as a means of easing the pressure on defendants in low-level cases to plead guilty.<sup>134</sup>

These reforms get no quarrel from me either. But again, consider their likely effect on the trial rate. In a sophisticated empirical study comparing case outcomes for detained and released defendants in two large urban counties, Will Dobbie, Jacob Goldin, and Crystal Yang found evidence for the common-sense proposition that defendants released before trial have stronger negotiating positions vis-à-vis prosecutors than in-custody defendants.<sup>135</sup> For many defendants, that likely translates into a better plea deal, not a trial. But for some portion of defendants, pretrial release will make the difference between having a BATNA better than the prosecutor's plea offer or not. In other (less jargony) words, there are surely in-custody defendants in low-level cases currently pleading guilty to avoid prolonged pre-trial detention who would, if released, decide to contest the charges. If so, bail reform that reduces pre-trial detention entails more trials.<sup>136</sup>

c. *Trial Penalty Caps.* Another proposal to curtail coerciveness is to place explicit caps on trial penalties.<sup>137</sup> Such caps could take the form of “fixed discounts,” where defendants who plead guilty are entitled to a specific “discount” off the sentence they would have received after trial, and not more.<sup>138</sup> Or, as Russell Covey has suggested, a trial penalty cap could instead be a “ceiling” on post-trial sentences, where the maximum sentence a defendant could receive after trial is based on a fixed multiplier of the

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on misdemeanor charges are routinely offered sentences for ‘time served’ or probation in exchange for tendering a guilty plea.”); Will Dobbie et al., *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 236 (2018) (“We find that pre-trial release significantly decreases the probability of conviction, primarily through a decrease in guilty pleas.”).

133. Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1322 (2012).

134. See Stevenson & Mayson, *supra* note 93, at 7 (“Reducing reliance on monetary bail is a central goal of many pretrial reform advocates.”); JUSTICE POLICY INSTITUTE, BAIL FAIL: WHY THE U.S. SHOULD END THE PRACTICE OF USING MONEY FOR BAIL 13 (2012), <http://www.justicepolicy.org/uploads/justicepolicy/documents/bailfail.pdf>.

135. Dobbie et al., *supra* note 132, at 234.

136. That does not, of course, mean that it will be impossible, but only that it will be more difficult than it should. Indeed, recent bail reform efforts have already begun to show results. See, e.g., Susan N. Herman, *Getting There: On Strategies for Implementing Criminal Justice Reform*, 23 BERKELEY J. CRIM. L. 32, 58 (2018); Devin Taseff, Note, *The Illinois Bail Reform Act of 2017: Roadmap to Reform, or Reform in Name Only?*, 38 N. ILL. U. L. REV. 528, 531 (2018).

137. See, e.g., Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1245 n.30 (2008).

138. *Id.* In a similar vein, Oren Gazal-Ayal proposes a “partial ban” on plea bargaining, which would “restrict sentence concessions to a certain percentage of the post-trial sentence.” Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 CARDOZO L. REV. 2295, 2313 (2006).

most favorable plea offer he had received.<sup>139</sup> Covey persuasively argues that an enforceable cap on trial penalties would transform plea bargaining, making it less coercive and more protective of innocent defendants.<sup>140</sup>

But consider what a trial penalty cap would do to trial rates. Covey allows that a cap would affect the mix of cases that make it to trial.<sup>141</sup> Indeed, that is one of its virtues. An enforceable cap prevents prosecutors from giving extremely lenient plea offers to defendants in cases where the evidence is weak; as a result, the cases more often go to trial, and, some portion of the time, innocent defendants are acquitted.<sup>142</sup> A modest trial penalty cap does more than change the mix of cases, however.<sup>143</sup> It would also change the overall trial rate.<sup>144</sup> The “weak evidence” cases that a trial penalty cap would route to trial are cases that are currently *not* going to trial. Unless a trial penalty cap would offset that by dissuading the few defendants who are currently opting for trial from doing so—and there is no obvious reason why it would—it would likely increase the overall trial rate.

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139. Covey, *supra* note 137, at 1242. Covey argues that a ceiling on trial sentences would be more effective than a fixed discount on pleas because discounts are “easily evaded through substitute bargaining mechanisms, including charge and fact bargaining, and most fixed-discount proposals provide few effective mechanisms to prevent the parties from engaging in alternative bargaining.” *Id.* at 1260. Covey’s criticism of fixed discounts is surely correct. See Jenia Iontcheva Turner, *Plea Bargaining*, in 3 ACADEMY FOR JUSTICE, A REPORT ON SCHOLARSHIP AND CRIMINAL JUSTICE REFORM 88–90 (Erik Luna ed., 2017). But trial sentence ceilings, Covey’s alternative, are just as easily circumvented: prosecutors need only condition the *making* of an offer on its *acceptance*. Covey recognizes this and argues that “prosecutors should not be permitted to make the extension of a plea offer contingent on its acceptance.” Covey, *supra* note 137, at 1273. It is unclear, however, how such a principle could be enforced.

140. Covey, *supra* note 137, at 1245.

141. *Id.* at 1250.

142. *Id.* at 1250–51.

143. The proponents of this reform favor a “modest” cap. See *id.* at 1242 (“Pursuant to the ceiling, no defendant could receive a punishment after trial that exceeded the sentence he could have had as a result of a plea offer by more than a modest predetermined amount.”); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1560–61 (1981) (proposing “relatively modest, prescribed sentencing concession of ten or twenty percent of the sentence received for a guilty plea”); see also Wright, *supra* note 24, at 111 (“The trial distortion theory, therefore, promotes guilty plea negotiations and sentence practices that offer only modest plea discounts to defendants.”).

144. To be sure, theoretically there is some fixed trial penalty that would be large enough to ensure no overall increase in the trial rate. As Schulhofer notes, with a sufficient explicit trial penalty, “a jurisdiction could retain control over its guilty plea rate and preserve its . . . level of resources committed to trials.” Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 2004 (1992). Schulhofer’s point is true in theory and perhaps was even practical in 1992, when trial rates were around 10%. See *supra* note 25 and accompanying text. But what sort of explicit trial penalty would be required to preserve current rates? Considering the size of status quo trial penalties, see *supra* notes 54–57 and accompanying text, a “modest” penalty probably would not suffice.

### B. *Injecting Adjudication*

As we have seen, many critics, and even some supporters, believe that plea bargaining is tantamount to conviction without adjudication.<sup>145</sup> A second set of reform proposals seek to inject meaningful adjudication into the plea process.

*External Review.* Some reformers propose to supplement the existing plea process with review by a body independent of the prosecutor-defender-judge workgroup. Laura Appleman's "plea jury" proposal is illustrative.<sup>146</sup> To infuse adjudication and participatory democracy into a plea bargaining regime that lacks it, Appleman would require, as a precondition to any plea, that a jury determine: "(1) whether the facts stated fit the alleged crime; (2) whether the plea was knowing and voluntary; (3) and whether the proposed sentence was appropriate."<sup>147</sup> Appleman explains that this would "inject some genuine adjudication into our system of plea bargains, something that is badly needed."<sup>148</sup>

Appleman recognizes that running guilty pleas through the gauntlet of jury review "might make for slower processing of defendants to jail, prison, or probation."<sup>149</sup> But that would not be the plea jury's only effect on criminal case processing; jury review of pleas would also lead to more trials. Unless the plea jury merely rubber-stamped deals negotiated by the parties—in which case it would not serve the purposes Appleman sets out for it—it would, in some cases, find that the facts stated did *not* fit the alleged crime, that the plea was *not* knowing and voluntary, or that the proposed sentence was *not* appropriate.

Sometimes, as Appleman suggests, the parties would then return to the negotiating table and come back with a new deal that satisfied the jury.<sup>150</sup> In those cases the jury's rejection of the initial deal would affect only a plea's price. But in some cases—the proportion is unknowable—the plea jury's refusal to accept a negotiated plea would necessitate a trial.<sup>151</sup>

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145. See *supra* Section II.B.

146. Laura I. Appleman, *The Plea Jury*, 85 IND. L.J. 731 (2010). Additional reforms along these lines include Roger Fairfax's proposal to make grand juries the independent reviewers of pleas. Roger A. Fairfax, Jr., *Thinking outside the Jury Box: Deploying the Grand Jury in the Guilty Plea Process*, 57 WM. & MARY L. REV. 1395 (2016), and John Blume and Rebecca Helm's citizen review panels, which would evaluate post-conviction innocence claims by prisoners who pled guilty. Blume & Helm, *supra* note 68, at 186. Such panels, Blume and Helm contend, would counteract plea bargaining's innocence problem.

147. Appleman, *supra* note 146, at 748.

148. *Id.* at 750.

149. *Id.* at 768.

150. *Id.* at 749.

151. Appleman acknowledges as much, noting that when the jury rejects a plea, "the defendant could back out of the plea deal entirely and take his chances with a trial." *Id.* at 749.

Engrafting a plea jury onto the plea process means that some cases that are currently resolved by plea would have to be resolved by trials.<sup>152</sup>

*Hard Screening.* In a classic article, Ronald Wright and Marc Miller propose a different mechanism for injecting adjudication into criminal procedure. Adjudication, they contend, need not come from “external reviewers,” such as judges or juries, but can instead take place “within the [prosecutor’s] office.”<sup>153</sup> They contend that the traditional “alternatives” to plea bargaining—abolishing pleas or shortening trials<sup>154</sup>—miss a viable prosecutorial strategy: thorough pre-charge prosecutorial screening combined with a firm refusal to negotiate reductions after charges are filed. The strategy, which they label “hard screening,” allows prosecutors to reduce or eliminate plea “bargaining,” in the sense of deals that are actively haggled for between prosecutor and defendant. Through hard screening, Wright and Miller argue, prosecutors can avoid the most unpleasant aspects of plea bargaining in a cost-effective manner.<sup>155</sup>

But what of hard screening’s consequences for trial rates? Because prosecutors will have eliminated the weakest cases before filing charges, it is likely that more defendants would enter open guilty pleas than in jurisdictions without hard screening. If the evidence against the defendant is overwhelming, there may be little point to undergoing the ordeal of trial, especially if the defendant must pay his own attorneys. But it seems unlikely that *all* defendants who could be persuaded to plead guilty via bargaining would accede to an open plea under hard screening. Where prosecutors refuse to negotiate reductions after charges are filed, defendants who stand a reasonable prospect of acquittal have a powerful incentive to forge ahead to trial.

That hard screening entails more trials is not just a matter of speculation. Wright and Miller grounded their analysis in detailed data from the office of former New Orleans District Attorney Harry Connick, Sr.<sup>156</sup> Immediately after Connick took office and implemented hard screening, the number of trials in New Orleans exploded. In the final year of Connick’s predecessor’s tenure, the district attorney’s office tried 190 cases. By the third year of Connick’s term, the number was over one-thousand, and it remained “around the same level of up to 1,000 per year” for the next twenty years.<sup>157</sup>

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152. Appleman notes that “[t]he reality of the modern criminal justice system prevents any increase in jury trials . . .” *Id.* at 761.

153. Wright & Miller, *supra* note 68, at 49.

154. *See supra* notes 117–118 and accompanying text.

155. Wright & Miller, *supra* note 68, at 57–58.

156. *Id.* at 59.

157. *Id.* at 76. Wright and Miller acknowledge that “[t]raditional assumptions about the plea bargain/trial tradeoff would predict an increase in trials from a decrease in plea bargains,” but argue that “we have shown that the traditional assumptions are misguided, and the actual effect on trial rates of implementing the screening/bargaining tradeoff is hard to predict.” *Id.* at 59. Wright and Miller show

### C. *Detecting Outliers*

A third category of plea bargaining reforms consists of measures meant to detect outlier plea bargains produced by bad lawyering, cognitive biases, prosecutorial overreach, and more. Perhaps the most prominent of these is the proposal of Stephanos Bibas (then a law professor and now a judge on the Third Circuit) to combat the “chronic misunderstandings and irrationality” in plea bargaining via consumer protection-style regulation.<sup>158</sup> For example, to counteract the pressure that defendants feel to plead guilty, Bibas suggests a “cooling-off period for plea bargains authorizing five years’ imprisonment or more.”<sup>159</sup> Bibas also offers a range of consumer protection-style disclosure requirements that would “give defendants fair warnings of the sentences they are likely to receive in exchange for their pleas.”<sup>160</sup> Like consumer protection laws, Bibas’s plea bargaining rules would ensure that defendants not hastily enter pleas based on an incomplete or faulty understanding of the terms.

If one’s goal is to construct a more humane, rational, and just plea bargaining system, Bibas’s ideas are clearly good ones. Why, then, hasn’t consumer protection-style regulation flooded the plea bargaining zone? The trial constraint suggests an explanation.

For all the similarities that Bibas points out between consumers and defendants, they differ in the most critical dimension. When a company makes a legally-mandated disclosure that persuades a would-be consumer not to do business with the company, the would-be consumer walks away. The consumer protection law has done its work, and the person is no longer a would-be consumer. When a prosecutor or judge makes a legally-

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that the traditional assumptions about how *prosecutors* can respond to plea bargaining are misguided. Yet two other key players—defendants and judges—must also be considered. As noted in the text, defendants in hard screening jurisdictions have more reason than defendants in traditional plea bargaining jurisdictions to insist on trial. Still, as Wright and Miller point out, a hard screening regime could maintain a negligible trial rate if judges sentence defendants who go to trial much more harshly than defendants who plead guilty. *Id.* at 75–76. But if so, hard screening merely substitutes one form of coercive plea bargaining for another. That is, hard screening with judicially imposed trial penalties converts plea bargaining from a practice that plays out between prosecutors and defendants behind closed into a practice that involves judges and defendants communicating with winks and nods. That is how Gerard Lynch interpreted Wright and Miller’s data from New Orleans. Connick’s hard screening policy did not actually eliminate plea bargaining in New Orleans, Lynch observed, but rather turned it into an “implicit bargain between defendants and judges,” through which “defendants who plead guilty receive an imprecise, unannounced, yet roughly predictable sentencing discount from judges in exchange for their waiver of rights.” Gerard E. Lynch, *Screening versus Plea Bargaining: Exactly What Are We Trading Off?*, 55 STAN. L. REV. 1399, 1402 (2003).

158. Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1152 (2011).

159. *Id.* at 1155.

160. *Id.* at 1156. For a related reform proposal, see Covey, *supra* note 49, at 964 (arguing for “[b]argaining at the retail, rather than the wholesale, level”).

mandated disclosure to a defendant that dissuades the defendant from pleading guilty, the defendant is still a criminal defendant. Bibas's rule has done its job, except now, unless the prosecutor or judge can find a way to put the broken deal back together, he is a defendant heading for trial. Consumer protection-style rules governing plea bargaining would dissuade some defendants from pleading guilty and push them to insist on trials. As such, the trial constraint implies that policymakers are unlikely to adopt them. Is that just? Of course not. It is wretched that maintaining a negligible trial rate depends on forcing some half-informed defendants to make hurried decisions with only a dim sense of the consequences. But that is the pathological structure of our criminal process.

#### IV. TOWARDS SECOND-BEST CRIMINAL PROCEDURE

The first three Parts add up to an impasse. Part II described two deep objections to status quo plea bargaining—it coerces defendants to convict themselves and in many cases (though not all) it renders uncertainty irrelevant to punishment. The reform measures described in Part III would ameliorate these status quo pathologies. Indeed, because they curtail prosecutorial leverage, the proposals discussed in Section III.A—eliminating overlapping offenses and draconian sentencing, reforming pre-trial detention, and/or capping trial penalties—might even be *necessary* steps in constructing a reasonable plea bargaining system. Yet the reforms described in Part III—*especially* those targeting prosecutorial leverage—would likely increase the trial rate. If the trial constraint posited in Part I is real, that means that the Part III reforms will be unduly difficult to accomplish in the near-term.

This Part explores a “second best” way out of the impasse. Specifically, this Part shows that if we want to make the plea bargaining reforms discussed in Part III feasible, we could combine them with reforms that would simultaneously make formal criminal litigation *inefficient*. The logic comes from the general theory of second best. Efficient criminal procedure would be part of “first best” criminal justice, but if strategic inefficiency could make criminal trials undesirable to both sides, then prosecutorial leverage could be eliminated without increasing trial rates. The idea is to make American criminal justice more like American civil justice, which achieves trial rates comparable to the criminal justice system without (typically) giving overwhelming leverage to any party.<sup>161</sup> The “civil justice” model of reform would not lead to a first-best system—few familiar with

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161. See *infra* Section IV.B.2.

American civil justice would contend that it deserves such acclaim—but it could be less pathological than the status quo.

Beyond the civil justice model, this Part also briefly considers an alternative second-best strategy. If prosecutors were empowered to formally determine that a defendant is guilty (perhaps subject to some form of after-the-fact judicial review), they would not need leverage to coerce pleas. I call this the “administrative enforcement” second best, as it bears a loose resemblance to enforcement in administrative law. I argue that while the administrative enforcement second best is still plausibly better than the status quo in many cases, it is inferior to the civil justice model.

This Part proceeds in three sections. Section IV.A introduces the general theory of second best and its application to questions of institutional design. Section IV.B identifies and analyzes a second-best model of criminal justice based on making formal criminal procedure less efficient. Finally, Section IV.C considers, but ultimately rejects, a second best model of criminal justice patterned on administrative enforcement.

#### A. *The General Theory of Second Best*

If the trial constraint is real, and American criminal justice is stuck with a negligible trial rate, the logic of second best comes into play. The general theory of second best provides that when one of the inputs necessary to a Pareto (or “first-best”) optimum is unavailable, it is usually foolish to try to get all of the other inputs that the optimum would include.<sup>162</sup> As the theory’s progenitors, economists Lipsey and Lancaster, explain more formally, “[g]iven that one of the Paretian optimum conditions cannot be fulfilled, then an optimum situation can be achieved only by departing from all the other Paretian conditions.”<sup>163</sup> The theory has important implications for institutional reform. When the ingredients necessary for an optimal institutional ordering are attainable, reformers ought to focus on attaining them. But when one of them becomes unavailable, reformers should refrain from chasing the rest.

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162. See generally Adrian Vermeule, *System Effects and the Constitution*, 123 HARV. L. REV. 4, 17–18 (2009) (introducing general theory of second best); Lawrence B. Solum, *Constitutional Possibilities Essay*, 83 IND. L.J. 307, 311–12 (2008) (same); Thomas S. Ulen, *Courts, Legislatures, and the General Theory of Second Best in Law and Economics*, 73 CHI. KENT L. REV. 189, 192–96 (1998) (same); Richard S. Markovits, *A Basic Structure for Microeconomic Policy Analysis in Our Worse-Than-Second-Best World: A Proposal and Related Critique of the Chicago Approach to the Study of Law and Economics*, 1975 WIS. L. REV. 950, 967–76 (1975) (same).

163. R.G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11, 11 (1956).

Though developed in welfare economics, the theory of the second best “generalizes easily” to matters of law, policy, and institutional design.<sup>164</sup> In these domains, the theory often implies that a social policy (or law, institution, etc.) that is undesirable on first principles might be usefully checked by a second policy that is *also*, on first principles, undesirable.<sup>165</sup> This is because the relationship between policies is interactive rather than additive.<sup>166</sup> For example, Jon Elster, drawing on Tocqueville, notes that ancien régime France had three governance features that were, at first glance, objectionable: (i) “the royal administration had wide, ill-defined, and arbitrary powers,” (ii) “venality of office made bureaucracy impossible,” and (iii) the “obstruction of . . . highly politicized courts . . . made it difficult to pursue consistent policies.”<sup>167</sup> Yet, Elster observes, one could argue—and Tocqueville did—that in light of the first feature, the others were useful checks on monarchical abuse.<sup>168</sup>

Bruce Coram has explained that applying the theory of second best to questions of institutional design involves a difficulty that applying it to economic questions usually does not: “choosing an appropriate standard for the first best.”<sup>169</sup> That is, unlike in economics, where maximizing welfare is the agreed-upon goal, the designers of social and political institutions lack a shared objective. This requires a “flexible” application of the theory, Coram explains: “The most natural application of the first best in cases of non-market institutions would be to use it to refer to the set of rules being used for the model of the best arrangement.”<sup>170</sup> The first best, a “simplified model of mechanisms and outcomes that has been constructed under certain assumptions about information or preference revelation,” can then be used in the “general sense of an ideal, or benchmark, or unit of comparison, that has to be specified for each case.”<sup>171</sup>

To apply the theory of second best to criminal justice, we must specify what “first-best” criminal adjudication would look like. Of course, there are no *a priori* optima here. The ideal method for adjudicating criminal cases

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164. Vermeule, *supra* note 162, at 18; *see also* Robert E. Goodin, *Political Ideals and Political Practice*, 25 BRIT. J. OF POL. SCI. 37, 53 (1995) (“In its original application, of course, the general theory of second best was devised by economists for application to economics.”); Juha Räikkä, *The Problem of the Second Best: Conceptual Issues*, 12 UTILITAS 204, 204 (2000) (“The problem of the second best is not limited to economics alone.”).

165. Vermeule provides numerous examples. *See* Vermeule, *supra* note 162, at 18–23.

166. *Id.* at 18 (“Because the variables interact, a failure to attain the optimum in the case of one variable will necessarily affect the optimal value of the other variables.”).

167. JON ELSTER, EXPLAINING SOCIAL BEHAVIOR: MORE NUTS AND BOLTS FOR THE SOCIAL SCIENCES 440 (2007); *see also* Vermeule, *supra* note 162, at 18 (citing Elster).

168. ELSTER, *supra* note 167, at 440.

169. Bruce Talbot Coram, *Second Best Theories and the Implications for Institutional Design*, in THE THEORY OF INSTITUTIONAL DESIGN 92 (Robert E. Goodin, ed. 1996).

170. *Id.*

171. *Id.*

might, for instance, be inquisitorial.<sup>172</sup> But consistent with the adversarial ideal long thought to be central to American criminal justice,<sup>173</sup> I proceed conservatively (in the Burkean sense) on the assumption that “optimal” American criminal justice is what Gerard Lynch calls the “idealized model of adversary justice described in the textbooks.”<sup>174</sup> Just how do the textbooks describe adversary criminal justice? One popular high school civics textbook identifies the “Steps of Justice”: arrest, interrogation, grand jury proceeding, trial, punishment, and appeal.<sup>175</sup> Or consider this from a college American government text:

The second virtue of the adversary process is that it helps preserve the equality of the contending parties in criminal as well as civil cases. In criminal cases, because of the adversary process, the government is simply one of the contending forces. . . . [T]he routine of adversary proceedings do help keep the judge in the middle rather than on the side of the government.<sup>176</sup>

First-best criminal justice entails abundant, efficient trials that embody due process ideals with well-funded counsel on all sides. The textbook model is simplistic and artificial, and has likely never existed anywhere or at any time.<sup>177</sup> Yet, in a meaningful sense, it is what the criminal justice system professes to aim towards.

Of course, the first-best model runs headlong into the trial constraint. The robust trials “ingredient” is unattainable, or so I have asked the reader to assume for purposes of the thought experiment.<sup>178</sup> This is the starting point for second-best analysis. It does not, however, imply that our criminal justice system can, at present, be characterized as a second best; it may be a great deal worse.

The remainder of Part IV considers the implications of applying second-best logic applies to plea bargaining reform. The most important implication

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172. Indeed, Vermeule has suggested that adversarial criminal justice might be a second best, with inquisitorial criminal justice as the first best. See Vermeule, *supra* note 162, at 22.

173. LANGBEIN, *supra* note 37, at 1 (“The lawyer-conducted criminal trial, our so-called adversary system, is the defining feature of criminal justice in . . . countries like the United States that are founded on the English common law.”); Epps, *supra* note 90, at 764 (“While few criminal cases today are resolved through full-blown trials, the adversarial ideal nevertheless guides the entire criminal-adjudicative process.”).

174. Lynch, *supra* note 77, at 2121.

175. WILLIAM A. MCCLENAGHAN, *MAGRUDER’S AMERICAN GOVERNMENT* 594–95 (Teacher’s Ed. 2009).

176. THEODORE J. LOWI & BENJAMIN GINSBERG, *AMERICAN GOVERNMENT* 350 (1990).

177. See Coram, *supra* note 169, at 92 (“[T]he first best may be a simplified model of mechanisms and outcomes that has been construed under certain assumptions about information or preference revelation.”); see also Feeley, *supra* note 2, at 344–46 (pointing out that nineteenth century criminal trials were “perfunctory affairs that bear but scant resemblance to contemporary trials”).

178. See *supra* Part I.

is that it is an error for a reformer to conclude that just because some institutional feature is worthwhile on first principles, it is necessarily worthwhile for us. Efficient litigation might seem sensible in principle, and it would be in a first-best system. But as we will see, it is not necessarily sensible under second-best conditions.<sup>179</sup>

### *B. Second-Best Criminal Justice: The Civil Justice Model*

The objective for a “second-best” criminal procedure is to process cases without either (very many) trials or the pathological status quo tools of prosecutorial leverage. This Section describes such a second-best approach—the civil justice model. The basic idea is simple: adjust criminal procedure so that plea bargaining works more like civil settlement.

#### *1. The Basic Model*

So how can we encourage defendants and prosecutors to resolve criminal cases without resorting to coercive prosecutorial leverage? By making the formal litigation process *inefficient*—by filling it with procedural devices that add costs—both parties in criminal cases could be dissuaded from taking cases to trial. Policymakers could then eliminate the sources of prosecutorial leverage without affecting the trial rate. Setting constitutional constraints aside (for the moment), there are any number of possible mechanisms to increase the cost of formal criminal litigation. Prosecutor’s offices could be required to pay a large “tax” to the court (in effect, an intra-governmental transfer) for cases not resolved by plea. While a defense trial tax would likely not create useful incentives,<sup>180</sup> the explicit trial penalty—i.e., the trial penalty fixed by law, rather than by coercive charging and pre-trial detention—could be calibrated to have the equivalent effect.<sup>181</sup> Alternatively, litigation itself could be bloated (even more than it is) with inefficient procedures. And making trials expensive need not be about direct costs. Unpredictable trials are also costly to litigants, so this strategy could include measures that make it hard to predict trial outcomes.<sup>182</sup>

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179. See *infra* Section IV.B.

180. This is because the majority of defendants are indigent. See Russell C. Gabriel, *Public Defenders, Local Control, and Brown v. Board of Education*, 67 MERCER L. REV. 625, 637 (2016) (“80 percent of defendants are indigent.”). The point of a trial tax would be to disincentive a party from demanding trial, not to prohibit trials.

181. By “explicit” trial penalty, I mean a trial penalty that is set forth expressly in sentencing law. For instance, the law might provide that when a defendant is convicted at trial, his sentence is first calculated in the same manner as it would have been had he pleaded guilty, and then an additional 30% (or whatever number was required to maintain the trial rate) is tacked on as the “trial penalty.” See *supra* notes 137–144 and accompanying text.

182. Cf. Albert W. Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808, 1825 (1986) (“[T]he

Obviously, increasing litigation costs in criminal cases is deeply unappealing on first principles.<sup>183</sup> But in exchange for inflating the cost of litigation, reformers could eliminate the sources of prosecutorial leverage without violating the trial constraint. If neither side of a criminal case can credibly threaten to take a case to trial, overlapping offenses and draconian sentencing could be relaxed without worry that the prosecutor's loss of leverage would increase the trial rate. Whatever specific form litigation costs might take, the point is to reduce both sides' BATNAs to the point where settlement will almost always be in their interests. The cost of litigation, on this approach, serves the function that overlapping offenses and mandatory sentencing (and pre-trial detention in low-level cases) do in the status quo. In this second-best environment, introducing inefficiencies can counterintuitively make the system more efficient.<sup>184</sup>

While this approach would not change trial rates, bargaining would look different. As we have seen, in status quo plea bargaining, plea outcomes in many (though not all) cases are a function of one variable—the prosecutor's preferred level of punishment.<sup>185</sup> In these cases, the parties' relative probabilities of victory at trial do not matter. In a criminal justice system where the parties are both averse to formal litigation (but in which the prosecutor lacks coercive levers), plea outcomes would incorporate the parties' appraisals of the probability that the decision maker would find the defendant legally, factually, or (more controversially) normatively innocent.<sup>186</sup> The approach thus avoids one of the deep pathologies of status quo plea bargaining.<sup>187</sup>

An example will illustrate. Assume that armed robbery has a statutory maximum sentence of twenty years, with no mandatory minimum, such that following a conviction, the judge has discretion to impose a sentence anywhere from zero to twenty years. Prosecutor (*P*) and Defendant (*D*)

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lawlessness of our [civil] jury system—especially the largely unguided discretion that juries exercise in assessing damages—exerts pressure for settlement on risk-averse litigants on both sides.”)

183. Cf. Irving R. Kaufman, *Judicial Reform in the Next Century*, 29 STAN. L. REV. 1, 15 (1976) (“Legislatures, therefore, must make more stringent efforts to reduce the cost of justice and to render the litigation process simpler and more efficient.”).

184. Cf. Brown, *supra* note 64, at 223 (“But it can improve political decision-making—as a Pigouvian tax can improve decision-making—to acknowledge that the price of goods with negative externalities can be too low.”).

185. See *supra* text accompanying notes 99–110.

186. Normative innocence is more controversial because it implicates the question of jury nullification. The parties would be negotiating about the likelihood that a jury would acquit a defendant it believed to be factually and legally guilty beyond a reasonable doubt. On the nullification debate, see Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1683–84 (2010).

187. There is a caveat here. There are some cases—for instance, high stakes cases where the government has fairly weak evidence—that do go to trial now and result in acquittals, but would probably result in plea deals favorable to the defendant in the civil justice model. Depending on one's perspective, the status quo might be a better way of handling these outlier cases.

disagree about the probability of conviction at trial. *P* believes the probability of conviction is 90%; *D* believes it is 70%. The parties agree, however, that if *D* is convicted, the judge will sentence *D* to between twelve and fifteen years. If litigation is costless (no attorney fees, no trial penalty, etc.), there is no plausible settlement range. From *P*'s perspective, the expected outcome of trial is a range of between 10.8 and 13.5 years (i.e., the 90% chance of conviction multiplied by the 12–15 year sentencing range). *D* believes the expected outcome of trial is a range of 8.4 to 10.5 years. *P* is unwilling to offer anything less than 10.8 years and *D* will be unwilling to accept anything higher than 10.5. Both side's BATNAs are better than a negotiated settlement.

Now impose litigation costs. For *D*, assume that the law explicitly imposes a one-third discount for pleas. For *P*, assume that costs can be imposed equivalent to the utility that *P* receives from six years of imprisonment. The expected "value" of trial for *P* falls to a range from 4.8 to 7.5 years. *D* still expects the outcome of trial to be between 8.4 and 10.5 years. But *D* also expects that if he pleads guilty without an agreement, his sentence will be in a range from approximately 8 years to approximately 10 years (the 12–15 year range multiplied by the 33% discount). Now both sides are better off negotiating a sentence of between 7.5 (the best *P* can expect to do at trial) and 8 years (the best *D* can do in an open plea).<sup>188</sup> Litigation costs ensure that both side's BATNA is worse than negotiating.<sup>189</sup>

Making formal litigation undesirable while at the same time enacting the sorts of reforms discussed in Part III.A—that is, eliminating overlapping offenses and mandatory sentencing (and potentially money bail)—would produce a regime that resembles the contractual model of plea bargaining imagined by Easterbrook, Scott, and Stuntz.<sup>190</sup> It would also resemble segments of civil litigation.<sup>191</sup> While comparing civil and criminal

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188. The settlement range could be considerably bigger, moreover, if we take into account the parties' attitudes toward risk.

189. With a larger plea discount, it could easily become the case that the defendant's dominant option is to plead without an agreement. In our example, if the plea discount was 75%, *D* would expect a sentence of between 3 and 3.75 years if he pleads guilty without an agreement. As *P* will refuse any settlement offer below 4.8 years (the worst *P* can expect to do at trial), *D*'s best choice would be an open plea. While "open pleas" are not negotiated settlements, they nonetheless avoid trial, and so abide the trial constraint.

190. See *supra* text accompanying notes 70–80. To be sure, making trials undesirable to both sides would not solve plea bargaining's implementation problems. See *supra* notes 82–85 and accompanying text (describing critiques of plea bargaining focused on problems of implementation). In particular, the principal-agent problems that mar contemporary plea bargaining would remain, especially if indigent defense remains underfunded. My aim is to work through problems of plea bargaining design using second best theory. Implementation questions are important, but beyond my scope.

191. Cf. Robert D. Cooter & Daniel L. Rubinfeld, *Reforming the New Discovery Rules*, 84 GEO. L.J. 61, 62 (1995) ("Equalizing discovery costs eliminates distortions in bargaining power between the parties and promotes fairness.").

settlement rates is a fraught exercise,<sup>192</sup> it is noteworthy that civil and criminal cases settle at roughly comparable rates.<sup>193</sup> Yet civil litigation lacks (in many, albeit not all, cases)<sup>194</sup> any analogue to the overlapping offenses and mandatory sentencing that drive plea bargaining. With no party able to deploy extreme leverage, why do so few civil cases make it to trial? Scholars offer a range of explanations,<sup>195</sup> but civil litigation's expense plays a leading role. To take an extreme example, few will take a contract dispute with \$50,000 in controversy to judgment if the attorney fees are expected to be \$60,000.<sup>196</sup> The expense compels settlement in lieu of trial. And while distributional concerns in civil settlement are important,<sup>197</sup> civil plaintiffs and defendants negotiate on far more equal terms than do criminal prosecutors and defendants.<sup>198</sup>

## 2. *Approximating the Model*

But how can formal criminal litigation be made more inefficient, *not* setting aside constitutional constraints? The criminal trial itself is already famously slow and costly;<sup>199</sup> slowing it down even more seems unlikely. Yet there are opportunities to introduce inefficiencies on trial's front-end—

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192. One reason comparing civil and criminal settlement rates is fraught is that many civil disputes are resolved between the parties prior to litigation. Such disputes do not show up in court statistics at all. By contrast, subject to narrow exceptions, criminal matters almost always require some judicial process. The implication is that official court statistics likely undercount civil compared to criminal settlements.

193. Russell M. Gold et al., *Civilizing Criminal Settlements*, 97 B.U.L. REV. 1607, 1660 (2017).

194. To be sure, sometimes civil litigation is rife with leverage. In a "strike suit" or "nuisance suit," a civil claim is asserted "for the purpose of coercing a settlement rather than obtaining judicial relief." Paul A. LeBel, *Standing After Havens Realty: A Critique and an Alternative Framework for Analysis*, 1982 DUKE L.J. 1013, 1040 (1982). This is obviously not the kind of civil litigation to which I look as a model.

195. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 515–20 (2004) (identifying causes of civil trial decline). As Galanter observes, "going to trial has become more costly as litigation has become more technical, complex, and expensive." *Id.* at 517.

196. In law and economics, these are known as "negative expected value" claims. *See generally* Lucian Bebchuk & Alon Klement, *Negative-Expected-Value Suits*, in *PROCEDURAL LAW AND ECONOMICS* 341–48 (Chris Sanchirico, ed. 2011). The logic of negative expected value claims is discussed *infra* notes 228–234 and accompanying text.

197. Owen M. Fiss, Commentary, *Against Settlement*, 93 YALE L.J. 1073, 1077–78 (1984).

198. Gold et al., *supra* note 193, at 1659.

199. *See* LANGBEIN, *supra* note 37, at 9 ("In the two centuries from the mid-eighteenth to the mid-twentieth, a vast transformation overcame the Anglo-American institution of criminal jury trial, rendering it absolutely unworkable as an ordinary dispositive procedure . . ."); *see also* William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 802 (2006) ("The law of criminal procedure makes criminal trials more expensive than they otherwise would be."); Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 155 (1989) ("Our mistrust of the jurors whom we extol has led us to surround the criminal trial with an extraordinarily expensive and cumbersome collection of courtroom procedures.").

by introducing civil litigation-style discovery and motions—and its back-end—by providing more opportunities for interlocutory appeals.

The pre-trial phase of criminal litigation could be a lot heftier. Unlike in civil litigation, where motions to dismiss and summary judgment motions are major milestones in a case, pre-trial motions on the merits (as distinguished from suppression motions) rarely factor into criminal litigation.<sup>200</sup> Commentators have proposed giving motions to dismiss a more prominent role in criminal litigation,<sup>201</sup> creating a new summary judgment stage,<sup>202</sup> or both.<sup>203</sup> As a recent article by Russell Gold, Carissa Byrne Hessick, and F. Andrew Hessick proposes, defendants “could move for summary judgment, which would require the government to demonstrate with evidence that a reasonable jury could find beyond a reasonable doubt that the defendant satisfied every element of the crime.”<sup>204</sup> This proposal sets the standard for a defensive summary judgment motion at the same level as a federal motion for judgment of acquittal,<sup>205</sup> but a more demanding standard is conceivable. The judge, for example, could be instructed to grant summary judgment on a defendant’s motion unless the government’s evidence would render a conviction “appropriate,” giving the judge more leeway to consider normative questions and matters of credibility.<sup>206</sup> Moreover, although the Sixth Amendment precludes prosecutors from seeking offensive summary judgment on the ultimate question of whether the defendant is guilty, it would not preclude prosecutorial motions for summary judgment on a defendant’s affirmative defenses.<sup>207</sup> Drafting and responding to dispositive motions is time-consuming and expensive.<sup>208</sup> If one’s goal is to make criminal litigation more costly, and thereby to dissuade trials, expanding pre-trial motions practice makes good sense.

But if one wished to *really* boost the cost of pre-trial criminal litigation, the discovery process is the place to look. The core tools of civil

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200. See Gold et al., *supra* note 193, at 1642–43; James M. Burnham, *Why Don’t Courts Dismiss Indictments?*, 18 GREEN BAG 2D 347, 348 (2015).

201. Burnham, *supra* note 200.

202. Carrie Leonetti, *When the Emperor Has No Clothes: A Proposal for Defensive Summary Judgment in Criminal Cases*, 84 S. CAL. L. REV. 661, 691–94 (2011).

203. Gold et al., *supra* note 193, at 1642–43.

204. *Id.* at 1648.

205. See, e.g., *United States v. Miranda*, 425 F.3d 953, 959 (11th Cir. 2005) (“In considering a motion for the entry of a judgment of acquittal, a district court must view the evidence in the light most favorable to the government, and determine whether a reasonable jury could have found the defendant guilty beyond a reasonable doubt.”) (internal quotation omitted) (citing *United States v. Sellers*, 871 F.2d 1019, 1021 (11th Cir. 1989)).

206. This would, to be sure, depart somewhat from the civil litigation analogy.

207. Gold et al., *supra* note 193, at 1649.

208. John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522, 535 (2007) (“Drafting these motions and the responses to them is a crucial part of the lawyers’ work . . . . [P]arties are willing to pay lawyers to spend massive numbers of hours drafting and revising these long, detailed motions on which the outcome of the litigation turns.”).

discovery—interrogatories, requests for the production of documents, and depositions—are largely unknown in criminal litigation in most American jurisdictions,<sup>209</sup> a gap that many observers have urged policymakers to close.<sup>210</sup> Discovery is, of course, a major source of litigation costs in civil litigation.<sup>211</sup> Responding to interrogatories and requests for the production of documents is burdensome, as is preparing witnesses for depositions.<sup>212</sup> The higher discovery costs go, the more parties want to avoid them by settling.<sup>213</sup>

While I am certainly not the first to suggest expanding motions practice and discovery in criminal litigation, there are important distinctions between this proposal and those that have come before. First consider expanded motions practice. Prior proposals to create a summary judgment stage in criminal cases are premised on the value of judges' decisions on these motions. Thus, Gold and his coauthors argue that the principal virtue of dispositive motions in criminal cases is that they would "provide the court an opportunity to weigh in on the merits of the case . . . which may help the parties' view of the case converge and thus facilitate settlement," and further, that the "ability to challenge legal theories would also tend to clarify

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209. See Ion Meyn, *Discovery and Darkness: The Information Deficit in Criminal Disputes*, 79 BROOK. L. REV. 1091, 1094 (2014) ("In civil litigation, these powers take the form of depositions, interrogatories, and document requests. A criminal defendant, however, is rarely afforded such tools.").

210. Gold et al., *supra* note 193, at 1645–48; Daniel S. McConkie, *Judges as Framers of Plea Bargaining*, 26 STAN. L. & POL'Y REV. 61 (2015); Susan R. Klein, *Enhancing the Judicial Role in Criminal Plea and Sentence Bargaining*, 84 TEX. L. REV. 2023 (2006).

211. See Rebecca Love Kourlis, *Civil Justice at A Crossroads*, 11 PEPP. DISP. RESOL. L.J. 3, 9 (2010) ("The ABA, ACTL, and NELA surveys also asked about discovery costs, and more than 70% of respondents in all three surveys indicated their belief that it was too expensive."); John H. Beisner, *Discovering A Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 549 (2010) ("[P]retrial discovery process is broadly viewed as dysfunctional, with litigants utilizing discovery excessively and abusively."); Michael Boudin, *The Real Roles of Judges*, 86 B.U. L. REV. 1097, 1097 (2006) ("On the civil side, the courts have become victims of their own success in making litigation so 'fair' through discovery 'reforms' as to be both expensive and slow."); Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 547–48 & tbl.4 (1997) ("Among attorneys reporting discovery expenses, the proportion of litigation expenses attributable to discovery is typically fairly close to 50 [percent] . . . . Half estimated that discovery accounted for 25 [percent] to 70 [percent] of litigation expenses.").

212. See Bronsteen, *supra* note 208, at 534–35 (explaining high costs of document review, producing and responding to interrogatories and requests for production, and depositions in civil cases).

213. See Stephen C. Yeazell, *Getting What We Asked For, Getting What We Paid For, and Not Liking What We Got: The Vanishing Civil Trial*, 1 J. EMP. L. STUD. 943, 950 (2004) ("Discovery leads to a decline in trials because it both produces information and requires continued investment."); AM. COLL. OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System* 9 (2009), [http://www.uscourts.gov/sites/default/files/final\\_report\\_on\\_the\\_joint\\_project\\_of\\_the\\_actl\\_task\\_force\\_on\\_discovery\\_and\\_the\\_iaals\\_1.pdf](http://www.uscourts.gov/sites/default/files/final_report_on_the_joint_project_of_the_actl_task_force_on_discovery_and_the_iaals_1.pdf) ("Fewer than half of the respondents thought that our discovery system works well and 71% thought that discovery is used as a tool to force settlement.").

the law for future cases, which would facilitate future plea bargaining.”<sup>214</sup> These are important benefits, but note that they accrue only if judges actually rule on summary judgment motions. On the other hand, if the parties settle before filing these motions in order to avoid an expensive litigation process (of which the motions are a part), they are elusive.<sup>215</sup> For my purposes, it does not matter whether judges actually decide many summary judgment motions. Rather, the key benefit of adding a summary judgment stage to criminal procedure is that it augments the litigants’ incentives to settle.<sup>216</sup>

Likewise with discovery. Previous proposals to enhance criminal discovery have centered on “level[ing] the investigative playing field.”<sup>217</sup> The asymmetry of information in criminal cases is a major problem, as many have observed.<sup>218</sup> Given the existing imbalance, if defendants took advantage of new discovery tools, that *could* have a levelling effect. Of course, if defendants traded away expanded discovery rights for sentencing concessions, the rights would impact the price of pleas but not the symmetry of information.<sup>219</sup> On the traditional justification for expanded discovery, that is a problem. It is not a problem for my purposes, because the additional tools in the discovery toolkit would still give the parties more reason to settle.

So far I have considered mechanisms that would make pre-trial criminal litigation more like pre-trial civil litigation. In civil litigation, the costs of dispositive motions practice and discovery contribute to the near-

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214. Gold et al., *supra* note 193, at 1642, 1650.

215. Gold and his coauthors recognize this point, observing that “[s]o long as the procedures are waivable, prosecutors will likely seek waivers of those procedures as part of the plea bargain.” *Id.* at 1653. And they are appropriately sanguine about the viability of formal bars on defendants waiving procedural rights. *Id.* at 1654 (“[Waiver-bans] would likely not prevent all waivers. Prosecutors and defendants could work together to avoid these limits on waivers by negotiating before charges have been filed.”).

216. To be sure, the more straightforward benefits that Gold and his coauthors identify are—one hopes—politically sellable.

217. Grunwald, *supra* note 52, at 773.

218. See, e.g., Miriam H. Baer, *Timing Brady*, 115 COLUM. L. REV. 1, 25 (2015) (“Criminal defendants often know less about the government’s case than the government itself, and their only means for determining the weakness of the government’s case is by proceeding to trial. Since most defendants lack the resources and fortitude to seek this option, criminal discovery’s information asymmetry severely undermines the integrity and reliability of the plea-bargaining process.”); see also Laurent Sacharoff & Sarah Lustbader, *Who Should Own Police Body Camera Videos?*, 95 WASH. U. L. REV. 269, 293 (2017) (“This asymmetry exacerbates the inequities of the criminal justice system when it comes to access to information and discovery . . . .”); Russell Covey, *Reconsidering the Relationship Between Cognitive Psychology and Plea Bargaining*, 91 MARQ. L. REV. 213, 234 (2007) (“Limited discovery in criminal trials is a longstanding feature of criminal law that reflects and responds to the fundamental asymmetries of criminal litigation.”).

219. See Grunwald, *supra* note 52, at 804 (“The first is that one defendant’s right to discovery is another’s right to exchange it for lenience. Thus, particularly if the plea-trial differential represents a plea discount, open-file could help guilty defendants obtain more lenient sentences simply by giving them a valuable bargaining chip to trade away.”).

elimination of trials. But that may not suffice to maintain a criminal trial rate close to zero. Settlement-promoting inefficiencies can also be added by creating more opportunities for interlocutory appeals.

In the federal system and most states, prosecutors are entitled to take an interlocutory appeal from an order suppressing material evidence.<sup>220</sup> Perhaps the quickest way to stultify trials would be to liberalize who can take an interlocutory appeal and from what orders. This goes beyond anything in civil litigation, where the final judgment rule applies,<sup>221</sup> but if a prosecutor or defendant could halt trial proceedings every time the judge makes an ordinary evidentiary ruling with which she disagrees, or whenever the judge determines to give a jury instruction contrary to what she has proposed, inefficiency would flourish. Indeed, that is why courts ordinarily disallow interlocutory appeals. As Justice Frankfurter wrote for the Supreme Court in *United States v. Cobbledick*, the “momentum” of a case would be “arrested by permitting separate reviews of the component elements in a unified case.”<sup>222</sup> “To be effective,” Frankfurter explained, “judicial administration must not be leaden-footed.”<sup>223</sup> Following Frankfurter, if the final judgment rule makes the administration of justice “effective,” then liberalizing interlocutory appeals should make the (formal) administration of criminal justice *ineffective*.

Both on the front and back end of trial, criminal litigation could be made significantly more inefficient than it is now. It is worth reiterating that inefficiency is not an *intrinsic* value of the civil justice model of criminal justice reform. Its value is instrumental. Making the formal litigation process costlier makes it possible for policymakers to dismantle the tools of prosecutorial leverage—overlapping offenses, draconian sentencing laws, and so on—without increasing the trial rate. While litigation in a first-best world would surely be efficient, inefficiency is a second-best response to a world in which the trial constraint must be abided.

There are two further wrinkles to consider. First, the civil justice model depends on the existence of criminal defense lawyers who can credibly threaten to *use* the expanded motions, discovery, and interlocutory appeals. To succeed, that means, the civil justice model would require adequate

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220. 18 U.S.C. § 3731; § 27.3(c), 7 Crim. Proc. § 27.3(c) (4th ed.) (“The federal government and most states have adopted legislation providing for review of suppression orders as a matter of right.”). This is because the government cannot ask an appellate court to review the suppression order after a final judgment, as the Double Jeopardy Clause precludes a government appeal from an acquittal. *See Sanabria v. United States*, 437 U.S. 54, 63 (1978).

221. *See generally* Timothy P. Glynn, *Discontent and Indiscretion: Discretionary Review of Interlocutory Orders*, 77 NOTRE DAME L. REV. 175, 176 (2001) (explaining final judgment rule).

222. *Cobbledick v. United States*, 309 U.S. 323, 325 (1940)

223. *Id.*

funding of indigent defense.<sup>224</sup> In a world of underfunded indigent defense, that may not be realistic.<sup>225</sup> Is that a fatal blow to the civil justice model? Not necessarily. If the trial constraint is grounded in minimizing costs, then perhaps we should not expect policymakers to adequately fund indigent defense.<sup>226</sup> But I suggested above that the trial constraint may not be just about minimizing costs.<sup>227</sup> Rather, it may be that policymakers prefer to avoid trials because that means the government never (or rarely) suffers the embarrassment of losing. If that is the underlying motivation for the trial constraint, then while increasing the trial rate is off the table, adequately funding indigent defense is not. In the civil justice model, indigent defense could be funded without materially increasing the government's risk of losing.

The second wrinkle is that defendants, imbued with new opportunities to file motions and receive discovery, might be less willing to settle, and thus force prosecutors to either try more cases or dismiss valid charges. The logic is as follows: Defendants will know that if they refuse to settle, prosecutors will face expensive motions and discovery practice (in addition to trial costs). Defendants will also know that in many cases—particularly less serious cases—it would not be worth the prosecutor's efforts to incur these expenses in order to secure any particular conviction. In law and economics terminology, enhanced motions and discovery would mean that more criminal cases have “negative expected value” (NEV) to prosecutors. The law and economics literature on NEV claims rebuts that logic. Readers not interested in a detour through that literature, however, would be well-advised to skip ahead to Part IV.C now. The main story picks up there.

An NEV claim exists where the expected value of a judgment is less than it would cost the claimant to litigate to judgment.<sup>228</sup> Armed with the knowledge that his case is NEV for the prosecutor, a defendant in a low-level criminal case might call the prosecutor's bluff by insisting on trial. If so, the civil justice approach to reform would *increase* the trial rate and, on my own logic, must be rejected. The law and economics literature on NEV civil claims shows why this possibility is unrealistic.

Early law and economics models puzzled over why civil defendants do not tell plaintiffs with NEV claims to pound sand.<sup>229</sup> More sophisticated

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224. I am grateful to Jon Weinberg for emphasizing this point.

225. There is an enormous literature on the crisis of indigent defense funding. *See, e.g.*, Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1045–46 (2006); Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 972–77 (2012).

226. *See supra* text accompanying notes 36–38.

227. *See supra* text accompanying note 40.

228. Bebhuk & Klement, *supra* note 196, at 341.

229. *Id.*

models demonstrate that under realistic conditions, plaintiffs with NEV claims *can* extract positive-value settlements from defendants, and that this is often welfare-enhancing.<sup>230</sup> At least two of the conditions that enable plaintiffs to settle NEV claims would be implicated by the civil justice model.

First, “the divisibility of the litigation process can provide a plaintiff with a credible threat, and enable it to extract a settlement, even if the plaintiff is known by the defendant to have an NEV suit.”<sup>231</sup> Civil litigation is “divisible” in the sense that defendants do not expend their litigation costs in one shot, but rather spread them over the course of a dispute. Criminal cases operate in an analogous manner. The criminal defendant’s principal analogue to the civil defendant’s litigation costs is the trial penalty. Just as civil defendants’ total expenditures rise as they sink deeper into litigation, so too can criminal defendants’ trial penalty. The formal plea discount works just this way in the federal system. Under the federal sentencing guidelines, a defendant who “demonstrates acceptance of responsibility”—code for pleading guilty—reduces his offense level by two points.<sup>232</sup> If he accepts responsibility early in the case, “thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently,”<sup>233</sup> he can receive an additional one point off. Criminal defendants’ litigation costs are thus, like civil defendants’ litigation costs, divisible.

Second, repeat players have built-in credibility in asserting NEV claims: “If any one of the parties is a repeat player, this party might develop a reputation that would might enable it to bind itself to take a different course of action than the one that it would be expected to take in the case of one-shot litigation.”<sup>234</sup> Prosecutors are the ultimate repeat players. While it might not be worth a prosecutor’s effort to go through with motions practice and discovery to obtain any particular low-level conviction, she must

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230. A related but analytically separate question is why defendants plea bargain at all, given that prosecutors lack the capacity to take more than a small fraction of their cases to trial. See Oren Bar-Gill & Omri Ben-Shahar, *The Prisoners’ (Plea Bargain) Dilemma*, 1 J. LEGAL ANALYSIS 737 (2009). According to Bar-Gill and Ben-Shahar, because defendants lack a cooperation mechanism, prosecutors can adopt a divide-and-conquer strategy. *Id.* at 754 (“As long as prosecutors are able to identify sequencing strategies and other divide-and-conquer strategies and make it publicly known that they subscribe to these orderings, they will be able to bargain with each defendant as if they have a credible threat to take this defendant to trial.”). This would remain the case in the civil justice model.

231. Bebachuk & Klement, *supra* note 196, at 343 (citing Lucien A. Bebachuk, *A New Theory Concerning the Credibility and Success of Threats to Sue*, 25 J. LEGAL STUD. 1, 9 (1996)).

232. See U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(a) (U.S. SENTENCING COMM’N 2018); Covey, *supra* note 137, at 1245 n.30 (“The Guidelines incorporate an approximately 25-35% fixed discount for ‘acceptance of responsibility,’ universally understood to serve as code language for pleading guilty.”).

233. USSG § 3E1.1(b).

234. Bebachuk & Klement, *supra* note 196, at 346.

maintain a reputation for being willing to do so. And because defendants know that, they would be unlikely to call the prosecutor's "bluff," even in low level cases that the prosecutor would rather not spend the time on.

*C. Alternative Second Best: The Administrative Enforcement Model*

The civil justice model is not the only strategy for achieving a near-zero trial rate without using overlapping offenses and draconian sentencing to coerce guilty pleas. An alternative second best approach is to minimize the defendant's active participation in the adjudicative process. There are a number of ways in principle that this could work. As in the current criminal justice system, law enforcement officers could bring their investigations to prosecutors for an up or down decision. Today the prosecutor decides whether to charge the suspect or decline prosecution.<sup>235</sup> Instead, the prosecutor's decision could be whether to convict and sentence. Or it could be whether to convict, with the sentencing decision moving to the judge. Or the conviction itself could be "reviewable" by a judge, perhaps in the deferential manner by which administrative enforcement matters are subject to judicial review.<sup>236</sup> The precise details are unimportant for present purposes. The point is that in principle, a system could be constructed that processes cases without trials, but also without requiring defendants to actively convict themselves.<sup>237</sup>

Most readers will understandably recoil at this approach—which for convenience I call the "administrative enforcement" second best. I certainly agree that giving prosecutors unilateral control over convictions is distasteful. Even so, I argue in Part IV.C.1, the approach would plausibly be better than the status quo in many cases, though that says more about the pathology of the status quo than anything else.<sup>238</sup> In Part IV.C.2, however, I show that it lacks something that the civil justice model offers—a long-run pathway to first-best criminal justice.<sup>239</sup>

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235. See Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 130 (2008).

236. Cf. Lynch, *supra* note 77, at 2135 ("In this system, the formal adversarial jury trial serves as a kind of judicial review, in which a defendant who is not content with the administrative adjudication by the prosecutor has a right to de novo review of the decision in another forum.").

237. Strictly speaking, such a system would not be a plea bargaining regime at all, as it would involve no bargaining.

238. See *infra* Section IV.C.1.

239. See *infra* Section IV.C.2. It has surely not missed the reader's notice that as described in the text, the model is flagrantly unconstitutional. Because I conclude that the administrative enforcement model is inferior to the civil justice one, see *infra* Section IV.C.2, I will not test the reader's patience with a lengthy discussion of how to approximate the administrative enforcement model in a constitutionally acceptable form. It does bear mention that a specific reform making inroads in some jurisdictions—mediation of guilty pleas by judges—may point in that direction. In an important recent article, Nancy King and Ronald Wright identify a variety of mechanisms by which trial judges manage their dockets, several of which place the judge in the role of "mediator" of pleas. Nancy J. King &

### 1. *Comparison to Status Quo*

Why do I say that the administrative enforcement approach could be preferable to the status quo? The core point here is that because of their outsized leverage in plea bargaining, prosecutors *already* unilaterally adjudicate guilt in many cases.<sup>240</sup> The administrative enforcement approach would make the prosecutor's unilateral determination of guilt *de jure* while—and here is its advantage—relieving defendants of the obligation of convicting themselves.

But wait, the reader may be thinking, does this “model” eliminate the opportunity for advocacy by defense lawyers? Not entirely. It could, however, entail changing the lawyer's role from adversary to lobbyist. Depending on the system's details, the defense lawyer's core function in the administrative enforcement second best might be to try to persuade the prosecutor not to bring charges, or to bring lesser ones. For some defendants—especially those who can afford aggressive lawyers—this would be a disadvantageous change. Still, the change in role is perhaps not as momentous as it appears. In the status quo world of excessive prosecutorial leverage, the criminal defense lawyer's function is sometimes already closer to lobbyist than adversary. As Lynch observes, “the defense attorney who wishes to have any influence over the inquisitorial process of the prosecutor is largely limited to the power of persuasion.”<sup>241</sup>

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Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325, 351–55 (2016). King and Wright's interviews with defense lawyers, prosecutors, and judges yield evidence suggesting that the judicial mediation process, while not “coercive” in a traditional sense, *id.* at 383, exerts pressures on defendants and defense lawyers to be “reasonable” by accepting a resolution short of trial. *See id.* at 343 & n.99. One judge, for example, commented on the pressure to be “reasonable” in settlement conferences: “If there is an *unreasonable* defense practitioner who is looking to jam up the system, wanting to have as many cases set for trial or push things as far as they can to gum up the works, the judge is able to impact things then.” *Id.* at 367 (emphasis added). Recall that the primary quality of the administrative enforcement model is that it does not require the defendant to play an *active* role in his own conviction. This judge's comment raises the prospect that judicial mediation may propagate anti-trial norms that encourage defendants to passively accept mediated pleas. If so, widespread judicial mediation of pleas could mean that prosecutors set the terms of discussion (and the fact of conviction) via their charging decisions, with judges-as-mediators then adjusting the terms—likely, if King and Wright's findings are generalizable, in a somewhat lenient direction. *See id.* at 371–72. If that is how judicial mediation plays out, it would be a reasonable approximation of the administrative enforcement model.

240. *See supra* Section II.B.2.

241. Lynch, *supra* note 77, at 2125. Indeed, the administrative enforcement second best is, in many respects, similar to the vision of plea bargaining that Lynch defends, but with one important difference. For Lynch, it is important that “the de facto administrative process operates within the shell of the due process model,” such that “defendants retain the power to opt out of that process and submit themselves instead to a formal judicial procedure that is bound strictly by due process rules.” *Id.* at 2144–45. There may be less of a due process backstop in the administrative enforcement second best, but as a practical matter there is not much of a backstop in the status quo plea bargaining regime either. *See supra* Part II.

Even if the administrative enforcement model is less of a departure than it might first appear for defense lawyers, there is still the matter of prosecutors and police. Wouldn't they be less careful about screening cases in a world in which there was no (or reduced, depending on the details) adversarial check on their decisions?<sup>242</sup> This is a possible, but not necessary, consequence. The administrative enforcement approach would reduce "legal" checks on prosecutorial screening. Specifically it would eliminate the probable cause charging standard (which applies in most jurisdictions)<sup>243</sup> and the beyond a reasonable doubt conviction standard (which applies in all). Yet in the contemporary plea bargaining regime, these legal checks do very little to ensure screening. In a previous paper, I argued that the anemic and largely unenforceable probable cause standard exacerbates the pathologies of plea bargaining.<sup>244</sup> The beyond a reasonable doubt standard for convictions, moreover, does little work in a criminal justice system that uses prosecutorial leverage to compel pleas before trial.<sup>245</sup>

The impetus for police and prosecutorial screening in the contemporary criminal justice system comes from professional norms and standards as much as, if not more than, external regulation.<sup>246</sup> As Marc Miller and Ronald Wright observed about the New Orleans screening attorneys they studied, prosecutors decline "some charges in an effort to interpret the criminal law faithfully, even when there is no reason to believe that some other interpreter stands ready to overturn the prosecutor's choice."<sup>247</sup> The administrative enforcement approach would abrogate external enforcement that is of questionable significance, but it need not annul professional norms surrounding police and prosecutorial screening. Indeed, by eliminating the fiction that probable cause and beyond a reasonable doubt are back-end checks on such screening, it could even strengthen those norms.<sup>248</sup>

To be sure, the normative case for the administrative enforcement approach over the status quo is not a slam dunk. Prosecutors are not

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242. Cf. Alschuler, *supra* note 90, at 922 ("A legal system in which a prosecutor could convict whomever he liked just by pointing could lead to conviction in cases in which the prosecutor had no evidence at all. The system would be even more effective than ours in producing wrongful convictions.").

243. See Ortman, *supra* note 18, at 546.

244. *Id.* at 558–60.

245. See Albert W. Alschuler, *Straining at Gnats and Swallowing Camels: The Selective Morality of Professor Bibas*, 88 CORNELL L. REV. 1412, 1413–14 (2003) ("The plea bargaining system effectively substitutes a concept of partial guilt for the requirement of proof of guilt beyond a reasonable doubt.").

246. See generally Miller & Wright, *supra* note 235.

247. *Id.* at 154.

248. Cf. Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 HARV. L. REV. 1065, 1124 (2015) ("[I]t's possible that a system less formally committed to protecting the innocent might actually do a better job of minimizing false convictions.") (emphasis omitted).

unilateral price-setters in every status quo case, after all.<sup>249</sup> In weak cases defendants have *some* negotiating power, which they would lose in the administrative enforcement model. Perhaps, as I have suggested, some of these weak cases would not have been brought in the first place, but some surely would, and those defendants would be worse off than they are now. My point, however, is not that the administrative enforcement model is Pareto superior to the status quo. It isn't. My modest aim is to show that the model is plausibly better than the status quo in many cases. That the comparison is even possible condemns the status quo.

## 2. *Comparison to the Civil Justice Model*

It is at least plausible that the administrative enforcement model would be preferable to the status quo in a range of cases. Why then, did I devote the lion's share of Part IV to the civil justice model? The administrative enforcement model has a significant downside when compared to the civil justice model. In Part I, I asked the reader to accept the premise that the trial constraint is a fact of life in the short and medium runs. I excluded the long run from the request. The day may come when policymakers are ready for more trials. That prospect makes the civil justice model preferable to the administrative enforcement model.

The civil justice model is premised on injecting costly procedures into criminal adjudication to make trials unattractive to both sides. Moving from that world to a first-best world—one in which trials are available at least in cases where there is a serious question about whether the defendant is guilty—becomes a matter of eliminating the costly trial-avoiding procedures, which can be done incrementally. So long as that is not accompanied by a return of prosecutorial leverage, the likely effect would be an increase in the trial rate.

The administrative enforcement model, on the other hand, is more binary. Either defendants play an active part in criminal adjudication or they do not. In the administrative enforcement model, they would not, and no incremental reform from that baseline could increase trial rates on the margins. The administrative enforcement model is thus a one-way door. Opening it means closing the door on a first-best criminal justice system, not only in the short and medium runs, but in the long run as well.

## CONCLUSION

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249. See *supra* notes 105–107 and accompanying text.

I have asked the reader to indulge a plausible but unprovable assumption—that trials are not vanishing, but vanished—and then to ask how best we might conduct criminal adjudication in a post-trial world. I conclude by attempting to make the payoffs of this thought experiment concrete.

Part IV identified two models of plea bargaining reform that could preserve a low trial rate while shedding the status quo of its reliance on excessive prosecutorial leverage. One would harness inefficient procedures to make litigation unattractive to both parties. The other would formally empower prosecutors to determine guilt. I labored in Part IV to show that either model could be better than the status quo. But I made no claim that either model would be good enough, much less that it would be just. Let me be clear—neither would.

The second-best models are far from the normative ideals of American criminal justice.<sup>250</sup> My hope is that the reader finds it disturbing that criminal procedure might be better if trials were prohibitively expensive or if prosecutors could unilaterally convict defendants. For me, that is grounds for despair about the status quo of criminal adjudication.

But despair is not the thought experiment's only payoff; there is a more constructive angle as well. That the possible second bests are normatively inadequate is evidence that the trial constraint stands between us and a just system for adjudicating criminal cases. The trial constraint is a function of politics, and politics can change.<sup>251</sup> A clear-eyed understanding of second-best criminal justice—including the tradeoffs that it requires—might even help.

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250. See *supra* text accompanying notes 174–176.

251. Cf. William H. Riker, *Implications from the Disequilibrium of Majority Rule for the Study of Institutions*, 74 AM. POL. SCI. REV. 432, 446 (1980) (“[I]n the long run, nearly anything can happen in politics.”).