PLEA BARGAINING'S BASELINES

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ABSTRACT

In this Symposium Article, I examine the Court's unwillingness to take seriously the issue of coercion as it applies to plea bargaining practice. It is not so much that the Court has ignored coercion entirely. Rather, it has framed the inquiry in a legalistic manner that has made immaterial the kinds of considerations we might think most relevant to the evaluation. The Court has refused to ask qualitative questions about felt pressure, prosecutorial motivation, or the risk or reality of excessive punishment. All that matters is legal permissibility. A prosecutor may compel a defendant to plead guilty as long as she uses only code law to do so. In this way, the Court's coercion baseline is legalistic—it is defined by what the prosecutor is legally entitled to pursue.

Recently, however, the Court has shifted its constitutional focus away from code law. In a series of right-to-counsel cases, it has redefined prevailing plea bargaining practice as the benchmark. This amounts to an emerging extralegalistic baseline, defined not by code law but rather by the parties' efforts to circumvent it. Of course, the Court did not mean to alter coercion's landscape and almost certainly will not do so. My intention is to demonstrate only that the doctrinal building blocks are in place for the adoption of a better baseline—a proportionality baseline. I defend this alternative extralegalistic baseline and even prescribe a practical methodology for its discovery. And, notably, my preferred approach is not without

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precedent. The Court has applied analogous extralegalistic baselines to claims of coercion in other constitutional contexts.

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INTRODUCTION

What does it mean for a guilty plea to be "voluntary"? As I have examined elsewhere, the Supreme Court has adopted a procedural conception of voluntariness that principally demands that the defendant "plead[] guilty with his eyes open."[1] That is to say, a guilty plea is voluntary as long as the defendant is given fair notice of the charges, the rights waived, and the consequences of pleading guilty.[2] By focusing almost exclusively on a procedural doctrine of fully informed bargaining, the Court has neglected to examine substantive questions of when and whether a plea or trial sentence is disproportionate, or when and whether the sentencing differential between plea and trial is so great that the defendant was given no practical choice but to take the deal. Likewise, the Court has held prosecutorial motivation irrelevant.[3] Thus, a prosecutor may freely threaten sentences of death or mandatory life without parole even if her objective is only to compel a plea to a term of years.[4] Of course, the charge must be supported by probable cause.[5] But this measure of technical legal guilt—or "formal legality," as Bill Stuntz termed it—is the touchstone.[6] Concretely, a charge supported by probable cause can never be coercive. And, as long as the defendant sees the charge coming, his plea is constitutionally voluntary.[7]

The Court has recently revisited the practice of plea bargaining in a series of cases establishing the right to effective assistance of counsel during negotiations and pleas. As in the past, the Court has kept its focus on notice. In *Missouri v. Frye*, the Court held that

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1. Josh Bowers, *Fundamental Fairness and the Path from* Santobello *to* Padilla*: A Response to Professor Bibas*, 2 CALIF. L. REV. CIR. 52, 61 (2011) [hereinafter Bowers, *Fundamental Fairness*]; *see also* Josh Bowers, *Two Rights to Counsel*, 70 WASH. & LEE L. REV. 1133, 1149 (2013) [hereinafter Bowers, *Two Rights to Counsel*]; *infra* notes 91-94 and accompanying text.

2. *See, e.g.*, Brady v. United States, 397 U.S. 742, 755-56 (1970) (quoting Sheldon v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc), *rev'd on confession of error on other grounds*, 356 U.S. 26 (1958)).

3. *See, e.g.*, Bordenkircher v. Hayes, 434 U.S. 357, 364-65 (1978).

4. *See id.*

5. *See id.* at 364.

6. WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 258 (2011).

7. *See* Bowers, *Fundamental Fairness*, *supra* note 1, at 61; Bowers, *Two Rights to Counsel*, *supra* note 1, at 1149.

defense attorneys are constitutionally obligated to make clients aware of formal plea offers.[8] And in *Lafler v. Cooper*, the Court suggested that defense attorneys are also obligated to give constitutionally adequate advice about the wisdom of pleading guilty.[9] Again, the Court's perspective is that a defendant constitutionally accepts or refuses a plea bargain when he satisfactorily understands his options.[10] The question is not the substantive degree of bargaining pressure, but only whether the defendant is sufficiently aware of that pressure. In this way, coercion remains irrelevant—or, at most, an afterthought.

At a conceptual level, however, the Court's decisions in *Lafler* and *Frye* did break ground. For the first time, the Court owned up to a somewhat embarrassing fact—that ours is "a system of pleas, not a system of trials."[11] With this acknowledgment, the Court came to grips with plea bargains and guilty pleas as the *expected* mode of disposition. How does this change matters? One may persuasively argue that the Court has effectively reset the baseline against which constitutional infirmities are measured in the plea bargaining context. The trial is no longer the benchmark. To the contrary, the defendants in *Lafler* and *Frye* were able to demonstrate ineffective assistance of counsel for *negotiation* errors—not errors at the pretrial, trial, or sentencing stages.[12] Most notably, in *Lafler*, the defendant suffered a constitutional injury from the "loss of the plea opportunity"—the opportunity to access the negotiated sentence that he otherwise "would have received in the ordinary course."[13] Thus, the Court redefined the "ordinary course" as the plea bargain and recognized the "market price"[14] as the baseline against which

8. *See* 132 S. Ct. 1399, 1408 (2012).

9. *See* 132 S. Ct. 1376, 1383, 1390-91 (2012).

10. *See supra* note 1 and accompanying text.

11. *Lafler*, 132 S. Ct. at 1388.

12. *See id.* at 1384, 1386; *Frye*, 132 S. Ct. at 1406-08, 1411.

13. *Lafler*, 132 S. Ct. at 1387.

14. Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1959 (1992). In this context, the market price is defined as the jurisdiction-specific penalty typically received by similarly situated defendants convicted after plea. *Id.* (explaining that the "market price" is "the sentence usually assigned after a guilty plea in similar cases"); *cf.* Stephanos Bibas, *The Myth of the Fully Informed Rational Actor*, 31 ST. LOUIS U. PUB. L. REV. 79, 82 (2011) (analogizing the plea bargain market to car dealerships where most purchasers get "the going rate," while "only a few suckers pay full sticker price for a car").

the constitutional injury was to be evaluated. More to the point, it established that, in some circumstances, the defendant might even enjoy a constitutional entitlement to what is sometimes called the market price.[15]

But what does this have to do with coercion? At first blush, not much. Nor do I harbor illusions that the Court might reorient its plea bargaining focus from procedural notice to substantive pressure. Long ago, the Court assumed away the coercion question.[16] We should not expect it to retread that terrain any time soon. In this sense, the aim of my project is modest. I intend to show only that the Court's recent decisions have made its underlying assumptions that much harder to sustain.

To understand what I mean, the reader may require some grounding in theories of coercion. This is no easy task because coercion is just too contested. Nevertheless, there is fair consensus for the proposition that only threats, not offers, may coerce.[17] More importantly, the Court's rhetoric has reflected this proposition—that plea proposals constitute *offers*, noncoercive opportunities to make defendants better off than they otherwise would have been.[18]

The question of whether a plea proposal constitutes an offer, as opposed to a threat, depends in the first instance on the applicable baseline.[19] And for any coercion question there are many prospective baselines. Most theorists lump baselines into one of two camps: predictive or normative.[20] At the risk of oversimplification, a predictive baseline is what a person *empirically would expect* to happen in the ordinary course.[21] A normative baseline is what a person legally, morally, or prudentially *is entitled to expect* in the ordinary course.[22]

So where does that leave us? In Part I, I explore what I understand to be the Court's two prevailing baselines in this context. The first is a predictive baseline defined by the trial punishment. On

15. *See* Scott & Stuntz, *supra* note 14, at 1959.

16. *See infra* notes 84-86 and accompanying text.

17. *See* ALAN WERTHEIMER, COERCION 204 (1987).

18. *See, e.g.*, Bordenkircher v. Hayes, 434 U.S. 357, 363, 367 (1978).

19. *Cf.* Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 13 (2001) (dividing baselines into two categories—positive and normative—with the positive category further divided into "history" and "prediction").

20. *See, e.g.*, *id.*

21. *See infra* note 45 and accompanying text.

22. *See infra* note 46 and accompanying text.

this reading, the trial sentence is the anticipated criminal sanction, and, against that baseline, all plea proposals are offers with corresponding benefits.[23] The second is a normative baseline defined by what the prosecutor is lawfully entitled to do.[24] According to this conception of coercion, a permissible criminal charge (a count supported by probable cause) cannot constitute a threat, because the prosecutor has the authority—legalistically defined—to pursue it in the first instance.[25] In such circumstances, the plea proposal operates only to make the defendant better off than he was lawfully entitled to be.[26] I think it is fair to say that, as a matter of positive law, this legalistic baseline has been doing comparatively more work than the predictive baseline.[27]

In Part II, I examine the manner by which the Court's decisions in *Lafler* and *Frye* may have reset—or at least upset—the conventional plea bargaining baselines. In these cases, the Court finally took frank notice of the long-apparent fact that the guilty plea is the *expected* mode of disposition and, consequently, that the negotiated sentence is the anticipated penalty. Deviations from plea prices thereby constitute deviations from the Court's newfound predictive baseline. More importantly, as Justice Scalia emphasized in a pair of characteristically scathing dissents, the Court has even established something of a constitutional *entitlement* to plea bargain.[28] In doing so, the Court arguably has come to adopt a competing legalistic baseline premised upon the defendant's limited constitutional right to access at least some plea proposals.

Next, I explain that, with its predictive and normative shift, the Court may even have subtly laid the foundation for a weak version of what I consider to be the proper baseline—*a normative baseline grounded in an entitlement to proportional punishment*.

In Part III, I clarify why a proportionality baseline is, in fact, the proper baseline (at least as a supplement to the Court's prevailing legalistic baseline). Thereafter, I offer a methodology by which the Court might discover the parameters of a proportionality baseline

23. *See infra* text accompanying note 69.
24. *See infra* note 64 and accompanying text.
25. *See infra* notes 62-64 and accompanying text.
26. *See infra* notes 67-69 and accompanying text.
27. *See infra* note 62 and accompanying text.
28. *See infra* note 123 and accompanying text.

and evaluate claims of coercion against it. Finally, I apply that methodology to one case, *Bordenkircher v. Hayes*,[29] in which the Court should have found coercion but failed to do so.

I am not the first to endorse proportionality as a prospective measure for claims of coercion.[30] And, no doubt, the Court has ostensible reasons for rejecting this baseline. For the Court, inquiries into proportionality and purpose are just too murky—too subjective and indeterminate—for a criminal justice system that depends upon hard rules. As I have argued previously, the Court's concerns may be overblown.[31] In fact, the judiciary is not so ill-equipped to consider equitable questions.[32] In any event, it may do better than the executive branch, to which such questions are almost exclusively left.[33]

More interestingly, the Court has sometimes endorsed a qualitative conception of unconstitutional coercion, and in Part IV, I examine one such context—judicial regulation of conditional federal spending measures. Of course, there are obvious differences between plea bargaining and conditional spending[34] (and, for that matter, any of the many other constitutional settings in which questions of coercion arise). The point is not that the Court needs to be consistent across constitutional contexts—only that the Court sometimes considers itself competent to *know coercion when it sees it*.

I conclude by explaining what likely accounts for the Court's hesitance to regulate the potentially coercive nature of negotiated guilty pleas.[35] In the process, I identify an underlying alternative normative baseline—a prudential baseline. By the Court's estimation, plea bargaining is simply too big to fail. In turn, the system cannot tolerate any form of oversight that even plausibly could undermine the practice. But, to my thinking, the Court is too cautious

29. 434 U.S. 357 (1978).

30. *See infra* text accompanying note 193.

31. *See infra* note 174 and accompanying text.

32. *Cf.* Josh Bowers, *Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of a "Pointless Indignity*," 66 STAN. L. REV. 987, 994 n.25, 1029, 1034, 1039-40, 1044-45 (2014).

33. *See id.* at 1029.

34. *See infra* note 284 and accompanying text.

35. *See infra* notes 324-26 and accompanying text.

in its estimation. Plea bargaining is plenty strong enough to withstand a bit of light constitutional tinkering.

I. BARGAINING BENEFITS

When it comes to the practice of plea bargaining, the issue of coercion would seem to be front and center.[36] The Court, however, has largely skirted the issue. In its very first plea bargaining case,[37] *Brady v. United States*, the Court concluded without much explanation that the negotiated sentence constituted only a "*benefit* to a defendant" in exchange for his "ready and willing" admission to his crime.[38] The terminology is critical. Once the Court framed the bargain as an offer to *provide* benefits to those who *choose* to take it, the coercion question was all but foreclosed.

A. Baselines: A Primer

As conventionally (but not universally) understood, benefits cannot coerce.[39] Benefits do not coerce, because offers do not coerce, and an offer is defined as a proposal to provide a benefit. Offers do not coerce because they enhance autonomy by promoting choice.[40]

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36. *See* Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation*, 68 FORDHAM L. REV. 2011, 2016 (2000) (indicating that one of "[t]he most common criticisms of the practice of plea bargaining" is "that the threat of much harsher penalties after trial is impermissibly coercive upon defendants"); *see also* WERTHEIMER, *supra* note 17, at 122 ("It can be argued ... that plea bargaining is not just coercive under abnormally stressful conditions, but that coercion is the *norm*.").

37. Robert Schehr, *The Emperor's New Clothes: Intellectual Dishonesty and the Unconstitutionality of Plea-Bargaining*, 2 TEX. A&M L. REV. 385, 402-03 (2015).

38. 397 U.S. 742, 753 (1970) (emphasis added); *see also* Howard E. Abrams, *Systemic Coercion: Unconstitutional Conditions in the Criminal Law*, 72 J. CRIM. L. & CRIMINOLOGY 128, 128, 154 (1981) (criticizing the Court for its unarticulated "purely conclusory" approach—its "intellectual abstinence" in deciding *Bordenkircher v. Hayes* and *Griffin v. California*).

39. *See* WERTHEIMER, *supra* note 17, at 136 ("We ordinarily say that threats to make a person worse off are coercive whereas offers to make him better off are not."); Robert Nozick, *Coercion*, *in* PHILOSOPHY, SCIENCE, AND METHOD: ESSAYS IN HONOR OF ERNEST NAGEL 440, 447 (Sidney Morgenbesser et al. eds., 1969) ("If [a proposal] makes the consequences of [the recipient's] action worse than they would have been in the normal and expected course of events, it is a threat; if it makes the consequences better, it is an offer.").

40. *See* WERTHEIMER, *supra* note 17, at 204 ("[T]hreats are coercive whereas offers are not .... [T]hreats limit freedom, whereas offers enhance it."). On the unconventional view that even an offer may coerce, see *infra* notes 300-10 and accompanying text (discussing the claim).

Conversely, penalties *do* coerce, because threats coerce. And a threat is defined as a proposal backed by a penalty.[41]

Of course, this reasoning is all circular. It invites—almost begs—the question. An offer depends on the existence of a benefit; in turn, a benefit is the product of an offer. A threat depends on the existence of a penalty; in turn, a penalty is the product of a threat. The Court has made no serious attempt to resolve the circularity.[42] Nevertheless, coercion theory can resolve it. The determination of whether a proposal promises sticks or carrots depends upon the baseline against which benefits and threats are measured.[43]

Baselines may be described as predictive or normative.[44] According to a predictive baseline, the point of reference is what, descriptively, the recipient of a proposal would anticipate occurring in the ordinary course.[45] With a normative baseline, the point of reference is what the recipient would be entitled—morally, prudentially, or legally—to anticipate occurring in the ordinary course.[46] With this in mind, consider the gunman's paradigmatic coercive proposal: "Your money or your life." Ordinarily, I can empirically expect to

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41. *See* Harry G. Frankfurt, *Coercion & Moral Responsibility*, *in* ESSAYS ON FREEDOM OF ACTION 63, 67 (Ted Honderich ed., 1973) ("Threatening a person is generally thought to require justification, while there is no similar presumption against the legitimacy of making someone an offer.... [A] threat holds out to its recipient the danger of incurring a penalty, while an offer holds out to him the possibility of gaining a benefit.").

42. *See* Abrams, *supra* note 38, at 154-55.

43. *See* WERTHEIMER, *supra* note 17, at 136 ("[T]o characterize a proposal as an offer or a threat, we need a 'baseline' from which to evaluate the proposal—a view of the person's present situation, a view of his status quo."); Peter Westen, *"Freedom" and "Coercion"—Virtue Words and Vice Words*, 1985 DUKE L.J. 541, 589 ("[W]hether a given proposal is a threat or an offer depends entirely on the baseline condition by which it is measured.").

44. *Cf.* Berman, *supra* note 19, at 16 (dividing baselines into three camps (not two), but concluding that the concept of coercion remains "irreducibly normative").

45. *Cf.* Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1371-74 (1984).

46. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 262 (1974) ("Other people's actions place limits on one's available opportunities. Whether this makes one's resulting action nonvoluntary depends upon whether these others had the right to act as they did."); WERTHEIMER, *supra* note 17, at 217, 251 ("To set B's moral baseline, we need to know what A is morally *required* to do for B (or not do to B)."); E. Allan Farnsworth, *Coercion in Contract Law*, 5 U. ARK. LITTLE ROCK L.J. 329, 336 (1982) (attributing to Nozick the argument that "a proposal is coercive if what is proposed is from the victim's point of view worse than 'the normal or expected' course of events ... or worse than the 'morally expected' course of events"); Westen, *supra* note 43, at 589 ("A coercive constraint is anything that leaves a person worse off either than he otherwise expects to be or than he ought to be for refusing to do the proponent's bidding.").

keep both my money and my life. Thus, the proposal is coercive as against any conceivable predictive baseline. And, ordinarily, I can expect to retain the legal and moral right to keep both my money and my life.[47] Moreover, the gunman has no legal or moral entitlement to either. The proposal is thus coercive as against any conceivable normative baseline.[48]

The possibility also exists that different predictive and normative baselines may lead to different outcomes. Consider Robert Nozick's "slave example."[49] A slave owner proposes not to beat his slave, provided the slave agrees to work on his normal day of rest.[50] The slave owner is cruel (is there another kind?) and has a long history of administering daily beatings.[51] Against this precedent, we may expect the slave to be beaten in the absence of the proposal, and so the proposal might not be coercive as against a predictive baseline.[52] But, of course, the slave is morally entitled not to be beaten under any circumstance, and so the proposal is coercive as against one type of normative baseline—that is, a moral-philosophic baseline, defined by a given ethical principle.[53] At the same time, the slave owner may be legally entitled to beat his slave (pursuant to the backward legal rules of the backward slave state), and so the proposal might not be coercive as against another type of normative baseline—a legalistic baseline, defined by positive law.[54]

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47. *See* WERTHEIMER, *supra* note 17, at 135 ("We evaluate the victim's choices by comparing them with his choices *prior* to the gunman's proposal. The victim must now waive one right (his money) in order to preserve another (his life), whereas he previously had both his money and his life.").

48. *See id.* at 127 ("The gunman's proposal is wrong ... because he has no right to do what he threatens to do, namely, to kill his victim."); *cf.* Abrams, *supra* note 38, at 153 ("'Penalty' ... embodies a normative concept."). Of course, the rough sketch is incomplete. There are many variations of predictive and normative baselines, and a theorist may even mix and match them. *See, e.g.*, Nozick, *supra* note 39, at 447 ("The term 'expected' is meant to shift between or straddle *predicted* and *morally required*.").

49. Nozick, *supra* note 39, at 450-51.

50. *See* Westen, *supra* note 43, at 583.

51. *See id.*

52. *See id.*

53. *See id.* ("[T]he baseline that renders the proposal a threat is not a description of the condition that [the slave] actually expects to occupy, but a prescription of the condition he ought to occupy ... for refusing to do the slaveholder's bidding.").

54. *See id.* at 586 (distinguishing moral and legal baselines).

B. Plea Bargaining's Predictive Baseline

How does this translate to the practice of plea bargaining? Again, we must determine whether the bargaining defendant is threatened with a penalty for asserting his rights or whether he is rewarded for his cooperation.[55] Implicit in the Court's supposition that plea bargains provide "advantages" to defendants,[56] there would seem to be two prospective baselines in play—one predictive and one normative. According to the predictive baseline, a jury trial is taken to be the ordinary course—the expected outcome.[57] Any downward deviation from a trial conviction sentence is considered exceptional and, consequently, a benefit.

I do not pretend that the Court genuinely subscribed to the perspective that trials, in fact, do constitute the ordinary course. I cannot believe that the Court remained for so long blithely unaware of the predominance of the plea bargaining practice. But it is true that—jurisprudentially, though not empirically—the Court treated the jury trial *as if* it were the *sine qua non* of American criminal justice—"the exorbitant gold standard of American justice."[58] This is what Stephanos Bibas meant when he called the full-dress jury trial the Court's "frame of reference"—its "touchstone."[59]

Bibas criticized the Court for its anachronistic trial fixation.[60] And I think he was right to do so. But, for present purposes, it is enough just to understand the implications of this *fictive* predictive baseline. From there, the Court could assume a "mutuality of advantage"—a set of benefits that flowed from the practice of plea bargaining.[61]

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55. *See* Abrams, *supra* note 38, at 153 ("One ought not be penalized for asserting one's rights, but one surely may be rewarded for helping the state.").

56. *See supra* note 38 and accompanying text.

57. *See* Lafler v. Cooper, 132 S. Ct. 1376, 1387 (2012).

58. *Id.* at 1398 (Scalia, J., dissenting).

59. Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1121-22 (2011); *see also* Albert W. Alschuler, Lafler *and* Frye*: Two Small Band-Aids for a Festering Wound*, 51 DUQ. L. REV. 673, 685 (2013) ("Defenders of plea negotiation typically treat post-trial sentences as the baseline from which plea agreements are to be judged.").

60. Bibas, *supra* note 59, at 1121 (describing the Court's jurisprudential approach as "stuck in the eighteenth century").

61. Brady v. United States, 397 U.S. 742, 752 (1970); *see also* Bibas, *supra* note 59, at 1125 ("Trials remain as benchmarks against which both sides can measure their mutual advantages and as fallbacks against bargaining coercion.").

C. Plea Bargaining's Normative Baseline

The better reading, however, is that the Court subscribed to a normative baseline, rooted in positive code law—what I term a legalistic baseline and what Alan Wertheimer termed a "rights-based" baseline.[62] This baseline represents "the options that the state has a *right* to exercise."[63] And, according to this baseline, technically viable charges cannot coerce. The argument is not that defendants typically face these viable charges at trial (a dubious empirical claim), but rather that prosecutors—should they choose to do so—are *legally entitled* to force defendants to face these charges. When a prosecutor proposes to push ahead with a particular trial charge, her proposal is no threat, because she "has the right ... to carry out [her] declared unilateral plan."[64]

Comparatively, before *Lafler* and *Frye*, defendants' legal entitlements were thought to include only their *trial* rights against these legally viable trial charges.[65] That is to say, defendants possessed no entitlement to plea bargain.[66] Many—indeed, most—defendants have been fortunate enough to receive offers for negotiated lesser sentences,[67] but luck is not law. On this reading, we may distinguish the prosecutor from the gunman. The gunman is an *out*law, but the prosecutor operates *within* the law.[68] Put differently, highway

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62. WERTHEIMER, *supra* note 17, at 137 ("[The] rights-based baseline analysis has been crucial to several plea bargaining decisions."); *see also* Albert W. Alschuler, *The Supreme Court, the Defense Attorney, and the Guilty Plea*, 47 U. COLO. L. REV. 1, 58-70 (1975) (describing the Court's theory of coercion as requiring a threat of *unlawful* action).

63. WERTHEIMER, *supra* note 17, at 137 ("On this view, if the state proposes to impose *less* punishment than it is otherwise *entitled* to do, the state is making an offer, and offers do not coerce. Call this a *rights-based baseline analysis*.").

64. *Id.* at 127. According to Bob Scott and Bill Stuntz, the prosecutor's legal entitlement amounts to a "probabilistic entitlement to put the defendant in jail *before the bargain is struck*." Scott & Stuntz, *supra* note 14, at 1929.

65. *See supra* text accompanying notes 11-13.

66. *See supra* text accompanying notes 11-13.

67. *See* Abrams, *supra* note 38, at 133 n.29.

68. As I have explained previously:

> [Although] the Court has seen fit to forbid plea-bargaining pressure that amounts to ... "mental coercion overbearing the will of the defendant [,] " ... it has held expressly that the kind of mental coercion implicit to a charge—even to a capital charge or mandatory charge of life without parole—does not qualify as [unconstitutional] mental coercion. As long as any such charge is legally supportable, the attendant pressure amounts to no more than legal justice in action.

robbery does not describe the *ordinary* course because it does not describe a *lawful* course. By contrast, a legally permissible charge is, by its nature, a lawful course—and a lawful course is the ordinary course within a system of law. According to this perspective, the only remedy left available to the defendant is the legally prescribed remedy—dismissal or acquittal *at trial*. The plea proposal amounts to nothing other than an exercise of prosecutorial grace—*an offer with corresponding benefits*.[69]

This view explains how the Court has avoided extending the doctrine against "unconstitutional conditions" to the practice of plea bargaining.[70] The defendant is not selling his trial rights; he is only avoiding what a prosecutor was legally authorized, at her election, to force him to face.[71] Of course, the principle of legality dictates that the prosecutor may not compel a plea by threatening to charge a noncrime (or an actual crime for which there is no proof), just as a prosecutor may not, in the first instance, charge a noncrime (or an actual crime for which there is no proof).[72] But with a codified crime and probable cause to believe the defendant is guilty of it, the prosecutor's charge is *never* impermissible. In such circumstances, the prosecutor's authority to charge—and, thereafter, to bargain with those charges—is practically plenary.[73]

Bowers, *Two Rights to Counsel*, *supra* note 1, at 1147-48 (quoting Brady v. United States, 397 U.S. 742, 750 (1970)).

69. *See* Josh Bowers, Lafler*,* Frye*, and the Subtle Art of Winning by Losing*, 25 FED. SENT'G REP. 126, 128 (2012) ("The plea bargain is merely the process by which the prosecutor—in the nature of a benign sovereign—does less than she legally could do (because what she could do is often much worse than what the defendant normatively deserves)."); *see also* Austin Sarat & Conor Clarke, *Beyond Discretion: Prosecution, the Logic of Sovereignty, and the Limits of Law*, 33 LAW & SOC. INQUIRY 387, 390 (2008) (observing that prosecutorial charging authority may be best described as an exercise of sovereign prerogative).

70. Abrams, *supra* note 38, at 128 (discussing *Bordenkircher*) ("By refusing to recognize that an extreme difference in degree can result in a difference in kind, the Court, by intellectual abstinence, declined to extend the doctrine of unconstitutional conditions to criminal procedure."); *see also* Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (holding constitutional a charge intended to "persuade the defendant to forgo his right to plead not guilty"); *infra* Part IV (discussing unconstitutional conditions).

71. *See Bordenkircher*, 434 U.S. at 364.

72. *See infra* notes 83-102 (discussing what constitutes permissible prosecutorial bargaining behavior).

73. *See* Morrison v. Olson, 487 U.S. 654, 705-06 (1988) (Scalia, J., dissenting) (describing criminal prosecution as a "purely executive power" over which prosecutors retain "exclusive control"); United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965) ("[T]he courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United

For better or worse, the legalistic baseline amounts to a formalistic baseline. The only judicial inquiry is entirely objective—whether probable cause exists to believe that the defendant is technically legally guilty. On this reading of coercion, a court must deem immaterial all extralegalistic considerations, like prosecutorial motivation or felt pressure. These alternative considerations are rejected not only because they are taken to be unduly subjective and contextual, but also because they are immaterial to the formal legal analysis—the operative question of *legal* guilt. Thus, a prosecutor may file or promise to file a draconian charge that even she feels is much too harsh. Moreover, she may frankly admit that she is doing so for no other reason than to provoke a guilty plea.[74]

This is precisely what happened in *Bordenkircher*. Because the defendant refused to "save the court the inconvenience and necessity of a trial" by accepting a five-year plea deal for forgery of an eighty-eight dollar check, the prosecutor made good on her promise to file a habitual-offender charge, which carried a mandatory sentence of life without parole.[75] The defendant could make no claim that the prosecutor had failed to bargain in good faith; he could not emphasize the parties' unequal bargaining power, nor could he complain that his mandatory trial sentence was undeserved or otherwise disproportionate.[76] More to the point, he could not highlight the very real pressure intrinsic to the substantial differential between

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States in their control over criminal prosecutions."); Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1659-60 (2010); Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1481 (2008) (describing "the prosecutor's nearly plenary discretion to charge"); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1540-41 n.71 (1981) (describing "an almost unbroken line of cases upholding prosecutors' powers to decide who and how to charge," and collecting cases).

74. *See infra* notes 214-16 and accompanying text.

75. *Bordenkircher*, 434 U.S. at 358-59, 358 n.1.

76. *See* STUNTZ, *supra* note 6, at 258 (discussing *Bordenkircher* and concluding that "the fairness of the charge was irrelevant"; instead "[t]he only question ... was ... formal legality"); WERTHEIMER, *supra* note 17, at 133 (discussing *Bordenkircher* and observing that "the Supreme Court held, in effect, that there is no significant distinction between offering a more lenient punishment than permitted under an original charge and threatening a more severe punishment than permitted under the original charge—*if* the more severe punishment is otherwise legally permissible"); Bowers, *Two Rights to Counsel*, *supra* note 1, at 1141 (explaining that "the Court has done too little to promote the *substantive* fairness of bargains and pleas" and that, instead, the practice of plea bargaining is subject "to only a legalistic probable cause check").

his trial sentence and the plea proposal.[77] The legally authorized trial sentence defined the baseline. Against that baseline, the prosecutor had offered the defendant a generous offer—a significant benefit—which he foolishly passed up.[78]

Even the specter of death does not coerce as long as the prosecutor is legally authorized to impose the risk. In *Brady v. United States*, the first case in which the Court considered the constitutionality of plea bargaining,[79] it rejected the defendant's claim that his plea to a thirty-year prison sentence was involuntary—that it was compelled by his panic in the face of a capital charge.[80] To its credit, the Court observed that a prosecutor could not subject a defendant to "mental coercion overbearing the will,"[81] but it held without explanation that the defendant's mortal fear was not that.[82] For the Court, mental coercion turned on the existence of a prosecutor's *improper* charging and bargaining behavior, and, implicitly, it read impropriety to mean legal impermissibility only.[83]

In an early plea bargaining dissent, Justice Brennan expressed greater enthusiasm for a more capacious and qualitative conception

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77. *See infra* notes 236-39 and accompanying text (discussing the pressure intrinsic to sentencing differentials); *cf.* Scott & Stuntz, *supra* note 14, at 1920 ("The duress argument against plea bargaining is that the large differential between post-trial and post-plea sentences creates a coercive environment in which the criminal defendant has no real alternative but to plead guilty. No plea produced by that sort of pressure could be deemed voluntary.").

78. *Cf.* Scott & Stuntz, *supra* note 14, at 1920 (explaining that the size of the sentencing differential may be said to represent only the generosity of the plea deal).

79. *See* Schehr, *supra* note 37, at 402-03.

80. *See* 397 U.S. 742, 743-44, 758 (1970).

81. *Id.* at 750.

82. *See id.* at 755 ("[A] plea of guilty is not invalid merely because entered to avoid the possibility of a death penalty."); *see also* Parker v. North Carolina, 397 U.S. 790, 791, 794-95 (1970) (companion case to *Brady*, holding constitutional a plea taken from juvenile facing capital charge).

83. *See Brady*, 397 U.S. at 755 ("[A] plea of guilty entered by one fully aware of the direct consequences ... must stand unless induced by threats (or promises to discontinue *improper* harassment), misrepresentation ... , or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes)." (quoting Shelton v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957))) (alteration in original) (emphasis added); WERTHEIMER, *supra* note 17, at 133 (discussing legal permissibility); *cf.* Ellis v. First Nat'l Bank, 260 S.W. 714, 715 (Ark. 1924) ("It is not duress to threaten to do that which a party has a legal right to do."); Farnsworth, *supra* note 46, at 334 ("[An] improper threat[] ... is a threat to do something one *has no legal right to do* .... Can there be duress if the person making the threat has a right to do the thing that he threatens to do? Courts have often said that such a threat cannot be duress.") (emphasis added).

of coercion, explaining that "[t]he critical question that divides the Court is what constitutes an impermissible factor."[84] Justice Brennan would have asked the contextual question of whether the defendant practically had retained and exercised free will.[85] But by adopting its legalistic baseline, the Court assumed away actual compulsion and examined only whether the defendant was "improperly compelled"—that is, compelled by extralegalistic force.[86]

To some degree, the Federal Rules of Criminal Procedure have codified the Court's legalistic perspective. To wit, Rule 11 provides that a lawful guilty plea may not be a product of "threats, or promises (*other than promises in a plea agreement*)."[87] This distinction between *ordinary* promises and *plea bargaining* promises would seem to be somewhat cryptic. One may wonder what the difference is between the two.[88] However, the rule makes perfect sense when considered against the legalistic baseline. That is to say, promises in a plea agreement are permissible promises because they are made pursuant to law, whereas ordinary promises are impermissible because they have no foundation in law.

The legalistic baseline likewise helps to explain the prevailing disconnect between the Court's conception of voluntariness as it applies, alternatively, to plea bargains and confessions produced by interrogation. As indicated, in the plea bargaining context, the Court has tolerated wholesale the persuasion implicit in the lawful charge, but, in the confession context, the Court has more actively regulated the kinds of psychological or physical force permitted in stationhouse interrogations. A court will invalidate a confession when it "is the product of sustained pressure by the police" such

84. *Parker*, 397 U.S. at 802 (Brennan, J., dissenting).

85. *Cf.* Cheyney C. Ryan, *The Normative Concept of Coercion*, 89 MIND 481, 482 (1980) ("Definitions of coercion are typically terse. 'Coercion is the activity of causing someone to do something against his will, or of bringing about his doing what he does against his will', writes Virginia Held."); Westen, *supra* note 43, at 542-43 (discussing the manner by which the concepts of coercion and freedom are "open texture[d] ... less than fully specified and ... capable of further specification").

86. *See Brady*, 397 U.S. at 750; *see also* WERTHEIMER, *supra* note 17, at 134 ("Here the [*Bordenkircher*] Court implies that although bargained guilty pleas may be coercive in *some* sense ... such pleas are not wrong in the ... constitutional sense.").

87. FED. R. CRIM. P. 11(b)(2) (emphasis added).

88. *Cf.* John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 14 (1978) (criticizing this provision of Rule 11 and explaining, "[o]f course, the plea agreement is the *source* of the coercion and already embodies the involuntariness").

that "it does not issue from a free choice."[89] This test considers the totality of the circumstances because there are no hard and clear rules to apply.[90]

Again, consider the defendant in *Brady*. Undoubtedly, he felt pressure.[91] He accurately took the State's message to be: "If you do not plead, we may kill you."[92] But the Court did not get to that question.[93] From its legalistic baseline, it pivoted to a constitutional analysis rooted in fully informed bargaining. Accordingly, the Court made much of the fact that the defendant was "fully aware" of his circumstances.[94] Considerations of compulsion thereby gave way to considerations of irrationality: rather than take seriously the defendant's claim that he was "gripped by fear of the death penalty," the Court evaluated only whether the defendant was competent to "*rationally* weigh the advantages of going to trial against the advantages of pleading guilty."[95] In subsequent cases, the Court would continue to rely upon such rhetoric—whether the defendant's counsel had "correctly appraised" the defendant's situation;[96] whether the defendant had made an "intelligent choice among the alternative courses of action";[97] whether the prosecutor had "act[ed]

89. Watts v. Indiana, 338 U.S. 49, 53 (1949); *see also* Bram v. United States, 168 U.S. 532, 542-43 (1897) (holding that a confession may not be "obtained by any direct or implied promises, however slight"); Bowers, *Two Rights to Counsel*, *supra* note 1, at 1150 & n.73.

90. As I explained previously: "For the Court, it matters terrifically that prosecutors apply pressure with the law, not with their hands." Bowers, *Two Rights to Counsel*, *supra* note 1, at 1151.

91. *See Brady*, 397 U.S. at 744; *see also* Scott & Stuntz, *supra* note 14, at 1912 ("Defendants accept bargains because of the threat of much harsher penalties after trial.").

92. *Cf.* Alschuler, *supra* note 62, at 58 ("A more coercive threat than the death penalty does not readily come to mind." (quoting James F. Parker, *Plea Bargaining*, 1 AM. J. CRIM. L. 187, 200 (1972))).

93. *Brady*, 397 U.S. at 748-50; Alschuler, *supra* note 62, at 58 ("In *Brady*, the Supreme Court assumed that the defendant's guilty plea had been induced by the government's threat of a death sentence, and words must mean very little to a Court that could describe such a guilty plea as voluntary.").

94. *Brady*, 397 U.S. at 755 ("A plea of guilty entered by one fully aware of the direct consequences ... must stand.") (citation omitted); *see also* Mabry v. Johnson, 467 U.S. 504, 511 (1984) ("Respondent was fully aware of the likely consequences when he pleaded guilty," and, thus, it was "not unfair to expect him to live with those consequences").

95. *Brady*, 397 U.S. at 750 (emphasis added).

96. Tollett v. Henderson, 411 U.S. 258, 267 (1973).

97. North Carolina v. Alford, 400 U.S. 25, 31 (1970); *see also* Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978) ("[T]he course of conduct engaged in by the prosecutor ..., which no more than openly presented the defendant with the unpleasant alternatives of forgoing trial or

forthrightly in his dealings";[98] or, conversely, whether he had engaged in "unhealthy subterfuge"[99] or "governmental deception."[100]

Ultimately, then, the defendant retains no substantive right against overwhelming force, just a set of procedural rights designed to ensure that he adequately feels the State's exercise of force.[101] Notably, that force may be tremendous, not only because the prosecutor's plea bargaining authority is coextensive with her charging authority, but also because the prosecutor typically has plenty of charges from which to choose.[102]

II. TRIAL PENALTIES

Padilla v. Kentucky marked a sea change in the Court's constitutional approach to plea bargaining.[103] At first blush, the decision had little to do with coercion. The Court merely expanded a defendant's constitutional right to effective assistance of counsel during the negotiation and guilty plea stages.[104] But, as Stephanos Bibas foresaw, *Padilla*'s significance ran deeper:

> *Padilla* is the Court's first case to treat plea bargaining as a subject worthy of constitutional regulation in its own right and

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facing charges on which he was plainly subject to prosecution, did not violate the Due Process Clause.").

98. *Bordenkircher*, 434 U.S. at 365.

99. *Id.*

100. Mabry v. Johnson, 467 U.S. 504, 510 (1984) (holding a plea constitutional when it was "in no sense the product of governmental deception"). Indeed, the Court has even reversed plea convictions that entailed lesser forms of surprise. For instance, in *Santobello v. New York*, the Court invalidated a negotiated sentence when the prosecutor only *inadvertently* failed to fulfill a promise to make no sentencing recommendation. 404 U.S. 257, 262 (1971). The plea was constitutionally infirm not because the defendant had faced a coercive threat, but only because the State did not keep its end of the bargain. *See id.* at 262 ("[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."). In such circumstances, the plea benefits were rendered illusory.

101. *See* Bowers, *Two Rights to Counsel*, *supra* note 1, at 1151 ("[B]argaining counsel serves less as a buffer against state power and more as a lens to draw the state's power into sharp focus."); *id.* at 1149 ("[O]ne party's superior ability to turn the bargaining screws is of far less significance than the other party's ability ... to recognize that fact.").

102. *See* Bowers, *supra* note 32, at 1000 n.54; *infra* notes 163-66 and accompanying text (discussing overcriminalization and overpunishment).

103. *See* 559 U.S. 356 (2010).

104. *See id.* at 373-74.

> on its own terms. By heeding plea-bargaining realities and evolving professional norms, the ... majority began to drag the law into the twenty-first century.... *Padilla represents the eclipse of ... eighteenth-century formalism in criminal procedure ... and the emergence of ... pragmatism*.[105]

In short, the Court took note of conditions on the ground and reoriented its focus accordingly—away from the jury trial and toward the plea bargain.

Three years later, the Court revisited the issue of ineffective assistance of counsel at plea in *Lafler v. Cooper*[106] and *Missouri v. Frye*.[107] In these cases, the Court considered for the first time whether a defendant had a right to effective assistance of counsel with respect to plea offers *not taken*.[108] In *Frye*, the lawyer failed to tell his client of two formal offers, and the defendant ultimately accepted a much worse deal.[109] In *Lafler*, the lawyer advised his client to reject a manifestly good offer, and the defendant ultimately was convicted after a jury trial and was sentenced to a much longer term.[110]

A. Plea Bargaining's New Predictive Baseline

For our purposes, we need not linger long on precisely what is or is not ineffective assistance of counsel post-*Lafler* and *Frye*. The cases are just as important for what they say about the criminal justice system and plea bargaining's paramount place within it. In a particularly striking passage, the Court acknowledged that the practice today "is not some adjunct to a criminal justice system; it *is* the criminal justice system."[111] The Court thereby reset the

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105. Bibas, *supra* note 59, at 1120 (emphasis added); *see also id.* ("[A] solid majority of the Court at last sees that plea bargaining is the norm.").

106. 132 S. Ct. 1376 (2012).

107. 132 S. Ct. 1399 (2012).

108. *See* Nancy J. King, Lafler v. Cooper *and AEDPA*, 122 YALE L.J. ONLINE 29, 29 (2012), http://www.yalelawjournal.org/forum/lafler-v-cooper-and-aedpa [https://perma.cc/VPU3-JU5B].

109. *See Frye*, 132 S. Ct. at 1404-05.

110. *See Lafler*, 132 S. Ct. at 1383.

111. *Frye*, 132 S. Ct. at 1407 (quoting Scott & Stuntz, *supra* note 14, at 1912 (describing the criminal justice system as a system of "horse trading between prosecutor and defense counsel [to] determine[] who goes to jail and for how long") (original alteration omitted)); *see*

predictive baseline, at least conceptually. That is, the Court rejected any notion that the post-trial sentence is the *expected* punishment.[112] To the contrary, the Court recognized that the plea negotiation is "the critical point" in almost all criminal cases.[113]

From this starting point (or baseline, if you will), the Court could readily conclude that the constitutional harm is the "loss of the plea opportunity" to access a market-rate bargain, and, in turn, that even "a reliable trial" cannot immunize a defendant against such injury.[114] To the contrary, the trial may even be described as the source of that injury, foreclosing the negotiated sentence that otherwise would have been imposed "in the ordinary course."[115] This phrase—"in the ordinary course"—is crucial to our understanding of the Court's approach. And it is a phrase to which the Court returned repeatedly.[116] As compared to the ordinary course—defined by the practice of plea bargaining—the trial sentence may be understood as an exceptional *threat*. According to the Court: "It is like the sticker price for cars: *only an ignorant, ill-advised consumer would view full price as the norm and anything less a bargain*."[117] In

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Lafler, 132 S. Ct. at 1397; Bowers, *Two Rights to Counsel*, *supra* note 1, at 1154 ("[T]he Court signaled that a plea-bargain is the *expected* mode of disposition."); Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 YALE L.J. 2650, 2663 (2013) ("[T]he Court's recent plea jurisprudence is firmly grounded in the 'reality' of the central role plea bargaining plays in the criminal justice system.").

112. *See, e.g.*, *Frye*, 132 S. Ct. at 1407.

113. *Id.*

114. *Lafler*, 132 S. Ct. at 1387-88.

115. *Id.* at 1386-87 (observing that "the trial caused the injury from the error").

116. In *Lafler*, the Court observed that deficient counsel had caused the defendant to "lose benefits he would have received *in the ordinary course*." *Id.* at 1388 (emphasis added). And elsewhere the Court explained that "[t]he favorable sentence that eluded the defendant in the criminal proceeding appears to be the sentence he or others in his position would have received *in the ordinary course*, absent the failings of counsel." *Id.* at 1387 (emphasis added).

117. *Id.* (emphasis added) (quoting Bibas, *supra* note 59, at 1138). Worse than the sticker price for cars, the trial price is not even apparent. As trials become rare commodities, prospective trial sentences grow muddier and less predictable in turn. Nationally, trial rates hover just above 5 percent. MATTHEW R. DUROSE & PATRICK A. LANGAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE [DOJ], NCJ 208910, STATE COURT SENTENCING OF CONVICTED FELONS, 2002: STATISTICAL TABLES tbl.4.2 (2005), https://www.bjs.gov/content/pub/pdf/scscf02.pdf [https://perma.cc/Q4US-HFQK]; *see* Erica Goode, *Stronger Hand for Judges in the 'Bazaar' of Plea Deals*, N.Y. TIMES (Mar. 22, 2012), http://www.nytimes.com/2012/03/23/us/stronger-hand-for-judges-after-rulings-on-plea-deals.html? [https://perma.cc/A2MB-K2HH]. In inferior criminal courts, the rates are even lower. Personally, I practiced in front of one criminal-court judge who would commonly open the initial appearance on misdemeanor cases with the query: "What's the disposition?" The point is that the judge anticipated nothing but a summary,

other words, the Court has recognized the plea bargain as the predictive baseline. And it is against this baseline that coercion might be tested.

B. Plea Bargaining's New Normative Baseline

The fictive predictive trial baseline has probably never done much more than rhetorical work for the Court. To the contrary, the legalistic baseline more readily describes the doctrine, as I have indicated already.[118] By way of reminder, the notion is that the prosecutor is *entitled* to file any charge for which she has probable cause.[119] And because the prosecutor operates within her lawful authority when she files a legally valid charge, she does not coerce a defendant by proposing a plea to avoid the charge or attendant trial sentence.[120] The question, then, is whether the Court in *Lafler* and *Frye* may have unsettled this normative baseline just as it unsettled the fictive predictive baseline. I believe it has. Admittedly, the logic is subtler here. But I am not the only one to see it—in dissent, Justice Scalia made much of this jurisprudential shift.[121]

Justice Scalia immediately recognized what it meant for the Court to declare that a defendant had suffered a constitutionally remediable injury from the "loss of the plea opportunity" to avoid a statutorily prescribed trial sentence.[122] Justice Scalia explained that the Court had to have discovered at least a limited "*constitutional entitlement* to plea-bargain"—specifically, an entitlement that kicks in the moment the prosecutor proposes a plea.[123] To put it another way, we now may have *two competing entitlements*: first, the prose-

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negotiated guilty plea, and it was not always obvious what he might do at trial if he did not get one. Of course, much more frequent trials might overwhelm the system and become slapdash and likewise unpredictable, but that concern is beyond the scope of this Article. On the disappearing or even nonexistent "shadow" of criminal trials, see Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004).

118. *See supra* Part I.C.

119. *See supra* notes 64, 73 and accompanying text.

120. *See supra* notes 68-73 and accompanying text.

121. *See Lafler*, 132 S. Ct. at 1391-92 (Scalia, J., dissenting); *see also* Alschuler, *supra* note 59, at 685 ("[The] majority opinion in *Lafler* rejects the assumption that post-trial sentences are the appropriate ethical baseline.").

122. *Lafler*, 132 S. Ct. at 1391-92 (Scalia, J., dissenting).

123. *Id.* at 1397-98.

cutor's entitlement to file a charge and use it for purposes of negotiation or trial, and second, the defendant's entitlement to effective assistance by a lawyer who is sometimes obligated to bargain out from under pending or threatened trial charges and sentences. At least conceptually, it is no longer apparent which of these entitlements should establish the operative legalistic baseline.

But the significance of the jurisprudence is more profound still. It may be fair to say that the Court has reconceived the nature of criminal law itself. When the Court dubbed the criminal justice system "a system of pleas, not a system of trials,"[124] it swapped out legislated code law for what I have called party-driven "practice law"[125] (and what Justice Scalia called "plea-bargaining law").[126] Previously, code law had served as the exclusive foundation for the Court's legalistic normative baseline. But, after *Lafler* and *Frye*, code law is just the starting point or "sticker price."[127] On this reading, code law exists on the books for bargaining purposes. It is subservient—or at least secondary—to practice law, whereas practice law is the *real* law—the law in operation, or the law *in the ordinary course*.[128]

Moreover, we may even argue that because the prosecutor's entitlement is now grounded in only a subservient form of law, it is a comparatively diminished entitlement. Indeed, this is precisely what so bothered Justice Scalia. For him, "the law is the law," whereas "plea-bargaining law" undermines the legality principle.[129] For my part, I am not so troubled.[130] But, for now, my normative

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124. *Id.* at 1388 (majority opinion).

125. Bowers, *Two Rights to Counsel*, *supra* note 1, at 1154, 1159 ("[T]he measure of what the defendant 'would have received in the ordinary course' depends upon some evaluation of local practice.").

126. *Lafler*, 132 S. Ct. at 1391 (Scalia, J., dissenting).

127. *Id.* at 1388 (majority opinion) (quoting Bibas, *supra* note 59, at 1138).

128. *See id.* at 1387-88 (concluding that plea bargaining is not "outside the law"); *see also* Bowers, *supra* note 69, at 127 (observing that "code law is not real law"; it is "a kind of raw material or proto-law from which real law is manufactured"); Bowers, *Two Rights to Counsel*, *supra* note 1, at 1154 ("[A] bargain is more than just consistent with law; *it is law*.").

129. *Lafler*, 132 S. Ct. at 1391 (Scalia, J., dissenting); *see also id.* 1397 ("[T]he law is the law, and those who break it should pay the penalty provided.... Today, however, the Supreme Court of the United States elevates plea bargaining *from a necessary evil to a constitutional entitlement*.") (emphasis added).

130. *See* Bowers, *Two Rights to Counsel*, *supra* note 1, at 1155 ("[T]hough Justice Scalia may have the better end of the argument descriptively, I do not agree that plea-bargaining—by virtue of its extralegal status—ought also to fall beyond constitutional regulation. To the

defense of practice law can wait.[131] For present purposes, my point is only that Justice Scalia had the better end of the descriptive debate. The Court *has* recognized a constitutional plea bargaining entitlement that is at least somewhat unmoored from code law.[132] I previously dubbed this newfound constitutional entitlement a "right to *extralegal* counsel,"[133] and I explained that, in addition to legal acumen, it depends on expertise in courthouse custom and practice.[134] More to the point, the entitlement may be accurately described as *extralegalistic* because it entails "creative" bargaining that is designed to circumvent legally permissible trial charges and sentences.[135] Rather than the trial, the bargain provides the "backstop"—the practice law baseline.[136] This was the message behind the Court's assertion that "the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant."[137]

Once we have reconceptualized plea bargaining as an entitlement, it becomes all the more difficult to conceive of the negotiated sentence as a benefit—as only an exercise of sovereign grace. By comparison, as the significance of the trial sentence diminishes empirically and legalistically, that punishment comes to assume the character of a penalty—a deviation from the practice law baseline.[138]

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contrary, the Court's decisions reflect a welcome recognition that ... plea-bargaining ... demands constitutional regulation.") (footnote omitted).

131. *See infra* Part III.

132. *See Lafler*, 132 S. Ct. at 1391 (Scalia, J., dissenting) ("[T]he Court today opens a whole new field of constitutionalized criminal procedure: plea-bargaining law."); *see also* Bowers, *Two Rights to Counsel*, *supra* note 1, at 1153 ("The Court had to have determined that the bargain standing alone has some constitutional significance after all."); Roberts, *supra* note 111, at 2664 (explaining that it "logically follows" from the Court's decisions in *Lafler* and *Frye* that "there is a right to effective bargaining counsel").

133. Bowers, *Two Rights to Counsel*, *supra* note 1, at 1133 ("The right to *legal* counsel applies principally to the formal domain of the criminal trial; the right to *extralegal* counsel applies exclusively to the comparatively unstructured domains of the plea-bargain and guilty plea.").

134. *See id.* at 1133-34, 1157.

135. *See* Padilla v. Kentucky, 559 U.S. 356, 373-74 (2010) (approving of "creative" bargaining to circumvent mandatory sentencing and so-called collateral consequences).

136. *See Lafler*, 132 S. Ct. at 1388 (describing "a fair trial" as an insufficient backstop for a missed plea offer).

137. Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012).

138. Of course, the Court would reject this reading. It would claim, as it did in *Lafler*, that there remains "no constitutional right to plea bargain." *Lafler*, 132 S. Ct. at 1395 (Scalia, J., dissenting) (quoting Weatherford v. Bursey, 429 U.S. 545, 561 (1977)); *cf.* Mabry v. Johnson,

C. Plea Bargaining's Burgeoning Proportionality Baseline

What is the aim of practice law? What do the parties intend to do with it? Prosecutors, defense attorneys, and judges have many plea bargaining objectives—defensible or otherwise.[139] But we may hope that they are driven most by the desire to achieve proportionality (or at least some other defensible purpose of punishment, like deterrence, incapacitation, or rehabilitation).

It is tempting to respond, then, that the aims of practice law and code law are aligned. That is to say, we may hope also that code law is concerned principally with proportionality. But code law and practice law take different perspectives on questions of desert. Code law defines proportionality legalistically, whereas practice law pursues a richer conception, which I have called *normative guilt*.[140] Of course, there is no magical gauge with which to measure normative guilt.[141] Moreover, we must acknowledge that it matters terrifically who is doing the measuring. After all, we are not talking about normative guilt in the transcendental sense. Rather, we are talking about the parties' *perceptions* of proportionality—their practical conceptions of desert.

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467 U.S. 504, 507-08 (1984) ("A plea bargain standing alone is without constitutional significance.... It is [only] the ensuing guilty plea that implicates the Constitution."). But the claim is false. All the Court could mean is that the defendant has no right to *receive* a plea proposal in the first instance. The prosecutor must trigger the entitlement by making a plea proposal (which, of course, she has already done in any case in which the question of plea bargaining coercion comes into play).

139. On the incentives of the parties to plea bargain, see Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179 (1974); Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968); Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining*, 76 COLUM. L. REV. 1059 (1976); Josh Bowers, *Mandatory Life and the Death of Equitable Discretion*, *in* LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY? 25 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012) [hereinafter Bowers, *Mandatory Life*]; Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1117-18, 1139-42 (2008) [hereinafter Bowers, *Punishing the Innocent*].

140. Bowers, *supra* note 69, at 128 ("Code law is concerned with only legal guilt and technically accurate convictions. Practice law is concerned with normative guilt, instrumental crime control, and fair sentence length."). *See generally* Bowers, *supra* note 73. The difference between these two perspectives on proportionality is akin to the distinction sometimes drawn between "broad" and "narrow" culpability (where broad culpability refers to morality and narrow culpability to legality). *See generally* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 10.02[B] (6th ed. 2012); Douglas N. Husak, *Broad Culpability and the Retributivist's Dream*, 9 OHIO ST. J. CRIM. L. 449 (2012).

141. *See generally* Bowers, *supra* note 73.

Consider, for a moment, the justice-minded prosecutor. She may be eager to give the defendant no more than the punishment she believes he deserves. But the prosecutor's perception of proportionality may be wrong.[142] Here, effective assistance of counsel can help. The defense attorney may be more or less successful at persuading the prosecutor to rethink the question, but we still cannot be convinced that practice law will hit its mark (though we may have reason to hope that it may get close). Ultimately, we are left with a perception of proportionality developed by one set of stakeholders: the parties to the bargain—in particular, the prosecutor.[143]

This account is not entirely pessimistic. An added worry, however—beyond the possibility that the parties may misconstrue normative guilt—is that the perceived equitable sentence is available only to the defendant who waives his trial rights.[144] This problem is intrinsic to almost any plea bargaining system, and I do not wish to linger long on the criticism. I intend only to make plain that, by comparison to the negotiated sentence, the often-mandatory code law sentence is *widely* considered disproportionate, even by the prosecutor who may pursue the high charge only to achieve the instrumental end of cooperation and quick plea.[145]

Consider the unhappy case of Clarence Aaron.[146] He was a promising student athlete sentenced to three terms of life without parole for a relatively minor role in a sizable drug deal.[147] Even the prose-

142. *See* Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211, 246 (2012) ("Perceptions ... of ... empirical desert ... may be wrong.... [T]here may be moral truth ... but popular *perceptions* of fairness and justice may be otherwise.").

143. *See* Stuntz, *supra* note 117, at 2563 ("Prosecutors can credibly threaten ... punishments in order to induce plea bargains at the customary price ... fixed by the prosecutors themselves.").

144. *See* Bowers, *Mandatory Life*, *supra* note 139, at 38 ("The defendant must either bargain for an individualized sentence or forfeit equitable evaluation in exchange for the exercise of trial rights.").

145. *See, e.g.*, Bowers, *supra* note 69, at 128 (describing the plea bargain as an opportunity for a defendant to avoid a sentence that is "often much worse than what the defendant normatively deserves").

146. *See generally* Transcript of *Frontline: Snitch* (PBS television broadcast Jan. 12, 1999), http://www.pbs.org/wgbh/pages/frontline/shows/snitch/etc/script.html [https://perma.cc/2NE3-BYUA].

147. *See id.*; Jennifer Lawinski, *Locked up for Life, Part One: The Case of Clarence Aaron*, FOX NEWS (Dec. 4, 2008), http://www.foxnews.com/story/2008/12/04/locked-up-for-life-part-one-case-clarence-aaron.html [https://perma.cc/2M8Y-J8DV].

cutor agreed that Aaron had received an undeservedly harsh penalty.[148] But, because he was either unable or unwilling to "play ball," Aaron was denied the practice law price—an average of eight years in prison for each of his codefendants.[149] According to the prosecutor:

> He thought he was going to win and he was given every opportunity to help himself early on and he didn't want to do it.... These other people were perhaps guiltier or more culpable [but he] ... suffered ... the consequences of the arrogance of thinking that you're going to beat this, that I'm too good to take a deal.[150]

The prosecutor was not opposed to what he perceived to be a proportionate term of years, but the defendant had to "pick which horse" he would ride.[151] The defendant could have accepted the sentence that the prosecutor had considered proportionate, or he could have fought on under the genuine threat of a sentence that everyone agreed was draconian.[152]

How do we know, however, that Clarence Aaron's trial sentence was draconian? After all, if perceptions are not transcendental truth,[153] is it not at least possible that the available practice law sentence of eight years in prison might have been *too lenient* and his trial sentence of life without parole was, in fact, comparatively proportionate? We cannot know for certain, but I think that our intuitions tell us otherwise (and, more to the point, that our intuitions are right). First, the obvious political reality is that Americans would not tolerate underpunishing more than 95 percent of convicted defendants.[154] Second, consider another set of familiar

148. *See* Bowers, *Mandatory Life*, *supra* note 139, at 38; *cf.* Stuntz, *supra* note 117, at 2563 ("[P]rosecutors [may] threaten the death penalty in cases in which they have no desire to impose it, as a means of getting better plea bargains.").

149. Bowers, *Mandatory Life*, *supra* note 139, at 38.

150. *Id.* (emphasis omitted) (quoting former United States Attorney J. Don Foster).

151. *Id.* (explaining that, pursuant to mandatory sentencing statutes, "legislators have prescribed a punishment that only interested prosecutors can temper but that prosecutors have the least interest in tempering for reasons of equitable justice alone").

152. *See id.* ("[T]he defendant must submit to whatever sentence the prosecutor deems equitably (or otherwise) appropriate or face a trial.").

153. *See infra* note 160 and accompanying text.

154. *See* Alschuler, *supra* note 59, at 701, 704 ("Do you suppose that judges ... now sentence 95% of all offenders less severely than they deserve? ... When a legislature plans from the

statistics: America has almost 5 percent of the world's population but nearly 25 percent of its incarcerated population;[155] over two million people are currently warehoused in America's jails and prisons;[156] and almost seven million Americans live under some kind of criminal justice supervision.[157] I suppose it is conceivable that these are the numbers of a proportionate—and highly efficient—criminal justice system. But they more likely represent a disproportionately harsh—but still quite efficient—system. It would seem to be entirely far-fetched, however, to claim that these figures describe a lenient system. And, if our system of pleas is at best a system of *proportionate* pleas (and it is probably not even that), then trial sentences must be disproportionately harsh by comparison.

Still, I freely admit that there is no definitive way to resolve our uncertainty about what may constitute a proportionate penalty for a given offense. It brings to mind Paul Robinson's familiar distinction between "empirical desert" and "deontological desert."[158] To discover "empirical desert," Robinson explained that we use the tools of social science to reveal what people perceive and believe.[159] Comparatively, to discover "deontological desert," we use the tools of moral philosophy to strive for transcendental truth.[160] With

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outset to allow 95% of all offenders to avoid the punishments it prescribes, these [trial] punishments do not establish a moral norm."); *see also* DUROSE & LANGAN, *supra* note 117, at tbl.4.2 (noting that 95 percent of criminal convictions are products of guilty pleas).

155. Michelle Ye Hee Lee, *Does the United States Really Have 5 Percent of the World's Population and One Quarter of the World's Prisoners?*, WASH. POST (Apr. 30, 2015), http://www.washingtonpost.com/blogs/fact-checker/wp/2015/04/30/does-the-united-states-really-have-five-percent-of-worlds-population-and-one-quarter-of-the-worlds-prisoners/ [https://perma.cc/A357-UY7J].

156. Ezra Klein & Evan Soltas, *Wonkbook: 11 Facts About America's Prison Population*, WASH. POST (Aug. 13, 2013), http://www.washingtonpost.com/news/wonkblog/wp/2013/08/13/wonkbook-11-facts-about-americas-prison-population/ [https://perma.cc/8T65-SUX6].

157. ERIC LOTKE & JASON ZIEDENBERG, JUSTICE POLICY INST., TIPPING POINT: MARYLAND'S OVERUSE OF INCARCERATION AND THE IMPACT ON PUBLIC SAFETY 3 (2005), http://www.justicepolicy.org/images/upload/05-03_REP_MDTippingPoint_AC-MD.pdf [https://perma.cc/A37W-RJTR] (citing LAUREN E. GLAZE & SERI PALLA, BUREAU OF JUSTICE STATISTICS, DOJ, NCJ 210676, PROBATION AND PAROLE IN THE UNITED STATES, 2004, at 1 (2005), http://www.bjs.gov/content/pub/pdf/ppus04.pdf [https://perma.cc/4S44-GSQP]).

158. Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1, 31-32 (2007); *see also* Bowers & Robinson, *supra* note 142, at 216-17.

159. *See* Bowers & Robinson, *supra* note 142, at 233-34.

160. *See* Paul H. Robinson, *The Role of Moral Philosophers in the Competition Between Deontological and Empirical Desert*, 48 WM. & MARY L. REV. 1831, 1834 (2007).

practice law we have something like empirical desert, but not quite. We are not relying upon laboratory experiments to reveal laypeople's intuitions. Rather, we are relying upon a natural, ongoing experiment—criminal justice in action—to reveal prevailing adjudicative practices and preferences. The process is bottom-up. Institutional actors on the ground operate according to their own retributive viewpoints and beliefs, designing the practices that constitute *real* law.

The process may be bottom-up, but the top has taken notice. The Court is no longer wed to the conceit that the trial sentence is the deserved sentence. In this way, the Court has done more than just prioritize practice law; it has prioritized what practice law generates—*its particular conception of proportionality*. Look no further than the Court's description of trial penalties as "longer sentences" than defendants deserve—sentences that "exist on the books largely for bargaining purposes."[161] For the Court, the trial sentence is not just an atypical sentence; it is an *atypically harsh* sentence. In contemporary criminal justice, it is often the case that *no one* wants to see the trial sentence imposed. Even legislators expect and intend prosecutors to use their discretion to soften code law.[162]

With the recognition that code law should not be taken too seriously, the Court has also come to acknowledge the practical consequences of overcriminalization and excessive punishment[163]—though it has continued to refuse to reckon with those consequences constitutionally. As Bill Stuntz demonstrated, political and institutional expediency motivate legislators to criminalize too much conduct too harshly.[164] And, for its part, the Court has almost

161. Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) (quoting Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1034 (2006)).

162. *See* Scott & Stuntz, *supra* note 14, at 1963 (explaining that the legislature often does not "intend for the statute to be applied to every offender who might fall within its terms," but instead relies on prosecutors "to exercise their discretion *not* to pursue habitual criminal sentencing for offenders who [fall] within the statute but seem[] not to deserve such harsh treatment").

163. *See id.* at 1965 ("[W]here the legislature drafts broad criminal statutes and then attaches mandatory sentences to those statutes, prosecutors have an unchecked opportunity to overcharge and generate easy pleas."); *see also* Bowers, *supra* note 32, at 989-91, 996; Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 716 (2005) (depicting overcriminalization as "the abuse of the supreme force of a criminal justice system—the implementation of crimes or imposition of sentences without justification").

164. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV.

categorically refused to check what Stuntz famously called "the pathological politics of criminal law."[165] As I observed previously, "the Court has left almost unfettered the legislature's authority to criminalize conduct and to prescribe disproportionately harsh punishments, and the prosecutor's consequent authority to stack counts and to overcharge inequitably."[166] But now the Court has come at least to appreciate and promote the back-end safety valve of equitable plea bargaining—a practice law mechanism designed to produce sentences perceived to be "consistent with the sound administration of criminal justice."[167] The parties use their perceptions of proportionality as the building blocks of practice law—the building blocks

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505, 510 (2001).

165. *Id.* at 505. Consider the Court's observation in *Whren v. United States*:

> [W]e are aware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement. And even if we could identify such exorbitant codes, we do not know by what standard (or what right) we would decide ... which particular provisions are sufficiently important to merit enforcement.

517 U.S. 806, 818-19 (1996); *accord* United States v. Batchelder, 442 U.S. 114, 126 (1979); *see, e.g.*, Ewing v. California, 538 U.S. 11, 30-31 (2003) (upholding a habitual-offender sentence of twenty-five years to life for theft of three golf clubs); Lockyer v. Andrade, 538 U.S. 63, 77 (2003) (same for theft of five videotapes); Harmelin v. Michigan, 501 U.S. 957, 990, 996 (1991) (upholding sentence of life without parole for possession of 672 grams of cocaine); *see also* Abrams, *supra* note 38, at 163 ("[T]he Supreme Court has ruled that if a legislature wants to send a petty recidivist to prison for life, neither the eighth amendment's prohibition of cruel and unusual punishment nor any other part of the Constitution stands in the way."); Bowers, *supra* note 69, at 126 ("[T]he Court has adopted a tone of almost cheerful resignation, as if it were helpless—as opposed to merely unwilling—to constitutionally check the overinflated criminal codes.... The substantive law is what legislatures have made it and what the Court has permitted it to become."). More recently, Justice Kagan made the point explicitly in a case purportedly about statutory construction:

> [T]he real issue [is] overcriminalization and excessive punishment....
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> .... [This statute] is a bad law—too broad and undifferentiated, with too-high maximum penalties, which give prosecutors too much leverage and sentencers too much discretion. And ... [it] is unfortunately not an outlier, but an emblem of a deeper pathology in the federal criminal code.
>
> But whatever the wisdom or folly of [a statute], this Court does not get to rewrite the law.... If judges disagree with [the legislative] choice, we are perfectly entitled to say so—in lectures, in law review articles, and even in dicta. But we are not entitled to replace the statute.

Yates v. United States, 135 S. Ct. 1074, 1100 (2015) (Kagan, J., dissenting).

166. Bowers, *supra* note 69, at 126 ("[O]verinflated criminal codes ... have enabled prosecutors to turn bargaining screws and ... to decide which defendant gets what discount and why.").

167. Lafler v. Cooper, 132 S. Ct. 1376, 1387 (2012).

of an emerging proportionality baseline. And it is against this baseline that draconian trial *threats* are made.

By tacitly endorsing this sentiment, the Court arguably has revisited a coercion theory that it had squarely rejected previously. As Justice Powell articulated in an early plea bargaining dissent, a plea proposal may be coercive when it threatens "to penalize" a defendant with a trial sentence of "unique severity."[168] The Court seems to have circled back to this idea that severity, and not just legality, may matter.

This is, in fact, what so vexed Justice Scalia—that a statutorily valid sentence could somehow still be constitutionally suspect.[169] Justice Scalia's position relies upon the notion that validity absolutely equals legality. As I explain in the next Part, that is an increasingly difficult proposition to maintain in our system of outsized codes and excessive punishments.[170]

III. SOME TENTATIVE THOUGHTS ON A JURISPRUDENCE OF PROPORTIONALITY

I do not mean to overstate the degree to which the Court has reconceptualized proportionality as permissibility. As I mentioned, it has done so by implication only. The issue in *Lafler* and *Frye* was only whether the defense attorney had fought hard enough for a fair enough bargain. The issue was not coercion, much less proportionality's relationship to it. Nor do I expect the Court to revisit the question any time soon.[171]

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168. Bordenkircher v. Hayes, 434 U.S. 357, 373 (1978) (Powell, J., dissenting); *see also* Parker v. North Carolina, 397 U.S. 790, 807 (1970) (Brennan, J., dissenting).

169. *See Lafler*, 132 S. Ct. at 1398 (Scalia, J., dissenting).

170. Stephanos Bibas and Gerard Lynch have taken issue with the outmoded and "fictive" legalistic perspective "that the sentencing outcomes after trial are in fact just." Gerard E. Lynch, Frye *and* Cooper*: No Big Deal*, 122 YALE L.J. ONLINE 39, 40-41 (2012), http://yalelawjournal.org/forum/frye-and-lafler-no-big-deal [https://perma.cc/5RVU-ZKPU] (criticizing Scalia); *see also* Stephanos Bibas, *Taming Negotiated Justice*, 122 YALE L.J. ONLINE 35, 37 (2012), http://www.yalelawjournal.org/forum/taming-negotiated-justice [https://perma.cc/U738-45HE] ("The other flaw in Justice Scalia's [*Padilla*] dissent is his assumption that nothing matters except for factual guilt, so no defendant can complain if he or she gets a longer sentence anywhere within the broad statutory range.").

171. *See* Berman, *supra* note 19, at 98 n.414 ("[W]hether plea bargaining [generally] constitutes coercion ... I put ... aside because the Supreme Court has already determined that it is constitutionally permissible.... Perhaps it should be otherwise. But to think that it may be

Before presenting a prescription for this issue, I first emphasize briefly—and at the risk of overkill—why I believe a proportionality baseline is prudent, at least as a supplement to the conventional legalistic baseline.

A. Legality All the Way Down

I have devoted considerable space in other articles and essays to cataloguing the criminal justice system's exceptional—almost anachronistic—fidelity to the principle of legality.[172] This fidelity results in a fervent, systemic affinity for bright-line rules.[173]

Bright-line rules have their place, but, as I have argued elsewhere, we may have gone too far.[174] The pendulum has swung radically from a historically unstructured approach to criminal law and procedure to a rigid formalism.[175] It is a formalism that does more to empower police and prosecutors than to constrain them. Our bright-line rules end up describing safe harbors within which

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otherwise within the lifetime of anyone reading this Article is, I think, fanciful.").

172. *See, e.g.*, Bowers, *supra* note 32, at 1021; *see also* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 44-47 (2d ed. 2008); Egon Bittner, *The Police on Skid-Row: A Study of Peace Keeping*, 32 AM. SOC. REV. 699, 700 (1967) (noting that "crime belongs wholly to the law, and its treatment is exhaustively based on considerations of legality"); Stephen R. Perry, *Judicial Obligation, Precedent and the Common Law*, 7 OXFORD J. LEGAL STUD. 215, 256 (1987) (discussing "the especial need for certainty" in criminal law) (internal quotation marks omitted); Louis Michael Seidman, *Points of Intersection: Discontinuities at the Junction of Criminal Law and the Regulatory State*, 7 J. CONTEMP. LEGAL ISSUES 97, 97 (1996) ("The law of crime is special."); Kenneth I. Winston, *On Treating Like Cases Alike*, 62 CALIF. L. REV. 1, 39 (1974) (discussing criminal law's long tradition of "strict adherence to rules").

173. *See, e.g.*, Virginia v. Moore, 553 U.S. 164, 175 (2008) ("In determining what is reasonable under the Fourth Amendment, we have given great weight to ... the need for a bright-line constitutional standard."); Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 260 (1984); Dan M. Kahan et al., *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 888 (2009) ("Fourth Amendment doctrine is replete with rule-like *presumptions of reasonableness* for generically defined fact patterns.").

174. *See* Bowers, *supra* note 73 (charging discretion); Bowers, *Mandatory Life*, *supra* note 139, at 26 (mandatory sentences); Bowers, *supra* note 32, at 1031, 1050 (Fourth Amendment); Josh Bowers, *The Normative Case for Normative Grand Juries*, 47 WAKE FOREST L. REV. 319, 324 (2012) [hereinafter Bowers, *Normative Grand Juries*] (the authority of grand juries); *see also* Seidman, *supra* note 172, at 98, 103, 122, 160 (noting that "although realism's lessons for criminal law seem obvious, formalism continues to dominate criminal jurisprudence," and terming "old fashioned" this "formalist world view").

175. *See* Bowers, *supra* note 32, at 1007 n.87.

police and prosecutors exercise tremendous discretion over whether and when to act, and against whom.[176] In this way, the prevailing conception of legality has failed in its principal objective, which is to minimize arbitrary exercises of state power.[177]

But what do these bright-line rules have to do with the practice of plea bargaining? Discretion is desirable but dangerous. We pretend to deny it, but we cannot do without it.[178] Thus, we adopt hard rules that operate not to eliminate discretion, but merely to shunt its exercise underground and into the hands of the system's least transparent and accountable institutional actors. For instance, determinate sentencing laws, like habitual-offender laws and other mandatory-minimum statutes, serve to strip judges of sentencing discretion only by delivering it to prosecutors at the point of charge and bargain.[179]

But there is much more going on than just that. Because legislators have powerful incentives to overcriminalize, and the Court, as I explained, has done very little to limit the reach and severity of criminal codes, police and prosecutors have no shortage of prospective charges with which to arrest and charge.[180] In such a world,

176. *See id.* at 995; Ronald F. Wright & Marc L. Miller, *Subjective and Objective Discretion of Prosecutors*, *in* CRIMINAL LAW CONVERSATIONS 673, 673 (Paul H. Robinson et al. eds., 2009) ("The law sets outer boundaries, but any administrative choice that falls within those boundaries is something distinct from law—call it discretion—because there is no law to apply.").

177. *See infra* notes 182-92 and accompanying text (discussing the principle of legality and the rule of law).

178. *See* KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 19 (1969) ("Rules must be supplemented with discretion.... For many circumstances the mechanical application of a rule means injustice; what is needed is individualized justice ... tailored to the needs of the individual case."); MICHAEL R. GOTTFREDSON & DON M. GOTTFREDSON, DECISION MAKING IN CRIMINAL JUSTICE: TOWARD THE RATIONAL EXERCISE OF DISCRETION 51 (2d ed. 1988) ("[I]ndividualized judgment, taking account of the immediate circumstances of the behavior in question, is a necessary component of just decision making."); MORTIMER R. KADISH & SANFORD H. KADISH, DISCRETION TO DISOBEY: A STUDY OF LAWFUL DEPARTURES FROM LEGAL RULES 75 (1973) (arguing executive exercises of equitable discretion are "widely regarded by responsible sources as both inevitable and desirable"); Bowers, *supra* note 73, at 1664; Roscoe Pound, *Discretion, Dispensation and Mitigation: The Problem of the Individual Special Case*, 35 N.Y.U. L. REV. 925, 928 (1960) ("Unbending rules rigidly administered may not merely fail to do justice, they may do positive injustice."); R. George Wright, *Dreams and Formulas: The Roles of Particularism and Principlism in the Law*, 37 HOFSTRA L. REV. 195, 214 (2008) (noting that law, without equity, can become "insensitive, mechanical, morally blind, or 'rule fetishist'" (footnotes omitted)).

179. *See* MICHAEL TONRY, SENTENCING MATTERS 148, 151 (1996); Bowers, *Mandatory Life*, *supra* note 139, at 41-42.

180. *See* Bowers, *supra* note 32, at 1003, 1029, 1036.

legal guilt becomes less important than normative guilt. Between four legally guilty offenders, one is set free, another charged with a misdemeanor, a third with a felony, and a fourth with a third strike, which, upon conviction, mandates a life sentence. And between four other legally guilty offenders, each of whom is allowed to plead out from under third strikes, one gets two years in prison, another five, a third goes away for ten, and a fourth receives twenty-five. In these examples, the prosecutor's charging and bargaining decisions are monumentally important, but they have very little to do with legal guilt. The prosecutor may justify the consequent sentencing differences as appropriate exercises of what I have called equitable discretion.[181] But, critically, she is not required to justify the differences in the first instance because, pursuant to prevailing constitutional doctrine, she exercises almost "sovereign prerogative" over these determinations of normative guilt.[182]

As I suggested already, equitable discretion is defensible—indeed, necessary.[183] But there are strong reasons to question whether the prosecutor may exercise it effectively or fairly.[184] It is not that she lacks moral sense, but only that her charging and bargaining decisions are clouded by institutional and cognitive biases of a kind that do not affect other stakeholders.[185] What the system lacks, and what it desperately needs, are equitable checks on a prosecutor's normative authority—a set of checks with which other institutional actors would prevent prosecutors from exercising free reign within the safe harbors described by hard rules.

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181. For the purposes of this Article, my conception of equity is consistent with what Aristotle called *epieikeia* or "fair-mindedness," of which proportionality is a part. *See* Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centred Theory of Judging*, 34 METAPHILOSOPHY 178, 205 (2003).

182. Sarat & Clarke, *supra* note 69, at 413 ("[T]he rule of law is replete with ... places where law runs up against sovereign prerogative. In those places, law runs out, law gives way, law authorizes the exercise of a power that it does not regulate."); *see also* Bowers, *supra* note 73, at 1659; Bowers, *supra* note 32, at 1031-32 ("In our criminal justice system, legalistic constraints on executive discretion—to the extent they are required at all—are typically no more than thresholds to permissive state action. That is, they do not *mandate* state action; they *authorize* it.").

183. *See* United States v. Dotterweich, 320 U.S. 277, 285 (1943) ("Our system of criminal justice necessarily depends on conscience and circumspection in prosecuting officers." (quoting Nash v. United States, 229 U.S. 373, 378 (1913))); *supra* notes 174-79 and accompanying text (discussing the danger and desirability of discretion).

184. *See* Bowers, *supra* note 73, at 1660.

185. *See id.*

For present purposes, we may recast the debate in terms of permissibility. The current systemic approach to legality generates a cramped conception of permissibility defined as technical guilt accuracy only. First, courts do not ask whether criminal codes are too expansive or harsh, but only whether statutes are precise enough.[186] In other words, precise enough criminal laws are *permissible* criminal laws. Second, courts do not ask whether arrests and charges—made and filed pursuant to these codes—are generally unreasonable, but only whether there is probable cause to believe that suspects and defendants are legally guilty of the offenses.[187] In other words, criminal charges supported by probable cause are *permissible* criminal charges. Third, courts do not ask whether plea bargains are genuinely coercive, but only whether, again, the underlying charges are permissible criminal charges.[188] In other words, permissible criminal charges generate *permissible* plea bargains. Fourth, courts do not ask whether negotiated sentences or, conversely, often mandatory trial sentences are disproportionate or otherwise unfair, but only whether the underlying convictions are based upon permissible guilty pleas or trial proof beyond a reasonable doubt.[189] That is, permissible plea bargains (or proof of *legal guilt*) produce *permissible* punishment.

From start to finish, the criminal process is designed to punish legally guilty offenders without any consideration of whether, in a particular case, it ought to do so. The jurisprudential tie that binds all stages of the process is the same sterile, technocratic, and overplayed notion that the legality principle cannot be polluted by equitable oversight. Because we find the same thread winding through all stages, no stage operates independently of the others. That is, we cannot adequately consider the prosecutor's bargaining power without also considering bright-line criminalization, charge, trial, and sentencing rules.

But, happily, because each interlocking stage influences the others, we are provided various opportunities for reform. An equit-

186. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972); *infra* notes 211-12 and accompanying text.

187. *See, e.g.*, Atwater v. Lago Vista, 532 U.S. 318 (2001); *see also* Bowers, *supra* note 32, at 988-89.

188. *See supra* notes 68-73 and accompanying text.

189. *See In re* Winship, 397 U.S. 358, 368 (1970); *supra* notes 75-76 and accompanying text.

able "circuitbreaker" at one stage may do promising work at another.[190] For instance, I previously have prescribed two different types of equitable arrest and charging screens—one administered by judges and the other by grand juries.[191] With those in place, we might not also require aggressive regulation of the equities of plea bargains. But because those are not forthcoming, the need grows for a proportionality baseline, or at least something other than a coercion test grounded exclusively in legality.[192]

B. A Proportionality Methodology

I am not the first to envision a proportionality baseline. Most notably, Alan Wertheimer suggested that a prosecutor's plea proposal might be coercive when it threatens an obviously disproportionate trial sentence:

> [I]t may prove easier to think of B's moral baseline in terms of the requirements of *justice* rather than rights .... Whether it was a *coercive* proposal [on this reading] ... depends on whether [the sentence] is an unjust sentence for the offense.... *If it is an excessive punishment, the proposal was a threat*.[193]

It is all well and good to talk of "excessive punishment." The trick is to identify it. In truth, there is no definition, as I examined in the previous Section. My hope here is to demonstrate only that the judge is particularly well situated to inquire—or perhaps it is more accurate to say that the judge is well situated to *share*—in the practice by which the parties negotiate for proportional punishment.[194]

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190. *See* Blakely v. Washington, 542 U.S. 296, 306 (2004) (discussing the jury as a "circuitbreaker" capable of interrupting unwarranted use of "the State's machinery of justice").

191. *See* Bowers, *supra* note 73, at 1713; Bowers, *supra* note 32, at 1047; Bowers, *Normative Grand Juries*, *supra* note 174, at 321, 323.

192. Elsewhere in this Issue, Donald Dripps echoes my claim that positive legality should not provide the exclusive answer to the constitutional question. *See* Donald A. Dripps, *Guilt, Innocence, and Due Process of Plea Bargaining*, 57 WM. & MARY L. REV. 1343 (2016).

193. WERTHEIMER, *supra* note 17, at 218 (emphasis added); see also Alschuler, *supra* note 59, at 697 (discussing "harshness and leniency" as "deviations" from a "moral baseline").

194. There is a powerful complaint that equitable checks undermine the rule of law. Elsewhere, I have responded to this critique in considerable detail. *See* Bowers, *supra* note 73, at 1661-62, 1664-73; Bowers, *supra* note 32, at 1021-25, 1043, 1045-46. I think the debate is largely beyond the scope of this Article, but it is worth mentioning that this *sharing* of

At her disposal, the judge possesses not only the conventional tool of the common law method but also her experience with practice law.[195] She may use these analytic tools to do a bit of social science and a bit of moral philosophy—a methodology that may be said to lie at the midpoint between Paul Robinson's empirical desert and the moral philosopher's deontological desert.[196] That is, the judge may consider both descriptive and normative conceptions of proportionality—prevailing practice as well as moral conviction.

I am more comfortable, however, with an alternative framing of the enterprise. In truth, a judge will never be willing or able to thoroughly consult social science or moral philosophy. She will make a softer study of things. Instead of engaging in rigorous empiricism or deontological analysis, she will reflect on her intuitions and her experience to discover what, in the ordinary course, *tends* and *ought* to occur. This jurisprudence may be better understood, then, as a light brand of *virtue jurisprudence*.

What is virtue jurisprudence? A number of legal scholars and virtue ethicists—most notably Larry Solum—have developed a theory of decision making whereby the judge relies upon a combination of "[t]he intellectual virtues of theoretical and practical wisdom and the moral virtues of courage, temperance, and good temper" to achieve "excellence in judging."[197] This end goal is to recognize and

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equitable authority ameliorates the standard rule-of-law concerns about arbitrary and capricious punishment. *See* Bowers, *supra* note 32, at 1042-43 ("[A]n [equitable] approach would not empower executive agents by creating a safe harbor for the authorized exercise of discretion; rather, it would empower *other* agents (and even promote consistency) by eliminating such safe harbors."); Martha C. Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFF. 83, 93, 96 (1993) ("Equity may be regarded as a 'correcting' and 'completing' of legal justice.... [I]t seems wrong ... [to] suggest[] that we have to choose ... between equity and the rule of law.... [W]hen [rules] ... have manifestly erred, it is justice itself, not a departure from justice, to use equity's flexible standard."); William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 2039 (2008) ("[G]iving other decisionmakers discretion promotes consistency, not arbitrariness. *Discretion limits discretion*; institutional competition curbs excess and abuse.") (emphasis added); *cf*. Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 373-74 (1996) ("It's when the law falsely denies its evaluative underpinnings that it is most likely to be incoherent and inconsistent.").

195. *See, e.g.*, Wesley MacNeil Oliver, *Toward a Common Law of Plea Bargaining*, 102 KY. L.J. 1, 9-10, 14-15 (2013).

196. *See supra* text accompanying notes 158-60.

197. Solum, *supra* note 181, at 189; *see also* Lawrence B. Solum, *Natural Justice*, 51 AM. J. JURIS. 65, 72 (2006).

express "the virtue of justice."[198] It is an objective that "requires legal vision," which, happily enough, judges possess more so than any other institutional actor.[199] Ultimately, the theory is introspective, particularistic, and practical.[200] The judge critically reflects upon her "situation sense" to consider *all the circumstances*.[201] In this way, she behaves similarly to any individual who pursues a "flourishing human life."[202] But whereas a layperson examines life and her choices about it based on her everyday experiences in the world, the judge examines law and her choices about it based on her everyday experiences in the judicial system.[203]

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198. Solum, *supra* note 197, at 88; *cf.* Bowers, *supra* note 73, at 1672 ("*Complete* justice demands both the *simple* justice that arises from fair and virtuous treatment and the *legal* justice that arises from the application of legal rules."); Nussbaum, *supra* note 194, at 93 ("Aristotle[] ... define[s] equity as a kind of justice, but a kind that is superior to ... strict legal justice."); Solum, *supra* note 197, at 99 (distinguishing between "two styles of rule application, ... 'mechanical' and 'sensitive'").

199. Solum, *supra* note 181, at 197; *cf.* William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction* to HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW, at li, lx (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) ("In a government seeking to advance the public interest, each organ has a special competence or expertise, and the key to good government is not just figuring out what is the best policy, but figuring out which institutions should be making which decisions and how all the institutions should interrelate.").

200. *See* Bowers, *supra* note 73, at 1674-75, 1691 n.165, 1725-26; Kyron Huigens, *The Jurisprudence of Punishment*, 48 WM. & MARY L. REV. 1793, 1820 (2007) ("[D]esert for legal punishment is informal and particularistic."); Stephen J. Morse, *Justice, Mercy, and Craziness*, 36 STAN. L. REV. 1485, 1492-93 (1984) (explaining that proportionality provides no "invariant, objective deserved punishment for each offensive act"); Nussbaum, *supra* note 194, at 92 (describing equity as "a gentle art of particular perception, a temper of mind that refuses to demand retribution without understanding the whole story"); *see also* RICHARD J. BONNIE ET AL., CRIMINAL LAW 13 (3d ed. 2010) (explaining that, according to some commentators, "one of the strengths of retributive theory is its sensitivity to contemporary community morality"). *See generally* JONATHAN DANCY, ETHICS WITHOUT PRINCIPLES 1 (2004) (expressing the strong particularist account that "moral judgment can get along perfectly well without any appeal to principles").

201. Solum, *supra* note 181, at 192 (quoting Karl Llewellyn); *see* Kyron Huigens, *Virtue and Inculpation*, 108 HARV. L. REV. 1423, 1467 (1995) (explaining that inculpation "has nothing to do with obeying a rule given by others," but instead requires "practical judgment that enables one to act amid the contingencies of everyday life").

202. Solum, *supra* note 181, at 189.

203. *See id.* at 192 ("The person of practical wisdom knows which particular ends are worth pursuing and which means are best suited to achieve those ends. Judicial wisdom is simply the virtue of practical wisdom as applied to the choices that must be made by judges."). Lon Fuller called this kind of particularistic evaluation "productive thinking," which he defined as the ability to put aside "ready-made solutions" and "familiar props" in favor of decision making that is "free, flexible, and effective." Lon L. Fuller, *On Teaching Law*, 3 STAN. L. REV.

But how would virtue jurisprudence apply to the coercion inquiry? Before we proceed, I should make plain that I am no plea bargaining abolitionist. To the contrary, I share the view of Bob Scott and Bill Stuntz that, in a world of overcriminalization, defendants are better off with plea bargaining than without it.[204] Moreover, although I am skeptical of the prosecutor's ability to adequately exercise equitable discretion free of institutional and cognitive biases, I still believe the prosecutor is entitled to some amount of influence and deference. But we may recognize and respect, on the one side, the value of plea bargaining and prosecutorial competence and, on the other, the need for judicial oversight.[205]

With this balance in mind, Scott and Stuntz proposed a plea bargaining "presumption of enforceability."[206] Only in truly exceptional circumstances could a judge deviate downward from a negotiated sentence, a modest measure of substantive regulation designed to curb plea bargaining's worst excesses.[207] I might term the presumption a *presumption of proportionality*. But otherwise, I am largely on board. The presumption could apply to all legally permissible prospective trial sentences. In this way, the legality baseline might still play a primary role—even a pivotal role—but not always a dispositive role.[208] A defendant challenging his negotiated or trial sentence would call upon the judge to consider his punishment in its context and also to compare it with the sentences levied on other

35, 39 (1950). More to the point, Fuller suggested that "the kind of situation most likely to elicit 'productive thinking' ... [is] the process of adjudication." *Id.* ("I think we can say that not only does being put in the position of a judge develop the individual's capacity for objective and creative thought, but that the widespread existence of this capacity ... is itself a precondition for the successful operation of our judicial system.").

204. *See* Scott & Stuntz, *supra* note 14, at 1930-33.

205. *See* Douglas A. Berman, *Mercy's Disguise, Prosecutorial Power, and Equality's Modern Construction*, *in* CRIMINAL LAW CONVERSATIONS, *supra* note 176, at 675, 676 (observing that executive "expertise" need not translate to "discretion ... free from any judicial scrutiny").

206. Scott & Stuntz, *supra* note 14, at 1917 (arguing that plea bargains merit a "presumption of enforceability," but also endorsing modest reforms designed, inter alia, to check coercion).

207. *See id.* at 1931.

208. Perhaps the presumption might be comparable to the presumption of reasonableness that federal courts apply to judges who sentence within the federal guidelines. *See* Rita v. United States, 551 U.S. 338, 341 (2007). A federal appellate court presumes that the legally permissible guidelines sentence is reasonable; a criminal court would presume that the legally permissible negotiated or trial sentence was proportional. *Id.* at 347.

similarly situated defendants.[209] Thereafter, the judge would be required to make findings designed to support the proposition that the punishment was genuinely excessive.[210] Only then might she conclude that the plea proposal was coercive—a threat to impose a penalty.

But, of course, the question remains what it means for one defendant to be similarly situated to another. Again, the judge would likely start by comparing one *legally* guilty offender with another, but I would hope she would not stop there. Once we try to understand the idea of excessive punishment in virtue ethics terms, we must recognize that, like any normative concept, its shape "depends on a variety of circumstances."[211] The evaluation is influenced by intuition, practice, and experience. Thus, the judge would do more than merely calculate statistically whether the defendant received a punishment much worse than *legally* similarly situated others (that is, those with like records who were convicted of the same offense). The judge also would take into account the particular act behind the crime, the reasons for it, the defendant's circumstances, and even the prosecutor's charging and bargaining behavior.[212]

Again, we return to the question of permissibility. A fulsome proportionality baseline—even if it were just a supplement to a legalistic baseline—would call upon the judge to take a deep dive.[213] In this respect, even the prosecutor's charging and bargaining *purpose* should sometimes matter to the evaluation. That is to say, it might bolster a claim of coercion that a prosecutor filed or threatened a

209. *See id.* at 358-59.

210. *See id.* at 357-59.

211. Farnsworth, *supra* note 46, at 340 (discussing the concept of fairness as it relates to coercion).

212. *See* Huigens, *supra* note 201, at 1445 (explaining that "the inculpation of another" entails an exercise of "practical judgment").

213. *Cf.* Bowers, *supra* note 32, at 1023 ("[T]he legality principle works best when it operates as a special formalist *supplement* to otherwise relevant realist considerations and not as a special *substitute*."). Ultimately, this might end up an examination of prosecutorial motives—a form of judicial oversight that I have previously examined in much more detail. *See id.* at 1026-28. Specifically, I proposed that a viable test for the reasonableness of an arrest would be to ask "whether a reasonable officer in the same circumstances would have made the arrest for the reasons given." *Id.* at 1028 (emphasis omitted). Here, we might ask whether a reasonable prosecutor in the same circumstances would have similarly charged and bargained for the reasons given. If there were sound reasons to believe that the defendant faced an excessive punishment at plea or trial, the prosecutor could be asked to explain her charging and bargaining decisions.

harsh charge only in order to provoke a plea. Significantly, this perspective is in keeping with a number of legal theorists, moral philosophers, and even judges who have argued that *reasons* and *intentions*—and, particularly, purposeful manipulation of another's options—ought to be relevant to the coercion analysis.[214] As Wertheimer explained: "[W]hen A manipulates B ... we think that the voluntariness of B's actions is debatable or at least of a different sort than when A persuades B."[215] More generally, a judge might take into consideration the relevant bargaining power of the parties and the manner by which an imbalance may operate systematically to skew even typical sentences in the direction of excessive punishment.[216]

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214. *See* Bordenkircher v. Hayes, 434 U.S. 357, 373 (1978) (Powell, J., dissenting) ("Implementation of a strategy *calculated* solely to deter the exercise of constitutional rights is not a constitutionally permissible exercise of discretion.") (emphasis added); Berman, *supra* note 19, at 35 (arguing that a penalty is a burden imposed "*for the purpose* of discouraging or punishing assertion of a ... right") (emphasis added); Kenneth Kipnis, *Criminal Justice and the Negotiated Plea*, 86 ETHICS 93, 100 (1976); *cf.* ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 49 (1981) (drawing a distinction between staying inside to avoid (1) a lightning strike, (2) another party's use of electricity, and (3) a party's threat to electrocute); WERTHEIMER, *supra* note 17, at 263 (arguing that we feel differently when one feels "compelled by 'circumstances'" rather than by another's intentional actions). Of course, it is no easy feat to identify a prosecutor's *purposeful* manipulation of her charging authority. As any student of mens rea may attest, inquiries into the subjective mind are often difficult. But, significantly, judges make such determinations all the time. In any event, it is sometimes obvious why a prosecutor has decided to file a high charge. *See, e.g.*, *supra* notes 146-52 and accompanying text (discussing the Clarence Aaron prosecution); *infra* notes 222-27 and accompanying text (discussing the facts of *Bordenkircher v. Hayes*).

215. WERTHEIMER, *supra* note 17, at 293.

216. *Cf.* Farnsworth, *supra* note 46, at 340 ("[I]t must ... be shown that the assent of the weaker party was induced by unfair persuasion on the part of the stronger. What will be characterized as 'unfair' depends on a variety of circumstances."); Joel Feinberg, *Noncoercive Exploitation*, *in* PATERNALISM 201, 208-09 (Rolf Sartorius ed., 1983) (arguing that when one party exploits her superior bargaining power to manipulate the other party's options, the resulting offer is perhaps not just exploitative, but also coercive); Harry G. Frankfurt, *Coercion and Moral Responsibility*, *in* ESSAYS ON FREEDOM OF ACTION 65, 71-72 (Ted Honderich ed., 1973) (explaining that an offer "acquires the character of a threat" in the face of a power imbalance that generates "an exploitative price"); Joan McGregor, *Bargaining Advantages and Coercion in the Market*, 14 PHIL. RES. ARCHIVES 23, 24 (1989) ("[T]he 'better off'/'worse off' distinction ignores the power relationships that occur when there are radically disparate bargaining strengths."). *See generally* Grant Lamond, *The Coerciveness of Law*, 20 OXFORD J. LEGAL STUD. 39 (2000) (discussing intentional attempts by one party to exploit bargaining power).

C. Proportionality Applied

I admit that what I am after is abstract.[217] It would be easier to draw a proportionality baseline that relied wholly upon statistical analysis of prevailing practice.[218] But I fear that an exclusively empirical approach to coercion would prove almost as fictive as an exclusively legalistic approach. Excessive punishment is ultimately a moral concept, even if intuitions can be tested (at least quasi-empirically) against practice and experience.[219] The risk of a fuzzy moral concept is that it might collapse into tautology—*coercion is that which is coercive*. But, to my thinking, there are at least some exceptional cases in which we may know coercion when we see it. At a minimum, I would hope a judge would hold coercive a prosecutor's *purposeful manipulation* of her charging options to subject a defendant to the unenviable purported choice between an obviously *grossly excessive* trial punishment and an *arguably excessive* negotiated punishment.

This was Justice Powell's position in his *Bordenkircher v. Hayes* dissent.[220] Justice Powell cautioned that a legally valid plea proposal should not be disturbed *except* "in the most *exceptional case*."[221] And he felt *Bordenkircher* was just such a case.[222] First, he noted that even the plea proposal of five years in prison was excessive—that it "hardly could be characterized as a generous offer" for the crime of forging an eighty-eight dollar check.[223] Second, he labeled the grim alternative—the mandatory trial sentence of life without parole—a punishment of "unique severity."[224] Third, he focused on the prosecutor's "admitted purpose," which was "to discourage and ... penalize" the defendant's exercise of his trial rights by threatening to *add*

217. *Cf.* Nussbaum, *supra* note 194, at 93 ("[T]he 'matter of the practical' can be grasped only crudely by rules given in advance, and adequately only by a flexible judgment suited to the complexities of the case.").

218. *Cf.* Bowers & Robinson, *supra* note 142, at 216 ("[E]mpirical desert can be readily operationalized—its rules and principles can be authoritatively determined through social science research into people's shared intuitions of justice.").

219. *See supra* notes 197-203 and accompanying text (discussing virtue ethics and a particularist approach to proportionality).

220. *See* Bordenkircher v. Hayes, 434 U.S. 357, 368-73 (1978) (Powell, J., dissenting).

221. *Id.* at 372 (emphasis added).

222. *See id.*

223. *Id.* at 369.

224. *Id.* at 373.

a harsh habitual-offender charge that the prosecutor had not seen fit to file in the first instance.[225] Fourth, and perhaps most importantly, he appreciated the dynamic interaction between criminalization, charging discretion, and the potential for bargaining coercion.[226] That is, he determined that the existence of the habitual-offender statute had tipped "the scales of the bargaining" to something "so unevenly balanced as to arouse suspicion."[227]

And Justice Powell was not alone. Bob Scott and Bill Stuntz also questioned whether the prosecutor should have the "unchecked" authority to exploit a habitual-offender statute "to *overcharge* and generate easy pleas."[228] Significantly, Scott and Stuntz are generally regarded as sanguine about the practice of plea bargaining. Moreover, unlike Justice Powell, they did not consider even the five-year plea proposal to be wildly beyond the proportional "market price."[229] But, against the baseline of that price, they felt that the trial punishment was obviously grossly excessive.[230] This explains their use of the term "overcharge."[231] The prosecutor had overcharged in the retributive sense, not in the legal sense.[232] He had pursued a punishment that no one could want to see imposed under the circumstances. According to Scott and Stuntz, even "the legislature may have expected that prosecutors would not charge people like Hayes."[233]

The prosecutor was morally obliged to exercise charging discretion "[to] separat[e] the wheat from the chaff," but he was not legally obliged to do so.[234] And because his moral obligation did not bear on his legal obligation, he was freely able to exploit his legal authorization to compel a plea. His principal incentive was not to do equitable

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225. *Id.*

226. *See id.* at 372.

227. *Id.*

228. Scott & Stuntz, *supra* note 14, at 1963-65 (emphasis added); *see also supra* notes 163-66 and accompanying text.

229. Scott & Stuntz, *supra* note 14, at 1964.

230. *See id.*

231. *Id.* at 1965.

232. *See id.*; *see also* Berman, *supra* note 19, at 101; Bowers, *supra* note 73, at 1678-79; *cf. supra* note 178 and accompanying text (discussing prosecutorial obligation to seek individualized justice).

233. Scott & Stuntz, *supra* note 14, at 1963-64.

234. *Id.* at 1944; *see also infra* note 247 and accompanying text (discussing the prosecutor's obligation to individualize justice).

justice, but only "to increase the likelihood that his offer would be accepted—and that is how he framed his bargaining strategy."[235] Any lingering desire to pursue a proportional punishment was not only secondary, but also sacrificial and ultimately sacrificed.

Rather than check the prosecutor's inequitable overreach, the Court held fast to its legalistic baseline.[236] It thereby failed to reckon with the obvious pressure intrinsic to a substantial sentence differential. And it rationalized its abstinence with a curious claim: that the parties enjoyed "relatively equal bargaining power."[237] But saying it is so does not make it so. I am not prepared to go as far as those critics who have likened to *torture* the prosecutor's purposeful manipulation of a sentencing differential,[238] but the Court's rationalization feels positively feeble. The availability of the habitual-offender charge should have dispelled any pretense that the parties were operating on a level playing field. Only the prosecutor possessed a cudgel with which to bend the other party to her will. This is precisely what made *Bordenkircher* "a situation 'very different from the give-and-take negotiation common in plea bargaining,'" the Court's reassurances notwithstanding.[239]

Of course, the practice of plea bargaining always must consist of some amount of constrained choice, but this was much more than that. Consider an analogy offered by Scott and Stuntz. They compared the prosecutor to a gas station owner who operates his business in the middle of a desert.[240] The passing motorist may pay

235. Scott & Stuntz, *supra* note 14, at 1964.

236. *See* Bordenkircher v. Hayes, 434 U.S. 357, 363-65 (1978).

237. *Id.* at 362.

238. *See* Langbein, *supra* note 88, at 13 n.24 ("Like torture, the sentencing differential in plea bargaining elicits confessions of guilt that would not be freely tendered. It is, therefore, coercive in the same sense as torture, although not in the same degree."); *Frontline: The Confessions* at 38:11 (PBS television broadcast Nov. 9, 2010), http://www.pbs.org/wgbh/pages/frontline/the-confessions/ [https://perma.cc/XN5G-FXL7] (law and literature professor Peter Brooks explaining that, when the prosecutor makes the defendant aware of describing the sentencing differential, it is equivalent to the tormentor "showing the instruments" of torture); *see also* Berman, *supra* note 19, at 98-99 ("At least when the difference between y and $y+n$ is especially pronounced, the thinking goes, the defendant cannot reasonably decline the prosecutor's offer. Acceptance is therefore 'coerced' or 'involuntary' or 'unfree.' There is surely some sense in which this claim is plausible. But the sense in which it may be true is not a sense in which it is constitutionally meaningful.") (footnote omitted).

239. *Bordenkircher*, 434 U.S. at 362-63 (quoting Parker v. North Carolina, 397 U.S. 790, 809 (1970)).

240. *See* Scott & Stuntz, *supra* note 14, at 1964.

a high price, but we would not typically say that he has been coerced, because "the buyer's choices (no gas in the desert) [were] not produced by the seller's actions."[241] The analysis changes, however, when the station owner "*artificially* constrain[s] the buyer's choice" by, for instance, tampering with the motorist's tires.[242] When a prosecutor manipulates her charging options to threaten excessive punishment, she is like that disreputable station owner; she has produced the constrained choice.[243]

There is a risk that we might take this analogy too far. We might say that the prosecutor is *always* responsible for subjecting the defendant to his constrained choice. After all, the prosecutor is the one who files the charge in the first instance. The prosecutor forces the defendant into the criminal justice system. On this reading, the charge is, in all cases, a "new element" of the defendant's situation, and the plea proposal, in turn, is categorically coercive: "If the defendant's baseline is understood as *prior* to accusation, the prosecutor's proposal is a threat. If the defendant's baseline is understood as *subsequent* to accusation, the prosecutor's proposal is an offer, and offers do not coerce."[244] But we may draw a line between the kinds of charges that are consistent with the prosecutor's core mission and those that are not. That line is the proportionality baseline. The prosecutor's moral and professional imperative is *never* to pursue excessive punishment, even if her ultimate objective

241. *Id.*

242. *Id.*

243. *See* Abrams, *supra* note 38, at 134 ("Hayes' dilemma was entirely state created."); Einer Elhauge, *Contrived Threats v. Uncontrived Warnings: A General Solution to the Puzzles of Contractual Duress, Unconstitutional Conditions, and Blackmail*, 83 U. CHI. L. REV. (forthcoming 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2566053 [https://perma.cc/93F4-AZ5R] (discussing *Bordenkircher* and concluding that "if concrete evidence did exist that the prosecutor's initial charges were deliberately excessive to coerce plea bargains, that should suffice to show a due process violation"). Indeed, Einer Elhauge has developed a general theory of state coercion, premised entirely on the impropriety of an official's "contrived" proposal to undertake an otherwise lawful course of action. Elhauge, *supra*; *cf.* David Zimmerman, *Coercive Wage Offers*, 10 PHIL. & PUB. AFF. 121 (1981) (discussing special interference as relevant to coercion).

244. WERTHEIMER, *supra* note 17, at 136; *see also* Garrity v. New Jersey, 385 U.S. 493, 497 (1967) (affirming a coercion claim where the loss of employment "is the antithesis of free choice to speak out or to remain silent"); *infra* note 292 and accompanying text (discussing "new elements" as threats).

is to cow the defendant into accepting a more proportional punishment.[245] As Mitchell Berman explained:

> If it is constitutionally permissible for prosecutors to try to induce defendants to plead guilty, ... the Court seems to reason, we must allow them to overcharge. But this is simply wrong. Plea bargaining is made possible so long as prosecutors are allowed to offer sentencing discounts; it is not necessary that they also be allowed to threaten a penalty.[246]

In *Bordenkircher*, the prosecutor purposefully disregarded his moral obligation to do equitable justice.[247] He thereby acted impermissibly. Concretely, the State's plea proposal was a threat to impose a penalty; it was coercion.

IV. EXTRALEGALISTIC COERCION & POSITIVE CONSTITUTIONAL LAW

As I mentioned, I have no illusions that the Court actually might be persuaded to revisit the coercion question as it applies to plea bargains.[248] To the contrary, the Court's prevailing opposition to endorsing a qualitative conception of coercion is in keeping with its overall resistance to regulating substantive criminal law. The Court seems to believe that it cannot reach the proportionality question without abandoning the legality principle, and without also implica-

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245. *Cf.* Berman, *supra* note 19, at 100-01 (discussing *Bordenkircher* and concluding that it is coercive for a prosecutor to threaten a disproportionate sentence); Sarat & Clarke, *supra* note 69, at 389-92 (discussing the argument that "discretion is a part of the prosecutor's responsibility to 'seek justice'" independent of legal guilt).

246. Berman, *supra* note 19, at 101.

247. *See id.* at 100 ("Overcharging, Justice Powell concluded, is constitutionally impermissible."); *see also* McCleskey v. Kemp, 481 U.S. 279, 295 n.15 (1987) ("[D]ecisions whether to prosecute and what to charge necessarily are individualized and involve infinite factual variations."); Newman v. United States, 382 F.2d 479, 482 (D.C. Cir. 1967) (observing that the prosecutor "is expected to exercise discretion and common sense"); People v. Byrd, 162 N.W.2d 777, 782 (Mich. Ct. App. 1968) (concurring opinion) ("It is undoubtedly part of the prosecutor's job to individualize justice."); ABRAHAM S. GOLDSTEIN, THE PASSIVE JUDICIARY: PROSECUTORIAL DISCRETION AND THE GUILTY PLEA 3 (1981) (explaining the prosecutor's role is to "individualize[] justice ... and mitigate[] the severity of the criminal law"); KADISH & KADISH, *supra* note 178, at 82 ("[I]t is widely accepted that a vital part of the prosecutor's official role is to determine what offenses, and whom, to prosecute, even among provably guilty offenders and ... the prosecutor must ... balance ... inflexible punishment against the greater impulse of the quality of mercy."); Bowers, *supra* note 73, at 1663 n.25.

248. *See supra* text accompanying notes 16, 84-86, 171.

ting the substantive scope of the liability and punishment rules that provide prosecutors with such terrific bargaining leverage in the first instance.

Going forward, we may expect the Court to continue to craft procedural standards and rules designed to promote efficient and fair bargaining, but we should expect no more than that. This Article, then, is not *genuinely* prescriptive—or perhaps it is right to say that it is only prescriptive in order to be provocative. My chief aim is to take the Court to task for its self-proclaimed inaptitude when it comes to regulating the substance of plea bargains (and criminal codes more generally). I think the Court is wrong to have been so skittish. In fact, it has the capacity to engage effectively in this kind of regulation.

Elsewhere, it has even done so. In other constitutional contexts, the Court has articulated, adopted, and applied decidedly extra-legalistic conceptions of coercion. That is to say, the Court has declared itself *sometimes* competent to know the qualitative shape of coercion—even when that shape is less than legally precise. Indeed, many of the so-called unconstitutional conditions cases could be said to fall within this category.[249] For instance, in *United States v. Jackson*, the Court invalidated the portion of a federal kidnapping statute that authorized imposition of a potential death sentence only after a jury conviction.[250] The Court held that the government had coerced the defendant by "chilling" his jury trial right in an "excessive" manner.[251] Never mind that, when it comes to plea bargaining, the Court has deemed irrelevant that defendants feel pressure intrinsic to capital charges.[252] My point is only that the *Jackson* Court saw fit to make the call. It decided that the "chilling"

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249. *See* Berman, *supra* note 19, at 2-3 ("[T]he so-called unconstitutional conditions problem ... has been recognized for well over a century and appears in dozens of doctrinal contexts."). Pursuant to the doctrine, the State imposes an unconstitutional condition when it unduly penalizes the exercise of a constitutional right. *See infra* text accompanying note 328. *See generally* Frederick Schauer, *Too Hard: Unconstitutional Conditions and the Chimera of Constitutional Consistency*, 72 DENV. U. L. REV. 989 (1995).

250. *See* 390 U.S. 570, 577-78, 591 (1968).

251. *Id.* at 582; *see also* Berman, *supra* note 19, at 12 ("That the unconstitutional conditions doctrine may be explainable by reference to coercion is intuitive."). *See generally* Abrams, *supra* note 38.

252. *See* Brady v. United States, 397 U.S. 742, 746-47 (1970) (distinguishing *Jackson*); *see supra* notes 82-83, 91-95 and accompanying text (discussing *Brady*).

effect was "excessive," as opposed to merely tolerable.[253] And it would seem to me that this question of *excessive* chilling is no more clear-cut than the question of *excessive* punishment with which we have been concerned.[254]

A. Justice Roberts's Extralegalistic Conception of Coercion

I intend to focus, however, on a setting a bit further afield from criminal procedure. In *National Federation of Independent Businesses v. Sebelius*, the landmark ruling on the constitutionality of the Patient Protection and Affordable Care Act, the Court applied an extralegalistic coercion test to invalidate a condition attached to the Act's Medicaid provisions.[255] The condition specified that a state would lose *all* of its Medicaid funds if it failed to expand coverage substantially.[256] Critical to the Court's ruling was the fact that Congress had proposed to withhold funding not only for the Medicaid *expansion*, but also for the *extension* of the preexisting program.[257] In other words, if a state refused to expand the program, it also would lose the money it had been receiving prior to passage of the Affordable Care Act.[258]

Writing for the plurality, Chief Justice Roberts reasoned that, although Congress was free to impose whatever conditions it wished on the funds designated for the expansion, it was not entitled to threaten a preexisting subsidy.[259] Chief Justice Roberts concluded that there were really *two* programs instead of one; the Medicaid expansion was separate "in kind" from the Medicaid system that came before it.[260] By this logic, the Court struck down the coercive

253. *Jackson*, 390 U.S. at 582.

254. *Cf.* Corbitt v. New Jersey, 439 U.S. 212, 218 (1978) ("[N]ot every burden on the exercise of a constitutional right ... is invalid."); Abrams, *supra* note 38, at 131 ("The Supreme Court has attempted to resolve these cases by determining whether the condition *unduly* burdens the constitutional right, or whether it is reasonable, and therefore constitutional.") (emphasis added).

255. *See* 132 S. Ct. 2566, 2606-07 (2012).

256. *See id.* at 2582.

257. *See id.* at 2603.

258. *See id.*

259. *See id.* at 2603-04.

260. *Id.* at 2605-06.

conditional threat to the extension, but it upheld the conditional offer to pay for the expansion.[261]

In a separate opinion, Justice Ginsburg, joined by Justice Sotomayor, acknowledged that a conditional spending measure might be coercive when it threatens an *ancillary* program, but she argued that the extension and the expansion were part and parcel of a single program—Medicaid.[262] Finally, Justice Scalia authored a four-Justice dissent, arguing that it did not matter whether the extension or the expansion constituted one program or two; the conditional spending measure was coercive in any event and unconstitutional in its entirety.[263] Thus, seven Justices held that at least some part of the spending measure was coercive, and all nine Justices accepted that a conditional spending measure might coerce.[264]

The difference between the Roberts and Ginsburg opinions boils down to a fight over baselines and how they should apply. Roberts relied upon both predictive and normative baselines. First, on the predictive front, Chief Justice Roberts noted that, as a new program, the Medicaid expansion threatened the preexisting Medicaid program in a manner that the states could not have anticipated.[265] Justice Ginsburg responded that the expansion constituted merely a modification of the old program, and modifications were neither new nor surprising.[266] Congress had changed the program previously, and the states should have expected it might do so again.[267] Thus, we may say that Chief Justice Roberts and Justice Ginsburg agreed upon a predictive baseline but not upon the facts with which it was set.

Second, on the normative front, Chief Justice Roberts did something much more interesting. He adopted a patently extralegalistic conception of coercion that allowed him to consider all the circumstances and determine that some forms of governmental pressure are just too much pressure regardless of legal entitlement. That is,

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261. *See id.* at 2608.

262. *See id.* at 2630 (Ginsburg, J., concurring in part and dissenting in part).

263. *See id.* at 2642-43 (Scalia, J., dissenting).

264. *See id.* at 2607 (majority opinion); *id.* at 2634 (Ginsburg, J., concurring part and dissenting in part); *id.* at 2666-67 (Scalia, J., dissenting).

265. *See id.* at 2605-06 (majority opinion) (describing the Medicaid expansion as an unanticipated "retroactive condition[]" that "accomplishes a shift in kind, not merely degree").

266. *See id.* at 2635-39 (Ginsburg, J., concurring in part and dissenting in part).

267. *See id.* at 2638-39.

Chief Justice Roberts conceded that Congress was constitutionally *authorized* to establish both versions of Medicaid—or, for that matter, to eliminate Medicaid altogether—but he concluded that legal authority was not dispositive under the circumstances.[268]

By contrast, Justice Ginsburg endorsed a legalistic baseline. Measured against that baseline, she described the matter as "a simple case."[269] Congress had proposed to provide only *benefits* to those states that chose to participate in the administration of a *constitutionally permissible* program—a program that the federal government could have administered itself: "[Congress does not] use Medicaid funding to induce States to take action Congress itself could not undertake. The Federal Government undoubtedly could operate its own health-care program for poor persons, just as it operates Medicare for seniors' health care. That is what makes ... the Court's decision so unsettling."[270]

In this vein, Justice Ginsburg distinguished *NFIB* from other potentially coercive spending measures.[271] She explained, for instance, that a coercion question had arisen in the seminal spending case, *South Dakota v. Dole*, only because Congress had proposed to do through conditional highway spending something that it potentially lacked the constitutional authority to do on its own: set a national drinking age.[272]

Perhaps one might respond that, by virtue of the *NFIB* ruling, Congress also lacked the constitutional authority to threaten the Medicaid extension. But that puts the cart before the horse. The Court first had to determine that there was coercion, thereby making the condition unconstitutional. And a legalistic baseline—of the kind that has animated plea bargaining jurisprudence all along—could not get the Court there. If the Court had applied a legalistic baseline, it would have had to treat Congress like the

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268. *See id.* at 2578-79, 2608 (majority opinion).

269. *Id.* at 2634 (Ginsburg, J., concurring in part and dissenting in part).

270. *Id.*; *cf.* United States v. Butler, 297 U.S. 1, 81 (1936) (noting that the "[t]hreat of loss, not hope of gain, is the essence of ... coercion").

271. *See NFIB*, 132 S. Ct. at 2634 (Ginsburg, J., concurring in part and dissenting in part) ("This case does not present the concerns that led the Court [previously] ... even to consider the prospect of coercion.").

272. *See id.* (distinguishing *South Dakota v. Dole*, 483 U.S. 203 (1987)); Berman, *supra* note 19, at 29 ("The federal government has no authority to order the states to establish particular minimum drinking ages.").

bargaining prosecutor who operates within her legal authority when she proposes to file a valid charge. The Court would have had to recognize that Congress was constitutionally entitled to do what it wanted to do for whatever reason, just as the prosecutor—with probable cause—is constitutionally entitled to charge what she wants to charge for whatever reason. On this score, consider an analogy to the prosecutor in *Bordenkircher*.[273] He proposed to *add* a new charge as leverage to get the defendant to accept conditions on an old charge.[274] The prosecutor coupled a legally permissible new charge to a legally permissible old charge, just as Congress—on Chief Justice Roberts's reading—coupled a legally permissible new program to a legally permissible old program. According to a legalistic baseline, there was no coercion in either case.[275]

If Chief Justice Roberts's operative normative baseline was not legalistic, what was it? I think it obvious that his baseline was grounded in a structural principle—the principle of federalism.[276] I do not claim that the principle of federalism has much in common with the principle of proportionality. But they do share a distinctive characteristic—federalism is an extralegalistic principle, just as proportionality is an extralegalistic principle.[277] Both principles lay the groundwork for a capacious and contextual reading of *permissibility*.

Ultimately, Chief Justice Roberts was unconstrained by legality. He was willing to determine that, all things considered, it was improper to put so much pressure on a state—that Congress had upset the abstract balance of power between national and state govern-

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

274. *See id.* at 358-59.

275. *See id.* at 365.

276. Sam Bagenstos has called this the "anti-leveraging principle"—that spending conditions cannot unduly threaten other "significant independent grants." Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After* NFIB, 101 GEO. L.J. 861, 865, 869 (2013). Whatever the name, it remains extralegalistic.

277. Admittedly, one could point to the Tenth Amendment as a legal basis for the federalism principle. *See* U.S. CONST. amend. X. However, one could just as readily point to the Eighth Amendment as a legal basis for the proportionality principle. *See* U.S. CONST. amend. VIII. In either event, even though the given amendment may be animated by the given principle, it has not been interpreted, as a matter of positive doctrine, to reach the federalism coercion question presented in *NFIB* or the proportionality coercion question presented in *Bordenkircher*. In that way, we may say that the existence of the Tenth Amendment does not undercut the conclusion that *NFIB* depended upon an extralegalistic reading.

ments.[278] In this way, Chief Justice Roberts's test was undertheorized and particularistic—a test without a test. He expressed little concern for the fuzzy line or the slippery slope. He just called it as he saw it—"a gun to the head."[279] He never tried to identify precisely at what point "persuasion gives way to coercion."[280] To the contrary, he just accepted that "wherever that line may be, this statute is surely beyond it."[281]

Notably, a number of critics have faulted the opinion for just this reason. Neal Katyal, for instance, dubbed the Court's ruling an "extraconstitutional limit" and a "worrisome development."[282] And Justice Ginsburg seemed to agree: "The coercion inquiry ... appears to involve political judgments that defy judicial calculation.... [C]onceptions of 'impermissible coercion' premised on States' perceived inability to decline federal funds 'are just too amorphous to be judicially administrable.'"[283]

As should be apparent by now, I have comparatively more confidence in the Court to reach these kinds of qualitative judgments. I just wish the Court more consistently had the same confidence in itself.

B. Reforms Revisited

I do not mean to make too much of the overlap; there are plenty of reasons not to carry over a coercion test from conditional

278. *See* NFIB v. Sebelius, 132 S. Ct. 2566, 2628 (2012) (Ginsburg, J., concurring in part and dissenting in part). Indeed, Chief Justice Roberts made something of the same normative point with respect to the Affordable Care Act's so-called individual mandate. Interpreting the Necessary and Proper Clause, the Court had never previously ascribed weight-bearing meaning to the term "proper." However, Chief Justice Roberts noted: "Even if the individual mandate is 'necessary' to the Act's insurance reforms, such an expansion of federal power is not a 'proper' means for making those reforms effective." *Id.* at 2592 (majority opinion). Again, the message seems to be that this kind of governmental overreach is just not normatively acceptable.

279. *Id.* at 2604 (majority opinion).

280. *Id.* at 2606.

281. *Id.*

282. Neal K. Katyal, Opinion, *A Pyrrhic Victory*, N.Y. TIMES (June 28, 2012), http://www.nytimes.com/2012/06/29/opinion/in-health-care-ruling-a-pyrrhic-victory.html?ref=opinion [https://perma.cc/F7T6-6GP4].

283. *NFIB*, 132 S. Ct. at 2641 (Ginsburg, J., concurring in part and dissenting in part) (citations omitted).

spending to plea bargaining.[284] But Chief Justice Roberts's opinion is instructive. It may serve as a useful reminder to plea bargaining reformers that legal guilt is but one potential constitutional line; normative guilt is another. And once we move beyond a legalistic baseline, there is plenty of room to evaluate coercion according to any of the many other viable and persuasive principles. From there, we may fairly conclude that, under certain circumstances, a charge may coerce *even if* it is legally permissible. Chief Justice Roberts's opinion has modeled for the Court what it might have done with plea bargains and substantive criminal law, if only it were not so timid.

I would add only that Chief Justice Roberts's opinion even has a framework modeled for concrete plea bargaining reforms. First, there would seem to be some similarity not only between the coercive spending condition in *NFIB* and the kind of charge bargaining at issue in *Bordenkircher*, but also between the spending condition and so-called wired plea deals. A wired plea entails a proposal to go easy on a codefendant or a potential codefendant (typically, a family member or friend) in exchange for a guilty plea from the defendant.[285] The proposal thereby *wires* the defendants' cases together, just like charge bargaining wires charges together, and, more to the point, just like the Medicaid spending condition wired purportedly separate Medicaid programs together.[286] Even if the system tolerates plea bargaining generally, we may think that there is something much more troubling about a prosecutor's effort to bind together in the negotiation process separate criminal charges, cases, or defendants.[287]

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284. For example, on federalism questions, there is the need to promote political accountability by making plain which actor—state or federal—is responsible for which governmental decision or action. *See* New York v. United States, 505 U.S. 144, 168-69 (1992); *cf.* FERC v. Mississippi, 456 U.S. 742, 761 (1982) ("[H]aving the power to make decisions and to set policy is what gives the State its sovereign nature."). On the other side, there are liberty and autonomy considerations distinct to the criminal justice context that would seem to demand closer attention to whether a pleading defendant is acting according to his own free will. This is all to say that each context is animated by its own unique considerations.

285. *See, e.g.*, United States v. Pollard, 959 F.2d 1011, 1018-19, 1021 (D.C. Cir. 1992) (holding wired bargain constitutionally voluntary when defendant accepted a life sentence so his wife could receive a five-year sentence).

286. *See NFIB*, 132 S. Ct. at 2605-06.

287. Generally speaking, charge bargaining is a plea bargaining practice that critics have singled out as particularly problematic. *See* Parker v. North Carolina, 397 U.S. 790, 809

Second, even if we accept the constitutionality of conventional charge bargaining and wired pleas, we still may disapprove of threats to *add* a charge, as the prosecutor did in *Bordenkircher*.[288] Here, the criticism is that the prosecutor should have to charge everything upfront or not at all.[289] In *NFIB*, Chief Justice Roberts took seriously the notion that states had come to rely upon an expectation that they would continue to receive the preexisting Medicaid funds.[290] Likewise, the defendant in *Bordenkircher* tried to claim that he had come to rely upon an expectation that he would continue to face only the preexisting forgery charge.[291] The framing is critical. Again, if the habitual offender charge is considered a "new element" of the defendant's situation, then it is more likely to be thought of as a threat.[292] Chief Justice Roberts's approach to coercion could have provided a prophylactic against the prosecutor in *Bordenkircher* upping the ante by threatening the habitual offender charge.[293]

Third, Chief Justice Roberts's remedy for the constitutional violation in *NFIB* may attract even a plea bargaining reformer. Significantly, Chief Justice Roberts did not invalidate the Medicaid expansion; he just *softened the blow* for noncompliance.[294] That is, he upheld the Medicaid expansion but struck down the threat to the extension.[295] By uncoupling the extension from the expansion, he managed to eliminate the penalty while preserving the benefits, thereby transforming a threat into an offer.[296] This sounds suspi-

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(1970) (Brennan, J., dissenting) (distinguishing between charge bargaining and the normal give and take of plea bargaining); *cf.* WERTHEIMER, *supra* note 17, at 132 ("[E]ven on Brennan's view, normal plea bargaining does not compromise the voluntariness of guilty pleas."). *See generally* Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979 (1992).

288. *See* Bordenkircher v. Hayes, 434 U.S. 357, 361 (1978).

289. *See id.* at 361 n.6.

290. *See NFIB*, 132 S. Ct. at 2664.

291. *See Bordenkircher*, 434 U.S. at 358-59.

292. *See supra* note 244 and accompanying text (discussing "new elements" as threats); *cf.* WERTHEIMER, *supra* note 17, at 225 ("[A]ssuming that B would *not* be made worse off if she spurned A's offer than if there had been no offer at all, there is no reason to regard A's proposal as *coercive*.").

293. *Contra Bordenkircher*, 434 U.S. at 362-63, 365 (concluding that the prosecutor was not upping the ante but was engaging only in the "give-and-take" negotiation common in plea bargaining).

294. *See NFIB*, 132 S. Ct. at 2608.

295. *See id.*

296. *See id.*

ciously like the remedy proposed by Scott and Stuntz to check prosecutorial exploitation of prevailing bargaining imbalances.[297] That is, in exceptional circumstances, they would have allowed judges to soften the blow by deviating downward from excessively disproportionate plea prices.[298]

Let me reiterate that my position is not that the Court should adopt any of these particular reforms (though I do favor some of them, particularly the judicial opportunity to reduce harsh bargained penalties).[299] Again, I merely hope to highlight that the Court has developed its own positive prototypes that it could use to invigorate constitutional consideration of plea bargaining coercion—if only it had the desire to do so.

C. Justice Scalia's Extralegalistic Conception of Coercion

Justice Scalia took an even less law-bound approach to coercion in his *NFIB* dissent—a remarkable departure from the hyperlegalistic perspective that animated his opinions in *Lafler* and *Frye*. Indeed, in *NFIB*, Justice Scalia did not just abandon the legality principle as a baseline for measuring coercion; he arguably abandoned baselines altogether. That is, his dissent can be read to endorse the claim that even an *offer* sometimes may coerce—that carrots have the capacity to overbear the will almost as readily as sticks do.[300]

This conception of coercion is unusual but not unprecedented. It is a view espoused typically by Marxists and other critics of capitalism—not Justice Scalia's obvious ideological brethren. The logic is that, under sufficiently unequal market conditions, some offers may appear too good to refuse, but only because the weaker party's options are so dismal to begin with.[301] Per Justice Scalia, the choice

297. *See* Scott & Stuntz, *supra* note 14, at 1959-60.

298. *See id.* at 1960.

299. *See supra* text accompanying notes 206-08.

300. *See infra* notes 304-15 and accompanying text.

301. According to the *Stanford Encyclopedia of Philosophy*'s entry on coercion:

> Dealings in capitalist markets are often highly exploitative.... Given the potency such offers possess, one might suspect that there are many offers that one cannot reasonably refuse, possibly reflecting great imbalances in power or prior historical injustices between the bargaining parties.... When one party is in a much stronger bargaining position than another, the stronger party sometimes

between these options is coerced if in some sense the choice is so stark that it overwhelms the states' ability to make a real choice, so that the states' choice whether to enact or administer a federal regulatory program is rendered illusory. "[I]f States really have no choice other than to accept the package, the offer is coercive, and the conditions cannot be sustained under the spending power."[302]

The reference to stark choices might as well have been a description of the sentencing differential between plea and trial prices. Here, Justice Scalia sounded at least a bit like John Langbein, who provocatively claimed that a sentencing differential may coerce "in the same sense as torture."[303] If nothing else, we may conclude that, pursuant to Justice Scalia's approach, *Bordenkircher* becomes an easy case. It would not have mattered even if the prosecutor had charged the habitual offender count prenegotiation, as opposed to postnegotiation. In either event, the stark—and thereby coercive—choice remained present.

In *NFIB*, Justice Scalia also offered the hypothetical of an almost limitless education funding grant.[304] It provides an even better analogy to *Bordenkircher*. That is, Justice Scalia explained that it surely would be unconstitutional for Congress to induce states to establish a national education system by offering "a [funding] grant equal to the State's entire annual expenditures for primary and secondary education."[305] According to Justice Scalia, the proposal would be practically irresistible and therefore coercive, notwithstanding the

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> uses its advantage to keep for itself most or all of the gains to be had from cooperative interaction between the parties. So employers who are in a stronger bargaining position than their employees may exploit them by paying them a small fraction of the value their labor contributes.

Coercion, STAN. ENCYCLOPEDIA PHIL., http://plato.stanford.du/entries/coercion/ [https://perma.cc/J9KP-HYDR] (last updated Oct. 27, 2011); *cf.* Virginia Held, *Coercion and Coercive Offers*, *in* COERCION 49, 58 (J. Roland Pennock & John W. Chapman eds., 1972) ("A person unable to spurn an offer may act as unwillingly as a person unable to resist a threat."). A number of theorists have claimed that no analysis of coercion is complete without some consideration of relative bargaining power and the stronger party's subjective intention to take advantage of it. *See* McGregor, *supra* note 216, at 24 ("[T]he 'better off'/'worse off' distinction ignores the power relationships that occur when there are radically disparate bargaining strengths."); *supra* note 218 and accompanying text. *See generally* David Zimmerman, *Coercive Wage Offers*, 10 PHIL. & PUB. AFF. 121 (1981).

302. NFIB v. Sebelius, 132 S. Ct. 2566, 2660-61 (2012) (Scalia, J., dissenting).

303. Langbein, *supra* note 88, at 13 n.24; *see also supra* note 238 and accompanying text.

304. *See NFIB*, 132 S. Ct. at 2662 (Scalia, J., dissenting).

305. *Id.*

absence of any threat to a preexisting program.[306] Again, this is an unconventional perspective. The traditional view is that, as long as a state is free to forego the education grant, and it is not made worse off by doing so, then there is no coercion, only a persuasively good offer.[307] Likewise, as we have seen already, defendants are thought to be free to forego attractive plea proposals. The sentencing differential is said to mark only the attractiveness of the plea offer—the magnitude of the bargaining benefits.[308] But Justice Scalia abandoned the formal distinction between offers and threats.[309] In the federalism context, Justice Scalia believed they are often one and the same. In the words of Harry Frankfurt, an offer "acquires the character of a threat" in the face of a power imbalance that generates "an exploitative price."[310]

Even Chief Justice Roberts felt compelled to retain the orthodox boundary between attractive offers and coercive threats: "States are separate and independent sovereigns. Sometimes they have to act like it."[311] By also abandoning that boundary, Justice Scalia apparently was comfortable with an even more abstract test for coercion. He refused "to fix the outermost line ... [of] coercion,"[312] observing that "[w]hether federal spending legislation crosses the line from enticement to coercion is often difficult to determine."[313] By Justice Scalia's estimation, "the coercive nature of [the] offer [was] unmistakably clear," but, in turn, he failed to make unmistakably clear precisely what went into his estimation.[314] Justice Scalia merely

306. *See id.* at 2661-62.

307. *See, e.g.*, Zimmerman, *supra* note 301, at 124.

308. *See supra* notes 77-78 and accompanying text.

309. *See supra* text accompanying note 300.

310. HARRY G. FRANKFURT, THE IMPORTANCE OF WHAT WE CARE ABOUT: PHILOSOPHICAL ESSAYS 33 (1988); *see also* Held, *supra* note 301, at 58 ("An unreasonable incentive to accept a good might be no less coercive than an unreasonable incentive to avoid an evil."). *But cf.* WERTHEIMER, *supra* note 17, at 230 (explaining that "an exploitative price is not, by itself, coercive").

311. *NFIB*, 132 S. Ct. at 2603.

312. *Id.* at 2606.

313. *Id.* at 2662 (Scalia, J., dissenting).

314. *Id.* ("If the anticoercion rule does not apply in this case, then there is no such rule."). Notably, Justice Scalia apparently considered congressional intent to be a relevant factor. *See id.* Specifically, he ascribed to Congress an intent to coerce, which, by his lights, made a finding of coercion that much more obvious. *See id.* ("Congress unambiguously signaled its belief that every State would have no real choice but to go along with the Medicaid Expansion."); *cf. id.* at 2635, 2637-38 (Ginsburg, J., concurring in part and dissenting in part) (considering

concluded that "Congress [had] plainly crossed the line distinguishing encouragement from coercion."[315] In this way, we may describe Justice Scalia's approach as functionalist. States are coerced when they enjoy no practical independence (and states often lack practical independence under prevailing unequal structural conditions). To promote practical choice, the Court must be willing to check federal power, extralegally.

In the plea bargaining context, this methodology has never held sway. No majority has ever held that, in the face of an excessively harsh mandatory sentencing law, a plea proposal could be coercive. No majority has ever acknowledged that, even if a plea proposal has made a defendant significantly better off than he was legally entitled to be, it could be only because he was made so impermissibly bad off to begin with. But these are the practical realities of the plea bargaining market, as Scott and Stuntz realized: "[A] defendant ... would be better off if the prosecutor could not bargain at all: in that event, the prosecutor would probably drop the recidivist charge, since she would get nothing out of it."[316]

In cases like *Bordenkircher*, there is just too much punishment in play; in Justice Scalia's education hypothetical, there is just too much money in play. If one is coercive, we should perhaps be willing to say that the other is too. In both settings, the stronger party manufactures ostensible options, but only a fool would choose not to cooperate.[317] More to the point, only a fool would even call the options a genuine choice in the first instance.[318]

Plausibly, we might frame Justice Scalia's dissent slightly differently. We might say that Justice Scalia did not, in fact, abandon all

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what she perceived to be a *lack* of congressional intent as relevant to her conclusion that the Medicaid expansion was *not* coercive). Again, Justice Scalia's position has support. *See supra* notes 263-64 and accompanying text. However, it is a perspective that is wholly foreign to the Court's conception of coercion as it applies to plea bargaining practice—and likewise to criminal justice more generally. *See supra* notes 188-89 and accompanying text. As we discussed in the context of *Bordenkircher*, all that mattered to the Court was "formal legality"—the existence of charges supported by probable cause. STUNTZ, *supra* note 6, at 258.

315. *NFIB*, 132 S. Ct. at 2661 (Scalia, J., dissenting).

316. Scott & Stuntz, *supra* note 14, at 1965.

317. *See* Farnsworth, *supra* note 46, at 339 (referencing coercion test that asks whether there was "no reasonable alternative"); *see also supra* note 301 and accompanying text (discussing coercive offers).

318. *See* Bowers, *Mandatory Life*, *supra* note 139, at 38 (describing this choice as a Hobson's choice—"a choice that offers only one [genuine] option").

baselines. Rather, his operative baseline was just some intangible conception of how our federal structure ought to work. And it is against that baseline that threats are identified. In the end, however, I do not think that the distinction matters much. More to the point, I am sympathetic to either reading. How could I not be? After all, I have endorsed a proportionality baseline that could be considered only slightly more tangible. But that is my prerogative as a pragmatist. Justice Scalia, on the other hand, was the Court's chief proponent of "the rule of law as a law of rules."[319] Even in the federalism context, Justice Scalia once cautioned: "[A]n imprecise barrier against federal intrusion upon state authority is not likely to be an effective one."[320] The surprise, then, is that Scalia—of all Justices—would have championed such an inexact approach.

So what is going on? Why the uncharacteristic move? Did Justice Scalia become a pragmatist overnight? Of course not. He just believed deeply in a national government of limited power—deeply enough that he felt the need to take a pragmatic stand, at least just this once. Justice Scalia's normative commitment was the principle of federalism. And coercion has the capacity to bend to this or that normative commitment.

I am content with this. It is a defensible methodological move to bend coercion to normative commitment—but only to the extent that the underlying normative commitment is a defensible one, furthered openly and without unduly compromising some other important value. Indeed, the aim of my research agenda to date has been to defend my own normative commitment—a commitment to check equitably police and prosecutorial power without unduly compromising the principle of legality.[321] Thus, I am attracted to Justice Scalia's

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319. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1175 (1989); *see, e.g.*, Virginia v. Moore, 553 U.S. 164 (2008) (reasoning that a "bright-line" approach best serves the "essential interest in readily administrable rules"). Apparently, Justice Ginsburg was surprised too. She invoked Justice Scalia's seminal article in her criticism of the Court. *NFIB*, 132 S. Ct. at 2641 (Ginsburg, J., concurring in part and dissenting in part) (citing Scalia, *supra*).

320. Printz v. United States, 521 U.S. 898, 928 (1997). Even more so in the criminal justice context, Justice Scalia has rejected imprecise measures—not only with respect to plea bargaining practices, but also with respect to criminalization and other questions. *See supra* notes 122-29, 165 and accompanying text (discussing Justice Scalia's dissents in *Lafler* and *Frye*, and quoting his majority opinion in *Whren*).

321. *See generally* Bowers, *supra* note 73; Bowers, *Mandatory Life*, *supra* note 139; Bowers, *Normative Grand Juries*, *supra* note 174; Bowers, *Two Rights to Counsel*, *supra* note 1.

one-time pragmatism because it provides tangential support for my own normative perspective: that the criminal justice system should do more to regulate inequitable exercises of executive discretion.

CONCLUSION

Imagine a world in which Supreme Court Justices regularly read law review articles and essays.[322] All the more fantastic, imagine that they were persuaded to respond to interlocutors. And more incredible still, imagine that they were won over by this or that critic's claim. How would they reply to me if I somehow convinced them to follow the logic of *Lafler* and *Frye* and abandon their legalistic baseline? Would they transition to a normative baseline grounded in the principle of proportionality? Almost certainly not.[323] They would fall back, instead, on an alternative normative baseline anchored to a prudential principle that has been doing significant work all along. That principle is naked expedience—the cold, hard fact that, as currently constructed, the system would crumble without the practice of plea bargaining.

This is the real triumph of plea bargaining.[324] Plea bargaining conquered practice, and the Court followed suit, crafting doctrines to accommodate it—even to nudge it along. Just one year after the Court first considered the constitutionality of plea bargaining, it declared the negotiated conviction to be an "essential component of the administration of justice"—one that "is to be encouraged."[325] And, in order to adequately encourage it, the Court has refused to regulate it substantively. That is the thrust of the Court's observation that "acceptance of the basic legitimacy of plea bargaining

322. *Cf.* Adam Liptak, *The Lackluster Reviews that Lawyers Love to Hate*, N.Y. TIMES (Oct. 21, 2013), http://www.nytimes.com/2013/10/22/us/law-scholarships-lackluster-reviews.html?_r=0 [https://perma.cc/U8BU-A4EH].

323. *See supra* text accompanying note 171.

324. *See* Berman, *supra* note 19, at 98 n.414 (referencing "the pressures inexorably favoring plea bargaining in American legal culture" (citing George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857 (2000))).

325. Santobello v. New York, 404 U.S. 257, 260 (1971); *see also* Blackledge v. Allison, 431 U.S. 63, 71 (1977) (noting that plea bargains are "important components of this country's criminal justice system").

necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense."[326]

In this vein, we may say that plea bargaining has come to rest comfortably on its own normative foundation—a pragmatic and almost quasimoral foundation.[327] This explains why the Court has never taken seriously the claim that the pressure to waive trial rights amounts to an unconstitutional condition. The unconstitutional conditions doctrine asks whether the "chilling effect" on the exercise of a constitutional right is excessive, unnecessary, or undue.[328] By the Court's estimation, the chilling effect of plea bargaining practice is never excessive or undue; to the contrary, it is entirely necessary—necessary enough to be nurtured.[329]

Occasionally, a student in my plea bargaining seminar will identify what I take to be an accurate overarching theme to the case law: In some cases the prosecutor wins; in other cases the defendant wins; but in all cases plea bargaining wins. This does not mean that the Court has wholly declined the opportunity to exercise constitutional oversight. To the contrary, it has developed a rich jurisprudence designed to ensure that our system of pleas is "properly administered."[330] The Court has exercised a kind of quality control

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326. Bordenkircher v. Hayes, 434 U.S. 357, 363-65 (1978) ("To hold that the prosecutor's desire to induce a guilty plea ... may play no part in his charging decision, would contradict the very premises that underlie the concept of plea bargaining itself."). Moreover, it is a perspective that *Lafler* and *Frye* did nothing to diminish. *See* Lafler v. Cooper, 132 S. Ct. 1376, 1397 (2012) (Scalia, J., dissenting) ("[W]e accept plea bargaining because many believe that without it our long and expensive process of criminal trial could not sustain the burden imposed on it, and our system of criminal justice would grind to a halt."); Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) ("The reality is that plea bargains have become ... central to the administration of the criminal justice system."). To the contrary, with the Court's recognition that plea bargaining "*is* the criminal justice system," the Court just made all the more explicit its prudential commitment. *Frye*, 132 S. Ct. at 1407 (quoting Scott & Stuntz, *supra* note 14, at 1912).

327. *See* WERTHEIMER, *supra* note 17, at 140 ("The Court has held that because plea bargaining serves the society's interests, it is not immoral.").

328. United States v. Jackson, 390 U.S. 570, 582 (1968). *See generally supra* notes 249-54 and accompanying text (discussing unconstitutional conditions). Indeed, the *Jackson* Court expressly distinguished guilty pleas, observing that "the automatic rejection of all guilty pleas would rob the criminal process of much of its flexibility." *Jackson*, 390 U.S. at 584 (internal quotation marks omitted).

329. *See* WERTHEIMER, *supra* note 17, at 138-39 (observing that, according to the Court, the chilling effect of plea bargaining "is not needless because ... the state cannot afford" the alternatives).

330. *Santobello*, 404 U.S. at 260; *see also supra* note 100 (discussing *Santobello*).

over the procedural mechanisms of "the machinery of criminal justice."[331] But it consistently has refused to exercise quality control over the substantive penalties that plea bargains produce.

Why has the Court proven comparatively so ready to exercise procedural quality control—to rectify the intermittent "unfortunate lapse in orderly ... procedures"?[332] Because an unreliable procedure generates an unreliable and inefficient market.[333] Consider the cases in which the Court has invalidated guilty pleas. The judge is required to develop "an 'adequate' record"—the better to foreclose a frivolous appeal.[334] The defense attorney is required to provide effective assistance of counsel—the better to convince a stubborn client to take a good deal.[335] The prosecutor is required to keep her promises—the better to maintain the credibility of her offers and threats.[336] These procedural rules and standards serve primarily to keep the guilty-plea apparatus humming along smoothly.[337]

There is obvious truth to the notion that our criminal justice system depends upon plea bargaining.[338] I would not deny it for a moment. But I take that to be a sign of its strength, not its weakness. Plea bargaining is an entrenched practice. It is not going anywhere. Moreover, I think it is in the nature of any human system—particularly an overburdened one—to tend toward compromise as much as toward conflict. In this way, negotiation is something of an inevitable social and adjudicative fact. It will happen. But, as with any human system, the institutional actors who operate the levers of power are prone to pursue improper objectives—objectives informed

331. *See generally* STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE (2012).

332. *Santobello*, 404 U.S. at 260.

333. *See id.*; *see also* Bowers, *Fundamental Fairness*, *supra* note 1, at 58 n.35 (explaining that cases like *Santobello* "can be re-read as an effort to cement a set of national (and constitutional) contract standards to promote fair and efficient bargaining").

334. Boykin v. Alabama, 395 U.S. 238, 247 (1969).

335. *See* Padilla v. Kentucky, 559 U.S. 356, 364 (2010); Bowers, *Two Rights to Counsel*, *supra* note 1, at 1136.

336. *See Santobello*, 404 U.S. at 262.

337. *See* Lafler v. Cooper, 132 S. Ct. 1376, 1397 (2012) (Scalia, J., dissenting).

338. *See* Abrams, *supra* note 38, at 133 ("[I]f one in five defendants demanded all such [trial] rights, our criminal justice resources would be exhausted."); Bowers, *Two Rights to Counsel*, *supra* note 1, at 1140 ("[T]he criminal justice system would grind to a halt without well-oiled guilty-plea machinery.").

by self-interest and professional and cognitive biases.[339] And this is why oversight—substantive as well as procedural—is indispensable.

Furthermore, because our criminal codes serve to empower state actors (perhaps just as much as they constrain them), we cannot count upon the prevailing principle of legality to provide all of the oversight that a sound system should demand. This has been the point of my Article—we need equitable checks, too.

If plea bargaining is here to stay, then why has the Court proven so unwilling to do more? The easy answer is that it has no incentive to tinker.[340] The Court may well understand that its tinkering will not upend the institution, but it nevertheless could conclude that tinkering is just not worth the very slight risk or the admittedly larger administrative headache that it entails. I have a lingering fear, however, that something else is at play. I worry that judges also might be motivated by a more troubling normative commitment—a bias (subconscious, perhaps) that it is appropriate for the prosecutor to bully the defendant for the simple reason that the defendant is probably guilty. Returning to the paradigmatic example of the slave who is threatened with a beating for not working on his normal day of rest, we concluded that the slave was coerced according to a moral-philosophic normative baseline because he never should have been subjected to bondage in the first place.[341] The contrary perspective, in the plea bargaining context, is that the probably guilty defendant is exactly where he ought to be.[342]

If this bias is doing real work, then it—and not my proportionality baseline—is the genuine threat to the legality principle. It amounts to a base desire for rough and summary justice— *punishment without process*. And that is the most undeserved penalty of all, particularly in a criminal justice system—such as ours—where wide racial and economic (and otherwise inequitable) disparities exist in the treatment of probably guilty offenders.

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339. *See* Bowers, *supra* note 73, at 1660 (examining the sometimes improper incentives and biases that shape prosecutors' charging and bargaining decisions); Bowers, *Punishing the Innocent*, *supra* note 139 (same).

340. As John Langbein explained: "[A] legal system will do almost anything, tolerate almost anything, before it will admit the need for reform in its system of proof and trial." Langbein, *supra* note 88, at 19.

341. *See supra* notes 49-54 and accompanying text.

342. *Cf.* Scott & Stuntz, *supra* note 14, at 1929-30 (distinguishing plea bargaining from contracts of enslavement).