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## The Value of Plea Bargaining

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# THE VALUE OF PLEA BARGAINING

SCOTT W. HOWE\*

## *I. Introduction*

Plea bargaining has many critics.<sup>1</sup> The public tends to believe that bargaining treats defendants too leniently.<sup>2</sup> Academic commentators typically contend that bargaining treats defendants too cavalierly or too harshly.<sup>3</sup>

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1. As used in this article, “plea bargaining” means the creation by the prosecutor or judge, whether explicitly or implicitly, of an expectation of leniency that is subsequently honored in exchange for the entry of a guilty plea. “So long as defendants routinely expect to receive some form of sentencing consideration in exchange for an admission of guilt, the essence of a system of bargain justice is present.” Thomas W. Church, Jr., *In Defense of “Bargain Justice,”* 13 *LAW & SOC’Y REV.* 509, 512 (1979).

2. See, e.g., Stanley A. Cohen & Anthony N. Doob, *Public Attitudes to Plea Bargaining*, 32 *CRIM. L.Q.* 85, 97 (1989-1990) (study finding that large majority of Canadians opposes plea bargaining because it treats defendants too leniently).

Academic commentators have also asserted this concern. See, e.g., Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 *CAL. L. REV.* 652, 678-79 (1981) (asserting that plea bargaining improperly abandons “the legitimate objectives of the criminal sanction”); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 *YALE L.J.* 1979, 2009 (1992) (asserting that “trials in open court and deserved sentences imposed by a neutral factfinder,” rather than “plea negotiations,” further “the public interest in effective law enforcement and adequate punishment of the guilty”). However, undue leniency is the principal concern about plea bargaining expressed by the public.

3. This criticism applies both to defendants who do not plead guilty and later receive higher post-trial sentences and to those who accept the bargained plea and forfeit their right to trial. For examples of the former criticism, see Alschuler, *supra* note 2, at 680 (asserting that the lack of penological justification for the disparities calls into question the fairness of post-trial sentences); Kenneth Kipnis, *Plea Bargaining: A Critic’s Rejoinder*, 13 *LAW & SOC’Y REV.* 555, 564 (1979) (contending that plea bargaining unfairly penalizes those who go to trial); Note, *The Unconstitutionality of Plea Bargaining*, 83 *HARV. L. REV.* 1387, 1407 (1970) (“The burdens which plea bargaining imposes on the exercise of constitutional trial rights render the practice unconstitutional.”). For examples of the latter criticism, see Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 *U. ILL. L. REV.* 37, 49 (“The reality of sentencing differentials is generally enough to deprive defendants of any real choice in plea bargaining.”); John H. Langbein, *Torture and Plea*

Defenders of the practice have often sought to justify bargains on penological grounds, but this argument is a hard sell.<sup>4</sup> Critics have cast serious doubt on the notion that those who accept deals usually deserve less punishment or become better people than those convicted after trial.<sup>5</sup> Guilty pleas, mostly induced by government concessions,<sup>6</sup> remain the method by which the criminal justice system resolves approximately ninety percent of all criminal cases in America.<sup>7</sup> Nonetheless, critics continue their assault on plea bargaining.<sup>8</sup>

Recently, a “shadow of trial” efficiency theory has gained prominence as a way to rationalize plea bargaining.<sup>9</sup> This theory posits trial outcomes as the

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*Bargaining*, 46 U. CHI. L. REV. 3, 13 (1978) (“Plea bargaining, like torture, is coercive.”); Schulhofer, *supra* note 2, at 2009 (contending that plea bargaining “undercuts” the “due process right to an adversarial trial” and “inflict[s] undeserved punishment on innocents who could win acquittal at trial”).

4. See, e.g., *Brady v. United States*, 397 U.S. 742, 753 (1970) (emphasizing that plea bargains “extend a benefit to a defendant” in part because he “demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary”); cf. *United States v. Grayson*, 438 U.S. 41 (1978) (upholding the imposition of increased sentence based on conclusion of trial judge that defendant committed perjury while testifying in his own defense); Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 315 (1983) (asserting that some defendants who are convicted at trial perjure themselves or suborn perjury and, thus, warrant increased punishment).

5. See, e.g., Alschuler, *supra* note 2, at 662-67 (rebutting the notion that those who bargain have more remorse or are better candidates for rehabilitation); see also Comment, *The Influence of the Defendant’s Plea on Judicial Determination of Sentence*, 66 YALE L.J. 204, 211-17 (1956) (contending that perjury at trial is not a valid reason for imposing an increased sentence).

Arguments that those who accept deals usually deserve less punishment or demonstrate greater rehabilitative potential also do not respond to some of the criticism of plea bargaining, such as that bargaining coerces some innocent defendants to plead guilty. For further discussion of this criticism, see *infra* Part IV.B.

6. See Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1106 (1984) (“In the absence of concessions, most felony defendants do in fact demand a trial . . .”).

7. See, e.g., CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE* 667 (4th ed. 2000).

8. Plea bargaining has been held constitutional and endorsed on policy grounds by the Supreme Court. See *Brady*, 397 U.S. 742; see also *Santobello v. New York*, 404 U.S. 257, 261 (1971) (asserting that “[d]isposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons”).

9. See, e.g., Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2469-96 (2004) (asserting that recent scholarship treats plea bargaining, like civil case settlements, as bargaining “in the shadow of expected trial outcomes”).

measure by which plea bargains are assessed.<sup>10</sup> Based on perspectives earlier applied in the civil settlement context,<sup>11</sup> proponents claim that plea bargaining is justified because it largely mirrors the results that would have occurred after a highly regulated trial process, discounted to reflect uncertainty and adjudication costs.<sup>12</sup> Plea bargaining is “efficient”<sup>13</sup> in punishing crime if it achieves the same overall results as trials while expending fewer resources.<sup>14</sup> Likewise, plea bargains are not systematically unfair to defendants if they only reflect discounted results from a trial process that we accept as legitimate.<sup>15</sup>

Scholars who are critical of plea bargaining, however, have also begun to use this shadow-of-trial efficiency theory to support arguments for abolition or reform of the practice. The debate focuses on impediments that distort plea bargaining in ways that skew results away from accurately discounted trial outcomes. These impediments include structural problems surrounding the plea bargaining process, such as information deficits, agency costs, poor lawyering, pre-trial incarceration rules, and rigid sentencing mandates,<sup>16</sup> along with the many psychological disabilities of defendants, such as “[o]verconfidence, self-serving biases, denial mechanisms . . . [and] risk

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10. See generally Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969 (1992); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992).

11. The article credited with first presenting this theory of civil settlement is Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979). Many subsequent articles have developed this idea with respect to civil settlement. See Bibas, *supra* note 9, at 2464 n.1 and authorities cited therein.

12. See, e.g., Scott & Stuntz, *supra* note 10, at 1914-15 (using this economic theory to provide “[t]he affirmative case for the enforceability of plea bargains”); *id.* at 1935 (asserting that parties bargain over “adjudication costs” and “the risks of an uncertain future”).

13. See, e.g., Easterbrook, *supra* note 10, at 1969 (“So bargains are ethically attractive as well as efficient.”); Scott & Stuntz, *supra* note 10, at 1935 (contending that “parties bargain over the allocation of criminal punishment in order to reassign and thereby reduce the risks of an uncertain future” and describing the normative outcome as “an efficient contract that fully exploits potential gains”); Robert E. Scott & William J. Stuntz, *A Reply: Imperfect Bargains, Imperfect Trials and Innocent Defendants*, 101 YALE L.J. 2011, 2015 (1992) [hereinafter Scott & Stuntz, *Imperfect Bargains*] (“Plea bargaining is, for the most part, efficient and fair.”).

14. See, e.g., Scott & Stuntz, *supra* note 10, at 1915 (“Plea bargaining provides a means by which prosecutors can obtain a larger net return from criminal convictions, holding resources constant.”).

15. See, e.g., Easterbrook, *supra* note 10, at 1978 (endorsing plea bargaining and asserting that “[i]mperfections’ in bargaining reflect the imperfections of an anticipated trial”); Scott & Stuntz, *Imperfect Bargains*, *supra* note 13, at 2011-12 (asserting that parties “must contract in the shadow of the enforcement regime” and that “[i]f the trial process is flawed — if trials sometimes convict innocent defendants — bargaining will not fix the mistakes”).

16. See Bibas, *supra* note 9, at 2468.

preferences.”<sup>17</sup> Some who have used the theory of discounted trial outcomes to argue for the legitimacy of plea bargaining have conceded that certain structural problems render many bargains inefficient,<sup>18</sup> and they have tried to suggest some modest solutions.<sup>19</sup> However, critics of plea bargaining have urged that the impediments are sufficiently numerous and egregious to require at least extraordinary reforms,<sup>20</sup> if not the abolition of plea bargaining.<sup>21</sup>

This article defends plea bargaining and, more importantly, shows why shadow-of-trial efficiency theory fails to properly measure its effectiveness.<sup>22</sup> The article demonstrates that trial outcomes accurately discounted for uncertainty and adjudication costs are not the appropriate standard of acceptable results from the perspectives of punishing crime or of treating criminal defendants fairly. In light of this conclusion, claims of structural or psychological impediments that interfere with accurate discounting have little relevance to whether to abolish or reform plea bargaining. While shadow-of-trial efficiency theory turns out to imply that plea bargaining is usually inefficient and, thus, highly problematic, this article contends that bargaining serves the interests of both society and criminal defendants.

The article addresses the three central concerns about plea bargaining. Part II confronts the criticism that bargaining typically harms the public interest by failing to impose sufficient punishment for crime. Part III focuses on the claim that bargaining effectively penalizes the exercise of trial rights by

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17. *Id.* at 2469.

18. *See, e.g.*, Scott & Stuntz, *supra* note 10, at 1948 (arguing that sometimes bargains are “inefficient” because they “fail[] to exploit the risk reduction potential of defendants’ private knowledge” regarding their odds of acquittal at trial).

Professor Stuntz has also more recently acknowledged that accurate discounting is very often impeded. *See* William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 HARV. L. REV. 2548, 2548 (2004) (asserting that Professor Bibas’s “basic claim — that there are serious impediments to efficient bargaining in criminal cases — is true and important”).

19. *See, e.g.*, Scott & Stuntz, *supra* note 10, at 1967 (recommending some minor reforms to provide innocent defendants with better plea offers so as to help “reduce the harm to innocent defendants and meanwhile reduce transaction costs and inefficiency for everyone else”).

20. *See, e.g.*, Bibas, *supra* note 9, at 2545 (“Further research must consider more safeguards, such as discovery mechanisms, debiasing interventions, use of mediators or other structured dispute resolution, and judicial involvement.”).

21. *See* Schulhofer, *supra* note 2, at 1979 (“I argue that other flaws in the bargaining structure, which Scott and Stuntz do not address, create massive problems of inefficiency and unfairness.”); *id.* at 2009 (“Plea bargaining is a disaster. It can, and should be, abolished.”).

22. The article does not address every argument that scholars have offered about the ill-effects of bargaining on the criminal justice system. *See, e.g.*, Peter Aranella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts’ Competing Ideologies*, 72 GEO. L.J. 185, 218-19 (1983) (discussing the tendency of plea bargaining to undermine the special moral features of criminal law).

defendants who are sentenced after trial. Part IV addresses the claim that bargaining unduly coerces or otherwise mistreats defendants who plead guilty, some of whom are innocent. Each part of this article shows that the shadow-of-trial efficiency theory tends to confuse rather than enlighten thinking about the problem. Although typically inefficient under shadow-of-trial theory, plea bargaining maximizes deserved punishment at a reasonable cost and generally treats defendants fairly.<sup>23</sup>

## *II. Plea Bargaining and the Social Interest in Punishing Crime*

This part makes the case that plea bargaining serves rather than undermines the public interest in punishing crime, but, more importantly, shows that shadow-of-trial efficiency theory does not help us resolve this question. This part begins by demonstrating that, given the basic constraints of our current criminal-justice system, plea bargaining tends to maximize punishment across cases regardless of whether participants in the bargaining process accurately discount trial outcomes. In so demonstrating, this part assumes the following constraints: (1) the amount of conduct defined as crime, (2) the amount of resources devoted to policing, adjudication, and incarceration, and (3) our constitutionalized approach to criminal trials. This part then takes up the question of whether we should change the constraints to abolish bargaining and, thereby, allow for greater punishment in cases that would have been bargained. Although this part concludes that we should not pursue abolition, its larger point is that shadow-of-trial theory does not accurately explain the utility of plea bargaining.

### *A. The Punishment-Maximizing Value of Plea Bargaining Under the Existing Constraints of Our Criminal Justice System*

Prosecutors and judges work to ensure that plea bargaining, relative to trials, does not shortchange the public interest in punishment.<sup>24</sup>

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23. While the article opposes shadow-of-trial efficiency as a measure for evaluating plea bargaining, it does not oppose reforms. Plea bargaining is not systematically unfair. However, courts might consider, for example, following practices through which they could more often accommodate sentencing reductions in plea-bargained cases with theories of remorse and apology. *See generally* Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 *YALE L.J.* 85 (2004).

24. The forms of plea bargaining vary among jurisdictions. *See generally* WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, *CRIMINAL PROCEDURE* 956, 989 (3d ed. 2000). In many locales, the bargain is between the prosecution and the defense, with the judge merely exercising veto power. The bargaining may occur over the charge and over recommendations to the judge about sentencing. Alternatively, the bargaining may determine the precise sentence to be imposed, with the judge's disagreement constituting a nullification of the bargain. *See id.*

Circumstances vary from one jurisdiction to another regarding the nature of their political accountability. However, in almost all states, District Attorneys are elected,<sup>25</sup> as are trial judges in the vast majority of states.<sup>26</sup> Even in states in which prosecutors or judges are appointed, elected officials generally appoint ambitious lawyers who hope to be reappointed or to be appointed or elected to another position in the future.<sup>27</sup> They generally give due regard to public concern about leniency in plea bargaining. Apart from their political motivations, they must also sympathize with the view, regularly reinforced by crime victims,<sup>28</sup> that criminals should receive their deserved punishment.

Because of these motivations, prosecutors and judges will weigh what they perceive as the deserved punishment<sup>29</sup> against the benefits they see in a disposition by plea. Officials measure deserved punishments differently; the perceived benefits of a guilty plea vary from one case to the next, and jurisdictions vary regarding perceptions of the need to promote guilty pleas generally.<sup>30</sup> Nonetheless, prosecutors and judges prefer higher sentences to lower sentences, up to the sentence that they believe the defendant actually deserves.

Prosecutors and judges willingly trade some deserved punishment in individual cases to maximize the punishments they can secure. They must make this trade-off because they have limited resources.<sup>31</sup> The trade-off works because convictions by jury trial require far more of their resources than

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at 956. In some locales, judges participate in actual plea bargaining, and, although there was once “a general consensus” against it, “further movement in this direction can be expected.” *Id.* at 989.

25. *See, e.g.*, Schulhofer, *supra* note 2, at 1987 (noting that “[t]he District Attorney is usually an elected official”).

26. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2002, tbl.1.89 (Kathleen Maguire & Anne L. Pastore eds., 2004) (noting that voters elect trial judges in thirty-nine states).

27. *See, e.g.*, Schulhofer, *supra* note 2, at 1987 (asserting that “whether elected or appointed,” the goal of the District Attorney “is to enhance her reputation and political standing”).

28. *See, e.g.*, Note, *Getting to “Guilty”: Plea Bargaining as Negotiation*, 2 HARV. NEGOT. L. REV. 115, 133 (1997) (noting that “[v]ictims have a tremendous emotional stake in seeing that perpetrators of crimes against them receive appropriate punishment”).

29. *See, e.g.*, Gifford, *supra* note 3, at 44-45 (contending, based on empirical studies, that prosecutors through bargaining “attempt to individualize justice by taking into account the circumstances of the offense and the characteristics of the offender”).

30. *See, e.g., id.* at 61-62 (“Prosecutors obviously possess varying temperaments, viewpoints toward certain kinds of crimes, and levels of enthusiasm for going to trial.”).

31. *See, e.g.*, Comment, *supra* note 5, at 205 (“If forced to prove the guilt of every defendant in a judicial proceeding, the prosecutor, with his limited staff and budget, would be hampered in his enforcement of criminal law.”).

bargained guilty pleas and because both parties in a criminal case have incentives to avoid the uncertainties of litigation.<sup>32</sup> Prosecutors and judges could try always to seek the maximum deserved punishment, but most defendants would demand a jury trial, and, assuming no changes in the governing constraints, the system would quickly become inadequate. Courts would necessarily dismiss cases in which legitimate charges had been filed due to the inability to prosecute them. Furthermore, prosecutors would decline to bring charges in many legitimate cases. Given these circumstances, prosecutors and judges maximize punishment by extending some leniency for guilty pleas. They obtain a certain conviction with some punishment in the case at hand and a large time savings that can be used to prosecute other cases.<sup>33</sup>

Plea bargains bring about an enormous punishment-maximizing effect. Suppose that we are in a jurisdiction in which the prosecutor bargains not only over charges and sentencing recommendations but actual sentences, with the judge merely holding veto power.<sup>34</sup> Assume that a prosecutor has six armed robbery cases to prosecute, among many others. She has spoken to the six defense lawyers and concluded that each case carries a ten percent chance of acquittal, but that the deserved and probable sentence for each defendant after a jury-trial conviction is fifteen years of imprisonment. The maximum possible sentence is twenty years, and no mandatory-minimum sentencing requirement applies. She concludes that each case will require six hours of court time for a jury trial and one hour of court time for a guilty-plea hearing.<sup>35</sup> In a six-hour period, she could try one case and, hopefully, secure a conviction, which would probably result in a fifteen-year sentence. The other five defendants would not be prosecuted. Alternatively, in that same period, she could proceed with six guilty plea hearings and obtain certain convictions. Suppose that the prosecutor knows that each defendant would accept a plea bargain if it carried only five years of imprisonment. Which option better serves the public interest in punishing crime? Obviously, six pleas at five years apiece is better than a ninety percent possibility of a single

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32. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 561-62 (4th ed. 1992).

33. See, e.g., H. Richard Uviller, *Pleading Guilty: A Critique of Four Models*, *LAW & CONTEMP. PROBS.*, Winter 1977, at 102, 102 (noting that a plea bargain will “save the state the time, effort, and risk entailed in the trial of the accusation”).

34. Regarding the varying forms of plea bargaining among jurisdictions, see *supra* note 24 and accompanying text.

35. This hypothetical understates the average time required for a jury trial and overstates the average time required for a guilty plea. See *infra* text accompanying notes 36-37.



fifteen-year sentence. The goal of maximizing punishments compellingly favors bargaining.<sup>36</sup>

The punishment-maximizing effect of bargained pleas over trials is much greater in reality than even this hypothetical reveals. The average jury trial requires substantially more than six hours and also involves several pre-trial hearings and much preparation time by the prosecutor. Likewise, the average guilty plea hearing requires well under an hour and minimal preparation. With the very conservative assumptions in the hypothetical, plea bargains still produced twice as much total punishment as any possible punishment that would be produced by the trial. The punishment differential would increase exponentially if we used more realistic assumptions.

This hypothetical also shows that bargaining will usually maximize punishment vis-à-vis jury trials even if the prosecutor does not pursue the highest possible sentence she could have obtained without scuttling the plea. All of the defendants in the hypothetical might easily have accepted ten-year or even twelve-year bargains, and the prosecutor would likely have had incentives to seek those higher sentences.<sup>37</sup> However, the punishment-maximizing power of plea bargaining is so great that even unnecessary and fairly extreme leniency by the prosecutor will not subvert the punishment-maximizing effect of deals. Bargaining will still produce more punishment than trials.

Variances among defendants in the distribution of leniency will also not affect the conclusion that pleas produce more punishment than trials. Suppose that, instead of offering each defendant a five-year deal, the prosecutor offered two of them nine years, two others five years, and the final two only one year, and each accepted. This distribution of leniency appears irrational under the posited circumstances. However, the results of the plea option still seem more rational than the results of the trial option, where all of the punishment would fall on a single defendant. Moreover, the better choice for purposes of maximizing deserved punishment remains the plea bargains.

Given these observations, it is clear that the shadow-of-trial efficiency theory has no practical bearing on whether pleas, as opposed to jury trials, maximize deserved punishment. Surely, prosecutors often weigh the probable

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36. There are also greater incapacitation benefits from incarcerating the six defendants for five years each rather than the single defendant for fifteen years.

37. See *supra* text accompanying notes 24-31. Certain influences, of course, may also temper the prosecutor's zeal. See, e.g., Schulhofer, *supra* note 2, at 1987-88 (noting reasons why prosecutors sometimes will want to pursue guilty pleas to further personal interests rather than to maximize deserved punishment); Gifford, *supra* note 3, at 65-68 (asserting that prosecutors may often be lenient because of the amorphous nature of the "public interest" as compared with the more concrete interests of the individual defendant).

outcome of the potential trial in deciding how much leniency to extend in a plea deal. They also surely consider factors related to adjudication costs, particularly how much of their time the case would require.<sup>38</sup> However, the accuracy of these judgments is irrelevant as a practical matter to whether bargaining, compared to trials, provides undue leniency. If only two guilty pleas could be traded for one jury-trial conviction, the accuracy of discounting efforts would matter, but not where the trade-off is far higher than six. The prosecutor in our hypothetical could arrive at bargain decisions by rolling dice, and bargaining would almost certainly still maximize punishments far more than a policy of no bargaining.<sup>39</sup>

Within the constraints of our current system, shadow-of-trial efficiency theory turns out to be an inappropriate measure even for maximizing deserved punishments among plea-bargained cases. The theory posits that expected trial and post-trial sentencing outcomes, accurately discounted to reflect uncertainty and adjudication costs, define efficient plea bargaining.<sup>40</sup> But why should the societal goal be to secure no more than the accurately discounted trial outcome? To maximize deserved punishments, we would prefer the highest deserved punishment the prosecutor could obtain on a plea, regardless of whether the defendant seems sensible in accepting the bargain. Suppose that the prosecutor in our hypothetical could secure plea bargains of fourteen years imprisonment from each defendant. The bargains might be inefficient in the sense that the defendants misjudged their chances of acquittal or their probable post-trial sentences. However, if the societal goal is to maximize deserved punishment, their blunder brings about positive results.

The shadow-of-trial efficiency theory misleads us in evaluating plea bargaining. The theory implies that plea bargaining is socially valuable only to the extent that it reflects accurately discounted trial outcomes. However,

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38. This evaluation of adjudication costs is highly subjective. The list of factors that might be included is broad, covering not merely the prosecutor's time and effort but also the costs to others, including the prosecutorial support staff, the court personnel, the jurors and the witnesses. Unlike the discounting of outcome uncertainties (expected post-trial sentence discounted by the fractional odds of acquittal), the value of these adjudication costs in sentencing terms is not calculable by any objective formula.

39. The defense might nix a deal if the prosecutor's final offer is too high. However, this problem is not one that correlates with undue leniency in plea bargaining. The problem also does not reveal injustice to the defendant who decides to proceed to a jury trial. *See infra* Part III.

40. *See, e.g.,* Scott & Stuntz, *supra* note 10, at 1935 (asserting that "parties bargain over the allocation of criminal punishment in order to reassign and thereby reduce the risks of an uncertain future" and describing the goal as that of reaching "an efficient contract that fully exploits potential gains"); *see id.* at 1915 ("Moreover, the gains the participants realize from the exchange presumably have *social* value, not just value to the bargaining parties.").

Professors Schulhofer and Bibas have shown why plea bargaining generally does not produce such outcomes.<sup>41</sup> Their critiques also reveal that it probably never will, regardless of reform efforts.<sup>42</sup> One could easily conclude from this analysis that plea bargaining should be ended.<sup>43</sup> Professor Schulhofer has made this very argument.<sup>44</sup> Even those who have used the shadow-of-trial efficiency theory to defend bargaining have posited that there are “social losses”<sup>45</sup> to inefficient bargains. However, because this efficiency standard actually does not correspond to the social gains and losses associated with plea bargaining,<sup>46</sup> we should not judge the validity of plea bargaining from our failure to achieve it.

*B. The Cost of Eliminating Plea Bargaining by Changing One or More of the Constraints of Our Current System*

While plea bargaining maximizes deserved punishment within the constraints of the current criminal justice system, the next question is whether the benefits of maximizing sentences over all criminal cases justify changing the constraints themselves. By eliminating bargaining, courts could increase the punishment imposed in cases that would otherwise be bargained and, thus, the level of deserved punishment imposed across all prosecutions. Bargaining is now pervasive and often considered intractable,<sup>47</sup> but we could, in theory,

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41. See generally Schulhofer, *supra* note 2; Bibas, *supra* note 9.

42. While Professor Bibas concludes that plea bargaining is, as a practical matter, here to stay and, thus, that we should focus on reforms, see Bibas, *supra* note 9, at 2547, his critique of the practice reveals too many fundamental impediments to accurate, shadow-of-trial bargaining to make achievement of that goal possible.

43. There is a tendency to believe that “efficiency” is an important factor in deciding social questions. See, e.g., POSNER, *supra* note 32, at 13 (“Although . . . efficiency [is not] . . . the only worthwhile criterion of social choice, . . . most people probably would agree[] it is an important criterion.”).

44. See Schulhofer, *supra* note 2, at 1979 (asserting that “plea bargaining seriously impairs the public interest in effective punishment of crime” and that “flaws in the bargaining structure . . . create massive problems of inefficiency”); *id.* at 2009 (asserting that plea bargaining should be “abolished”).

45. See Scott & Stuntz, *supra* note 10, at 1914-15 (“Since it is difficult to know a priori which party enjoys the comparative advantage in risk reduction, a policy of contractual autonomy is the only way that parties can reduce the social losses that result from uncertainty and frustrated expectations.”); see also *id.* at 1940 (asserting that an “efficient allocation of risks and entitlements” can “generate net social gains”).

46. The shadow-of-trial standard is at least an unhelpful, if not inappropriate, measure of efficiency regarding plea bargaining. See Mario J. Rizzo, *The Mirage of Efficiency*, 8 HOFSTRA L. REV. 641, 646-48 (1982) (discussing the difficulty of defining the efficiency criterion in economic analyses of law).

47. See, e.g., Bibas, *supra* note 9, at 2547 (“We cannot demolish the huge edifice of plea bargaining . . .”).

eliminate much of it. Doing so, however, would come with a high price. This section contends that the cost of abolition would be unjustifiably expensive, but, more importantly, it shows that shadow-of-trial efficiency theory, again, does not help resolve whether to abolish bargaining.

*1. The Unavoidable Trade-Offs*

Attempting to eliminate plea bargaining would involve costly trade-offs. The previous section assumed a system that would exchange guilty pleas for trials by not proceeding against many defendants who had previously been legitimately charged with crime or by not charging many who should be charged. To attempt to abolish plea bargaining in any other way would require changes in the constraints noted at the outset of this part — the amount of behavior defined as crime, the amount of public resources devoted to fighting crime, and the basic approach to criminal trials. Moreover, bargaining is so central to the current system of adjudicating crime that abolishing it would necessitate extraordinary changes.

Some commentators have suggested that abolition could be achieved without major costs, but their proposals are illusory. For example, based on a study of Philadelphia courts, one leading critic of plea bargaining contended that short bench trials could almost entirely replace plea bargains as the secondary means for resolving criminal cases.<sup>48</sup> According to the study itself, this conclusion was probably too optimistic. Nearly half of the cases in the Philadelphia courts ended with a guilty plea based on either explicit concessions from the prosecutor or implicit concessions from the judge.<sup>49</sup> Also, the trade-off of guilty pleas for bench trials was arguably only a triumph of form over substance. The bench trials were extremely short — generally only a few minutes longer than a guilty plea<sup>50</sup> — and judges richly rewarded jury waivers through sentencing concessions.<sup>51</sup> The Philadelphia system could be viewed as merely an effort by judges to reward jury waivers and to allow for the correction of prosecutorial overcharging where the prosecutor, for reasons particular to that city, did not provide these functions through

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48. See Schulhofer, *supra* note 6, at 1107 (pointing to the Philadelphia system and concluding that “[p]lea bargaining is not inevitable”).

49. *Id.* at 1051 (noting that “45% were disposed of by guilty plea, 49% by bench trial, and 6% by jury trial”).

50. The study determined that the jury-trial waiver colloquies and subsequent bench trials combined averaged only forty-five minutes while the guilty pleas averaged twenty minutes. *Id.* at 1085.

51. See *id.* at 1062-63 (noting that “sentencing differentials between jury and bench trials are marked”).

bargaining.<sup>52</sup> The system did not eliminate bargaining for actual guilty pleas<sup>53</sup> and, to the extent that it reduced such bargaining, arguably only substituted an essentially equivalent method for extending leniency to reward purely strategic behavior by defendants.<sup>54</sup>

Other efforts at abolition have turned out to be both illusory and costly. One study pointed to the results of a system implemented in New Orleans by then head prosecutor, Harry Connick.<sup>55</sup> This study showed that Connick had greatly reduced the number of plea bargains offered by his office through a plan of intensive screening at the charging stage.<sup>56</sup> The New Orleans District Attorney's office rejected many charges that prosecutors would have filed in most other cities. The office also routinely declined to offer bargains, leaving the defendant to decide whether to go to trial or to plead guilty to the original charge.<sup>57</sup> Doubtless, a tough screening policy by the prosecutor can somewhat reduce the need to dismiss questionable charges later. Due to the difficulty of accurately assessing cases, however, attempts at tough screening may allow a large percentage of questionable cases to go forward while also foreclosing many other legitimate charges.<sup>58</sup> This approach may also have little influence

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52. Professor Schulhofer cited among other factors that “[o]vert prosecutorial plea bargaining has long been discouraged and, to an extent, viewed with suspicion” and that “[a]ggressive prosecutorial policies and refusals to compromise have engendered equally uncooperative attitudes among defense counsel.” Schulhofer, *supra* note 6, at 1099.

53. The Philadelphia system provided plea bargains in a non-narrow sense. *See supra* note 1. Because the central criticisms of plea bargaining apply to this broad definition of bargaining, one cannot persuasively claim to have responded to those central criticisms by eliminating only the plea bargaining that would be included in a narrow definition of the practice.

54. While Professor Schulhofer urged that the bench trials were usually genuinely adversarial contests in which some acquittals occurred, these points provide weak support for emulating this system. First, plea negotiations themselves are also often adversarial in important respects and often result in the dismissal of questionable charges. Second, Professor Schulhofer's description of the average length of bench trials, *see supra* note 50 and accompanying text, demonstrates that bench trials were far more cursory than trials that afford constitutional protections for the defendant. Further, this system hardly honored more than plea-bargaining systems the notion embodied in our Constitution that juries are important, given that only six percent of the cases were resolved by jury trial. *See supra* note 49.

55. *See* Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 116-17 (2002) (asserting that “bargains are not inevitable” and urging “the substitution of hard prosecutorial screening practices for the use of plea bargains”).

56. *Id.* at 115.

57. *See id.* at 68 (noting that seventy-eight percent of all filed cases resulted in either a trial or a plea of guilty as charged).

58. Gerard E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off?*, 55 STAN. L. REV. 1399, 1407 (2003) (contending that the initial screener cannot evaluate a case nearly as effectively as the prosecutor who later ends up assigned to handle it and who reviews it more carefully).

on bargaining. The New Orleans District Attorney's office "reject[ed] for prosecution . . . 52% of all cases and 63% of all charges."<sup>59</sup> Nonetheless, the approach did not come close to eliminating bargaining. First, the authors were careful to note that charge bargaining by prosecutors may have occurred in up to twenty-two percent of the cases,<sup>60</sup> and some additional bargaining seemed to occur in the form of failures by the prosecution to pursue enhanced penalties under habitual felon statutes.<sup>61</sup> Much more significantly, overt sentence bargaining continued in almost all cases between judges and defense lawyers,<sup>62</sup> a practice historically deemed problematic even by proponents of plea bargaining.<sup>63</sup> In the end, the study failed to show that plea bargaining is eradicable through tough screening practices.<sup>64</sup> Instead, it raised the question whether tough screening forecloses too many valid prosecutions and suggested that a void in plea bargaining by prosecutors will tend to be filled with plea bargaining by judges.

Efforts to simply ban most plea bargains have also repeatedly failed, surely in part because of the expensive trade-offs involved.<sup>65</sup> Sometimes ban efforts

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59. See Wright & Miller, *supra* note 55, at 74. While conclusions cannot easily be drawn as to whether too many charges were screened out, evaluating a tough screening policy certainly involves asking whether the policy adequately addressed the crime problem in New Orleans.

60. See *id.* at 72.

61. See *id.* at 81-82.

62. See *id.* at 80.

63. See LAFAYETTE ET AL., *supra* note 24, at 989-91 (discussing the long-standing arguments, though expressing doubts about their persuasiveness, that judges should not be involved in plea bargaining).

64. See Wright & Miller, *supra* note 55, at 80 (implicitly noting that the judge would often tell the defense attorney in pre-trial discussions what sentence the defendant would receive after a guilty plea).

65. While large caseloads and the promise of cumbersome, expensive jury trials help explain the appeal of plea bargains from a societal perspective, some commentators have found the more driving explanation in the motivations of key courtroom actors. These theories vary in emphasis, but center around a persistent preference for cooperation to achieve self-serving benefits among trial judges, prosecutors, defense lawyers, and defendants. Compare Malcolm M. Feeley, *Two Models of the Criminal Justice System: An Organizational Perspective*, 7 LAW & SOC'Y REV. 407 (1973) (presenting a theory based on the structure of relationships and functions among courtroom participants), with MILTON HEUMANN, PLEA BARGAINING 2-6 (1978) (proposing an adaptation theory focusing on a socialization process of courtroom actors). Further, some have argued that plea bargaining became entrenched in our system through a complex set of developments, including the rise of probation and of the public defender, along with the failure of indeterminate sentencing. See GEORGE FISHER, PLEA BARGAINING'S TRIUMPH 2-3 (2003). Nonetheless, it appears that plea bargaining started to develop a firm toe-hold in America around 1850, after Massachusetts passed liquor laws that vastly increased criminal prosecutions. Prosecutors sought "to manage their crushing workloads and to gain an occasional effortless conviction." *Id.* at 230.

have resulted from legislation or referenda, such as a statewide prohibition imposed in California in the early 1980s.<sup>66</sup> More often, they have resulted from the order of the chief prosecutor, such as with the ban imposed by the Alaska Attorney General in 1975.<sup>67</sup> Most have occurred in rural areas with a low volume of criminal prosecutions, although the prosecutor in El Paso, Texas, also attempted to impose such a ban in 1975.<sup>68</sup> Almost all have been limited in major ways, such as to prosecutors alone or to certain stages of the adjudication process or to certain types of crimes.<sup>69</sup> In each case, either the bargaining shifted to other stages in the adjudication process,<sup>70</sup> the provision of bargains merely shifted from prosecutors to judges,<sup>71</sup> or prosecutors increasingly ignored the ban<sup>72</sup> or subverted it through subterfuges.<sup>73</sup> In the

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66. The constitutional amendment, Proposition 8, was approved by referendum on June 8, 1982. See CAL. CONST. art. I, § 28. Section 7 of Proposition 8 also addresses the prohibition of plea bargaining in certain circumstances. See CAL. PENAL CODE § 1192.7(a) (West 2004).

67. See Michael L. Rubinstein & Teresa J. White, *Plea Bargaining: Can Alaska Live Without It?*, 62 JUDICATURE 266 (1978).

68. See Robert A. Weninger, *The Abolition of Plea Bargaining: A Case Study of El Paso County, Texas*, 35 UCLA L. REV. 265 (1987).

69. For another example, see Milton Heumann & Colin Loftin, *Mandatory Sentencing and the Abolition of Plea Bargaining: The Michigan Felony Firearm Statute*, 13 LAW & SOC'Y REV. 393 (1979), discussing an effort by the Wayne County (Detroit) prosecutor to eliminate plea bargaining by his office in any case involving a recently promulgated law that imposed a mandatory add-on sentence of two years for the use of a firearm while committing a felony.

70. In California, for example, the ban did not eliminate plea bargaining, because it only applied in Superior Court. As a result, plea bargaining shifted to the earlier stages of adjudication — the municipal or district courts — where most cases began. CANDACE MCCOY, *POLITICS AND PLEA BARGAINING: VICTIM'S RIGHTS IN CALIFORNIA* 37-38 (1993).

71. For example, in Alaska, judges gave implicit bargains to those who pled guilty. For violent crimes, a study found that sentences after trial were, on average, “445 per cent longer than those given after pleas” and for fraud crimes, “334 per cent longer.” Rubinstein & White, *supra* note 67, at 278. A subsequent study also showed that charge bargaining again became increasingly more common in Alaska beginning in the mid-1980s. See Theresa White Carns & Dr. John A. Kruse, *A Re-Evaluation of Alaska's Plea Bargaining Ban*, 8 ALASKA L. REV. 27, 64 (1991).

72. In El Paso, for example, a study found that, during the two years after the ban was initially implemented, “the trial rate doubled and the two judges [assigned to criminal cases] found that they could not move a much enlarged caseload.” Weninger, *supra* note 68, at 311. Soon, ten judges in the city began helping with criminal cases, but, nonetheless, the ban essentially fell apart due to *sub rosa* bargaining at all levels of the prosecutor's office and the tendency of judges to bargain. *Id.* at 312.

73. When the prosecutor in Detroit tried to ban plea bargaining in felony cases involving firearms, see Heumann & Loftin, *supra* note 69, judges participated in subterfuges of two sorts. First, often by preagreement, they held short jury-waived trials in which the defendant was found not guilty of the felony, thus nullifying the mandatory additional penalty of two years applicable to felony cases involving firearms. See *id.* at 417-19. Second, they simply reduced

modern era no large city in the United States has gone for a long period without some form of widely practiced plea bargaining. This history underscores the costliness of eliminating bargaining.<sup>74</sup>

One leading critic of plea bargaining, Professor John Langbein, has openly confronted the unavoidable trade-offs required to try to eliminate it. He argued in the late 1970s that the United States should emulate the West German system of criminal justice.<sup>75</sup> According to the argument, the West Germans had avoided bargaining by resolving every case through a rapid, non-adversarial trial.<sup>76</sup> This contention later appeared to be inaccurate.<sup>77</sup> Plea bargaining reportedly emerged in the West German system in the 1970s and has gained popularity there since that time.<sup>78</sup> In any event, the argument reveals the kind of sacrifice required to try to end the practice. To adopt the German system would eviscerate not only plea bargaining but our basic approach to criminal trials, which the Constitution guarantees to criminal defendants.<sup>79</sup>

## 2. *The Argument for Preserving Bargaining*

The argument against fundamental systemic change to try to eliminate plea bargaining rests largely on the uncertain, although clearly substantial, costs involved. If jury trials produce results that we like, while plea bargaining produces results that we do not, we may prefer jury trials although they are more expensive. However, achieving a balance between results and costs is preferable where the cost of perfection is exorbitant. The argument for plea bargaining reflects this perspective. The costs of eliminating bargaining, although difficult to quantify, are plausibly thought to far outweigh the costs

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two years from the sentence that would otherwise have been given for the underlying felony. *See id.* at 417-24.

74. Because of the cumbersome pace of trials, plea agreements have also recently become common in international war crimes tribunals. *See* Julian A. Cook, *Plea Bargaining at The Hague*, 30 YALE J. INT'L L. 473, 475 (2005).

75. *See* John H. Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204 (1979); Langbein, *supra* note 3, at 21-22.

76. Langbein, *supra* note 75, at 206-10.

77. *See* Markus Dirk Dubber, *American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure*, 49 STAN. L. REV. 547, 549 (1997).

78. *See id.* at 549-50 (noting that, by the 1990s, "an estimated 20-30 percent of all German criminal cases [were] disposed of by some form of bargain").

79. Some commentators have contended, however, that the resources required to provide jury trials for all felony defendants are not as high as typically imagined and that such a system is not beyond our means. *See, e.g.,* Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 936, 948 (1983).



of leniency in punishment that result from continuing to allow it. The perceived imbalance in costs surely helps explain the lack of truly successful efforts in recent decades to end bargaining.<sup>80</sup>

All of the options for eliminating plea bargaining are infeasible in practice. Amending the Constitution to entitle criminal defendants to only short, non-adversarial, non-jury trials is too controversial itself to serve as a remedy for leniency in bargaining.<sup>81</sup> The negative consequences associated with this alternative begin with its tendency to promote erroneous trial convictions.<sup>82</sup> The notion of decriminalizing a large portion of the behavior currently deemed criminal is at least equally extreme. At best, legislatures might marginally stem the continuing expansion in the use of the criminal sanction.<sup>83</sup> The only remaining option focuses on money, and the increases would have to be enormous. Current police, court, and corrections budgets would have to increase at least several times over.<sup>84</sup> As for the practicalities of this latter approach, the only uncertainty is whether it is significantly less implausible than the other two potential remedies.

A large infusion of resources also might not eliminate plea bargaining. The scarcity of resources is not the only driving force behind bargaining, although resource scarcity helps fuel the practice. The key players involved — prosecutors, judges, defense lawyers, and defendants — have incentives to

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80. The determination of whether to change the current constraints of our criminal justice system to eliminate plea bargaining involves value preferences. The positives and negatives on either side of the equation are not readily calculable in monetary terms and would not be assigned the same value by all persons. What is the value to be placed, for example, on the preservation of the right to jury trial for the criminally accused? What is the value to be placed on the satisfaction that many would feel in knowing that more criminal defendants received their full deserved punishment? People will disagree about these questions. However, the lack of realistic efforts to eliminate plea bargaining indicates that the costs of elimination are generally deemed too high.

81. See, e.g., Gifford, *supra* note 3, at 96 (“[T]o replace the criminal justice system as it exists in the United States with an inquisitional system similar to those on the European continent is both politically infeasible and potentially fatal to rights traditionally regarded as fundamental in this country.”).

82. This option could also carry significant added costs. The system would avoid the expense associated with our current complex jury trials. However, “even slimmed-down, cheaper trials [would] be more expensive than bargained pleas.” Scott & Stuntz, *supra* note 10, at 1932. The increased level of punishment imposed would also carry increased incarceration costs.

83. The idea, however, of cutting back somewhat on the use of the criminal sanction has had prominent academic backers. See generally HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968).

84. See Scott & Stuntz, *supra* note 10, at 1932 (noting that, even if only a third of the current number of guilty pleas were thought to result from bargaining, eliminating bargaining “would quadruple the number of criminal trials”).

bargain merely because pleas are so much cheaper and easier than trials, and because litigation is fraught with uncertainty.<sup>85</sup> A substantial cost differential between pleas and trials would remain even if there were more resources available for adjudication.<sup>86</sup> Likewise, the uncertainty of litigation would remain. Therefore, the parties would often still want to bargain. Bans might temporarily help deter the practice. However, given the continuing incentives to deal, the parties would likely turn to subterfuges that produced the equivalent of plea bargains.<sup>87</sup>

Shadow-of-trial efficiency theory does not help decide whether to abolish bargaining. The arguments offered here against such efforts do not build on that theory. Likewise, nothing about that theory undermines these arguments. The shadow-of-trial efficiency theory in no way relates to this larger question because it assumes that the adjudication costs of trials are appropriately traded for leniency in sentencing.<sup>88</sup> Based on that assumption, the theory focuses on the degree of sentencing discount that will produce a purportedly “efficient” bargain. The theory does not address whether bargains should always be disallowed to try to ensure that every criminal defendant receives his maximum deserved punishment. This part of the article has argued against such a trade-off, but its larger point is that shadow-of-trial efficiency theory does not help resolve this question.

### *III. Fairness to Defendants Who Are Sentenced After Trial*

While plea bargaining serves the public interest in punishing crime at a reasonable cost, there may be other reasons for paying the price to eliminate it. One might conclude that bargaining is too often unfair to defendants, either those who do not accept bargains or those who do. This article now turns to the first of these unfairness questions, involving defendants who go to trial. Critics claim that defendants who are sentenced after a trial conviction without benefit of a bargain are effectively punished for exercising their right

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85. See, e.g., POSNER, *supra* note 32, at 562 (noting that the incidence of plea bargaining “is . . . determined by the relative costs of negotiation and of litigation and by the amount of uncertainty over the outcome of litigation — factors not greatly affected by the number of judges”).

86. If resources remained plentiful so that caseloads remained low, prosecutors and judges could then work at a leisurely pace, which many of them might prefer.

87. On this score, see *supra* note 73, regarding a subterfuge that developed to avoid a plea bargain ban implemented by the Detroit prosecutor for certain felonies involving firearms, and *supra* notes 48-54 and accompanying text, regarding the system that developed in Philadelphia to make up for the reduced level of traditional plea bargaining.

88. See *infra* notes 95-97 and accompanying text.

to a jury trial.<sup>89</sup> This part contends, however, that they are not punished for exercising their constitutional rights, but for their crimes, and it does so without reliance on shadow-of-trial efficiency theory. This part begins by demonstrating why one well-known judicial effort to use shadow-of-trial efficiency theory to rebut this criticism of plea bargaining is ill-considered. It then offers a theory of deserved punishment for crime to explain why plea bargains do not render post-trial sentences unjust.

*A. The Futility of Efforts to Deny the Disparities or to View Them as Tied Only to Outcome Uncertainties*

If plea bargaining focused only on the uncertainty of conviction at trial, the practice could easily be thought not to punish the exercise of trial rights by defendants sentenced after trial. Bargains would not account for the adjudication costs associated with trial. Each plea bargain would be determined simply by multiplying the expected trial-conviction sentence by the fractional probability of acquittal. Under this scenario, post-trial sentences would not carry a trial penalty. The disparity between bargained sentences and post-trial sentences would be explained not by the relinquishment versus exercise of trial rights, but by the possibility versus lost possibility of acquittal.

In *Scott v. United States*,<sup>90</sup> an opinion that continues to receive attention,<sup>91</sup> Judge David Bazelon used this shadow-of-trial notion to contend that plea bargaining need not improperly penalize defendants who are sentenced after trial. He asserted that post-trial sentences do not carry a trial penalty if bargains reflect only the uncertainty of conviction.<sup>92</sup> Judge Bazelon portrayed such bargains as simply reflecting the “expected sentence before trial,” which he characterized as “the same” for those who accept the bargain and those who go to trial.<sup>93</sup> He did not provide a good explanation about why plea offers that account for both the uncertainties of litigation and adjudication costs

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89. *See supra* note 3.

90. 419 F.2d 264 (D.C. Cir. 1969).

91. The decision is excerpted and discussed in leading casebooks and treatises on criminal procedure. *See, e.g.*, YALE KAMISAR, WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, MODERN CRIMINAL PROCEDURE 1303-04 (11th ed. 2005); LAFAVE ET AL., *supra* note 24, at 960-61.

92. *Scott*, 419 F.2d at 277 (distinguishing a bargain that merely reflects “the uncertainties of litigation” from one that “deter[s] defendants from demanding a trial”).

93. *Id.* at 276 (“To the extent that the bargain struck reflects only the uncertainty of conviction before trial, the ‘expected sentence before trial’ — length of sentence discounted by probability of conviction — is the same for those who decide to plead guilty and those who hope for acquittal but risk conviction by going to trial.”).

improperly penalize those who are sentenced after trial.<sup>94</sup> Nonetheless, he could plausibly contend that a discount focusing only on the uncertainty of conviction derives from the foreclosed possibility of acquittal and not the relinquished exercise of trial rights.

Judge Bazelon's shadow-of-trial theory is flawed, however, in that it does not describe what typically occurs in plea bargaining.<sup>95</sup> Prosecutors and judges do not shy from discounting based on adjudication costs avoided.<sup>96</sup> Where the likelihood of conviction at trial is seemingly assured, the parties commonly strike deals in part because of the anticipated costs of the trial that a guilty plea would obviate.<sup>97</sup> Also, in cases where acquittal seems possible, bargaining takes into account not only the uncertain outcome, but the time, effort, and other costs that can be anticipated in pursuing a trial conviction.<sup>98</sup>

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94. For his explanation and a discussion of its flaws, *see infra* text accompanying notes 137-38.

95. Judge Bazelon's theory also fails, however, to the extent that it requires accurate discounting for uncertainty. His language seemed to demand such accuracy. *See, e.g., Scott*, 419 F.2d at 277 ("If the sentence expectations of those two classes at that time are the same, then there will be no chilling effect upon exercise of the right to trial, and it is accurate to say that 'no price' has been placed upon the exercise of the right."). On this view, Judge Bazelon's theory would fail because of the likelihood that parties often cannot accurately determine the probability of acquittal, even assuming they focus on it exclusively. *See supra* text accompanying notes 16-17; *see also* Note, *supra* note 3, at 1401 ("But the prosecutor does not have sufficient information to make those predictions accurately."). The impediments to accurate bargaining would imply that the practice is generally problematic.

However, Judge Bazelon may only have meant that prosecutors, in extending plea offers, should have the goal of discounting exclusively for the possibility of acquittal. That view does not require accuracy in the calculations. Some of Judge Bazelon's language suggested that he was concerned primarily about intentions. *See, e.g., Scott*, 419 F.2d at 277 ("The situation is quite different when the prosecutor engages in bargaining not because he is willing to take a sure half loaf rather than to await the outcome of a trial, but because his limited resources convince him he must deter defendants from demanding a trial."). If this is what Judge Bazelon meant, his theory obviously departed from the accuracy demands of a strict, shadow-of-trial efficiency theory. However, his theory would still fail due to its implausible assumption that government actors would not try to discount for adjudication costs avoided.

96. *See, e.g., Gifford, supra* note 3, at 43-44 (asserting that outcome uncertainties are often less important than expected adjudication costs); *Scott & Stuntz, supra* note 10, at 1949 ("In the typical case, the gains from trade are straightforward — savings in adjudication costs — and the bargaining dynamic is relatively uncomplicated."); *Comment, supra* note 5, at 219 ("Many judges expressed the belief that a defendant pleading guilty should receive some reduction in the gravity of sentence because of the role of guilty pleas in the efficient and economical administration of criminal law.").

97. *See Gifford, supra* note 3, at 43-44; *Scott & Stuntz, supra* note 10, at 1949; *Comment, supra* note 5, at 219.

98. *See, e.g., Easterbrook, supra* note 4, at 309 ("The defendant, who buys the plea, pays by surrendering his right to impose costs on the prosecutor by demanding trial and by

More recent academic commentary defending plea bargaining based on shadow-of-trial efficiency theory acknowledges that bargaining typically discounts for both the outcome uncertainties and the adjudication costs of trials.<sup>99</sup>

The question remains whether plea bargaining that accounts for expected adjudication costs improperly penalizes those who resist. Contrary to the implication in Judge Bazelon's opinion in *Scott*, the next section of this article argues that the failure to confer such discounts on those sentenced after trial does not penalize defendants who opt against plea bargaining. Before proceeding, however, it should be clear that shadow-of-trial efficiency theory has no bearing on this question. As espoused by its most prominent academic proponents, the theory contemplates that bargains will incorporate discounts for adjudication costs avoided.<sup>100</sup> However, the theory merely assumes this conclusion.<sup>101</sup> As a result, it offers no response to the claim that bargained discounts for such costs effectively impose a trial penalty on defendants who are sentenced after trial. An explanation outside of shadow-of-trial theory would have to answer this contention. This article now turns to that explanation.

#### *B. Post-Trial Sentences as Deserved Punishment; Bargained Sentences as Utilitarian Leniency*

The notion of deserts explains the justness of post-trial sentences despite the lower sentences imposed through bargaining. Defendants receiving post-trial sentences get the deserved punishments for their crimes. Bargained sentences involve the extension of leniency on risk-reduction and utilitarian grounds from the maximum deserved punishment. Critics of plea bargaining do not accept this position.<sup>102</sup> They argue instead that the denial of a discount to those who are sentenced after trial amounts to punishment for the exercise of trial rights.<sup>103</sup> They emphasize the lack of a desert explanation for the disparities and the relation between rewards and penalties, among other

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surrendering his chance of acquittal at trial."); Easterbrook, *supra* note 10, at 1975 ("In purchasing procedural entitlements with lower sentences, prosecutors buy that most valuable commodity, *time*. With time, they can prosecute more criminals."); Uviller, *supra* note 33, at 102 (asserting that bargaining saves "the time, effort and risk entailed in the trial").

99. See *supra* notes 96-98.

100. See, e.g., Scott & Stuntz, *supra* note 10, at 1935 ("Criminal trials are costly for defendants, and even more so for prosecutors. These costs can be saved, and the gains split between the parties, by reaching a bargain early in the criminal process.").

101. See, e.g., *id.* at 1949 (asserting that trades focused on adjudication costs "appear to be paradigmatic value-enhancing bargains of the sort that the system ought to enforce").

102. See, e.g., Alschuler, *supra* note 2, at 659-60 & n.16.

103. See *id.*

factors. However, their arguments ultimately do not undermine the view that trial sentences dispense appropriate retribution.

*1. Deserts as a Limitation on Punishment*

Post-trial sentences are appropriately understood as deserved punishment for crime. Those responsible for setting criminal sentences — legislators, sentencing commissions, trial judges, and prosecutors — base their penal decisions upon the precept of justice that “undeserved” punishment is “indefensible on any theory.”<sup>104</sup> The idea that a person should not suffer undeserved punishment corresponds to deeply and widely held notions of fairness in our society.<sup>105</sup> The force of this sentiment leads to the conclusion that the relevant actors in criminal sentencing do not desire to impose more punishment after trial than they believe criminal offenders deserve for their crimes.

This notion of deserved punishment can explain post-trial sentences, although retributive theory does not lead to objective measures concerning the maximum deserved punishment for each crime.<sup>106</sup> Notions of desert derive from “contemporary community morality.”<sup>107</sup> As Professor Stephen Morse has emphasized, “[i]t is possible in any society to rank the seriousness of criminal offenses and to assign to each a punishment that the society at that time considers proportional to the seriousness of the offense.”<sup>108</sup> While this

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104. *Id.* at 659.

105. *See, e.g.*, ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* 45 (1976) (“Ask the person on the street why a wrongdoer should be punished, and he is likely to say that he ‘deserves it.’”); John Hospers, *Retribution: The Ethics of Punishment*, in *ASSESSING THE CRIMINAL* 181, 183 (Randy E. Barnett & John Hagel III eds., 1977) (asserting that most people would believe that treating criminals in accordance with their “deserts” is the essence of justice).

106. *See, e.g.*, RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY* 318-19 (1998) (discussing the difficulty of understanding and applying a deserts measure to criminal sentencing); H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 233 (1968) (“The simple equivalencies of an eye for an eye or a death for a death seem either repugnant or inapplicable to most offences, and, even if a refined version of equivalence in demanding a degree of suffering equivalent to the degree of the offender’s wickedness is intelligible, there seems to be no way of determining these degrees.”); WALTER KAUFMAN, *WITHOUT GUILT AND JUSTICE: FROM DECIDOPHOBIA TO AUTONOMY* 71 (1973) (“[T]here is no crime at all of which it could be said that those committing it clearly deserve a particular punishment.”); David Dolinko, *Three Mistakes of Retributivism*, 39 *UCLA L. REV.* 1623, 1626 (1992) (“[I]t has long been a stock objection to retributivism that there is simply no workable way to determine just what punishment a criminal deserves.”).

107. RICHARD J. BONNIE, ANNE M. COUGHLIN, JOHN C. JEFFRIES, JR. & PETER W. LOW, *CRIMINAL LAW* 12 (2d ed. 2004).

108. Stephen J. Morse, *Justice, Mercy, and Crazyness*, 36 *STAN. L. REV.* 1485, 1493-94

assignment may not be “an invariant, objective deserved punishment,” it is “the deserved punishment at that time and in that place.”<sup>109</sup>

Disagreements will often arise about the maximum deserved punishment for a criminal act, but these disputes only underscore people’s belief in the deserts limitation. People argue about whether a punishment is deserved because they believe it important that an offender not receive more punishment than he deserves. Except in the death-penalty context, the Supreme Court has given states substantial leeway under the Constitution in prescribing criminal punishments.<sup>110</sup> Consequently, criminal sentences will often cause controversy.<sup>111</sup> A sentence that many people will see as excessive retribution<sup>112</sup> will typically strike many others as entirely deserved.<sup>113</sup> This diversity of views underscores the impossibility of declaring a sentence deserved according to any objective measure.<sup>114</sup> The disagreements do not undermine the notion that the relevant players in the criminal process believe in the deserts limitation.<sup>115</sup>

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(1984).

109. *Id.*

110. *See infra* notes 123-24 and accompanying text.

111. *Compare* Editorial, *Cruel and Unusual*, ORANGE COUNTY REG., July 15, 2005, at Local 6 (editorial concluding that twenty-five-year sentence imposed on former WorldCom chief, Bernard Ebbers, for defrauding investors of \$11 billion “seems excessive,” particularly given that he is “a man of 63 with a heart condition”), *with* Ken Belson, *WorldCom Head Is Given 25 Years for Huge Fraud*, N.Y. TIMES, July 14, 2005, at A1, C4 (noting view of Michael J. Missal, lead counsel to the examiner in the WorldCom bankruptcy proceeding that “[w]hat the judge is saying here is Mr. Ebbers deserves a life sentence, and 25 years amounts to one”).

112. *See, e.g.*, Eric Lichtblau, *Scholar Is Given Life Sentence in ‘Virginia Jihad’ Case*, N.Y. TIMES, July 14, 2005, at A17 (discussing case in which federal trial judge, Leonie Brinkema, described as “very draconian” the life sentence that she felt compelled to impose on Muslim cleric, Ali al-Timimi, who was convicted of inciting others to commit acts of terrorism against the United States).

113. *See, e.g., id.* (noting that the federal prosecutor in the al-Timimi case contended that the defendant “deserves every day of the time he will serve”).

114. To the extent people believe that a particular sentencing statute improperly exceeds the desert limitation in an effort to deter crime, they should also believe that the problem lies with the statute, not with plea bargaining. The answer in such a case is not to eliminate plea bargaining so that all offenders would receive the undeserved sentence, but to change the statute and still allow plea bargaining so that no defendant receives more than he deserves.

115. In some cases, judges intentionally impose undeserved punishment to penalize the exercise of trial rights. Where such behavior can be proven, it should be condemned. When a “judge . . . manipulates posttrial sentences to ‘punish’ those who refuse to plead guilty,” she acts improperly. Church, *supra* note 1, at 519. This article does not mean to minimize this problem, and, indeed, contends that appellate courts should carefully scrutinize claims that such conduct has occurred. Nonetheless, this kind of improper behavior does not inhere in plea bargaining. *Id.* The failure to confer a discount from deserved punishment is not the same as the conscious imposition of a penalty beyond what the offender deserves. *See infra* text

While Americans have committed themselves to the idea that no person should receive undeserved punishment, they are less convinced that every person must receive all the punishment that he deserves.<sup>116</sup> The deserts notion operates in our criminal justice system much more powerfully as a limitation on punishment than as a mandate for imposing it. For this reason, the criminal justice system requires proof at an extremely high level — beyond a reasonable doubt — as a precondition to the imposition of the criminal sanction.<sup>117</sup> Consequently, many who appear very probably to deserve punishment do not receive it.<sup>118</sup>

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accompanying notes 135-37.

Prosecutors also sometimes pursue and are able to secure a punishment after trial that they believe is undeserved, merely because they wish to encourage plea bargaining. Criminal codes are expansive, and criminal prohibitions are often pliable. Through their broad charging powers, prosecutors wield substantial power over sentencing, particularly in jurisdictions that have employed sentencing guidelines like those used in the federal system. *See generally* Stuntz, *supra* note 18. The recent decision in *United States v. Booker*, 125 S. Ct. 738 (2005), will cause significant changes in this guideline approach and may produce more checks on federal prosecutorial power. *See generally* M.K.B. Darmer, *The Federal Sentencing Guidelines After Blakely and Booker: The Limits of Congressional Tolerance and a Greater Role for Juries*, 56 S.C. L. REV. 533 (2005). In any event, improper behavior by prosecutors also does not inhere in plea bargaining. A prosecutor need not pursue post-trial sentences that she believes are undeserved to encourage most defendants to accept deals.

Ultimately, this article disagrees with those who would contend that prosecutors frequently seek and judges often impose post-trial punishments beyond what they believe the offender deserves because they wish to encourage plea bargaining. That position seems unduly cynical.

116. *But see* IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 100 (John Ladd trans., Bobbs-Merrill Co. 1965) (1797) (“The law concerning punishment is a categorical imperative, and woe unto him who rummages around in the winding paths of a theory of happiness looking for some advantage to be gained by releasing the criminal from punishment or by reducing the amount of it . . .”).

117. The protection has substantive and procedural sides. The substantive side is revealed in *Jackson v. Virginia*, 443 U.S. 307 (1979), requiring reviewing courts to vacate convictions that are not supported by sufficient evidence. The procedural side is revealed in two distinct lines of decision. One line rejects jury instructions that shift to the defense the burden of proof on an element of the offense. *See, e.g.*, *Patterson v. New York*, 432 U.S. 197 (1977); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *In re Winship*, 397 U.S. 358 (1970). The other line limits the use of presumptions to establish the crime. *See, e.g.*, *Carella v. California*, 491 U.S. 263 (1989); *Francis v. Franklin*, 471 U.S. 307 (1985); *Sandstrom v. Montana*, 442 U.S. 510 (1979); *Ulster County Court v. Allen*, 442 U.S. 140 (1979).

118. Long before the promulgation of the U.S. Constitution, Blackstone declared it indisputable that the margin of advantage should lie heavily with the criminal defendant: “[T]he law holds, that it is better that ten guilty persons escape, than that one innocent suffer.” WILLIAM BLACKSTONE, 4 COMMENTARIES \*358. This view continues to permeate the rules of criminal procedure. *See, e.g.*, HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 190 (1966) (“Trial by jury is not an instrument of getting at the truth; it is a process designed to make it as sure as possible that no innocent man is convicted.”) (quoting Lord Delvin); Sanford



In the sentencing context, this notion of deserts as a limitation means that decision-makers concern themselves less that some offenders may escape part of their deserved punishment than that someone might receive more than he deserves. As a result, differences in punishment will arise even among offenders whose deserts are equivalent. A trial judge might, for example, agree with a prosecutor's request for leniency due to the offender's cooperation in providing information helpful in prosecuting another case.<sup>119</sup> She might conclude that a less severe sentence would better promote the offender's rehabilitation. She might conclude that the offender's incarceration would throw his family of young children into exceptional disarray, and, on that basis, she might opt for probation. She might also conclude that the benefits to the state of guilty pleas justify rewarding them with discounts.<sup>120</sup>

Acceptance of sentencing reductions among equally deserving offenders does not offend the prohibition on Cruel and Unusual Punishments<sup>121</sup> or the Equal Protection Clause.<sup>122</sup> The Supreme Court has concluded that neither the proportionality mandate<sup>123</sup> in the Eighth Amendment<sup>124</sup> nor the Equal

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H. Kadish, *Methodology and Criteria in Due Process Adjudication — A Survey and Criticism*, 66 YALE L.J. 319, 346 (1957) (“If in this effort to insure that none but those guilty be convicted, many guilty go free, the price is not too great in the long view of democratic government.”); Kate Stith, *The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal*, 57 U. CHI. L. REV. 1, 4 (1990) (“In the Anglo-American tradition, the social cost of factual error against the defendant . . . is deemed greater than the social cost of factual error against the government . . .”); Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L.J. 457, 461 (1989) (“Whether treated as a moral, constitutional, or popular sentiment inquiry, the greater injustice is almost universally seen in the conviction of the innocent.”).

119. Cooperation may bear on the offender's deserts in addition to providing utilitarian grounds for leniency. See generally Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 VAND. L. REV. 1 (2003).

120. See Uviller, *supra* note 33, at 130 (asserting that guilty pleas mean that “the righteous demand for full retribution must fade”).

121. U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

122. *Id.* amend. XIV (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

123. The Justices have interpreted the prohibition on cruel and unusual punishments to proscribe not only punishments that are inherently inhumane but also those that are excessively harsh in context. The Court first struck down a punishment as disproportional nearly a century ago, in *Weems v. United States*, 217 U.S. 349 (1910). With the possible exception of *Trop v. Dulles*, 356 U.S. 86 (1958) (plurality opinion) (holding the revocation of citizenship for wartime desertion cruel and unusual punishment), all of the Court's subsequent decisions striking down punishments under the Eighth Amendment have rested on this excessiveness theory. The Court has found disproportionality in the punishment either in relation to the crime or to the class of offender. See, e.g., *Atkins v. Virginia*, 536 U.S. 304 (2002) (prohibiting the death

Protection Clause requires equality in sentencing according to deserts.<sup>125</sup> The Court's decisions contemplate, for example, that many who deserve the death penalty will not receive that sanction, precisely because they will plea bargain to avoid it.<sup>126</sup> The deserts notion operates as an upper limitation, more than a mandate against leniency, which means that many will receive less punishment than they deserve.

### 2. *The Failure of Claims of Trial Penalty*

Arguments that post-trial sentences reflect trial penalties have not confronted the overriding point that post-trial sentences mete out appropriate retribution. Critics note that bargained discounts are often not themselves based on deserts, and, as a result, there is inequality, according to a desert measure, in the distribution of punishment.<sup>127</sup> While accurate, this conclusion does not subvert the view that post-trial sentences mete out deserved punishments for crime.<sup>128</sup> A deserved punishment does not become undeserved merely because other defendants deserving the same punishment receive a lesser sanction.<sup>129</sup>

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penalty for retarded offenders); *Coker v. Georgia*, 433 U.S. 584 (1977) (plurality opinion) (striking down the death penalty for the rape of an adult woman).

124. Courts have applied this mandate more stringently in death-penalty cases than in the non-capital context. *See generally* JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 55-62 (3d ed. 2001).

125. The Court articulated this point most clearly in *McCleskey v. Kemp*, 481 U.S. 279 (1987), in rejecting claims based on a sophisticated study that revealed a high probability that racial prejudice influenced death selection in Georgia. The Court concluded that evidence of inequity in the treatment of identically situated capital offenders would not mean that a death sentence would become disproportional under the Eighth Amendment. *See id.* at 308 (asserting that, despite such disparities, McCleskey's death sentence was "not disproportionate within any recognized meaning of the Eighth Amendment"). The Court also rejected an Equal Protection claim because McCleskey had not established *purposeful* discrimination based on race by *his* prosecutor or jury. *See id.* at 292 (stating that equal protection violation requires proof "that the decisionmakers in *his* case acted with discriminatory purpose").

126. *See, e.g., id.* at 312 & n.35 (noting that McCleskey might have avoided the death penalty through a plea agreement).

127. *See, e.g.,* Comment, *supra* note 5, at 220 ("But when defendants guilty of the same crime are awarded different sentences for administrative reasons, such a discrimination cannot be justified in terms of individual culpability."); Alschuler, *supra* note 2, at 657-58 ("[I]t seems unjust that when two virtually identical defendants have committed virtually identical crimes, one should receive a more severe sentence than the other only because he has exercised his right to trial.").

128. *See supra* text accompanying notes 104-15.

129. *See, e.g.,* LOUIS MICHAEL SEIDMAN & MARK TUSHNET, *REMNANTS OF BELIEF* 160 (1966) (contending that a criminal who deserves death should not gain a reprieve simply because another offender who equally deserves death escapes that penalty); John C. McAdams,

Critics of bargaining gain no ground by emphasizing the disproportionate numbers of defendants who accept plea bargains.<sup>130</sup> Some have asserted that, because the bargained sentences predominate so heavily, the post-trial sentences seem incorrect.<sup>131</sup> They assert that it is strange to say that the discount is offered in ninety percent of the cases and the proper punishment is imposed in only the remaining ten percent.<sup>132</sup> However, the disproportion of bargained sentences arises because most defendants would strongly prefer to avoid full retribution and because prosecutors and judges generally have both risk-reduction and utilitarian reasons to make a deal that will help defendants avoid it.<sup>133</sup> Given these explanations, the disproportion does not, by definition, imply irrational action that would suggest that post-trial sentences are undeserved.<sup>134</sup>

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*Racial Disparity and the Death Penalty*, LAW & CONTEMP. PROBS., Autumn 1998, at 153, 167 (“The fact that you parked illegally and did not get a ticket does not relieve me of paying the fine when I do get a parking ticket.”); Ernest van den Haag, *The Ultimate Punishment: A Defense*, 99 HARV. L. REV. 1663 (1986) (“Maldistribution of any punishment among those who deserve it is irrelevant to its justice or morality.”).

130. Some commentators also point to the substantial size of the bargains in contending that post-trial sentences carry a trial penalty. See, e.g., Gifford, *supra* note 3, at 46-47 (noting case involving plea offer of two to six years where maximum possible exposure after conviction at trial would have been forty to eighty years). The possible sentencing exposure after a trial conviction is not the same as the probable post-trial sentence, and disparity assessments should focus on the latter. In any event, the size of the disparities bears on whether bargaining causes some innocent defendants to plead guilty, which is a serious concern, see *infra* Part IV.B, but does not weaken the conclusion that those sentenced after trial receive deserved punishment.

131. Although it is not clear that he advocates abolition or even major overhaul of the plea bargaining process, Judge Gerard Lynch has articulated this point in an effort to explain why bargained sentences are not unduly lenient: “It is not clear, however, why we should privilege the sentences received by the tiny minority of defendants who go to trial as the ‘correct’ sentences, from which the sentences received by defendants who plead represent an unduly lenient departure.” Lynch, *supra* note 58, at 1401.

132. See *id.* (“In a system where ninety percent or more of cases end in a negotiated disposition, it is unclear why the ‘discounted’ punishment imposed in that ninety percent of cases should not rather be considered the norm.”).

133. See *supra* text accompanying notes 31-33.

134. Although plea bargaining does not qualify, in some unusual circumstances, evidence of irrational sentencing disparities would cast doubt on the desert judgments underlying the more severe sentences. This very sort of problem raises questions about the use of the death penalty. See Scott W. Howe, *The Futile Quest for Racial Neutrality in Capital Selection and the Eighth Amendment Argument for Abolition Based on Unconscious Racial Discrimination*, 45 WM. & MARY L. REV. 2083 (2004). In the death penalty context, evidence from statistical studies has revealed a high probability that racial factors sometimes influence prosecutors, when they decide in which cases to pursue the death penalty, and jurors, when they decide which capital offenders deserve death. See *id.* at 2106-23. The evidence of unconscious racial discrimination by prosecutors and jurors against killers of white victims and against black

The argument for a trial penalty also cannot build on the notion that the failure to receive a reward must be a penalty. Critics assert, for example, that a reward for abandoning trial can only sensibly be understood as a penalty for going to trial.<sup>135</sup> However, notions of reward and penalty are not interdependent. The fact that certain people receive rewards does not mean that all others who did not receive a reward received a penalty. The failure to receive a reward does not constitute a penalty, particularly when one did not do what was required to receive the reward.

Critics of bargaining have also asserted that the denial of a bargain-like reward would be perceived as a trial penalty by those defendants sentenced after trial and, thus, should be viewed as a trial penalty.<sup>136</sup> However, the views of defendants, even if they could be accurately discerned, are likely to be self-serving. Their perceptions should not determine whether the judiciary views the sentencing disparities as a trial penalty.

Critics sometimes erroneously claim that a reward in pleading guilty connotes a penalty for going to trial, because they posit the “normal” or “proper” punishment for a crime as the average of the sentences imposed on everyone found guilty of it — those who plead guilty and those who go to trial.<sup>137</sup> This assumption preordains a finding of penalty. Those who plead guilty receive less than the “correct” punishment, while those who go to trial receive more. If there are winners, there must be losers. The argument does

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defendants undermines the conclusion that all death sentences are based on valid desert assessments. *See id.* at 2145-49. However, bargaining is different. Prosecutors bargain down based on risk-reduction and utilitarian rationales, not racial discrimination. Further, to the extent that factors such as race correlate with who pleads guilty and who goes to trial, this evidence alone would not show that racial prejudice influenced prosecutorial bargaining practices and, thus, would not suggest that post-trial sentences were undeserved.

135. *See, e.g.,* Alschuler, *supra* note 2, at 659 (“If the concepts of reward and penalty are relative — if these concepts derive their meaning only from each other — the assertion that some defendants are rewarded and none penalized is simply schizophrenic.”); Comment, *supra* note 5, at 220 (“An accused who receives a harsher punishment than the court would have decreed had he waived a costly and time-consuming trial pays a judicially imposed penalty for exercising constitutionally guaranteed rights.”).

136. *See, e.g.,* Alschuler, *supra* note 2, at 659-60 n.16 (“This inequality leads to a sense of injustice, and it would be entirely appropriate for a defendant sentenced only to what he ‘deserves’ to conclude that, in one very clear sense, he has indeed been penalized.”).

137. *See, e.g.,* Scott v. United States, 419 F.2d 264, 278 (D.C. Cir. 1969) (“The ‘normal’ sentence is the average sentence for all defendants, those who plead guilty and those who plead innocent. If we are ‘lenient’ toward the former, we are by precisely the same token ‘more severe’ toward the latter.”); Alschuler, *supra* note 2, at 659 (“If it is possible to envision a ‘proper’ sentence for each offender, . . . an increase in this sentence when the offender has exercised his right to trial can be seen as an inappropriate penalty, and a reduction in the sentence when the defendant has pleaded guilty can be seen as a reward.”).

not explain why sentences imposed after trial are undeserved. It simply assumes the conclusion that they are improper. However, a theory that declares any sentence above the average as problematic is insensible.<sup>138</sup>

In the end, critics of plea bargaining who allege a penalty in post-trial sentences generally do not claim that it would be wrong to increase all punishments to the post-trial level. Indeed, one of their further criticisms of bargains is that they “fail to accomplish the legitimate purposes of the criminal law”<sup>139</sup> and that defendants who bargain “receive less than the punishment they deserve — an injustice.”<sup>140</sup> These assertions underscore that their arguments are actually about the impropriety of the discounts, not about the impropriety of sentences imposed after trial.<sup>141</sup> Their arguments avoid rather than rebut the conclusion that post-trial sentences reflect deserved punishment.

#### *IV. Fairness to Defendants Who Accept Plea Offers*

While defendants sentenced after trials are not appropriately viewed as penalized by the existence of plea bargaining, the question remains whether defendants who plead guilty based on bargains are treated unfairly. Both defenders and opponents of plea bargaining have implied that shadow-of-trial efficiency theory helps resolve this problem by defining when plea bargaining is acceptable.<sup>142</sup> However, this part shows that the theory actually leads us wildly astray with respect to the fairness of bargains to defendants who accept them. Most bargains that are inefficient according to shadow-of-trial theory do not treat these defendants unfairly. Likewise, some bargains that are efficient under that theory, in particular those involving innocent defendants, are troubling. This part ultimately defends plea bargaining, despite the

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138. For an argument that a bargained sentence represents “the lowest reasonable sentence” and that assumes that this is the “deserve[d]” punishment, so that a defendant has an “inalienable right” not to be given more, see Kipnis, *supra* note 3, at 563-64.

139. Alschuler, *supra* note 2, at 660; *see also* Gifford, *supra* note 3, at 41 (“plea bargaining undermines legislative intent on the correct punishment for defendants convicted of specified crimes”); Schulhofer, *supra* note 2, at 1979 (“plea bargaining seriously impairs the public interest in effective punishment of crime”).

140. Kipnis, *supra* note 3, at 558-59.

141. Critics may believe that the elimination of bargaining would result in reduced post-trial sentences due to the need to control incarceration costs. However, this utilitarian rationale for reducing sentences is arguably no better than the utilitarian rationale supporting plea bargaining. In any event, such a hypothesized outcome, particularly if thought spurred by such a utilitarian consideration, would not mean that current post-trial sentences are undeserved.

142. *See, e.g.*, Schulhofer, *supra* note 2, at 2009 (asserting that plea bargaining is inefficient and treats defendants unfairly); Scott & Stuntz, *supra* note 10, at 2015 (“Plea bargaining is, for the most part, efficient and fair.”).

problem with innocent defendants, and does so without reliance on shadow-of-trial theory. It starts with the unfairness claim as it relates to factually guilty defendants and then addresses the special issues raised by the specter of factually innocent defendants who plead guilty.

*A. Factually Guilty Defendants Who Plead Guilty*

Plea bargaining is fair as a matter of substance and process to factually guilty defendants who accept deals.<sup>143</sup> Regarding substantive outcomes, these defendants do not receive undeserved sentences. They receive a lesser sanction than they deserve. As for process, they are also not mistreated. Trial rights are entitlements, and no theory derived from a concern about fairness to defendants plausibly explains why the law should prevent defendants from bartering those entitlements in their own self interest.<sup>144</sup> Norms of “autonomy” support this freedom of exchange.<sup>145</sup> Traditional contract law does not suggest that the exchange amounts to duress or is like a contract of enslavement or is otherwise unconscionable.<sup>146</sup> Professors Scott and Stuntz have already provided an impressive analysis of these possible criticisms of bargaining and have shown why they are unpersuasive.<sup>147</sup>

Nor do plea bargains become unfair if they depart from an accurate discounting of trial outcomes. Shadow-of-trial efficiency theory miscalculates the fairness of plea bargaining to those defendants who accept deals. The theory implies that a bargained sentence that is either higher or lower than an accurately discounted one is inefficient and, thus, unacceptable.<sup>148</sup> However, with regard to factually guilty defendants, neither of these scenarios present a case of either coercion or an undeserved sentence, which is why shadow-of-trial efficiency theory confuses more than it enlightens.

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143. This conclusion does not depend on shadow-of-trial efficiency theory. Many critics of bargaining would claim that even factually guilty defendants accepting even accurately discounted bargains are mistreated. *See, e.g.,* Alschuler, *supra* note 2, at 695 (arguing the impropriety of “burdening of constitutional rights up to the point at which people are as likely to waive them as to exercise them”).

144. A plea offer gives the defendant a choice that he otherwise would not have had, and “other things being equal, more choice is better than less.” Scott & Stuntz, *supra* note 10, at 1918; *cf.* United States v. Barnett, 415 F.3d 690 (7th Cir. 2005) (in upholding plea deal in which petitioner had agreed to probation with searches not based on reasonable suspicion, Judge Posner noted: “Often a big part of the value of a right is what one can get in exchange for giving it up.”).

145. Scott & Stuntz, *supra* note 10, at 1913.

146. *See, e.g., id.* at 1919-34.

147. *See id.*; *see also* Easterbrook, *supra* note 4, at 311-16.

148. *See, e.g.,* Scott & Stuntz, *supra* note 10, at 1940 (asserting that the parties hope to “reach an efficient allocation of risks and entitlements”).

If the bargained sentence is higher than the accurately discounted trial outcome, the defendant still suffers no injustice as long as his sentence does not exceed what he deserves. The defendant simply does not receive the full value of the utilitarian benefits that he confers on the prosecution. However, a bargained sentence that is inefficiently high is not more coercive than an accurately discounted one. The inefficiency also does not mean that the sentence is undeserved. If the defendant receives less than full retribution, he deserves his punishment even if, on utilitarian grounds, one might have expected him to have gotten more value from his barter.<sup>149</sup>

The defendant who accepts a bargained sentence that is less than an accurately discounted trial outcome presents an especially odd claim of mistreatment. Under classical contract law, the inefficiency does not convert the bargain into a coerced transaction.<sup>150</sup> The defendant only receives an unusually good deal. He receives more than the utilitarian value of his relinquished entitlement. As for the fairness of the outcome, the sentence is far below what the defendant actually deserves.

The unimportance of accuracy in the discounting process reveals why structural and psychological impediments to accurate discounting lack practical relevance to whether plea bargaining is fair to defendants who accept deals. Certain basic protections regarding the competence of defense counsel,<sup>151</sup> the discovery of information from the government,<sup>152</sup> and the formal receipt of guilty pleas,<sup>153</sup> help ensure that defendants who plead guilty are not seriously duped about their choices. Nonetheless, the structural and psychological deficits noted by critics of plea bargaining surely do impede

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149. Critics of plea bargaining do not allege that guilty defendants who accept plea bargains generally receive punishments that exceed the deserts limitation. One of the critics' further complaints about bargaining is that, at least for factually-guilty defendants, the deals impose less punishment than the defendants deserve. *See, e.g.,* Alschuler, *supra* note 2, at 660, 679 (asserting that plea bargains "fail to accomplish the legitimate purposes of the criminal law" and abandon "the legitimate objectives of the criminal sanction"); Gifford, *supra* note 3, at 98 (declaring that plea bargaining provides "unwarranted leniency in sentencing"); Kipnis, *supra* note 3, at 558-59 (contending that defendants who bargain "receive less than the punishment they deserve — an injustice"); Schulhofer, *supra* note 2, at 2009 (concluding that plea bargaining undermines "the public interest in effective law enforcement and adequate punishment of the guilty").

150. *See, e.g.,* Scott & Stuntz, *supra* note 10, at 1919-34.

151. *See* Hill v. Lockhart, 474 U.S. 52 (1985) (holding that the two-part test of ineffective assistance from *Strickland v. Washington*, 466 U.S. 668 (1984), applies to representation by defense counsel leading to guilty plea).

152. *See, e.g.,* FED. R. CRIM. P. 16 (concerning discovery and inspection).

153. *See, e.g.,* FED. R. CRIM. P. 11 (concerning procedures to be followed at guilty-plea proceeding).

accurate discounting.<sup>154</sup> These problems often cause trials. Not surprisingly, shadow-of-trial efficiency theory implies that trials result from inefficient bargaining.<sup>155</sup> Likewise, many inefficient deals are struck. The nature of the most important problems that critics have identified suggests that deals tend to be inefficiently punitive rather than inefficiently lenient.<sup>156</sup> Because the efficiency of a bargain is not measurable, we cannot be sure, nor can we know how inaccurate the discounting.<sup>157</sup> However, none of this matters as long as it does not appear that defendants are accepting bargains that impose punishment in excess of the deserts limitation. Critics of bargaining offer no such contention.<sup>158</sup>

### *B. Factually Innocent Defendants Who Plead Guilty*

The phenomenon of factually innocent defendants pleading guilty raises a special concern about plea bargaining. Plea offers made to these defendants involve no inherent coercion or unconscionability. The same conclusions based on autonomy that apply to factually guilty offenders apply with equal

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154. See generally Bibas, *supra* note 9.

155. However, plea bargaining is not unfair to defendants who go to trial. See *supra* Part III.

156. Professor Bibas has listed the major impediments, and they predominately fall on the side of causing inefficient harshness:

The most powerful factors doubtless include the strength of the evidence and the likely sentence after trial, the two factors embraced by the shadow-of-trial model. But factors unrelated to the merits also loom large. I suspect that lawyer quality and experience, lawyer funding and workload, pretrial detention, the operation of mandatory or other lumpy sentences, and perhaps information deficits play the largest roles. Denial is a severe problem in certain categories of cases, such as sex offenses. The influence of overconfidence, risk preferences, framing, and anchoring appears to be more subtle. Lawyers debias enough to keep the number of trials relatively low. To encourage pleas, however, they may often use distorted frames and anchors that impair clients' evaluations of bargains. Many of these clients might have pleaded guilty regardless, but these influences probably affect the sweetness of the deals that they receive and are willing to accept.

Bibas, *supra* note 9, at 2530.

157. Shadow-of-trial efficiency is a construct. Neither of the components making up the discount — risk reduction over litigation uncertainties and adjudication costs avoided — are easily measured if they are measurable at all. Regarding litigation uncertainties, one could arrive at the proper discount by multiplying the probable post-trial sentence by the fractional odds of acquittal. However, even the parties can only estimate the probability of acquittal and, in many cases, the post-trial sentence upon a conviction. Regarding adjudication costs avoided, the breadth of factors included is ill-defined, and, unlike with a discount for uncertainty, it is not possible to translate their value into a sentence reduction using an objective measure.

158. See *supra* note 149 and accompanying text.



force to factually innocent defendants.<sup>159</sup> Unlike the factually guilty offender who pleads guilty and receives deserved punishment, however, the factually innocent defendant who pleads guilty does not deserve any sanction.

Current law and practice surrounding plea bargaining reflect ambivalence about this problem. American lawmakers have not abolished plea bargaining to prevent innocent people from pleading guilty, despite both warnings from academics that bargaining promotes false guilty pleas<sup>160</sup> and convincing evidence that they sometimes occur.<sup>161</sup> The Supreme Court has also concluded that a trial court can accept a guilty plea from a defendant who proclaims his innocence as long as a strong factual basis for the plea exists.<sup>162</sup> At the same time, many trial judges take precautions to try to prevent guilty pleas by innocent persons. At the guilty-plea proceeding, many judges require the defendant to assent to or even recount in his own words a story of guilt as a prerequisite to entering the plea,<sup>163</sup> and they will rescind the plea before sentencing if the defendant proffers a claim of innocence.<sup>164</sup>

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159. See *supra* text accompanying notes 144-47.

160. See, e.g., Aschuler, *supra* note 2, at 715 (asserting that the bargaining process “seems well-designed to produce the conviction of innocent defendants”); Gifford, *supra* note 3, at 59 (asserting that plea bargaining promotes “unjustified or inaccurate guilty pleas”); Langbein, *supra* note 3, at 16 (contending that plea bargaining poses an “increased danger of condemning an innocent man”); Schulhofer, *supra* note 2, at 2009 (contending that plea agreements “inflict undeserved punishment on innocents”).

161. Although the frequency of these cases is unclear, there has long been evidence that they occur. See, e.g., MICHAEL L. REDELET, HUGO ADAM BEDAU & CONSTANCE E. PUTNAM, IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES 282, 286, 286-87, 294, 305, 309, 318, 326, 328, 331, 333, 336, 338, 342 (1992) (noting cases from past decades involving persons who pled guilty in potentially capital cases and who were subsequently exonerated). An empirical study of recent exonerations also shows that innocent persons sometimes plead guilty. See SAMUEL R. GROSS ET AL., EXONERATIONS IN THE UNITED STATES, 1989 THROUGH 2003, at 12 (2004) (noting that approximately six percent of cases in the database of individually exonerated persons had been convicted through guilty pleas and that two cases of mass exonerations due to large-scale police corruption involved very large proportions of convictions based on guilty pleas), [http://www.soros.org/initiatives/justice/articles\\_publications/publications/exonerations\\_20040419](http://www.soros.org/initiatives/justice/articles_publications/publications/exonerations_20040419).

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

163. G. NICHOLAS HERMAN, PLEA BARGAINING 179 (2d ed. 2004) (“Usually, the judge will require the government to summarize the evidence in the case and ask the defendant to state whether the summary is correct. Alternatively, the judge might develop the factual basis on the record by having the defendant describe the conduct giving rise to the charge.”).

164. See, e.g., Ralph Blumenthal, *Judge Tosses Out Iraq Abuse Plea*, N.Y. TIMES, May 5, 2005, at A1, A11 (reporting that, after the defense called a witness on sentencing who suggested defendant’s innocence, military trial judge stated, “[Y]ou can’t plead guilty and then say you’re not” and vacated guilty plea by Pfc Lynndie England to charges in connection with Abu Ghraib abuse scandal); James Sterngold, *70’s Radical Reaffirms Guilty Plea*, N.Y. TIMES, Nov. 15, 2001, at A16 (discussing decision of trial judge to bring defendant Kathleen Soliah, also known

The number of innocent defendants who accept bargained guilty pleas is uncertain. Recent empirical evidence hints that, at least in serious cases, far fewer innocent persons plead guilty than proceed to trial. A study of official exonerations in the United States from 1989 through 2003,<sup>165</sup> led by Professor Samuel Gross, found that less than six percent of the persons exonerated (19 out of 328) had pled guilty.<sup>166</sup> Particularly if many innocent defendants who go to trial are acquitted, this figure does not support claims that innocent defendants are generally more risk averse regarding trials than factually guilty defendants<sup>167</sup> or that prosecutors frequently persuade innocent defendants with irresistibly low plea offers.<sup>168</sup> Those relying on this study, however, should do so cautiously. The proportion of false convictions due to guilty pleas probably exceeds the exoneration figure from the study,<sup>169</sup> because pleading guilty, as opposed to being convicted after trial, likely makes subsequent exoneration more difficult.<sup>170</sup> The Gross researchers also noted two unusual mass-exoneration cases, not included in the study, in which large proportions of innocent defendants pled guilty, suggesting that many innocent defendants

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as Sarah Jane Olson, back to court to either confirm guilt or have prior guilty plea vacated after she told reporters immediately after the plea that she had pled guilty although she was innocent).

165. See GROSS ET AL., *supra* note 161.

166. See *id.* at 12.

167. See, e.g., Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43, 80 n.97 (1988) (distinguishing the situation of the “innocent but highly risk-averse defendant from that of the guilty but less risk-averse defendant”); Scott & Stuntz, *supra* note 10, at 1948 (“Innocent defendants are probably highly risk averse relative to guilty defendants.”).

168. See, e.g., Alschuler, *supra* note 2, at 714-15 (asserting that prosecutors “tailor their offers not to balance but to overbalance a defendant’s chances of acquittal”); cf. Welsh White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439, 450-51 (1970) (noting that prosecutors in New York and Philadelphia commonly offered large concessions in apparently weak cases and that “this prosecutorial practice may compel innocent defendants to plead guilty”).

169. By “exoneration,” the researchers required “an official act declaring a defendant not guilty of a crime for which he or she had previously been convicted.” GROSS ET AL., *supra* note 161, at 1. Further, they required that the acquittal have been based on “strong evidence of factual innocence” and that there not have been countervailing physical evidence suggesting guilt. *Id.* at 1-2 n.4. They also excluded any case in which it appeared that the defendant had “play[ed] a role in the crime” even if found not guilty. *Id.*

170. The greater difficulty has two explanations. First, a guilty-plea conviction, as opposed to a trial conviction, may leave fewer avenues for challenge on legal grounds, and, thus, fewer opportunities for a retrial at which evidence of innocence will exonerate the defendant. Second, there may also be a widespread sense that innocent persons rarely plead guilty but that persons convicted at trial are more frequently innocent, which could make voluntary legal and investigatory assistance after direct appeal less forthcoming to those who have pled guilty.

faced with a seemingly strong government case will opt for the bargain.<sup>171</sup> In addition, while the study focused only on cases involving death or a long prison term (where exoneration efforts generally focus), more innocent offenders may enter bargained guilty pleas in minor cases.<sup>172</sup> Hence, the Gross study does not definitively show the proportion of innocent defendants who accept plea offers, although it confirms that some innocents do succumb.

Does the fact that innocents sometimes plead guilty call for reform? Shadow-of-trial efficiency theory confuses more than it advances our thinking about this question. According to proponents of the theory who defend plea bargaining, the law should enforce bargains that reflect accurate discounting and, in contexts where discounting tends to be inaccurate, try to eliminate the impediments to accuracy.<sup>173</sup> However, this efficiency polestar makes no sense in cases of innocent defendants. An efficient plea bargain followed by the discovery of evidence that incontrovertibly proves innocence should result in exoneration, not enforcement of the bargain. Likewise, inefficient plea offers may be preferable to efficient ones in cases of innocent defendants. If the law seeks to discourage pleas by innocent defendants, inefficiently harsh plea offers would serve this purpose. If, instead, the law seeks to provide the fairest outcome to innocent defendants short of outright dismissals of the charges, the more inefficiently lenient the offers, the better. Efficient bargaining as a goal does little to remedy the problem of innocents.

Those who urge abolition of bargaining to save innocent defendants also gain nothing by noting the inefficiency of most bargains.<sup>174</sup> Whether too high

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171. The researchers described these as “two incidents of mass exonerations of innocent defendants who were falsely convicted as a result of large scale patterns of police perjury . . . .” GROSS ET AL., *supra* note 161, at 10. One was the Ramparts scandal in Los Angeles and the other the Tulia scandal in a small town in Texas. The researchers noted that “the majority of the 100 or more exonerated defendants in the Ramparts scandal” pled guilty to offenses they did not commit as did “31 of the 39 Tulia defendants.” *Id.* at 12.

172. *See id.* at 12 (“It is well known, for example, that many defendants who can’t afford bail plead guilty in return for short sentences, often probation and credit for time served, rather than stay in jail for months and then go to trial and risk much more severe punishment if convicted.”).

173. *See, e.g.,* Scott & Stuntz, *supra* note 10, at 1967 (“By following appropriate contract models, one can devise different rules that reduce the harm to innocent defendants and meanwhile reduce transaction costs and inefficiency for everyone else.”).

174. Professor Schulhofer has acknowledged that the inefficiency of plea bargaining under shadow-of-trial efficiency theory does not help us think about the problem of innocents. He notes that “economic theory is incapable of demonstrating” that “the value of autonomy and the two-party gains of voluntary contracting outweigh the social costs of convicting the innocent.” *See* Schulhofer, *supra* note 2, at 1986. At the same time, Professor Schulhofer seems to view the value of autonomy in this context as quite low, *see id.* (describing the denial of bargaining as merely “inconveniencing” the innocent), and the social costs of allowing innocents to plead

or too low, the inefficiency does not mean that innocent defendants are better off without bargaining. Even in the face of an inefficiently harsh plea offer, an innocent defendant may prefer the deal, and, certainly, he may prefer the inefficiently lenient one. A significant number of innocent defendants are found guilty at trial, and the litigation process itself can be onerous and expensive. Consequently, denying the bargaining option would only compound the horror for those innocents who would favor a bargained plea. The argument for abolition based on the problem of innocent defendants gains no traction by rebutting shadow-of-trial efficiency theory.

Ultimately, the situation of innocent defendants presents competing concerns that the law cannot simultaneously remedy. On the one hand, concern for public trust in the criminal justice system does not warrant trying to foreclose innocents from pleading guilty. Abolition of plea bargaining would harm innocent defendants by denying them a risk-reducing option. This remedy would also not significantly further the public interest. Any public cost resulting from exonerations after guilty pleas is tiny<sup>175</sup> and is surely outweighed by the high costs of attempting to abolish bargaining.<sup>176</sup> On the other hand, lawmakers should not, out of concern for innocents, abandon the meaning of the guilty plea, such as by replacing all guilty pleas with pleas of *nolo contendere*. That approach would not only promote erroneous convictions but would also confuse the moral meaning of the criminal law by allowing factually guilty offenders to accept deals while claiming their innocence.<sup>177</sup>

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guilty as quite high, *see id.* at 1985 (asserting that a false guilty plea produces “serious negative externalities”). This calculus undervalues defendant autonomy and exaggerates the social cost of allowing innocents to plead guilty. *See infra* text accompanying notes 175-76.

175. There is a public cost, in the form of lost confidence in the criminal justice system, when a false conviction is exposed, but the Gross study shows that exonerations after guilty pleas are rare and much less common than exonerations after trial convictions. *See supra* text accompanying note 161.

176. *See supra* Part II.B.

177. Policies that apply to the factually innocent defendant would also have implications for the factually-guilty offender. The central practical problem is that prosecutors cannot at the pleading stage distinguish the few factually innocent defendants from the sea of factually guilty ones. This point must be considered regarding proposed reforms intended either to give innocent defendants better plea deals or to discourage them from accepting deals. For example, substituting *nolo contendere* pleas for guilty pleas would apply not only to innocents but to factually guilty defendants as well, which would “undermine key values served by admissions of guilt in open court.” Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1363 (2003). Lawmakers could also consider proposals in the other direction, such as those to limit plea discounts to fixed amounts, so as not to unduly tempt innocent offenders. *See, e.g.*, F. Andrew Hessick III & Reshma Saujani, *Plea Bargaining and Convicting the*

Given the dilemma, the current approach to bargaining is difficult to improve.<sup>178</sup> The law allows plea bargains by innocent defendants, but does not encourage them. Indeed, many trial judges take strong steps to try to discourage these bargains.<sup>179</sup> The law sometimes reflects conflicted views about certain conduct. The question of innocent defendants who wish to plead guilty presents an example.<sup>180</sup> The desire to maintain both plea bargaining and the moral meaning of guilty pleas produces ambivalence about innocent defendants' decisions.

### V. Conclusion

Plea bargaining is defensible, but efforts to rationalize it through shadow-of-trial efficiency theory are a bust. The shadow-of-trial efficiency theory contemplates that bargaining generally produces deals that accurately discount for adjudication costs avoided and the uncertainty of trial outcomes. The theory characterizes these accurately discounted deals as "efficient" and implies that they maximize the utility of the parties and, further, that they have social utility. However, the theory is defective. First, bargaining often does

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*Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. PUB. L. 189, 235-36 (2002) (proposing limited, fixed discounts as a way to give "the risk averse innocent defendant . . . greater incentives to go to trial"); Schulhofer, *supra* note 2, at 2004-05 (proposing as a second-best reform fixed discounts). However, such proposals, if not evaded, deny the prosecutor bargaining flexibility in cases of factually guilty defendants at the same time that they foreclose a desirable option to precisely those innocent defendants who would have accepted a more substantially discounted bargain.

178. Room remains for disagreement as to what bargaining approach best addresses the dilemma of innocents. Bargaining currently takes several forms and occurs in the context of differing sentencing environments. The federal sentencing guidelines attempt to limit to a fixed percentage the discount for a guilty plea. See Bibas, *supra* note 9, at 2535 (noting that "the federal sentencing system awards a fixed discount of about 35% for all guilty pleas"). Other approaches, such as that employed in the local courts in Washington, D.C., involve bargaining over charges and over sentencing recommendations by the prosecutor but not over the precise sentence. Still other jurisdictions, such as New York City, have allowed bargaining between the defense and the prosecution over precise sentences, with the trial judge exercising veto power. See White, *supra* note 168, at 446-48. All of these approaches straddle the competing objectives of allowing innocent defendants to plead guilty without generally abandoning the moral meaning of a guilty plea.

179. See *supra* notes 163-64 and accompanying text.

180. Jury nullification in criminal cases presents another example. Judges tell jurors that they must follow the law. Yet, juries have the power to acquit even in the face of overwhelming evidence of guilt. See generally LAFAYETTE ET AL., *supra* note 24, at 1027-28. By giving juries this nullification power without telling them about it, the law enables them to act "as a 'safety valve' for exceptional cases, without being a wildcat or runaway institution." *United States v. Dougherty*, 473 F.2d 1113, 1134 (D.C. Cir. 1972).

not involve accurate discounting. Second, and more importantly, the notion of efficiency that the theory promotes is an ill-considered measure of social value and of fairness to defendants.

Unfortunately, attacks on shadow-of-trial efficiency theory have amounted to attacks on plea bargaining. Critics of the theory have focused on why plea bargains do not commonly reflect accurate discounting. They have shown that impediments to accurate discounting are numerous and serious, and perhaps irreparable. They have followed with arguments that plea bargaining should be abolished or seriously reformed. Although important, these critiques of shadow-of-trial efficiency theory miss its more fundamental flaw. The accuracy of discounting has no practical connection with the social utility or fairness of plea bargaining. Consequently, impediments to accurate discounting lack practical import in evaluating bargaining.

Plea agreements serve the public interest and treat defendants fairly even when the deals are not efficient according to shadow-of-trial theory. Bargaining maximizes deserved punishment at a reasonable cost by allowing prosecutors and judges to pursue many discounted sentences with the same resources that they would otherwise use to pursue a single sentence after trial. Because a trial can be traded for many guilty pleas, bargaining, as opposed to no bargaining, maximizes deserved punishment under the constraints of our current system even if deals do not reflect accurate discounts. We could try to eliminate bargaining to allow prosecutors and judges to seek many more sentences that give defendants their full deserved punishment. However, the expense involved is plausibly thought inordinate.

Trading concessions for guilty pleas also does not mistreat defendants, regardless of whether the bargains reflect accurate discounting. As for those defendants who are convicted after trial, their higher sentences are best understood not as carrying a trial penalty but as deserved punishment for crime. As for defendants who accept bargains, their plea offers are not coercive or unconscionable according to classical contract law. The vast majority also do not receive undeserved punishment. The exceptions are the innocent defendants who accept bargains. They do not deserve their punishment. However, notions of autonomy support allowing even innocents to accept deals as does the recognition that denying them the bargaining option neither improves their position nor significantly serves the public interest.

Plea bargaining adds a valuable option to our system for adjudicating criminal cases. Bargaining does not produce the same amount of punishment as would a system without bargaining and does not accurately discount trial outcomes. We cannot expect government plea offers to replicate post-trial punishments, and we should not care whether they accurately discount them.

We prefer to trade some punishment to avoid the high costs associated with a bargainless system, and we do not believe that trial outcomes provide the only or even the best measure of social value or of fairness in criminal adjudication. For these same reasons, we can conclude that a system with bargaining, rather than one without bargaining, serves the public interest and the interests of defendants. Bargaining has value even if it often ends outside the shadow of trial.