RUSSELL D. COVEY*

Toward a More Comprehensive Plea Bargaining Regulatory Regime

* Professor of Law, Georgia State University College of Law. Many thanks to Lucian Dervan, who serves with me as Co-Chair of the ABA Plea Bargaining Task Force and Thea Johnson, who serves as the Task Force reporter. I have learned much from them, and from the diverse and talented Task Force members and the myriad witnesses and experts who testified in Task Force fact-finding efforts about plea bargaining. Thanks also to Thomas Lininger for his helpful comments on an earlier draft. All views expressed in this Article are those of the author alone.

INTRODUCTION

Few legal institutions are as tightly regulated by law as the American jury trial. What once was a reasonably casual and ad hoc method of adjudicating criminal charges is now carefully choreographed by statutory, and often constitutional, law.[1] Everything from the charging process to the admissibility of evidence, to the safeguards on what can and cannot be said during opening and closing statements by the attorneys, is subject to regulation. Because much of the trial process has been subject to constitutional law, Judge Henry Friendly famously complained that the Warren Court had turned the Bill of Rights into a code of criminal procedure.[2] And yet, despite this profusion of law, at no time in American history has American criminal practice been less subject to legal regulation because trials and juries played less of a role in resolving criminal charges than they do today. As has been widely recognized, the criminal trial is a "vanishing" artifact.[3] America's system of criminal justice is a system of plea bargaining,[4] and plea bargaining remains an overwhelmingly "law-free" zone.[5] As Stephanos Bibas has pointed out, "a $100 credit-card purchase of a microwave oven is regulated more carefully than a guilty plea that results in years of imprisonment."[6] This state of affairs recently

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1 As Professor John Langbein explained, in the period before the middle of the eighteenth century, the jury trial in England (and undoubtedly in the colonies as well) "was a summary proceeding" in which a court could process "a dozen and more cases to full jury trial in one day." John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 L. & SOC'Y REV. 261, 262–63 (1979).

2 Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 953–54 (1965).

3 The "vanishing trial" has recently been a popular motif in criminal reform circles. The National Association of Criminal Defense Lawyers in conjunction with Families Against Mandatory Minimums (FAMM) released a documentary film with that title in 2020. *See FAMM & NACDL Present: The Vanishing Trial*, FAMM, https://famm.org/vanishingtrial/ [https://perma.cc/J2BJ-9ADG]. The film followed a flurry of scholarship on the topic that had been kicked off with an ABA Journal article that appeared in 2002. *See* Hope Viner Samborn, *The Vanishing Trial: More and More Cases Are Settled, Mediated or Arbitrated Without a Public Resolution. Will the Trend Harm the Justice System?*, A.B.A. J., Oct. 2002, at 24. But the idea can be traced back at least to Raymond Moley's 1928 article, "The Vanishing Jury." Raymond Moley, *The Vanishing Jury*, 2 S. CAL. L. REV. 97 (1928). Thus, the intuition that jury trials are "vanishing" has long been with our criminal legal system.

4 As Justice Kennedy wrote, "[Plea bargaining] is not some adjunct to the criminal justice system; it *is* the criminal justice system." Missouri v. Frye, 566 U.S. 134, 144 (2012).

5 *See, e.g.*, Jenia I. Turner, *Plea Bargaining*, *in* 3 REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES 73, 77 (Erik Luna ed., 2017) ("Despite its central place in criminal law practice, plea bargaining remains remarkably lightly regulated.").

6 Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1153 (2011).

compelled one legal expert to counsel foreign judges to refuse extradition requests by United States officials, or at least recommend that they "should no longer grant those requests as a matter of course," because "American courts have largely jettisoned the constitutionally prescribed mechanism for adjudicating criminal charges in favor of an informal, unregulated, and often astonishingly coercive system of plea bargaining."[7]

The informality of the plea bargaining system is well-documented.[8] Specifics vary by locality, and bargaining norms are set more by local custom than by legal rule and often reflect the bargainer's "personal style."[9] As Colin Miller observes, this informality is partly explained by its history. Prior to the Supreme Court's express embrace of the institution in the 1970s, plea bargaining was conducted "in an informal and clandestine manner" because of both popular disapproval and a widespread worry that the practice was unconstitutional.[10] Not until the Supreme Court belatedly placed its imprimatur on plea bargaining did it begin to emerge from the shadows.[11] Fifty years later, plea bargaining

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[7] Clark Neily, *A Distant Mirror: American-Style Plea Bargaining Through the Eyes of a Foreign Tribunal*, 27 GEO. MASON L. REV. 719, 719 (2020).

[8] *See, e.g.*, Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1305–06 (2018) ("Thus, the conventional account: Plea bargaining operates 'outside the law's shadow,' governed instead only by brute prosecutorial power that is exercised in ways 'not usually written down anywhere,' let alone 'governed by formal legal standards.'") (disagreeing with this view, arguing that plea bargaining is governed largely through "subconstitutional state law" and norms).

[9] *Frye*, 566 U.S. at 145 ("Bargaining is, by its nature, defined to a substantial degree by personal style."); People v. Cuenca, No. A118672, 2008 WL 4062069, at *9 (Cal. Ct. App. Sept. 3, 2008) ("[L]ocal variations as to plea bargaining practices are understandable and appropriate in light of the nature of the plea bargaining process."). Steven Schulhofer proposed a one-level guidelines reduction for guilty pleas, which vary in effect on sentence but appear to range from about 20%–35%. *See* Stephen J. Schulhofer, *Due Process of Sentencing*, 128 U. PA. L. REV. 733, 791–92 n.225 (1980). *See generally* Crespo, *supra* note 8.

[10] *See* Colin Miller, *Plea Agreements as Constitutional Contracts*, 97 N.C. L. REV. 31, 34–35 (2018). This characterization was also used in a 1967 report of a presidential task force. *See* THE PRESIDENT'S COMM'N ON L. ENF'T & ADMIN. OF JUST., TASK FORCE REPT.: THE COURTS 9 (1967) (describing plea bargaining as a system that "operates in an informal, invisible manner"); *see also* William Ortman, *Probable Cause Revisited*, 68 STAN. L. REV. 511, 562 n.295 (2016) (citing *id.*). Reviewing the new ABA Minimum Standards on Guilty Pleas, one author noted that until that time there was "[l]ittle wonder that the relatively anonymous, quick, and often drab guilty plea has been ignored by scholars, policy makers, and the public." Donald J. Newman, Book Review, 66 MICH. L. REV. 1058, 1058 (1968).

[11] *See* Brady v. United States, 397 U.S. 742 (1970). The American Bar Association helped pave the way for this move by acknowledging the administrative advantages of plea bargaining in its newly promulgated standards. *See* AM. BAR ASS'N PROJECT ON STANDARDS FOR CRIM. JUST., STANDARDS RELATING TO PLEAS OF GUILTY § 3.1, at 10, 60

is no longer something hidden, but the widespread acceptance of plea bargaining's legality has not been followed by any corresponding effort to develop governing standards. It remains a fundamentally unregulated, informal practice. Moreover, to say that the common practice of plea bargaining is out in the open is not to say that its operative processes are visible or transparent. To the contrary, key aspects of the plea bargaining machinery remain shrouded in secrecy.[12] Data regarding why one person gets an offer and why another does not, or why offers change over time, or what factors went into the determination that a particularly generous deal was warranted in a case are simply unavailable.[13] Like other aspects of plea bargaining, this "opacity"[14] sets it apart from the supposed "standard model" of criminal trial procedure, which prominently features jury trials that are open to the public. As Jenia Turner observed, plea bargaining's secrecy "stands in marked contrast to the constitutional commitment to public criminal proceedings, enshrined in the Sixth Amendment right to a public trial and the First Amendment right of public access to the courts."[15]

The informality that characterizes plea bargaining generally is also apparent in key aspects of pre-plea criminal process and has created what is essentially a two-track system. The first track—the trial track—is governed by a pervasive complex of legal rules that regulate each stage of criminal procedure. The second track—the bargaining track—is governed by informal and ad hoc norms. These norms are prevalent

(tent. drft. 1967). This draft was adopted with minor revisions in 1968, *see* 2 CRIM. L. REP. 2419, 2422 (1968).

12 As Meghan Ryan observes:

> Most plea-bargaining takes place behind closed doors, where prosecutors and defense attorneys informally negotiate what charges defendants will plead guilty to and what punishments they will receive. No record is ordinarily kept of these conversations, nor even of the individual offers made. Even final plea agreements are often not reduced to writing, and in only about half the jurisdictions is there a requirement that the plea agreement reached be on the record.

Meghan J. Ryan, *Criminal Justice Secrets*, 59 AM. CRIM. L. REV. 1541, 1556 (2022).

13 To combat this secrecy, Jenia Turner has persuasively argued for ramping up all aspects of data collection related to plea bargaining. *See* Jenia I. Turner, *Transparency in Plea Bargaining*, 96 NOTRE DAME L. REV. 973, 993 (2021).

14 Daniel S. McConkie, Jr., *Plea Bargaining for the People*, 104 MARQ. L. REV. 1031, 1062 (2021).

15 Turner, *supra* note 13, at 975.

in such areas as discovery,[16] the treatment of collateral consequences,[17] the consequences of declining an early plea offer or of pursuing pretrial motions practice, the variety of rights that a pleading defendant must waive to receive the bargain, and, of course, the scope of the discount that the defendant receives in exchange for the guilty plea. Such norms also govern who gets an offer and who does not. Most of the substance regarding plea bargaining concerns how, and when, a case moves from one track to the other. Most cases move in one direction—from the legally regulated trial track to the lawless plea track. There is a background threat that a case will move back from the plea track to the trial track if the parties are unable to reach agreement or if either party withdraws from it. This threat, and the accompanying consequences, constitutes the supposed shadow that trial casts on plea negotiation.[18] For the most part, that is all the law that plea bargaining gets. In a very real sense, the law of plea bargaining is a law of shadows and, given the rarity of trials and the costs to defendants of demanding them, faint ones at that.

For years, there have been calls to formalize the plea bargaining process. It was apparent to commentators at the very dawn of the current plea-driven mass incarceration era that legal regulation of bargaining was needed to bring greater fairness and balance to the evolving criminal legal system. Many of the key features of

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16 *See, e.g.*, WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 20.2(d), at 1146–47 (6th ed. 2019) (noting distinction between formal procedures through which discovery can be legally compelled—as opposed to the discovery that occurs in informal interactions, such as plea bargaining); *id.* § 21.3(b), at 1231–37 (noting that despite ethical obligation not to reveal client confidences, defense attorneys often in the informal discovery in the plea bargaining process risk doing so because of expectations that the process is a two-way street). *See generally* Mary Patrice Brown & Stevan E. Bunnell, *Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia*, 43 AM. CRIM. L. REV. 1063 (2006); Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1225 (1975) (noting that defense attorneys have a personal stake in not insisting on utilization of formal mechanisms to obtain discovery because of the perceived need to maintain strong personal relationships with prosecutors).

17 *See* Thea Johnson, *Fictional Pleas*, 94 IND. L.J. 855, 871 (2019) (noting that prosecutors have pursued a patchwork of approaches, some informal and some through more formal office policies that consider the impact of collateral consequences in plea bargaining negotiations).

18 Standard theory postulates that guilty pleas, like other types of legal settlements, are negotiated in the shadow of expected trial outcomes. Numerous scholars, however, have argued that a variety of distorting effects undermine the standard account. *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004); Ronald F. Wright et al., *The Shadow Bargainers*, 42 CARDOZO L. REV. 1295 (2021) (arguing that some criminal defense attorneys pay little attention to predictions regarding trial outcomes but instead bargain "in the shadow of the client").

formalization were spelled out in great detail by earlier would-be reformers. While those calls have been largely ignored, the climate around plea bargaining reform seems to be changing. The Supreme Court helped nudge the issue closer to the fore with its decisions that have made clear that the right to effective assistance of counsel extends to plea bargaining.[19] Since then, increasing attention has been paid to plea bargaining's central role in the criminal legal system. Human Rights Watch issued a major report documenting how features of the current system create and rely upon highly coercive bargaining conditions.[20] That report was followed by a pathbreaking study of the trial penalty conducted by the National Association of Criminal Defense Lawyers (NACDL).[21] The NACDL study focused on the federal system, but states are following up with state-specific reports on how coercive bargaining conditions are manifested in various particular contexts.[22] The results bear out the widely shared sentiment that plea bargaining, as it is currently practiced, depends on coercive bargaining tools, mainly, but not exclusively, the trial penalty, to produce results. The prospects for reform took another step forward in 2018, when the American Bar Association (ABA) established a dedicated task force to investigate the current state of plea bargaining practice and to recommend reforms. I served as co-chair of that committee, and the reforms advocated here—although not the views of the task force itself or any of its members—were shaped by the work undertaken during the three-plus years that the task force carried out its work. This included hearing from policy experts, advocates, state and federal judges, prosecutors, public defenders, and national and global criminal law advocacy organizations. There is a growing sense, shared

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19 *See* Lafler v. Cooper, 566 U.S. 156 (2012); Missouri v. Frye, 566 U.S. 134 (2012); Padilla v. Kentucky, 559 U.S. 356 (2010).

20 *An Offer You Can't Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty*, HUM. RTS. WATCH (Dec. 5, 2013), https://www.hrw.org/report/2013/12/05/offer-you-cant-refuse/how-us-federal-prosecutors-force-drug-defendants-plead [https://perma.cc/4ZA6-K8AQ].

21 NAT'L ASS'N OF CRIM. DEF. LAWS., THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT (2018), https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf [https://perma.cc/JZH6-X2LX], *as reprinted in* 31 FED. SENT'G. REP. 331 (2019).

22 *See* N.Y. STATE ASS'N OF CRIM. DEF. LAWS. & NAT'L ASS'N OF CRIM. DEF. LAWS., THE NEW YORK STATE TRIAL PENALTY: THE CONSTITUTIONAL RIGHT TO TRIAL UNDER ATTACK (2021), https://cdn.ymaws.com/nysacdl.org/resource/resmgr/docs/nystrpenreportupdatedfinal.pdf [hereinafter NACDL] [https://perma.cc/5SLB-EZDW]. Organizations in other states, including California, are currently preparing similar state-specific reports.

by persons of varying professional roles and ideological persuasions, that our current set of plea bargaining practices are not working, and that reform is needed. Given this ferment, it certainly seems possible, as some scholars have asserted, that we now stand at "the gateway of a regulatory era."[23]

This Article proceeds as follows. Part I describes the lawless nature of the plea bargaining system. It argues that although there are bodies of law that deal with guilty pleas and aspects of procedure that are relevant to plea bargaining, there is very little law that regulates plea bargaining itself. As such, there is an enormous procedural vacuum at the heart of the criminal justice system. Part II reviews the consequences of this regulatory lacunae, the most prominent of which is the virtual disappearance of criminal trials as a regular component of criminal process. The disappearance of trials is especially noteworthy given the prominent place the Framers reserved for jury trials in the constitutional design. It can be blamed, in large part, on the increasingly draconian trial penalties that essentially coerce defendants into waiving the right to trial. This Article argues that these aspects of plea bargaining have contributed to some of the most dysfunctional aspects of modern criminal justice, including mass incarceration and an overindulgence in "assembly-line justice." Calls to regulate plea bargaining practice are not new. Indeed, over the years, professional bodies and scholars have made numerous efforts to bring some order to plea bargaining practice. These efforts have been largely ignored, but they provide a deep well of insight into the type of reforms needed to rein in plea bargaining's excesses. Drawing both on this literature and on work undertaken by the ABA Plea Bargaining Task Force, Part III offers a set of reforms intended to establish a meaningful regulatory system to align the practice of plea bargaining with other, more formally regulated aspects of criminal procedure. Finally, I offer a brief conclusion.

I
A SYSTEM WITHOUT LAW

Plea bargaining's defenders have argued that plea bargaining simply provides a mechanism to maximize efficiency through application of basic free market principles.[24] But a lawless, informal bargaining

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[23] Wright et al., *supra* note 18, at 1298.

[24] *See* Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289 (1983).

system[25] is not a free market system.[26] Nor is it a system that in any way can be characterized as preserving the parties' equal rights to engage in open and fair negotiation that eventuates in fair case resolutions. Rather, the absence of legal regulation has meant that the power to dictate case dispositions has largely been transferred from judges and juries in a trial system to prosecutors in a plea system. As Donald Dripps put it, under our modern plea system "the real trial is the one, quite informal and necessarily based mostly on hearsay, at which the prosecutor decides what charges to file and what plea to accept."[27]

Although plea bargaining is an informal method of case resolution, it is not *merely* informal, nor *merely* unregulated. It is, rather, purposefully protected from legal regulation or oversight. Long ago, the U.S. Supreme Court moved aggressively to protect guilty pleas from substantive review. As Justice Brennan observed in a 1970 dissenting opinion, the Court had clearly embraced "the goal of insulating all guilty pleas from subsequent attack no matter what unconstitutional action of government may have induced a particular plea."[28] States have followed suit. For example, by statute in Louisiana, sentences imposed on defendants who plead guilty may not be challenged on appeal.[29] Texas similarly limits the right to appeal after a guilty plea.[30] Jurisdictions across the board limit the grounds for appeal of a guilty plea, typically restricting such claims to matters related to the voluntariness of the plea itself.

This is not to say that states don't regulate certain aspects of the guilty plea process. Almost every jurisdiction has a set of rules setting

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25 Alschuler colorfully described plea bargaining as "a lawless and slovenly process." Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1132 (1976).

26 That is, unless one considers a man in an alley with a gun asking for your wallet part of the free market system.

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

28 McMann v. Richardson, 397 U.S. 759, 775 (1970) (Brennan, J., dissenting).

29 *See* State v. Kennon, 2019-00998, p. 4–5 (La. 9/1/20), 340 So. 3d 881, 885 ("As a general matter, sentences imposed in accordance with plea agreements are unreviewable. LA. CODE CRIM. PROC. ANN. art. 881.2(A)(2) (2021) ('The defendant cannot appeal or seek review of a sentence imposed in conformity with a plea agreement which was set forth in the record at the time of the plea.')") (citation omitted).

30 *See* TEX. CODE CRIM. PROC. ANN. art. 44.02 (West 1977); TEX. R. APP. P. 25.2(a)(2); *see also* Bobillo v. State, No. 05-21-01048-CR, 2022 WL 780443, at *1 (Tex. App. Mar. 15, 2022) ("When an appellant waives his right to appeal as part of his plea bargain agreement with the State, a subsequent notice of appeal filed by him fails to 'initiate the appellate process,' thereby depriving this Court of jurisdiction over the appeal.").

forth the contours of a plea hearing. There is some variation in the mandatory content of the plea colloquy, in the authority of courts to refuse to accept a plea, and to what extent trial judges are permitted to be involved in negotiations over pleas.[31] There are rules clarifying the consequences of and remedies for breach of plea bargains, rules regarding the obligation to notify or consult with victims before acceptance of a plea,[32] and rules governing the admissibility of statements made during plea bargaining.[33] Most states have rules barring the use of statements made during negotiations, and sixteen states, as well as the federal courts, prohibit judges from participating in plea bargaining.[34] In the federal system, the primary source of regulation of plea bargaining is Rule 11 of the Federal Rules of Criminal Procedure.[35] Rule 11 establishes minimum standards for the plea colloquy—the information which must be communicated to criminal defendants to make a guilty plea valid. Rule 11 also imposes certain duties on judges. In theory, the most important duty is to determine whether there is an adequate factual basis for the guilty plea. The factual basis requirement is potentially a critical safeguard. Nevertheless, in practice, establishing a factual basis for the plea is a pro forma exercise based on the bare representation of the prosecutor or the simple affirmation of the defendant. Typically, the defendant has already decided they prefer to enter a guilty plea and thus has no

31 *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 26.13 (West 2021) (setting forth, inter alia, admonishments that must be given to a defendant at a plea hearing); LA. CODE CRIM. PROC. ANN. art. 556.1 (2021).

32 *See, e.g.*, WIS. STAT. ANN. § 971.095 (West 2022).

33 *See* Rishi Raj Batra, *Judicial Participation in Plea Bargaining: A Dispute Resolution Perspective*, 76 OHIO STATE L.J. 565 (2015) (reporting on all fifty states' rules governing judicial participation in plea bargaining proceedings).

34 *See* Shari Seidman Diamond & Jessica M. Salerno, *Reasons for the Disappearing Jury Trial: Perspectives from Attorneys and Judges*, 81 LA. L. REV. 119, 162 (2020). But undoubtedly many jurisdictions have a set of unwritten rules that govern local practice. Napa County, for instance, "had a policy that had been in place for many years . . . that 'there are no plea bargains on the morning of trial.'" People v. Cuenca, No. A118672, 2008 WL 4062069, at *3 (Cal. Ct. App. Sept. 3, 2008).

35 FED. R. CRIM. P. 11.

interest in providing information to the court that might derail the deal.[36] Most states have adopted their own versions of Rule 11.[37]

Notwithstanding the above, few states have enacted rules to comprehensively regulate the bargaining process itself.[38] Some, however, have made isolated forays. A few states require that plea agreements be in writing or disclosed to the court, or both.[39] At least one, New Jersey, has placed limits on a prosecutor's bargaining authority in certain cases.[40] California enacted a statute that prohibits

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36 *See, e.g.*, Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CALIF. L. REV. 1585, 1634 (2005) ("[J]udges routinely fulfill their obligations to find a factual basis for guilty pleas by relying on parties' fact summaries rather than hearing witnesses and examining other evidence."); Thomas Weigend & Jenia Iontcheva Turner, *The Constitutionality of Negotiated Criminal Judgments in Germany*, 15 GERMAN L.J. 81, 102 (2014) ("The U.S. Supreme Court has failed to give substance to the factual basis requirement for guilty pleas and has accordingly allowed parties to engage in fact bargaining at will."); Christopher Slobogin, *Lessons from Inquisitorialism*, 87 S. CAL. L. REV. 699, 708 (2014) ("[G]uilty plea hearings consist primarily of a brief determination of whether a factual basis exists for the crime and an assessment of whether the defendant understands the rights he is waiving.").

37 *See, e.g.*, TENN. R. CRIM. P. 11; COLO. R. CRIM. P. 11.

38 Colin Miller, *Plea Agreements as Constitutional Contracts*, 97 N.C. L. REV. 31, 34 (2018). "The first attempt to regulate plea bargaining came in 1946, when Congress promulgated Federal Rule of Criminal Procedure 11" which provided that "a judge should not accept a guilty plea 'without first determining that the plea is made voluntarily with understanding of the nature of the charge.'" *Id.* Rule 11 was adopted in large part because "plea discussions and agreements have occurred in an informal and largely invisible manner." FED. R. CRIM. P. 11 advisory committee's note to 1947 amendment.

39 At least four states require that jurisdictions that require the agreement do so in writing. *See* Turner, *supra* note 13, at 979 n.27 (identifying Alabama, Arizona, Maryland, and Tennessee as states mandating written plea agreements). Pursuant to FED. R. CRIM. P. 11(c)(2)—requiring disclosure of plea agreements "in open court" or, on showing good cause, in camera—most federal courts require, or at least suggest, that plea agreements be in writing.

40 New Jersey has adopted guidelines that limit prosecutorial discretion to enter plea agreements that waive mandatory minimum sentences in certain drug cases. *See* State v. Brimage, 706 A.2d 1096, 1097 (N.J. 1998) ("[A] prosecutor may, through a negotiated plea agreement or post-conviction agreement with a defendant, waive the mandatory minimum sentence specified for any offense under the CDRA. To satisfy the constitutional requirements of the separation of powers doctrine, *N.J. Const.* art. III, ¶ 1, this Court in *State v. Vasquez* held that prosecutorial discretion under Section 12 must be subject to judicial review for arbitrary and capricious action. To further that review, the Court held that prosecutors must adhere to written guidelines governing plea offers and state on the record their reasons for waiving or not waiving the parole disqualifier in any given case. In response to that holding, the Attorney General promulgated plea agreement guidelines. *See Directive Implementing Guidelines Governing Plea-Bargaining and Discretionary Decisions in Drug Prosecutions Involving Mandatory Terms*, from Robert J. Del Tufo, Attorney General, to the Director, Division of Criminal Justice and All County Prosecutors (Sept. 15, 1992) (hereinafter "Guidelines" or "1992 Guidelines"). Those Guidelines were subsequently amended by the Attorney General's 1997 Supplemental Directive and then were again

prosecutors from seeking waivers of the right to benefit from future changes in the law.[41] Further, California has shifted some of the costs of incarcerating certain types of offenders from the state to the counties, which affects what cases prosecutors choose to charge and, by extension, seek plea deals to resolve.[42] But formal regulation of plea bargaining remains limited. States have yet to attempt to regulate the dynamics of bargaining. Moreover, states do not purport to limit the types of incentives prosecutors can use to induce a guilty plea or the magnitude of the sentencing differential. The creative manipulation of charges and the expected sentencing exposure influences the sentencing differential. On the contrary, most states, like Arizona, make clear that every aspect of a case is on the bargaining table.[43]

Various matters remain largely untouched by regulation. These include (1) who gets an offer; (2) how its contents are determined; (3) when the offer will be made available; (4) how long it will remain open; (5) whether a defendant will receive discovery prior to having to accept or reject the offer; (6) what rights the defendant will be required to waive and what promises they will be obligated to keep; (7) whether potentially dispositive motions may be litigated prior to acceptance; and (8) what the costs of litigating them will be in terms of impact on the offer. Most importantly, the ability of prosecutors to control the magnitude of the sentencing differential remains almost completely unchecked. In short, the regulation of plea bargaining remains scattershot and grossly underdeveloped. It fails to touch on most of the key issues that determine what the outcomes will be. These matters are almost entirely reserved to the parties, and that means, in effect, they are controlled by the party who holds all the cards—the prosecutor. To

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amended by the Uniformity Directive in 1998; however, the essential provisions of the Guidelines remain the same. Although the Guidelines prescribe statewide minimum plea offers, they also direct each county prosecutor's office to adopt its own written plea agreement policy, which may include standard plea offers that are more stringent than the statewide minimums provided by the Attorney General.") (citations omitted). *See generally* Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010, 1032 (2005) (discussing *Brimage* guidelines).

41 *See* CAL. PENAL CODE § 1016.8(b) (West 2020) ("A provision of a plea bargain that requires a defendant to generally waive future benefits of legislative enactments, initiatives, appellate decisions, or other changes in the law that may retroactively apply after the date of the plea is void as against public policy.").

42 *See* JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 210–12 (2017) (discussing state-level plea bargaining reform).

43 *See* ARIZ. R. CRIM. P. 17.4(a)(1) ("The parties may negotiate and reach agreement on any aspect of a case.").

the extent that states have legislated in this area, the laws enacted are as likely to protect the prosecutor's absolute discretion to bargain about any aspect of a case, and to insulate deals and the sentences that follow from any subsequent review, as they are to protect defendants from coercive bargaining practices.

Direct, formal regulation of plea bargaining remains rare (or has been taken off the table altogether through Supreme Court case law or through state common or statutory law), and constitutional regulation of plea bargaining (at least beyond *Lafler-Frye*) is virtually nonexistent. At least one scholar has argued that there is nonetheless a robust set of sub-constitutional procedural rules that have a significant, if underappreciated, impact on the practice of plea bargaining. According to Professor Andrew Crespo, these rules constitute a "hidden law of plea bargaining" made up of state (and federal) rules governing procedural domains that necessarily affect bargaining constraints and outcomes. In making this argument, Crespo focuses on legal doctrines pertaining to joinder and severance, the permissibility of serial prosecutions, the rules regarding the imposition of consecutive versus concurrent sentences, substantive pretrial evidentiary review, the prosecutor's ability to amend charges, and treatment of lesser included offenses.[44] Professor Crespo makes a compelling case that the mechanics of plea bargaining are, at least in part, shaped by such state rules of procedure, and that these rules tend to be made by judges through case law rather than legislatures. The mindful attention to these rules could provide a platform upon which a program of plea bargaining reform could take place.

Professor Crespo is no doubt correct. These mechanisms are central to how plea bargaining works because they directly affect the ability of prosecutors to make and carry out threats to seek an onerous trial penalty for any defendant who refuses to accept an offer.

Nevertheless, the hiddenness of this body of regulatory law is, in an important sense, precisely the point. While jurisdictions have the theoretical ability to regulate plea bargaining by modifying their procedural rules, they have overwhelmingly declined to do so in ways that seriously limit prosecutorial bargaining leverage. The empirical data Crespo presents suggests variation among the states concerning many relevant aspects of criminal procedure and indicates that how these rules are structured can make an important difference in the role played by plea bargaining.

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[44] Crespo, *supra* note 8, at 1303.

For example, as Wright and Miller observed in a landmark study of the New Orleans District Attorney's office, early screening mechanisms can have a major impact on the amount of post-charge movement or dismissals of initial charges resulting from bargaining.[45] But, apart from the somewhat unique experience of Philadelphia (which has long embraced bench trials as an alternate method to resolve cases),[46] the data suggests a quite modest amount of variation in plea and trial rates.[47] No state has bucked the modern trend toward ever-fewer trials, and nothing in the data suggests that any state has meaningfully limited the prosecutorial dominance of plea bargaining. This, in turn, suggests that regardless of jurisdictional, procedural rule variation, the plea bargaining juggernaut won't turn absent a change in paradigm.

Virtually every aspect of criminal law, both substantive and procedural, has an impact on plea bargaining. Plea bargaining has evolved in response to each system's unique dynamics, including relevant resource constraints, cultural norms, substantive criminal laws, sentencing laws, constitutional rules, and the workaday procedural rules under which criminal law transpires. Judges may be better positioned than some to craft procedural rules through their constitutional and common lawmaking and judicial oversight powers, and they may be ideologically or politically more inclined to create or enforce rules that marginally improve the position of criminal defendants in bargaining. But there is little to indicate that judges have done so. If we are to see any real reform of plea bargaining, it will need to come from a wholesale commitment, endorsed by the governing legal bodies in the jurisdiction, to move in a different direction.

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45 *See* Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29 (2002).

46 *See* Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1050–87 (1984) (describing Philadelphia's experience with using bench trials to partially supplant guilty pleas).

47 *See* Crespo, *supra* note 8, at 1375 (presenting data indicating variation in trial rates among sample jurisdictions to range from a low of 1.5% of criminal convictions in Missouri to a high of 5.5% in Hawaii, with the majority falling between a narrow band of 1.8% to 3.6%). Crespo's data does suggest that something unusual is going on in Hawaii, which appears to be an outlier on a number of fronts (e.g., according to the data presented, Hawaii reports only four felony pleas per 100 crimes, whereas the next lowest in the table is New York, which reported ten felony pleas per 100 crimes). *Id.* at 1376.

II
WHY REGULATION IS NEEDED

A. The Vanishing Trial

Plea bargaining regulation is needed to arrest the long-term trend toward ever fewer criminal trials.[48] As widely noted, "jury trials in America are endangered."[49] To borrow an oft-cited phrase, jury trials are a "vanishing" breed. While trials have not been the primary mechanism to resolve criminal cases for quite some time, the percentage of criminal convictions that are the product of trials has fallen precipitously since the 1970s. In the late 1950s to early 1960s, nolo contendere and guilty pleas together accounted for an average of 79% of all dispositions in federal criminal cases.[50] Now, guilty pleas alone account for more than 98% of all criminal convictions.[51]

The consequences of this disappearance of trials as a regular component of the criminal legal process are profound. First, the fewer trials there are, the more trial skills atrophy.[52] This atrophy makes the trials that are conducted less reliable and contributes to future trial avoidance. With ever less experience conducting jury trials, prosecutors, defense lawyers, and judges will all be increasingly hesitant to take the next case to trial if such a trial can be avoided, and less prepared to do so well when the occasion demands it. The vanishing trial is a self-reinforcing downward spiral.

Second, given that the criminal legal system in the United States is theoretically predicated on jury trials, the costs of their disappearance are profound. With fewer trials come fewer opportunities to hold state actors, such as police and prosecutors, accountable for their conduct. Civil penalties for official misconduct are already virtually unobtainable due to qualified immunity doctrines and practical

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48 *See* Diamond & Salerno, *supra* note 34, at 120 ("All court observers agree that the modern era has brought a dramatic decline in jury trials.").

49 Aloke Chakravarty, *Evolution of the Trial Advocate: From Quintilian to Quanta in the Contemporary Courtroom*, 50 SUFFOLK U. L. REV. 45, 46 (2017).

50 *See* Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865, 865 (1964).

51 GLENN R. SCHMITT & LINDSEY JERALDS, U.S. SENT'G COMM'N, OVERVIEW OF FEDERAL CRIMINAL CASES: FISCAL YEAR 2021 8 (2022).

52 *See, e.g.*, Walter I. Gonçalves, Jr., *"How Much Time Am I Looking At?": Plea Bargains, Harsh Punishments, and Low Trial Rates in Southwest Border Districts*, 59 AM. CRIM. L. REV. 293, 295 (2022) (stating that in over six and a half years as a federal defender he has taken two cases to trial, while other lawyers in the office have gone eight years or more without trials).

obstacles of collecting damages by sometimes unappealing plaintiffs.[53] The threat of the exclusionary rule loses force if there is no possibility of a suppression hearing.

Trials provide a forum to illuminate law enforcement's inner workings. Without them, there will be far fewer opportunities to hold state actors accountable for unlawful or unethical conduct. Judicial opinions, moreover, are a fundamental source of law. Statutes are interpreted and constitutional law is pronounced in appellate decisions, which in the overwhelming majority of cases are the product of trials. For various reasons, including the lack of opportunity to develop a factual record and the prevalence of appellate waivers, the lawmaking function of courts would essentially be—and indeed is increasingly—short-circuited in a legal system without trials.

Third, the absence of criminal trials undermines the theoretical foundation of plea bargaining itself. Since plea bargaining outcomes are typically justified as rational because they are negotiated in the "shadow of trials," plea bargaining without trials is a negotiation process in which bargaining outcomes are negotiated in a vacuum.[54] In such a system, it is entirely unclear which factors establish bargaining parameters. Without trials, plea bargains may be negotiated against nothing more than the prosecutor's intuitions about what constitutes an acceptable outcome.[55] To adopt a similar concern about arbitrary judicial decision-making coined by the legal realists, one might say that

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53 *See* Avani Mehta Sood, *Cognitive Cleansing: Experimental Psychology and the Exclusionary Rule*, 103 GEO. L.J. 1543, 1589–90 (2015) (noting that "felonious petitioner[s]" face significant disadvantages when pursuing "police officers in a civil damages action" and that qualified immunity doctrines further inhibit civil actions against police officers).

54 *See* Bibas, *supra* note 18 (acknowledging conventional account providing that plea bargains are negotiated in the shadow of expected trial outcomes but arguing that other factors sometimes short-circuit the conventional account).

55 Ron Wright, Jenny Roberts, and Betina Cutaia Wilkinson identified an alternative bargaining model in a recent empirical study of defense counsel bargaining strategies, which they label "bargaining in the shadow of the client." Wright et al., *supra* note 18, at 1313. Defense counsel negotiating under this model are described as "emphasiz[ing] the individual qualities of the client" and their "life situation," without necessarily focusing on the "predicted outcomes at trial, and at sentencing after trial." *Id.* at 1313, 1315. In my view, such bargaining strategies are exactly what should be expected in a world where trials are not available to set bargaining "prices." Instead, bargaining occurs in the gray zone formed by the prosecutor's intuitions about how much punishment would be "enough" and the client's sense of how much punishment they can tolerate.

in a world without trials, plea bargains are negotiated in the "shadow of what the prosecutor had for breakfast."[56]

The vanishing trial also threatens to extinguish community involvement in criminal law decision-making. The Framers considered the participation of lay jurors to be a foundational principle of constitutional governance. Jury service remains one of the last means available to enlighten citizens about the realities of law and the legal process. It also provides a strong check on governmental misconduct that lacks popular support.

Unless we are prepared to forgo these various goods or replace the system of criminal justice envisioned by the Framers with some new mechanism, it is critical that the relentless shrinkage of the criminal trial finally be reversed. Plea bargaining regulation could serve as an effective antidote to the vanishing trial through a program designed to impede bargains that are too easy to make.

B. The Trial Penalty

The primary explanation for the steady disappearance of the criminal trial is the steady expansion of tools that allow prosecutors to induce criminal defendants to waive their trial rights and plead guilty.[57] Chief among these is what has frequently been referred to as the trial penalty: the disparity in penal sanctions between convictions obtained through guilty pleas and those won following trial.[58] Although there is significant and growing literature on the trial penalty, including increasingly sophisticated empirical studies, pinning down the real magnitude of the trial penalty remains elusive. But the NACDL's Trial Penalty report states that, based on 2013 federal data, average trial sentences for federal drug charges were three times as long as those

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56 Judicial intuitions about fairness might be the backstop, because if going to trial is not an available option, entering an "open plea" to the indictment in the hope that the judge would reward the plea with a more lenient sentence would remain a possible strategy.

57 *See* NACDL, *supra* note 22.

58 Darryl K. Brown, *How to Make Criminal Trials Disappear Without Pretrial Discovery*, 55 AM. CRIM. L. REV. 155, 194 (2018). The trial penalty results from a variety of practices, including jury trial sentencing. *See, e.g.*, Caleb R. Stone, *Sentencing Roulette: How Virginia's Criminal Sentencing System Is Imposing an Unconstitutional Trial Penalty That Suppresses the Rights of Criminal Defendants to a Jury Trial*, 23 WM. & MARY BILL RTS. J. 559, 560, 567 nn. 67–69 (2014) (reporting that Virginia juries "impose harsher sentences than judges on average" and describing illustrative cases in which juries sentenced criminal defendants to terms more than ten times harsher than what the state sentencing guidelines used by judges would have called for).

imposed after guilty pleas.[59] More conservative estimates of the trial penalty have pegged it anywhere from 6% to 64%.[60] But most of these estimates omit numerous aspects of the bargaining process—most critically, charge and fact bargaining—in reaching their estimates.[61] Those types of bargains are pervasive, however, and undoubtedly account for the lion's share of the benefits conferred on defendants who agree to guilty pleas.

Professor John Langbein once famously compared modern plea practices, and in particular the trial penalty, to the medieval use of torture.[62] Confessions that once were secured by rack and screw are now more neatly and efficiently obtained simply by threatening dramatically increased punishment for any defendant foolish enough to refuse to plead guilty. This coercive practice cannot continue to be allowed. Just as medieval methods of torture eventually were subjected to, and displaced by, legal regulation, so should its modern-day equivalent. Every jurisdiction needs to begin a serious conversation about what an acceptable sentencing differential might look like and about the flashpoint when a sentencing differential morphs from a reasonable acknowledgment of a defendant's acceptance of responsibility into a coercive tool to extract a confession.

As of now, the magnitude of the trial penalty is totally unregulated. Since *Brady*, the Supreme Court has renounced any role in protecting

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59 *See* NACDL, *supra* note 22, at 12. This estimate is consistent with some empirical research that was completed by scholars. *See, e.g.*, Nancy J. King & Rosevelt L. Noble, *Jury Sentencing in Noncapital Cases: Comparing Severity and Variance with Judicial Sentences in Two States*, 2 J. EMPIRICAL LEGAL STUD. 331, 348 (2005) (finding average trial penalties in state courts vary by crime but exceed 400% with respect to certain crimes).

60 *See* 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, 1243 (2015) (estimating federal trial penalty to be around 64%); Jeffery T. Ulmer et al., *Trial Penalties in Federal Sentencing: Extra-Guidelines Factors and District Variation*, 27 JUST. Q. 560, 575 (2010) (finding federal trial penalty at 15%); Celesta A. Albonetti, *Sentencing Under the Federal Sentencing Guidelines: Effects of Defendant Characteristics, Guilty Pleas, and Departures on Sentence Outcomes for Drug Offenses, 1991-1992*, 31 L. & SOC'Y REV. 789, 805 tbl.2 (1997) (showing trial penalties of 6% to 14% for Black and White males charged with federal drug trafficking crimes); *see also* Gonçalves, *supra* note 52, at 300; *see, e.g.*, King & Noble, *supra* note 59.

61 Russell Covey, *Reconsidering the Relationship Between Cognitive Psychology and Plea Bargaining*, 91 MARQ. L. REV. 213, 227 (2007) (critiquing some empirical studies because "[a]n accurate estimate of the operative trial penalty . . . depends not only on raw sentence differentials but also on the amount and type of charge dismissal and movement that accompanies typical plea bargains.").

62 John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3 (1978).

defendants from the coercive effect of harsh trial penalties.[63] Indeed, in one of its earliest and most fateful plea bargaining cases, *Bordenkircher v. Hayes*, the Court sanctioned a prosecutorial bargaining strategy in which defendant Hayes was offered a plea deal of five years to settle a charge of writing an $88 bad check and told that if he didn't accept the offer he would be recharged under the state's habitual offender act.[64] When the defendant refused the offer, the prosecutor followed through on his threat. Hayes was recharged, convicted at trial, and sentenced to life.[65] In finding nothing constitutionally objectionable with the prosecutor's bargaining strategy, the Court essentially washed its hands of the duty to regulate coercive bargaining strategies. Professor Bill Stuntz summed up the incentives sanctioned by the Court in *Bordenkircher*: "For prosecutors, the message is: threaten everything in your arsenal in order to get the plea bargain you want. For defendants, the message is simpler: take the deal, or else."[66] Decided just prior to the explosion of America's prison population, *Bordenkircher* almost certainly has been a major contributor to the mass incarceration problem.[67]

C. Mass Incarceration

The decision to allow prosecutors to use all the tools in the penal arsenal to induce defendants to waive their trial rights is almost certainly a major factor in the expansion of the trial penalty, and helps explain other maladies of criminal justice—most significantly, the mass incarceration phenomena that emerged in the latter half of the

63 William Ortman, *When Plea Bargaining Became Normal*, 100 B.U. L. REV. 1435, 1496–97 (2020) (stating that "*Brady* took the courts completely out of the business of guarding against coercion in plea bargaining").

64 Bordenkircher v. Hayes, 434 U.S. 357, 358 (1978).

65 *Id.* at 359.

66 William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781, 841 (2006). Stuntz added an important additional point: "The incentive to plead applies to innocent and guilty defendants alike. Indeed, it may apply more strongly to innocents, who are more risk averse than their guilty counterparts." *Id.* Plea bargaining's mechanisms do not distinguish between guilt and innocence.

67 It was not inevitable that the law would develop as it did. Prior to *Bordenkircher*, there was case law holding that attempts to induce defendants to plead guilty by threatening imposition of maximum or disproportionate sentences if defendant did not plead guilty undermined the voluntariness of the pleas. *See* Heideman v. United States, 281 F.2d 805, 807 (8th Cir. 1960) (rendering plea involuntary after prosecutor threatened sixty-year sentence but was willing to recommend five-year sentence if defendant agreed to plead guilty); United States v. Tateo, 214 F. Supp. 560, 568 (S.D.N.Y. 1963) (rendering plea involuntary after threat of maximum consecutive sentences); Euziere v. United States, 249 F.2d 293, 294–95 (10th Cir. 1957) (same).

twentieth century. As Albert Alschuler has argued, plea bargaining has almost certainly served as "a major cause of the United States' mass incarceration."[68] The link between plea bargaining and mass incarceration is multipronged, but the bottom line is that by increasing prosecutorial efficiency, plea bargaining has made it substantially easier to ensure that those charged with criminal offenses join the ranks of the incarcerated. The growth of the plea bargaining machine has also encouraged other changes in the criminal legal system that contribute to mass incarceration. Mandatory minimum sentences and highly determinate sentencing guideline regimes have become increasingly common.[69] Moreover, the criminal legal system has seen an increase in severe sentencing enhancements for common and easily provable conduct that accompanies many types of criminal behavior[70] and an increase in severe sentences or cumulative sentencing rules that create truly draconian outcomes in many cases.[71]

The enormous leverage provided by mandatory minimum sentencing provisions has been frequently noted and is almost certainly one of the largest drivers in the dramatic upward spike both in plea rates and prison populations. But mandatory minimums have been accompanied by a wide variety of other sentencing rules that have comparable effects, including federal gun enhancements under 18 U.S.C. § 924, that are easy to add or delete during bargaining to gain

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68 Albert W. Alschuler, *Plea Bargaining and Mass Incarceration*, 76 N.Y.U. ANN. SURV. AM. L. 205, 205 (2021).

69 *See, e.g.*, Carol A. Brook et al., *A Comparative Look at Plea Bargaining in Australia, Canada, England, New Zealand, and the United States*, 57 WM. & MARY L. REV. 1147, 1194–95 (2016) (arguing that "Congress and many states have . . . given prosecutors unprecedented leverage in plea bargaining by enacting so many crimes that carry mandatory minimum sentences," making plea bargaining a "necessity").

70 *See* Brown, *supra* note 58, at 198 (observing that "[b]y the late 1980s, prosecutors had many more tools with which to set more severe post-trial penalties, control the bases of sentencing leniency, and make the consequences of the choice between a plea deal and trial more certain").

71 *See, e.g.*, Stephen C. Thaman, *Is America a Systematic Violator of Human Rights in the Administration of Criminal Justice?*, 44 ST. LOUIS U. L.J. 999, 1014–15 (2000) (explaining that "[b]esides the death penalty, many United States jurisdictions provide for life imprisonments for drug offenses and the repeated commission of non-violent property crimes" and that "the threat of draconian punishments is the prosecution's best bargaining chip" in plea bargaining); *see also* John H. Blume, *How the "Shackles" of Individual Ethics Prevent Structural Reform in the American Criminal Justice System*, 42 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 23, 28 (2016) (describing current system as one in which "[o]vercharging remains the coin of the realm; everyone pleads guilty, draconian sentences are the norm, and mass incarceration continues[]"); Alschuler, *supra* note 68, at 207 (explaining that "[t]he inflation of post-trial sentences to induce guilty pleas is . . . systematic and pervasive").

leverage and guideline sentencing provisions that turn on manipulable drug quantities.[72] They also include a profusion of habitual offender sentencing regimes that serve as Thor-sized hammers to induce guilty pleas.[73] The use of all these tools has eventuated in draconian sentencing outcomes that now rarely raise a stir.[74] Prominent examples include the life without parole sentence imposed on a first-time drug offender in *Harmelin v. Michigan*,[75] and the twenty-five-to-life "three strikes" sentence imposed on a man who stole three golf clubs in *Ewing v. California*.[76] These wildly draconian sentences, both of which were found to pass muster under the cruel and unusual punishments clause of the Eighth Amendment by the U.S. Supreme Court, have routinized the imposition of multiple decades-long sentences for a wide range of drug crimes and other offenses that would simply be unheard of in other developed countries. With the "Eighth Amendment a dead letter" for regulating the vast bulk of noncapital sentences, other sources of regulation are needed to scale back the use of excessively harsh sentences, the primary purpose of which is to maximize prosecutorial bargaining leverage.[77]

Greater regulation of plea bargaining would not directly affect these practices. But, to the extent that they exist primarily for the purpose of enhancing bargaining power, reform of plea bargaining might clear an easier path to a reform or abandonment of sentencing tools that serve little other purpose.

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72 Albert W. Alschuler, Lafler *and* Frye*: Two Small Band-Aids for a Festering Wound*, 51 DUQ. L. REV. 673, 703 (2013) (noting that according to United States Sentencing Commission data, "only 20% of the offenders who used firearms to commit drug crimes received the mandatory sentences that section 924 prescribes, and offenders who carried firearms without using them received the section 924 enhancements even less often").

73 *See* CANDACE MCCOY, POLITICS AND PLEA BARGAINING: VICTIMS' RIGHTS IN CALIFORNIA 180 (1993) (noting frequent use of California's three-strikes law to induce defendants to enter quick guilty pleas).

74 *See, e.g.*, Mugambi Jouet, *The Exceptional Absence of Human Rights as a Principle in American Law*, 34 PACE L. REV. 688, 696 (2014) (noting that even dissenting American judges never invoke "human rights" as a concern in such cases even though such characterization is arguably appropriate).

75 Harmelin v. Michigan, 501 U.S. 957, 994–95 (1991) (declining to find sentence "cruel and unusual" per the Eighth Amendment).

76 Ewing v. California, 538 U.S. 11, 18, 20 (2003).

77 William W. Berry III, *Cruel and Unusual Non-Capital Punishments*, 58 AM. CRIM. L. REV. 1627, 1628 (2021).

D. Assembly-Line Justice

Modern plea bargaining practices make possible a kind of "assembly line justice"[78] that has been scathingly criticized. Sometimes referred to as "meet 'em and plead 'em" lawyering, modern plea bargaining permits a type of mass processing of human beings that looks and smells like the opposite of "justice." The reasons for assembly-line justice are, no doubt, complex. Dire resource constraints play a major role. Nonetheless, such practices are enabled by a plea process that is unconstrained by legal regulation. Stephen Bright described the practice as he observed it:

> In a Georgia courtroom last year, a poor, 17-year-old high school freshman, charged as an adult with stealing a go-cart, entered a guilty plea to a felony charge of theft. It was his first time in court, and he was startled and confused when the judge asked if he was satisfied with his lawyer. "I don't have one," he answered. He had not spoken to a lawyer. A public defender's investigator had told him what the charges against him were and suggested he plead guilty. A public defender quickly spoke up and asserted that he was representing the youth. The judge accepted the guilty plea, imposed a sentence of probation, restitution, fines and a $50 public defender fee.
>
> In the same courtroom that day, other people who pleaded guilty had spoken to a lawyer for only three to five minutes before entering a plea and being sentenced. Still others pleaded guilty after speaking to only a prosecutor, without even consulting with a defense lawyer.
>
> Guilty pleas account for about 95% of all criminal convictions. In many courts, poor people are processed through the courts without lawyers or moments after speaking for a few minutes with lawyers they just met and will never see again. This is called "meet 'em and plead 'em" or "McJustice."[79]

This style of mass justice, which marks an incontrovertible failure to implement the mandate of *Gideon v. Wainwright*,[80] has been criticized for years, mostly to no avail.[81]

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78 Zohra Ahmed, *Bargaining for Abolition*, 90 FORDHAM L. REV. 1953, 1953 (2022). *See generally* Steven Zeidman, *Eradicating Assembly-Line Justice: An Opportunity Lost by the Revised American Bar Association Criminal Justice Standards*, 46 HOFSTRA L. REV. 293, 294 (2017).

79 Stephen B. Bright & Sia Sanneh, *Violating the Right to a Lawyer*, L.A. TIMES (Mar. 18, 2013), https://www.latimes.com/opinion/la-xpm-2013-mar-18-la-oe-bright-gideon-justice-20130318-story.html [https://perma.cc/WVV7-WXJZ].

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

81 *See, e.g.*, Tracey L. Meares, *What's Wrong with* Gideon, 70 U. CHI. L. REV. 215 (2003); Zeidman, *supra* note 78, at 294–95.

In short, the relentless rise of plea bargaining has led to an array of maladies. Bargaining has almost totally displaced the criminal trial as the mechanism for resolving criminal charges, leading to the vanishing of the primary procedural tool around which our constitutional system of criminal procedure is based. It has facilitated mass incarceration, encouraged and normalized wildly over-punitive penal policies, and paved the way for assembly-line justice. And it has done all the above notwithstanding any serious effort to subject it to legal regulation.

Plea bargaining as it is practiced today is a bewildering and arbitrary experience for criminal defendants. Offers to resolve cases may be presented with no clear sense of whether the offer will get better or worse over time or what precisely is at stake in accepting or refusing the offer. This is in part a function of the lack of regulation over the process by which plea deals are made and in part a product of the absence of regulation over the magnitude of penalties that prosecutors can threaten to induce defendants to waive their trial rights and plead guilty.

Ending lawless plea bargaining is thus not possible unless means are also found to regulate the timing, scope, and magnitude of the choice and consequences of pleading guilty. But what, exactly, would such regulation look like? How might it be accomplished? Although rethinking an institution as central to the criminal justice system as plea bargaining seems daunting, there is no need to write on a blank slate. Formalizing plea bargaining through thoughtful regulation has been on the radar screen of scholars and commentators from the very start of the modern era.

E. Calls to Formalize Plea Bargaining

To be clear, the call to regulate or formalize plea bargaining is not a call to abolish it. Although many critics of plea bargaining have called for its complete abolition,[82] if such calls are meant to signal that all cases should be resolved at trial, then the call for abolition is neither a practical solution given the way in which our criminal legal system has evolved nor is it necessarily a superior solution even if it were

82 *See* Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387 (1970); Alschuler, *supra* note 16, at 1180, 1314. Abolition has, however, been implemented with varying degrees of success in a variety of localities, and a general policy of disfavoring plea bargains has been viable in some jurisdictions. *See* Morano v. State, 572 S.W.2d 550, 551 (Tex. Crim. App. 1978); Phea v. State, No. 06-20-00078-CR, 2021 WL 786196, at *2 (Tex. App. Mar. 2, 2021) ("In Bell County, [Texas,] in most cases the judges do not allow plea bargaining; this is announced and provided for in the local rules.").

possible.[83] Resolution of criminal charges through the taking of guilty pleas offers several advantages given our current criminal legal framework that would be lost were abolition somehow made possible.[84]

First, guilty pleas deliver a comparatively speedy resolution of criminal cases. For a multitude of reasons, criminal trial practices are complex, time-consuming, and resource intensive. While far from perfect, they provide what constitutes Anglo-American law's best approximation of a fair opportunity to establish some sort of objective, factual, and moral "ground truth." Trials are not without their flaws, but they do allow relatively wide participation from people with varying vantage points, including prosecutors, defense attorneys, judges, victims, witnesses, subject matter experts, and jurors drawn from the community in which the alleged criminal offenses occurred. Criminal trials are undoubtedly the premier events in our criminal legal system pantheon, but the features that make them so invaluable—live witnesses, cross-examination, neutral factfinders, subject matter experts, and adversarial process—are the very features that limit their broad availability. We have never lived in a world where such

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[83] There have been a few experiments attempting to partially ban plea bargaining. Alaska formally banned plea bargaining in 1975 in an experiment that largely failed. Teresa White Carns & John Kruse, *A Re-Evaluation of Alaska's Plea Bargaining Ban*, 8 ALASKA L. REV. 27, 32 (1991) (reporting that sentences actually increased after the ban). Alaska's Attorney General unilaterally banned sentence bargaining in 2011 but continued to allow charge bargaining. This partial ban had no substantive effect on the incidence of guilty pleas as the parties simply replaced any sentence bargaining they might have otherwise pursued with charge bargaining. *See* Bryan C. McCannon, *Alaska's Plea Bargaining Ban*, SSRN (Jan. 7, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3761990 [https://perma.cc/7JFY-3YKT]. El Paso undertook a similar attempt. Robert A. Weninger, *The Abolition of Plea Bargaining: A Case Study of El Paso County, Texas*, 35 UCLA L. REV. 265 (1987). As Jeffrey Bellin recounts in a recent article, both New York and California purported to limit, or abolish, plea bargaining in certain ways. *See* Jeffrey Bellin, *Plea Bargaining's Uncertainty Problem*, 101 TEX. L. REV. (forthcoming 2023) (discussing New York's so-called Rockefeller Drug Laws and CAL. PENAL CODE § 1192.7(a)(2) (West 2015)). In New York, the laws purported to limit plea bargains in drug cases. *Id.* In California, the ban was supposed to extend to all "serious felon[ies]." *Id.* In practice, neither New York's law nor California's law actually reduce the incidence of plea bargaining. *See* MCCOY, *supra* note 73, at xvii, 23–30 (noting that the law as enacted enhanced prosecutorial power to induce early plea bargains rather than limit plea bargaining itself).

[84] Of course, it is hard to argue that guilty pleas are not, at best, a "Second-Best" procedural device. *See* William Ortman, *Second-Best Criminal Justice*, 96 WASH. U. L. REV. 1061, 1062 (2019) (explaining theory of "Second-Best" criminal procedure). If properly resourced, a full and fair trial is almost certainly a superior device to resolve contested criminal charges. Trials are, moreover, the sole constitutionally approved method of prosecuting criminal cases. The argument for guilty pleas begins with the premise of limited resources, imperfectly accurate factfinding methods, and strategic maximizing, or at least satisficing, players.

resources were routinely brought to bear to resolve the garden-variety criminal allegations that characterize the administration of a modern mass society, and we likely never will.

Voluntary guilty pleas, at least in theory, offer a much more efficient way to resolve criminal disputes while preserving the rights of the accused to individualized and fair outcomes. As such, they are viewed as a vital tool by prosecutors, the criminal defense bar, and judges alike. Guilty pleas, though, are not and should never be simply a mechanism to economize on the costs of criminal procedure. Like trials, guilty pleas should be structured to ensure that they advance the central goal of criminal justice: to separate the guilty from the innocent and ensure a fair, rational, and proportionate sentence for those who are in fact guilty of criminal conduct.[85]

Guilty pleas also offer one positive feature that, appropriately exploited and combined with the option of trial, could enhance the overall accuracy of the criminal justice system. Because they require the defendant to make an independent assessment of the case and the evidence against them, properly incentivized guilty pleas help elicit private information that otherwise would not be shared.[86] Where a defendant knows that they are guilty, that heretofore undisclosed evidence is more likely to be disadvantageous to their case, a trial has relatively less appeal than it might to someone who is actually innocent or who is in a position to muster stronger favorable evidence.[87] The reverse is also true. Innocent defendants should, at least in theory, be more confident that new evidence will exculpate rather than inculpate.[88]

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[85] Guilty pleas also perform the important function of minimizing uncertainty. For prosecutors, such pleas help ensure that offenders receive the prompt punishment so central to effective deterrence and community safety. For defendants, a guilty plea offers some control over ultimate outcomes, helping well-counseled defendants manage risk and identify least-worst alternatives.

[86] *See* Russell D. Covey, *Signaling and Plea Bargaining's Innocence Problem*, 66 WASH. & LEE L. REV. 73 (2009).

[87] For instance, a guilty defendant might reasonably expect that their testimony (if given) would be more likely to be revealed as false under cross-examination. Defendants who know they are guilty also might know that any favorable witnesses in their defense might be exposed as liars, or that forensic evidence might surface implicating them in the crime.

[88] I say "in theory" because the reality all too often is that the new, night-before-trial evidence that does emerge is false. Incentivized jailhouse informant testimony is the classic example, where a prosecutor's weak case suddenly becomes much stronger after a jailhouse informant steps forward ready to testify that the defendant confessed their guilt during the pretrial period.

These functions make guilty pleas useful, and some would argue indispensable, to the world we currently inhabit. If we didn't already have a system that permitted people to plead guilty, we would almost certainly have to invent it. At the same time, our current system of plea bargaining carries with it excesses that are obvious and seriously detrimental to the basic fairness of our criminal legal system. The widespread obsession with efficiency has resulted in the normalization of oppressive and coercive practices that treat the infliction of massive and life-destroying punishments on criminal defendants who exercise their right to trial a prosaic bureaucratic routine.[89] These ruinous punishments are often imposed in the absence of basic safety measures designed to prevent legal accidents from inflicting harm on innocent persons.[90] Such an absence of safety measures would be considered gross negligence in other regulatory fields and reflects a basic failure to respect the humanity of the people on the receiving end of the criminal legal system.[91] The critical project facing reform of our guilty plea practices, therefore, is to figure out how to rein in the excesses and abuses without undermining the perceived benefits of the system as it has evolved. Formalizing plea procedures could well provide the mechanism to make this possible.

The challenge, then, for legal communities across the nation is to rethink how criminal legal process works. To that end, there is a deep well of thought that largely remains untapped. Over the years, there have been regular calls by scholars and other commentators to subject plea bargaining to greater legal regulation. Proposals have been varied

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89 *See* Jalila Jefferson-Bullock, *The Time Is Ripe to Include Considerations of the Effects on Families and Communities of Excessively Long Sentences*, 83 UMKC L. REV. 73, 116 (2014) (noting that excessive sentences disproportionately are imposed on young African American men and harm not only the direct recipients of the sentences but also their families and communities; they also undermine rehabilitation, increase costs, and trigger recidivism, and that "[e]xcessive sentences and mass incarceration serve no tangible criminal justice purpose, and have weakened both our criminal justice system itself and the larger community").

90 *See, e.g.*, Boaz Sangero, *Safety from Plea-Bargains' Hazards*, 38 PACE L. REV. 301, 302 (2018) ("There is a significant risk—in safety terms, a hazard—that the wide gap between the defendant's anticipated punishment if convicted at trial and the relatively lighter punishment if he confesses in the plea-bargain will lead not only the guilty but also the innocent to confessing.").

91 *See, e.g.*, James M. Doyle, *Learning from Error in American Criminal Justice*, 100 J. CRIM. L. & CRIMINOLOGY 109, 109 (2010) (arguing for incorporation of safety principles in criminal justice because "[w]rongful convictions and other criminal justice system errors can be seen as 'organizational accidents' in which small mistakes (no one of which would suffice to cause the event) combine with each other and with latent defects in the criminal justice system to create disasters").

in content and scope, but an examination of them reveals certain consistent themes. In 1968, the ABA published its Standards on Pleas of Guilty. In 1975, the American Law Institute (ALI) advanced its own set of well-thought-out proposals when it published its "Model Code of Pre-Arraignment Procedure."[92] The ALI proposal in particular establishes a reasonable and balanced approach to plea bargaining that remains timely today. In addition, Alschuler's recommendations based on his extensive studies of plea bargaining deserve consideration. Other prominent criminal law scholars, including Norval Morris and Steven Schulhofer, also contributed important work in this area. Finally, there were several student notes published in leading law review journals during a period in which the legal status and practice of plea bargaining remained in substantial doubt. These notes assessed the state of plea bargaining practice and made important contributions to the discussion. This broad array of commentators was able to identify common problems with the state of plea bargaining practice.

In general, the suggestions advanced by this broad array of commentators converged on a set of proposed reforms that share numerous common features. Each suggestion sought to subject plea bargaining to greater legal regulation. Some of the proposals that have since been adopted by most or all jurisdictions include ensuring that guilty plea hearings are structured to ensure that criminal defendants understand their basic legal rights prior to entering a guilty plea, and that they understand what rights they waive by entering plea agreements (as incorporated in standard Rule 11 procedures). Another important and widely adopted proposal is judicial review of the evidence to ensure that there is a factual basis for the plea. Many other worthy suggestions for reform, however, have been studiously ignored. Those proposed reforms are introduced and further developed in the next Part.

III
REGULATING PLEA BARGAINING

In this Part, I develop a comprehensive set of proposals designed to begin the process of bringing effective legal regulation to the practice of plea bargaining. These proposals, which draw heavily from prior scholarship, are intended to redress the many maladies identified

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92 AM. L. INST., A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE (1975) [hereinafter ALI MODEL CODE]. An earlier draft of the model code was published in 1968. *See* AM. L. INST., A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE: STUDY DRAFT NO. 1 (1968).

above. In using the phrase "regulating plea bargaining," I mean employing a variety of constitutional and sub-constitutional tools to generate a legal regulatory system of plea bargaining that is comparable to the rules we routinely enforce in cases that go to trial. In my view, this will require a fundamental rethinking of plea bargaining as an institution. I believe we need to formally regulate plea bargaining so that, while preserving the concept of alternative dispute resolution of criminal accusations, we remove the excesses of discretion that are built into the system, and which lead to the worst forms of abuse and injustice.

The process of plea bargain regulation that I envision would encompass several critical components. First, bargaining would be removed from back hallways and courthouse lobbies and returned to where the resolution of significant legal accusations belongs—in the courtroom itself. What this means, in practical terms, is that plea offers must take on the characteristics of legal instruments that serve similar functions in the trial process. Plea offers, for instance, should always be in writing, and they should always be filed in court. In addition, the consequences of accepting, or declining, a plea offer should be transparent. Defendants, in all cases, need to understand what the maximum sentence will be if they accept or decline the offer. Better yet, defendants should understand the actual sentences that would be imposed if they agreed to enter a guilty plea or if they went to trial and were convicted.[93]

Regulation of plea bargaining also necessarily means regulating the conditions under which decisions to plead guilty are made. There is no justification for forcing defendants to make high-pressure decisions to accept or reject exploding offers,[94] or to prevent them from obtaining thoughtful, well-considered counsel from their lawyers and their loved ones before deciding which years or decades of their freedom may hinge. The amount of time that defendants have to consider whether or

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93 *See* ALI MODEL CODE, *supra* note 92, § 350.3, at 615 ("From the standpoint of the defendant attempting to assess his alternatives, the maximum sentence likely to result from the charging and sentencing policies of the jurisdiction is considerably more important than the theoretical maximum.").

94 *See, e.g.*, Kelly v. United States, No. 609-CV-1623-ORL-19KRS, 2010 WL 2991577, at *8 (M.D. Fla. July 27, 2010) (finding no coercion where defendant was told that state "would bring additional charges if he did not plead guilty pursuant to the plea agreement within 24 hours of receiving the plea agreement[]"); United States v. Pickering, 178 F.3d 1168, 1170 (11th Cir. 1999) (finding no impropriety warranting downward departure where prosecutor gave defendant "only forty-five minutes to consider the offer and discuss it with his lawyer before it expired").

not to accept plea offers must be standardized.[95] Individuals should not be forced to make critical decisions about the disposition of charges without having an opportunity to consider the implications and consequences of the decision, consult with counsel, or speak with friends or family about the decision. This means that short deadlines and high-pressure bargaining tactics must end. Defendants must be provided a reasonable time to consider and act on any offers extended.

Importantly, the range of penalties must be limited by law. As Darryl Brown has noted, plea bargaining exploded after prosecutors "recognized that the power to dictate enhanced post-trial sentences through charging decisions gave them enormous leverage in convincing defendants to plead guilty."[96] Prosecutors simply cannot be allowed to continue to exercise unfettered discretion over the size of the trial penalty and thereby ensure that they can compel just about any defendant to plead guilty in just about every case. Other types of highly dubious pleas that deserve renewed regulatory scrutiny include "linked" pleas, in which one defendant agrees to plead guilty in exchange for an agreement not to prosecute another person—often a family member or loved one—and group pleas, in which the offer made to one defendant is contingent on other defendants also agreeing to plead guilty.[97] A comprehensive attempt to regulate plea bargaining should entail a careful, systematic review of such tactics and mindful consideration of whether to allow their use.

Finally, the contents and terms of plea bargains should be standardized—particularly with respect to the rights that defendants are asked to waive. The range of rights currently thought to be "fair game" for bargaining runs the gamut. Defendants are regularly asked to waive their right to appeal, to challenge their sentence, to seek collateral review, to challenge the ineffective assistance of their lawyers, and to forgo discovery or to raise issues regarding the state's unconstitutional

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95 *See* Bibas, *supra* note 6, at 1155–56 (suggesting adoption of a "cooling-off period" for guilty pleas, at least for pleas to felony charges carrying at least five years of prison time, a requirement that plea deals be disclosed at least three days prior to a plea hearing, and a requirement that final plea offers be on the table for at least seven days prior to trial to "to allow time for advice and avoid pressure for last-minute deals").

96 Brown, *supra* note 58, at 194; *see also* Ortman, *supra* note 84, at 1064 ("The contemporary criminal justice system uses prosecutorial leverage to eliminate trials.").

97 *But see* ALI MODEL CODE, *supra* note 92, § 350.3, at 616–17; United States v. Marquez, 909 F.2d 738, 742 (2d Cir. 1990) ("noting unanimous rejection by ALI Council of recommendation to forbid plea bargains containing third-party benefits" and discussing numerous cases involving third-party beneficiaries, detailing one instance where defendant pleaded guilty to avoid prosecution of wife).

conduct, including its failure to produce exculpatory *Brady* material. The list goes on. The rights sought to be waived vary markedly between jurisdictions. Waivers held valid in some places have been held to violate constitutional rights or ethical rules in others. Effective plea bargaining regulation requires a standard plea agreement. Perhaps some waivers are appropriate and may be the proper subject of bargaining. But there is simply no justification for the anarchic scrum that constitutes contemporary waiver practice.

A. Regulating the Timing of Plea Bargaining

Currently, there are few rules that regulate the timing or manner in which plea bargaining occurs. Bargaining can occur prior to arrest, indictment, or arraignment,[98] or as late as while a jury is in mid-deliberation. The size of the plea discount often turns on how early in the process a defendant agrees to plead guilty.[99] Offers can be made verbally, in quick hallway conversations between lawyers, by telephone, text message, or email.[100] They can be made before counsel is even appointed.[101]

The informality of the bargaining process necessarily gives rise to disputes about whether plea offers were even actually made.[102] This

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98 *See, e.g.*, State v. Cepero, No. 2CA-CR2017-0417-PR, 2018 WL 2246553, at *1 (Ariz. Ct. App. May 16, 2018) (pre-arraignment plea offer).

99 *See, e.g.*, Wallace v. May, No. CV 19-176-CFC, 2022 WL 671081, at *2 (D. Del. Mar. 7, 2022) (noting that the defendant was told "the plea offers would get worse as the case proceeds"); State v. Ellerman, No. A-3632-14T3, 2017 WL 1316161, at *4 (N.J. Super. Ct. App. Div. Apr. 7, 2017) (noting that under the state plea guidelines for certain drug offenses, mandatory period of parole ineligibility turns on whether plea was entered prior to arraignment or later in the process).

100 *See* Wright et al., *supra* note 18, at 1297 (observing that "negotiations happen behind closed doors or in rushed hallway meetings," as well as by email, text message, and in person). *Id.* at 1340 tbl.8. For the classic study of plea bargaining practice, see MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1979).

101 A few states, such as Colorado, have enacted rules to prevent plea bargaining in the absence of defense counsel. *See* COLO. R. CRIM. P. § 11(f) (2018) ("[T]he district attorney . . . should engage in plea discussions or reach plea agreements with the defendant only through or in the presence of defense counsel except where the defendant is not eligible for or refuses appointment of counsel and has not retained counsel.").

102 *See Cepero*, 2018 WL 2246553, at *1 (defendant alleging that counsel was ineffective for failing to inform him of a pre-arraignment plea offer that the State later denied it ever made); State v. Walters, No. 13-0396, 2014 WL 211950, at *3 (W. Va. Jan. 17, 2014) (defendant contending that "his original trial counsel failed to present him with a pre-arraignment plea offer from the State that was more favorable than what petitioner eventually accepted"); Parks v. United States, 687 F. Supp. 2d 564, 571 (W.D.N.C. 2010) ("Petitioner alleges that his counsel failed to communicate to him the existence of a written

informality has led some courts to treat promises made to induce confessions during police interrogation as comparable to plea bargaining.[103] In all too many cases, defendants are induced to plead guilty prior to appointment of counsel.[104]

Indeed, current Sixth Amendment jurisprudence withholds any right of criminal suspects to a lawyer to help them negotiate with prosecutors prior to the filing of formal charges. As a result, prosecutors are incentivized to manipulate the timing or filing of charges to induce suspects to plead guilty prior to the appointment of counsel, since "the Sixth Amendment right to counsel does not extend to pre-indictment plea negotiations."[105] As one Sixth Circuit judge noted, "prosecutors can simply delay indicting people to extract unfavorable and uncounseled plea agreements."[106]

These problems can be greatly reduced, if not entirely eliminated, by formalizing and regulating the timing of plea discussions. Numerous commentators have advocated for regularization of plea negotiation. The ALI Model Code of Pre-Arraignment Procedure, for example, envisioned the establishment of two mechanisms to regulate plea negotiations. First, the ALI's model code established a mandatory screening conference prior to filing of formal charges. The screening conference would provide "defense counsel an opportunity to advance arguments and present facts bearing on the issues," and to discuss and potentially agree upon "(a) a disposition of the case which may include dismissal or suspension of the prosecution, (b) the charge to be filed,

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plea offer by the Government. Indeed, Petitioner asserts that he did not learn of the existence of such an offer until he was informed of it by his habeas counsel."); Hendricks v. Hill, 149 P.3d 318, 318 (Or. Ct. App. 2006) (alleging that "trial counsel had failed to tell petitioner about a pre-arraignment plea offer").

103 *See, e.g.*, State v. Sturgill, 469 S.E.2d 557, 562 (N.C. Ct. App. 1996) ("[P]romises not to prosecute a defendant made during a police interrogation, in return for a defendant's confession, deserve the same scrutiny under contract and due process principles as promises made in the context of plea bargains.").

104 *See, e.g.*, State v. Farfan-Galvan, 389 P.3d 155, 156 n.2 (Idaho 2016) ("[W]e are aware of the practice by certain prosecuting entities of initiating contact with defendants while they are in custody in advance of their initial appearance or arraignment in order to extend plea offers which, if not accepted, expire at the time of the initial appearance or arraignment . . . . [W]e view such conduct as violating Idaho Rules of Professional Conduct.").

105 Sierra Lovely, *Constitutional Law—Eighty-Six the Sixth Amendment: The Sixth Amendment Right to Counsel Applies to Pre-Indictment Plea Negotiations Too*—Turner v. United States*, 885 F.3d 949 (6th Cir. 2018) (En Banc)*, 25 SUFFOLK J. TRIAL & APP. ADVOC. 179, 185 (2020).

106 Turner v. United States, 885 F.3d 949, 983 (6th Cir. 2018) (Stranch, J., dissenting).

(c) the defendant's plea, and (d) recommendation of a sentence."[107] A second formalized opportunity to engage in plea discussions would be established under the ALI plan, after charges had been filed, at a plea conference. The plea conference would be required upon request of either party.[108] Alschuler, too, proposed establishing a "pretrial conference" that would be called upon request of the defendant. The pretrial conference would be the forum in which bargaining would occur, and the defendant would be permitted to be present during the conference. Bargaining outside the conference would be deemed "unethical."[109]

Norval Morris similarly suggested establishing a mandatory "pre-trial hearing" that would be "called by a judicial officer in respect of every criminal charge for which a true bill has been found or an equivalent preliminary hearing process completed."[110] Morris also suggested that discussions between prosecutor and defense counsel outside the hearing would be deemed an ethical violation, that would best ensure "all charge[s] and plea bargaining would be pursued in the controlled setting" of the pretrial hearing "and only there."[111] Morris further thought it important to ensure that all relevant parties were represented at the pretrial hearing. Accordingly, he advised that participants would include, in addition to the prosecutor and defense counsel, the defendant (since the "constitutional right to presence at trial can only be given reality if the accused is allowed to attend those aspects of the pretrial processes that are of significance to him");[112] the judge (who would retain a veto power over any plea agreement reached); and anticipating the victim's rights movement of the next decade, the victim (who would be invited, but not required, to attend and "allowed to be heard on the suitability of any pre-trial

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107 ALI MODEL CODE, *supra* note 92, § 320.1, at 199.

108 ALI MODEL CODE, *supra* note 92, § 350.3, at 244.

109 Alschuler, *supra* note 25, at 1147 ("The defendant should be permitted to attend the pretrial conference that he has sought, and bargaining in advance of this conference (or, more specifically, bargaining when either the defendant, defense attorney, prosecutor or trial judge is absent) should be considered unethical. At the conference, both the defendant and the prosecutor should have an opportunity to discuss the circumstances of the case, to present one or more proposals for disposition of the case, and to argue in support of these proposals.").

110 NORVAL MORRIS, THE FUTURE OF IMPRISONMENT 54 (1974).

111 *Id.* at 54–55.

112 *Id.* at 53.

settlement").[113] Proposals envisioning structured bargaining processes were similarly advanced by a wide variety of commentators.[114]

The insight captured by these various reform proposals is critical to bringing some measure of legal regulation to the plea bargaining process. Under current practice, no other aspect of criminal procedure is as unregulated as the manner and timing of plea bargaining. This absence of regulation creates substantial uncertainties that increase litigation costs. Both prosecutors and defense counsel alike have incentives to delay expenditure of resources in investigating and litigating cases as long as the possibility of a case-resolving bargain remains available. Often this leads to gamesmanship and threats to take cases to trial, only for those threats, when the bluffs are called, to evaporate. Regulating the timing in which bargaining occurs would eliminate incentives for gamesmanship and help the parties apportion their investigative and litigation resources more thoughtfully.

The first step toward regulating plea bargaining, accordingly, is regulating the manner in which it occurs. The ALI's proposal to establish two separate, fixed opportunities to plea bargain best conforms to contemporary plea practices. As noted above, a substantial amount of bargaining takes place at arraignment or prior to the filing of formal charges. Bargains negotiated at this stage of the proceedings allow f or a wider variety of dispositions, including deferred prosecution agreements, transfer of cases to specialty courts, and other outcomes that might affect the entire trajectory of a criminal case or obviate the case through a disposition that preempts charging altogether. Moreover, significant research and practical experience demonstrate that an increased emphasis on early screening relieves pressure on plea bargaining to resolve "weak cases."[115] Establishment of a pre-charge screening conference to facilitate early resolution of cases is thus eminently sensible as long as provisions are made to ensure that defendants have access to counsel at this stage in the proceedings.[116]

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113 *Id.* at 55.

114 *See, e.g.*, Note, *Plea Bargaining and the Transformation of the Criminal Process*, 90 HARV. L. REV. 564, 587–91 (1977) (proposing that magistrate conduct independent review of case and then, upon finding of adequate basis for charges, would upon defendant's request schedule a "plea-screening hearing" at which the parties would conduct negotiations within parameters set by the magistrate).

115 *See* Wright & Miller, *supra* note 45; Crespo, *supra* note 8.

116 Any pre-charge screening process should be expressly acknowledged to be a "critical stage" in a criminal prosecution that triggers the Sixth Amendment right to counsel to ensure that indigent defendants are eligible for appointment of counsel to represent and advise them

Indeed, the ALI noted that ABA standards related to the prosecution and defense functions recognize that plea discussions between a prosecutor and an unrepresented defendant constitute an ethical breach unless the defendant has knowingly and intelligently waived the right to counsel.[117] Ethics rules might be further strengthened to ensure that any plea negotiations that occur at the pre-charge stage are conducted with defendants who are represented by counsel.[118]

Of course, not all cases, or even most cases, can be resolved prior to charging. Accordingly, a second opportunity for plea negotiation is needed. Again, the ALI's framework makes sense. If either party wishes to initiate plea discussions, the filing of a motion requesting a plea conference should trigger a mandatory hearing, at which the parties can attempt to reach agreement on an appropriate disposition.

B. Formal Filing of Written Offer

Traditional charging practice requires the filing of formal documents. The practice, as manifested in grand jury proceedings and other charging procedures initiated by information and complaint, uniformly requires the preparation and filing of a formal charging document that provides adequate notice to defendants of the charges against them and satisfies a bevy of additional legal and due process requirements. There is no justification for plea offers, which are intended to resolve such charges, to be handled with any less formality. Accordingly, the requirement that both plea agreements and plea offers be in writing and disclosed to the court prior to entry of a guilty plea is both logical and essential to the development of an adequate plea bargain regulatory regime. To date, scholars have called for the memorialization of plea agreements,[119] and as noted above, some states

in negotiations. *See* United States v. Cronic, 466 U.S. 648, 659 (1984) (noting that the Sixth Amendment right to counsel attaches at critical stages).

117 *See* ALI MODEL CODE, *supra* note 92, § 350.3, at 612.

118 MODEL CODE OF PRO. CONDUCT r. 3.8 (AM. BAR ASS'N 2020), if strictly adhered to, already makes such bargaining an ethical violation. Model Rule 3.8(c) provides that "[t]he prosecutor in a criminal case shall . . . (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights." As one scholar observes, "Literal compliance with subsection (c) would exclude unrepresented defendants from the primary means of resolving criminal cases—plea negotiations." Ben Kempinen, *The Ethics of Prosecutor Contact with the Unrepresented Defendant*, 19 GEO. J. LEGAL ETHICS 1147, 1175 (2006).

119 Bibas, *supra* note 6, at 1154 (advocating a range of reforms to plea bargaining that begins, "for starters," with a requirement that "all plea agreements should be in writing").

have enacted laws requiring that plea agreements be in writing.[120] The ALI thought that memorialization and disclosure of plea agreements was the absolute minimum necessary to justify retention of plea bargaining in the face of calls to abolish the practice.[121] I agree that this is a minimal, necessary first step. As Bibas argues, "Simply memorializing all agreements in writing, ahead of time, would go a long way toward reducing confusion and later evidentiary disputes about what was promised or understood."[122] But subjecting the bargaining process to the rule of law requires that not only plea agreements but also plea offers be memorialized in writing and filed with the court. The U.S. Supreme Court has itself suggested this as a method to better ensure that defendants receive effective assistance of counsel during plea bargaining.[123]

In perhaps the most significant development in plea bargaining jurisprudence in recent years, the Supreme Court, in *Lafler v. Cooper* and *Missouri v. Frye*, acknowledged that plea bargaining had become the dominant procedural mechanism in the criminal legal system. As the Court famously observed, "horse trading . . . determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system."[124] The Court's opinions in these cases therefore made clear that the right to effective assistance of counsel could not be thought of merely as a trial right; rather, it extends to the plea bargaining context as well. After *Lafler* and *Frye*, counsel has a constitutional obligation to communicate plea offers to clients, to provide knowledgeable and professional advice regarding the wisdom of taking such offers, and to otherwise conduct themselves with a minimum amount of professional competence in the bargaining process. But enforcement of *Lafler* and *Frye* has proven difficult. Disputes arise regarding the terms of offers

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120 *See, e.g.*, ARIZ. R. CRIM. P. 17.4 ("The terms of a plea agreement must be in writing and be signed by the defendant, defense counsel (if any), and the prosecutor . . . [t]he parties must file the agreement with the court.").

121 *See* ALI MODEL CODE, *supra* note 92, § 350.3, at 609 ("While recognizing the validity and strength of these concerns, the Reporter believes that it is preferable to seek to make the process of negotiation visible and to regulate it rather than to abolish it.").

122 Bibas, *supra* note 6, at 1154.

123 *See* Missouri v. Frye, 566 U.S. 134, 146–47 (2012) ("States may elect to follow rules that all offers must be in writing, again to ensure against later misunderstandings or fabricated charges."). At least one state, the Court noted, had such a requirement. *Id.* (citing N.J. Ct. Rule 3:9–1(b) (2012), which notes that "[a]ny plea offer to be made by the prosecutor shall be in writing and forwarded to the defendant's attorney").

124 *Frye*, 566 U.S. at 144 (quoting Scott & Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)).

and, indeed, whether an offer was even made. Such disputes are inevitable in a world in which bargaining happens informally.

A writing requirement would help to solve this problem by ensuring that each step in the process is properly memorialized and creates a record of counsel's conduct to permit subsequent appellate scrutiny where allegations of ineffective assistance arise.[125] In addition, because such offers would be in the court file, judges could ensure that defendants were aware of the offers made in their cases prior to trial. Disputes about whether an offer was made, what its terms were, and whether the defendant's lawyer informed her client of the offer could be more easily resolved.[126] To be sure, special accommodations might be needed in cases involving cooperation bargains. Disclosure of the identities of defendants who have agreed to plead guilty and to cooperate has been a problem in certain types of cases, especially those involving group criminality such as mob and gang prosecutions.[127] This problem can be addressed by permitting plea offers containing cooperation agreements to be filed under seal in cases where the parties conclude that current or future investigations might be impeded by disclosure of the agreement.[128]

A filing requirement would also address the problem of pre-indictment plea offers. Since there would be no "case" in which an offer could be filed, the practice of pre-charge plea negotiation would be short-circuited. Plea offers could be extended only after a case had been

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125 Sabrina Mirza makes this point persuasively. *See* Sabrina Mirza, *Formalizing the Plea Bargaining Process After Lafler and Frye*, 39 SETON HALL LEGIS. J. 487, 508 (2015).

126 Courts are confused about which types of plea offers must be, per the Court's holdings in the *Lafler* and *Frye* cases, communicated to their clients to avoid running afoul of the Sixth Amendment. *See id.* at 501; *see also* Petition for Writ of Certiorari, Baggott v. Florida, No. 20-66, 2020 WL 6693173 (U.S. Nov. 6, 2020) (raising the issue of whether defendant must prove existence of plea offer to establish a claim of ineffective assistance of counsel).

127 Professor Caren Morrison addresses numerous complexities related to the disclosure of the identity of cooperating defendants, especially where such disclosures are available via electronic access in systems like PACER. Electronic access to plea deals creates exceedingly difficult dilemmas in certain types of cases. As Morrison explains, such difficulties are magnified by the existence of websites like "Whosarat.com, which maintains thousands of profiles of cooperators and informants." Caren Myers Morrison, *Privacy, Accountability, and the Cooperating Defendant: Towards a New Role for Internet Access to Court Records*, 62 VAND. L. REV. 921, 926 (2009). Morrison argues that such problems might be minimized by redaction of personal, identifying details that are available through such systems. *See id.*

128 An allowance for filing of plea offers and agreements under seal should not, however, impede obligations to collect and report data on plea bargaining, and cooperation bargaining in particular. Such data can be reported or collected without personal, identifying details to help further oversight of prosecutorial use of cooperation bargaining. *See id.*

charged and counsel had been appointed.[129] The filing requirement, moreover, serves as an essential prerequisite to several other critical steps needed to end lawless plea bargaining—namely subjecting the trial penalty to the rule of law and facilitating the gathering of accurate data about the actual workings of the criminal justice system.[130]

C. Standardization of Plea Agreements and Waivers

A standard characteristic of today's lawless plea bargaining system is the general absence of any restrictions on what prosecutors can demand in exchange for a guilty plea.[131] Terms vary from jurisdiction to jurisdiction and often from defendant to defendant. There is not yet any national consensus on the types of rights that a defendant may properly be required to waive to obtain the benefits of a plea bargain. Examples of aggressive demands are plentiful. Defendants are regularly asked to waive their rights to appeal, to challenge their sentences,[132] to seek collateral review,[133] to challenge the ineffective

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[129] Any filing requirement would likely need to be limited to plea bargains involving the defendant's agreement to enter a guilty plea to a criminal charge. Plea deals designed to avoid charges, such as deferred prosecution agreements, would necessarily be exempt from such requirements.

[130] *See* Missouri v. Frye, 566 U.S. 134, 146–47 (2012) (noting at least two jurisdictions, Arizona and New Jersey, with some type of requirement that plea agreements be put on the formal record).

[131] According to the U.S. Supreme Court, inducements are limited only by the lawfulness of the inducement, taking bribes and threats of physical violence off the table, but very little else.

[132] *See, e.g.*, Leinenbach v. State, No. 20A-CR-843, 2020 WL 6266450, at *3 (Ind. Ct. App. Oct. 26, 2020) ("It is well settled that a defendant may waive the right to appellate review of his sentence as part of a written plea agreement."); United States v. Henry, No. CR 07-20006-02-KHV, 2017 WL 6451100, at *3 (D. Kan. Dec. 18, 2017) (refusing to consider alleged sentencing error on appeal where plea agreement provided that defendant "waives any right to challenge a sentence or otherwise attempt to modify or change his sentence or manner in which it was determined in any collateral attack"). *See generally Criminal Resource Manual, § 626. Plea Agreements and Sentencing Appeal Waivers—Discussion of The Law*, U.S. DEP'T JUST. ARCHIVES, https://www.justice.gov/archives/jm/criminal-resource-manual-626-plea-agreements-and-sentencing-appeal-waivers-discussion-law (last updated Jan. 23, 2020) ("[T]he courts of appeals have upheld the general validity of a sentencing appeal waiver in a plea agreement.") [https://perma.cc/MR5N-ELGX]; J. Peter Veloski, *Bargain for Justice or Face the Prison of Privileges? The Ethical Dilemma in Plea Bargain Waivers of Collateral Relief*, 86 TEMP. L. REV. 429, 430 (2014) ("[I]t is now common for a defendant to waive the right to appeal his sentence before he knows what that sentence may be.").

[133] *See, e.g.*, Portis v. United States, 33 F.4th 331, 334–35 (6th Cir. 2022) (holding that waiver of rights to appeal "or to challenge their convictions through a postconviction proceeding" were enforceable notwithstanding subsequent change in the law that cast doubt on the validity of their convictions under the Armed Career Criminal Act).

assistance of their own lawyers, to forgo discovery, or to raise issues regarding the state's unconstitutional conduct, including the state's failure to produce exculpatory *Brady* material.[134] For example, in one case, the government insisted, as a condition to even engage in bargaining, that the defendant must "(1) submit to pretrial detention and not seek pretrial release at any time; (2) decline to litigate the case in any way or bring any motion to compel discovery, suppress evidence or dismiss the indictment; and (3) plead guilty."[135] The rights sought to be waived vary markedly from jurisdiction to jurisdiction. Waivers held valid in some places have been held to violate constitutional rights or ethical rules in others. The U.S. Department of Justice under President Biden only recently agreed to end the practice of demanding that defendants relinquish their right to seek compassionate release as a price of a bargain.

Practices also vary regarding the consequences of litigating a case. In some jurisdictions, defendants who fail to enter an early plea might, as a matter of office policy, face harsher charges as a consequence.[136] This was the practice in at least one prosecutor's office in California in the 1990s. As the court explained in *Riggs v. Fairman*,[137] the Riverside County District Attorney's Office treated potential three strikes cases differently for plea bargaining purposes than it treated all other cases. In potential three strikes cases, the office's best plea offers made to the defendant were ones it made before a preliminary hearing.[138] In cases where the initial offer was declined, the office often "add[ed] into a superseding information charges that had not been alleged in the original complaint."[139] In effect, if a defendant had the audacity to decline an offer prior to the preliminary hearing, not only would that

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134 Susan R. Klein et al., *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73, 77 (2015) ("Over the last decade, prosecutors began requesting waivers of all discovery materials, including not only impeachment evidence but also exculpatory evidence of actual innocence and claims of prosecutorial misconduct in failing to disclose such materials.").

135 United States v. Jones, No. CR 08-0887-2, 2009 WL 2912535, at *4 (N.D. Cal. Sept. 9, 2009). In *Jones*, however, the district court concluded that "[u]nder the specific circumstances of this case, the government's tactic crossed the line and violates due process." *Id.*

136 *See, e.g.*, Wallace v. May, No. CV 19-176-CFC, 2022 WL 671081, at *2 (D. Del. Mar. 7, 2022) (noting that defendant was told that if he insisted on suppression hearing eight-year offer would increase to ten years).

137 Riggs v. Fairman, 178 F. Supp. 2d 1141, 1144–45 (C.D. Cal. 2001), *aff'd*, 399 F.3d 1179 (9th Cir. 2005).

138 *Id.*

139 *Id.*

offer be gone forever but also a new indictment containing dramatically enhanced charges might be filed. Michael Riggs faced this situation after he was charged with petty theft for shoplifting a bottle of vitamins. Riggs's lawyer failed to appreciate the potential three-strikes liability that his client faced and advised him to decline the five-year offer that had been extended. Per office policy, prosecutors then filed a superseding information charging Riggs as a three-strikes offender which increased the sentence he faced upon conviction to twenty-five years to life and refused to reinstate the earlier plea offer. Riggs went to trial and received the twenty-five years to life sentence.[140]

The bargaining practices of the Riverside District Attorney are far from unusual. In many offices, plea offers get worse if the defendant refuses to plead guilty at arraignment, files motions for discovery, or seeks to suppress evidence.[141] These practices effectively deter defendants and their lawyers from investigating the facts and the law in their cases and from making considered, strategic decisions based on a full understanding of their legal situation.

Plea offers also sometimes contain incentives of dubious merit. Deals may include promises to withhold prosecution of a family member if the defendant pleads guilty. Codefendants may be informed that they all must agree to plead guilty or no one gets a deal, even if some codefendants might have stronger legal defenses than others. Cooperation deals are particularly problematic. While inducements to avoid charges may be a useful—and perhaps invaluable—tool for prosecutors in some otherwise unsolvable cases, they also provide dangerous incentives for those caught in law enforcement's crosshairs to falsely accuse others simply to obtain the benefits of the bargain. The National Registry of Exonerations is replete with innocent individuals who were convicted based on false accusations brought by individuals promised leniency (or no prosecution at all) if they testified against others at trial.[142]

Whether some, or all, of these various practices should be allowed is beyond the scope of this Article. At minimum, however, each of these practices should be subject to careful scrutiny by the relevant legal actors in each jurisdiction. Ideally, careful scrutiny would help

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140 *Id.* at 1145.

141 *See* NACDL, *supra* note 22, at 12 (urging abolition of the "Litigation Penalty" by which defendants are punished for filing pretrial motions or otherwise attempting to exercise legal rights).

142 *See generally*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/about.aspx [https://perma.cc/D2GY-BCBA].

develop a consensus regarding the propriety of some of these practices, the rejection of others, and the parameters that should constrain them. The legal community needs to make reasoned decisions about which rights are subject to waiver as part of a plea deal and which should be nonwaivable. For instance, whether it is appropriate for prosecutors to hinge favorable plea terms on early acceptance, or waiver of the right to pursue pretrial motions is a hard question. But establishment of a uniform rule is imperative; the consequences of investigating and litigating a case should not vary based on the whims of the individual prosecutors involved. Legal regulation is needed to ensure uniform treatment of all defendants and to protect the basic function of the criminal legal system to make accurate, morally justifiable factual and legal findings. Finally, policymakers need to revisit the formal and informal ways that a system of discretionary charging and plea bargaining can be used to induce cooperation. Protections are needed to safeguard innocent people from false accusations, and limits on the types of rewards that prosecutors can bestow on cooperators are essential to prevent cooperation bargaining from providing an end around to other efforts to reform plea bargaining.

D. Regulating the Trial Penalty

The trial penalty drives the plea bargaining machine. Finding an effective regulatory mechanism to prevent the abuse of the trial penalty is the central problem for the project of bringing plea bargaining under the umbrella of the rule of law. Many reformers have urged abolition of the trial penalty altogether.[143] While such a goal is perhaps admirable, it is not realistic, because without some sort of differential between plea and trial sentences (and trial penalties that have nothing to do with formal charge or sentence concessions can and do exist),[144] criminal defendants would have no reason (other than a guilty conscience) to plead guilty. In terms of expected value, criminal defendants will always prefer going to trial to pleading guilty because a trial offers the possibility, no matter how slim, of acquittal. Absent a revolutionary transformation of the criminal justice system, therefore,

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[143] An early call for abolition of plea concessions was advanced by the National Advisory Commission on Criminal Justice Standards and Goals. *See* MORRIS, *supra* note 110, at 52.

[144] Covey, *supra* note 61, at 241–42 (arguing that "[p]retrial detention coupled with the unrelenting misery endemic to most urban criminal court appearances . . . serve [a] . . . functional purpose . . . [b]y making the exercise of legal rights so tangibly and immediately painful" that pleading guilty is reframed as a gain rather than a loss).

some sort of plea system seems essential. That, in turn, means some sort of differential between plea and trial sentences would need to be retained.[145]

Given the existence of sentencing differentials, however, there still must be a reasonable relationship between the goals of the criminal legal system and the size of the allowable differential; that is, the magnitude of the plea sentence and the magnitude of any potential trial sentence must be rationally related. For example, if prosecutors are willing to settle a case in exchange for a three-year sentence, then a defendant should not have to risk a decades-long sentence if she wishes to contest the charges at trial. Conversely, if prosecutors believe that a decades-long sentence is truly the just or sensible response to the defendant's crime, then they should not be tempted by workload considerations or worries about how the evidence may impact the case result to settle the case for what amounts to a mere slap on the wrist. There is simply no penological justification for the dramatic disparities so commonly seen between plea and trial sentences. The costs of declining the offer can't be so large that the decision to decline to plead guilty is no longer rational.[146]

The question, then, is how to regulate the trial penalty properly. Regulation of the trial penalty requires figuring out how to accomplish two objectives: (1) standardizing sentencing differentials, and (2) determining their proper magnitude. I will discuss each aspect in turn.

1. Standardizing Sentencing Differentials

Currently, prosecutors have the freedom to offer a discount of any magnitude to a defendant to induce a guilty plea. These discounts—that is, the differentials in sentences that a defendant receives or can expect by pleading guilty rather than going to trial—must be standardized. By standardized, I mean that the magnitude of the differential must be fixed and, as much as possible, unvarying. This

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[145] This was recognized long ago in one of the foundational articles by plea bargaining's greatest critic, Albert Alschuler, who reluctantly observed that "[i]f 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." Alschuler, *supra* note 25, at 1124. *See also* ALI MODEL CODE, *supra* note 92, at 246 ("Bargaining when it relates to the charge decision will necessarily involve some discrepancy between the charges against a defendant who pleads guilty and one who pleads not guilty.").

[146] *See* Bibas, *supra* note 6, at 1160 (arguing that defendants need "accurate, intelligible information about the likely sentences they face after plea versus after trial").

claim will strike many as counterintuitive. After all, one might argue that there are so many variables in each case that there is no one-size-fits-all plea discount, whether fixed or standardized.

In some cases, there might be vulnerable witnesses that the prosecution wishes to shield from having to testify, or the costs of trying some cases might differ dramatically from others. An insider trading case might require months of preparation and months more of actual trial, while a drug possession case might be wrapped up in a matter of hours. In some cases, the prosecution's evidence may be extremely strong, making the risk of acquittal negligible. In others, the evidence might be quite weak, creating substantial pressure to secure a certain plea rather than risk no punishment at all with a loss at trial. There are also differences among defendants. Some are more remorseful than others. Some present a heightened risk to the community, while others present no risk at all. Some may be good candidates for rehabilitation; others not as much. Some might deserve especially harsh sanctions; some may be able to point to legitimate mitigating circumstances. Variations in non-case-specific factors might also come into play. Some jurisdictions might confront much larger dockets than others, increasing pressure to resolve cases quickly. Bottlenecks might arise in all sorts of areas, including the availability of forensic investigators and crime lab technicians, the size of judicial dockets, and the availability of defense counsel. These are just a handful of the almost infinite variations that each case presents. Without a doubt, every case is unique.

The fact that every case presents its own unique constellation of considerations, however, does not mean that sentencing differentials should be infinitely pliable in response. The argument for maximum discretion in responding to alleged offenders is an argument for doing away with law altogether. It is an argument against rules themselves. Here we are at the heart of the matter, for this is precisely the argument made to defend the current plea bargaining system. The claim, ultimately, is that we cannot subject our plea bargaining system (and hence our criminal justice system) to law, because doing so will constrain the discretion of the state to dispose of cases in whichever ways it deems most appropriate or most convenient. And this contention, on reflection, is simply intolerable in any jurisdiction that holds itself out as governed by the rule of law.

2. Determining the Proper Magnitude of Plea Discounts

The idea that plea discounts and trial penalties should be fixed is not a new one. Yale Law Journal editors put forth the proposal in 1972;[147] Albert Alschuler expressed support for the idea in 1976.[148] The Federal Sentencing Guidelines put a kind of fixed discount into effect when it prescribed a standard two- to three-level discount for "acceptance of responsibility," which applies virtually automatically when a defendant pleads guilty and constitutes a roughly 25%–35% sentence discount.[149]

While we can speculate about the impact of any particular discount size, ultimately the determination of the proper size of a standardized plea discount must be determined by its effects, and thus can be determined only by trial and error. Ideally, it should be kept relatively low, consistent with earlier proposals, perhaps around 30%;[150] although, even a 50% discount would represent a marked improvement over current practice.

Identifying a tolerable sentencing differential should be accompanied by a mindful attempt to pinpoint a target trial rate. Generally, the chosen target rate should represent a substantial increase in the number of trials conducted. It is impossible to say in the abstract what percentage of cases should be adjudicated at trial. After all, Raymond Moley complained, as long ago as 1928, that jury trials were "vanishing." Data showed the percentage of convictions obtained due to a guilty plea in states like New York had increased from about 25% in 1839 to around 90% by 1926.[151] At the federal level, data suggest that guilty plea rates

147 *See* Note, *Restructuring the Plea Bargain*, 82 YALE L.J. 286, 304 (1972).

148 The Yale Law Journal editors first advanced the proposal that jurisdictions adopt a "specific discount rate." *See id.* at 301. In discussing the proposal, Albert Alschuler hailed the many benefits a fixed and uniform discount would provide. *See* Alschuler, *supra* note 25, at 1127–28. These benefits include reducing improper incentives for prosecutors to cut lenient deals to, for example, shorten their workdays. *Id.* at 1126–27 n.221; *see also* James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1561 (1981) (proposing "a relatively modest, prescribed sentencing concession of ten or twenty percent of the sentence received for a guilty plea").

149 *See* Bibas, *supra* note 18, at 2488–89 (explaining that the Guidelines initially prescribed "a three-level discount (on average, 35%) for guilty pleas in serious federal cases regardless of the chance of acquittal," which was subsequently modified to an automatic two-level reduction with the possibility of a third upon motion by the Government).

150 *See* Mirko Bagaric et al., *Plea Bargaining: From Patent Unfairness to Transparent Justice*, 84 MO. L. REV. 1, 1 (2019) ("The size of the discount should be up to thirty percent."). This is also comparable to discounts authorized in the U.K. *See* DARRYL K. BROWN, FREE MARKET CRIMINAL JUSTICE 108 (2016) (reporting that the "Criminal Justice Act of 2003 . . . authorized sentence discounts" that were limited to "a one-third reduction from the post-trial sentence").

151 *See* Raymond Moley, *The Vanishing Jury*, 2 S. CAL. L. REV. 97, 108 (1928).

hovered around 50% at the beginning of the twentieth century but had risen to 72% by 1916.[152] Thus, while plea rates have been high for a long time, there is ample reason to believe that at least marginal improvement is possible. In that vein, some scholars have floated a targeted 5%–10% trial rate increase as a possible goal.[153]

Achieving a substantially larger trial percentage might well require, as William Pizzi has argued, major changes in American criminal procedure.[154] Such changes could include creating alternate forums in which cases might be tried in a stripped-down fashion.[155] Other suggestions include moving toward a more continental adjudicative style that "combin[es] laypersons with professional judges in streamlined procedures that guarantee significant lay participation in every case of serious crime,"[156] bargaining for trials,[157] or even selecting trials by lottery.[158] Of course, it may be possible to expand the number of trials without undertaking any major structural reform. Merely limiting the trial penalty's scope will inevitably cause more criminal defendants to exercise their right to trial. American courts have accommodated substantially more trials in the past, and there is no reason to believe that they could not accommodate an increased number in the future.

Finally, regulating the trial penalty also implies regulating other tactics that are used similarly to coerce pleas. One of the most insidious tactics is threatening death sentences to compel guilty pleas. Although common, threatening a death sentence is far too coercive to ensure that any guilty plea entered to avoid it is reliable.[159] Another even more

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152 *See* Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 8–9 (1979).

153 *See* Kiel Brennan-Marquez et al., *The Trial Lottery*, 56 WAKE FOREST L. REV. 1, 6 (2021).

154 *See* William Pizzi, *The Effects of the "Vanishing Trial" on Our Incarceration Rate*, 28 FED. SENT'G REP. 330 (2016).

155 *See id.*

156 John H. Langbein, *On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial*, 15 HARV. J.L. & PUB. POL'Y 119, 126–127 (1992).

157 *See* Gregory M. Gilchrist, *Counsel's Role in Bargaining for Trials*, 99 IOWA L. REV. 1979, 1981 (2014) (proposing a system in which "counsel could bargain for trials").

158 *See* Brennan-Marquez et al., *supra* note 153, at 15 (proposing a "'trial lottery,' whereby a small percentage of cases that plead out are sent to trial anyway, with the terms of the plea deal setting the upper bound of penal exposure for the defendant").

159 This has long been apparent both to the U.S. Supreme Court and to commentators. *See* United States v. Jackson, 390 U.S. 570 (1968) (invalidating a provision in Federal Kidnapping Act, 18 U.S.C. § 1210(a) that made the death sentence an available punishment only in cases that proceed to trial); Note, *Plea Bargaining: The Case for Reform*, 6 U. RICH. L. REV. 325, 342 (1972); *see also* Sherod Thaxton, *Leveraging Death*, 103 J. CRIM. L. &

common tactic is to trade a guilty plea for a time-served sentence. Administrative tools, such as pretrial detention, should not be misused to induce defendants to waive their trial rights.[160] To help protect against the abuse of pretrial detention, guilty pleas that entail releasing a defendant who has been detained pretrial before the time in which that defendant could reasonably expect to stand trial on the charges in their case should be prohibited. Any such plea offers to persons detained pretrial should be preceded by release from custody. Only then might a defendant be able to fairly assess the advisability of waiving the right to contest the charges.

E. Pre-Plea Sentencing Hearings

When a plea offer is made, the defendant should be fully aware of the consequences of accepting the offer or proceeding to trial. Both the plea sentence and the trial sentence, if a defendant is convicted at trial, should be clearly established at the time the plea decision is made. The most effective way to ensure this happens is by enforcing a "plea cap" on trial sentences.[161] Of course, both the plea sentence and the trial sentence must be based on lawful criminal statutes and sentencing laws.

This may be easily accomplished depending on the particular sentencing laws in effect. For instance, if a defendant were charged with robbery under a statute that imposed a sentence of one to ten years upon conviction, a plea offer might be made allowing the defendant to plead guilty in exchange for a three-year sentence. If the defendant declined the plea offer and went to trial, the defendant, if convicted, might be sentenced to a maximum of four and a half years. In this hypothetical, both sentences would be allowed under the jurisdiction's sentencing laws. However, in another case, the defendant might be charged under a similar statute and the prosecutor might offer the defendant a deal by which he could plead guilty and receive the maximum ten-year sentence. The prosecutor's leverage for securing the deal might be an agreement to drop a gun enhancement or a second

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CRIMINOLOGY 475, 483 (2013) (conducting an empirical study of using the death penalty and plea bargaining in Georgia and finding that "the threat of capital punishment deters roughly two out of every ten death-noticed defendants from pursuing a trial").

160 *See, e.g.*, Russell M. Gold, *Paying for Pretrial Detention*, 98 N.C. L. REV. 1255, 1294 (2020) (noting the impropriety of "using one form of liberty deprivation—pretrial detention—as a means of facilitating a waiver of constitutional rights and further liberty deprivation—a guilty plea and ensuing sentence").

161 *See* Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237 (2008).

count. If the defendant declined the offer and went to trial, the defendant might then face the enhancement or the second count at jury trial. However, regardless of the theoretical sentencing exposure that the defendant would confront at trial, the caps should ensure that the maximum trial sentence did not exceed the plea offer sentence by a fixed and reasonable amount.

To avoid any undue complications, jurisdictions might simply enact sentencing statutes authorizing fixed sentence enhancements of lawful plea offer sentences after trial. This would encourage prosecutors to make plea offers reflecting the criminal defendant's actual culpable conduct, rather than the post-*Bordenkircher* incentives they now use to maximize their bargaining leverage to coerce a guilty plea in each and every case. Alternatively, jurisdictions could enact "safety-valve" sentencing authority allowing judges to diverge from otherwise binding mandatory minimum sentence requirements. This would ensure that post-trial sentences are not excessively greater than dispositions made available through plea bargaining.[162]

An alternative mechanism to ensure that guilty pleaders know the consequences of their plea decisions would require an adjustment to standard sentencing procedures—conducting the sentencing hearing before a defendant enters a guilty plea. Leading plea bargaining scholar Albert Alschuler noted his approval of this idea, which was first advanced by a Yale Law Journal note author who argued that all plea bargains should be approved by a magistrate. Alschuler proposed that the magistrate would review the case facts and the defendant's criminal history and then authorize a range of possible sentencing outcomes to establish the parameters of bargaining.[163] Alschuler envisioned that such pre-plea conferences might take on the contours of mini bench trials, in which the parties would be required to present their arguments and evidence in a hearing before a neutral arbiter.[164] Alschuler summarized the proposal as follows:

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[162] The NACDL has urged adoption of such provisions allowing judges to avoid imposing harsh mandatory minimum sentences. *See* NAT'L ASS'N OF CRIM. DEF. LAWS., *supra* note 21; *see also* Gonçalves, *supra* note 52, at 303 (discussing proposals).

[163] Note, *supra* note 147, at 299.

[164] *Id.* at 300–03. A Harvard Note author floated a similar proposal a few years later that also featured "a requirement that an impartial magistrate play a primary role in structuring the plea negotiations and in limiting the range of acceptable sentencing concessions." Notes, *Plea Bargaining and the Transformation of the Criminal Process*, 90 HARV. L. REV. 564, 586 (1977). Under this proposal, the magistrate's primary function would be to conduct an independent investigation of the facts and evidence and, at a pre-plea hearing, "stipulate a range of acceptable plea concessions to comport with uniform, determinate standards previously formulated by the magistrate's office . . . based on a number of factors including

> A defendant would initiate the bargaining process by filing a motion for a "pre-plea conference," and this motion would trigger the preparation of a presentence report as well as "pre-plea discovery" between the parties. The conference itself would be, in essence, a sentencing hearing. Both parties would submit proposals for disposition of the case and would argue in support of these proposals. The parties might also, with the court's approval, call witnesses to testify during the conference. At the conclusion of the proceedings, the trial judge would first determine the sentence that would seem appropriate if the defendant were convicted following a trial. Then he would apply a "specific discount rate" to determine the sentence that the defendant would receive if he entered a plea of guilty. This "discount rate" would apparently be determined by all judges of the trial court acting collectively; it would be uniform throughout the local jurisdiction; and it would be set at a level that would induce an "administratively acceptable" volume of guilty pleas.[165]

In his influential work on sentencing reform, Norval Morris also made an early call for pre-plea sentencing proceedings. Motivated by the tight link between plea bargaining and sentencing, Morris argued that "there can be no rational future for imprisonment unless present plea bargaining practices, which are the main dispositive technique for sentencing criminals, are rendered principled and orderly."[166] Like Alschuler, Morris called for establishing a pretrial dispositional hearing in which a judge or magistrate (not the trial judge) would hear evidence and arguments and determine a rational, comprehensive settlement. Morris proposed this reform primarily to shift sentencing authority from the "marketplace" haggling of prosecutors and defense attorneys back to judges.[167] The key similarity in these proposals is locking in a predetermined sentencing differential that would limit the potential trial penalty and provide the defendant with notice regarding the consequences of accepting or rejecting a plea.

Stephen Schulhofer, another of the most powerful voices in the plea bargaining scholarship, suggested that problems in plea bargaining could be solved by transforming sentencing practices to embrace "real offense" sentencing.[168] Schulhofer believed a sentencing system that focused on an offender's actual conduct, regardless of the charges filed,

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the offense charged, a routine discount rate for pleading guilty, and the defendant's prior record." *Id.* at 589–90.

165 Alschuler, *supra* note 25, at 1124.

166 MORRIS, *supra* note 110, at 57.

167 *Id.* at 52. Morris also advocated including victims, who he believed were shabbily treated by present practices, in the pretrial settlement hearings.

168 *See* Schulhofer, *supra* note 9, at 734 (proposing a practice that was central at one point in creating the federal sentencing guidelines but which, ultimately, fell out of favor).

would lead to more consistent outcomes among offenders and reduce the trial penalty to reasonable levels.[169]

The American Law Institute's (ALI) Model Code of Pre-Arraignment Procedure, released in 1975, echoed these suggestions. Significantly, the ALI's model code calls for courts to order, where necessary, the probation officer to conduct a presentencing investigation to assist judges in evaluating the proposed disposition prior to the plea hearing.[170]

There is much to be said for conducting sentencing hearings as part of the pre-plea process. As radical as it might sound, the costs of making sentencing hearings a part of pretrial process are relatively small. After all, sentencing hearings will inevitably be conducted in all cases that eventuate in convictions. Since approximately 95% of all criminal convictions are obtained via guilty plea, incorporating sentencing hearings into the plea process will, in most cases, add no additional burden on the system.[171] Of the small number of cases that do go to trial, the vast majority—approximately 80%[172]—end in conviction anyway. While a post-trial sentencing hearing would still be needed in such cases, the contours of those hearings should be limited. Most of the important work, including identifying the offender's criminal history, would have already been done. The main issue remaining would be to determine what proportion of the projected pretrial sentence should be imposed given the jury verdict.[173] In many

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169 *Id.* at 747.

170 ALI MODEL CODE, *supra* note 92, § 350.5, at 250–51.

171 An objection might be made that while 95% or more of all convictions are obtained via guilty plea, a significantly larger number of cases that are initially charged end up without convictions because of dismissals. For example, as LaFave et al. report, California data indicates a felony conviction resulting from a felony arrest in 67% of cases, whereas its conviction rate at trial sits at 80.5%. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 1.11(c-1) (4th ed. 2022) (also reporting similar numbers in New York—66% vs. 90% when comparing dispositions as a percentage of arrests versus trials). Conducting sentencing hearings in cases that ultimately will be dismissed or diverted would indeed be burdensome. But the objection is likely meritless. By the time a plea hearing surfaces, the decision to dismiss should already have been made. In any event, the threat of having to devote resources to an ultimately pointless sentencing hearing will in all likelihood simply prompt the dismissal or diversion at a somewhat earlier (although still belated) point in the proceedings.

172 *See id.* ("The conviction rates for these states vary from a low of roughly 54% to a high of almost 90%, with a majority having a rate above 80%.") (footnotes omitted).

173 As indicated by the Supreme Court in the *Apprendi* line of cases, a sentencing court is authorized to impose a sentence only after trial based on the facts found by the jury beyond a reasonable doubt. *See, e.g.*, Apprendi v. New Jersey, 530 U.S. 466 (2000); Blakely v. Washington, 542 U.S. 296 (2004) (applying *Apprendi* to the states); United States v. Booker, 543 U.S. 220 (2005) (finding that Sixth Amendment requirement identified in

cases, such as those in which the jury finds a defendant guilty as charged, this should be a strictly pro forma procedure. Pretrial hearings would thus impose pure extra work only in cases that eventuate in acquittal. But such cases amount to only about 20% of the already small number of cases that proceed to trial. Accordingly, moving the sentencing hearing to the pretrial process will, at least under the current case distribution, require, at most, a 5% increase in overall sentencing hearing proceedings, and likely significantly less because of the sentencing proceeding's anticipated pro forma nature following trial convictions. While, as Alschuler notes, some precautions may be needed to protect a defendant's Fifth Amendment rights against compelled self-incrimination,[174] there is otherwise little practical difficulty with the idea.

As with plea caps, the benefit of conducting sentencing hearings prior to plea hearings is that it provides the defendant with the information needed to make a more authentically knowledgeable and informed choice about whether to plead guilty or hold out for trial. Equally importantly, it facilitates a mechanism to ensure that limits on the trial penalty can be effectively enforced.

CONCLUSION

The vision I have attempted to articulate here, which is based on decades of research and scholarship by a wide range of authoritative reform-minded legal organizations and plea bargaining experts, can be briefly summarized: take plea bargaining out of the wild and put it back into the courtroom where it can be regulated by law.

The components identified above are intended to bring greater rationality, predictability, and transparency to the plea bargaining process. Requiring plea offers to be in writing and filed in court ensures that defendants know precisely where they stand vis-à-vis resolving their cases, while also ensuring that other players, including judges and victims, are apprised of the cases' statuses. It would also provide critical data to researchers who are attempting to study criminal process to hopefully improve our justice system. Moreover, establishing a record of the terms on which the state is willing to resolve a criminal case is an essential prerequisite to further regulation. It allows courts to

Apprendi and *Blakely* applies to federal sentencing guidelines, but holding that guidelines are merely advisory); Alleyne v. United States, 570 U.S. 99 (2013) (holding that *Apprendi* also applies to factual findings necessary to trigger mandatory minimum sentences).

174 *See* Alschuler, *supra* note 25.

monitor the incentives offered to defendants and to police overly coercive inducements to plead guilty. Shifting sentencing from post-plea to pre-plea proceedings further contributes to these multiple goals. Most importantly, pre-plea sentencing hearings would provide defendants with the information they need to make informed choices about whether to plead guilty or exercise their trial rights. They also would provide a mechanism to ensure that penalties for exercising those rights do not become unduly coercive. Finally, any plea bargaining regulation regime must bring order to the plea agreement content, the panoply of rights that defendants are now being pressed to waive, the timing of plea bargaining, and the resultant consequences of engaging in pretrial litigation.

Our current plea bargaining system permits the State to effectively penalize defendants for exercising their right to defend themselves through mechanisms that are entirely lawful. It protects state actors who engage in misconduct by discouraging attempts to suppress evidence based on that misconduct, thereby diminishing the deterrent value of our most powerful constitutional remedy. Legal regulation designed to protect basic constitutional rights must be, along with a regulation of other aspects of the bargaining process, a fundamental goal of future efforts to reform our plea bargaining practices.