

WHY PLEA BARGAINS ARE NOT CONFESSIONS

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ABSTRACT

Is a plea bargain a type of confession? Plea bargaining is often justified as, at its core, a process involving in-court confession. The U.S. Supreme Court's early decisions approved plea bargains as something "more than a confession which admits that the accused did various acts."¹ I argue in this Article that plea bargains are not confessions—they do not even typically involve detailed admissions of guilt. The defendant generally admits to acts satisfying elements of the crime—a legally sufficient admission to be sure, but often not under oath, and often not supported by any extensive factual record. Because plea bargains typically contain only formulaic admissions, they have limited preclusive impact in future cases. The modern trend has been to find issues not precluded by a guilty plea, except perhaps as to elements of the charged offense. A deeper problem with the lack of adjudicated facts arises when other actors later seek to attach collateral consequences to the conviction. More careful development of the factual record could help to prevent at least some guilty pleas by innocent defendants, and additionally, that development could produce reforms that would more narrowly target the collateral consequences that now attach to entire categories of convictions. These benefits reveal that it is particularly important to understand precisely why plea bargains are not "more than,"² and are in fact much less than, confessions.

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1. *Boykin v. Alabama*, 395 U.S. 238, 242 (1969).

2. *Id.*

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INTRODUCTION

Is a plea bargain a type of confession? Confessions have long been powerful engines for expediting criminal cases, if nothing else. Confessions may be very powerful before a jury—indeed, a confession may “trump” all other evidence in the case, for better or sometimes for worse.³ In many civil law countries, confessions are provided in the vast bulk of criminal cases, and the process strongly encourages defendants to confess.⁴ In the United States, however, almost all cases are plea-bargained, while custodial confessions are not routine, although their exact prevalence is unknown.⁵ Some scholars have suggested that the U.S. system can be considered just as confession-dominated as civil law systems, if plea bargains are themselves seen as a type of confession, or an admission of guilt, rather than merely an expeditious negotiated settlement that avoids a criminal trial.⁶ I argue that whatever their other merits and defects, plea bargains are not confessions—they do not even typically involve detailed admissions of guilt. The defendant generally admits to acts satisfying the elements of the crime—a legally sufficient admission to be sure—but often not while under oath and

3. See, e.g., Brandon L. Garrett, *Contaminated Confessions Revisited*, 101 VA. L. REV. 395, 407 (2015).

4. See Jonathan T. Flynn, *No Need to Maximize: Reforming Foreign Criminal Jurisdiction Practice Under the U.S.-Japan Status of Forces Agreement*, 212 MIL. L. REV. 1, 53 (2012) (“From a U.S. suspect’s perspective, a plea bargain is essentially a trade: an admission of guilt for leniency. Japan’s informal system serves the same function, with the suspect’s defense lawyer gathering ‘evidence to persuade the prosecutor that suspension [of prosecution] is appropriate.’” (alteration in original) (quoting CARL F. GOODMAN, *THE RULE OF LAW IN JAPAN* 412 (2d ed. 2008))); Stephen C. Thaman, *Plea-Bargaining, Negotiating Confessions and Consensual Resolution of Criminal Cases*, 11 ELECTRONIC J. COMP. L. *1, *41-43 (2007), <http://www.ejcl.org/113/article113-34.pdf> [<https://perma.cc/DBQ7-JSTQ>] (“From the beginnings of criminal procedure, the confession has always been the main simpli[fi]er and expediter of criminal proceedings.”).

5. See, e.g., *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (“Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.”). Over ninety-five percent of federal felony cases are resolved through plea bargains, and in many states, still more cases are resolved through plea bargaining. See Frank Green, *Jury Trial Rate at All-Time Low in Va.*, RICHMOND TIMES-DISPATCH (Oct. 18, 2009, 6:01 AM), http://www.richmond.com/news/article_69942dd3-2cf8-52a6-84c3-62a5faf96b86.html [<https://perma.cc/J77D-VWZU>].

6. See generally Thaman, *supra* note 4.

typically without support from an extensive factual record.⁷ These characteristics have led courts to attach limited preclusive effect to pleas in future cases, exposing why it is worth considering mechanisms to more carefully develop the factual record during the plea process. Doing so could not only help to prevent guilty pleas by innocent defendants, but it could also produce reforms that more narrowly target collateral consequences of convictions.

Despite the reality that little is admitted—much less confessed—in a plea bargain, plea bargaining is often justified as, at its core, a process involving confessions. The U.S. Supreme Court's early decisions on plea bargaining approved a view that a plea bargain involved not just a stationhouse confession, but "more than a confession which admits that the accused did various acts."⁸ As the Court explained in *Boykin v. Alabama*, a plea "is itself a conviction; nothing remains but to give judgment and determine punishment."⁹ Far earlier, in 1927, the Court called a guilty plea more than "a mere admission or an extra-judicial confession" because "it is itself a conviction."¹⁰ The Court has highlighted how a plea is entered before a judge, assuring it is voluntary and informed, with the benefit of counsel.¹¹ The Court has emphasized that "[c]entral to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment."¹²

A confession in an interrogation room, in contrast, involves extra-judicial admissions of guilt, which could be coerced or false, and, if found involuntary or to have been given in violation of constitutional requirements, may be suppressed from trial.¹³ Consequently, some scholars have argued that plea bargains, in contrast to interrogations, produce particularly credible and valuable admissions of guilt. Indeed, the argument is sometimes made that plea bargaining

7. See *infra* Part I.B.

8. *Boykin v. Alabama*, 395 U.S. 238, 242 (1969).

9. *Id.*

10. *Kercheval v. United States*, 274 U.S. 220, 223 (1927).

11. See *id.* at 223-24; see also *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978); *Brady v. United States*, 397 U.S. 742, 748 (1970).

12. *Brady*, 397 U.S. at 748.

13. See *infra* text accompanying note 26; *infra* note 89 and accompanying text. For a discussion of Fifth Amendment review of the voluntariness of confession statements, see, for example, *Miranda v. Arizona*, 384 U.S. 436, 467 (1966).

is superior to trial because “the fact-finding task assigned to the jury at trial is displaced by the defendant’s confession.”¹⁴ The common assumption is that “a defendant will not falsely condemn himself by pleading guilty since he knows that the immediate consequence is a criminal conviction.”¹⁵ As one prosecutor has explained: “When a defendant agrees in a plea bargain that the state could prove a certain set of facts ... that becomes the truth as much as it can ever be established in the eyes of the law.”¹⁶ In its key plea bargaining decisions, the Supreme Court has made the empirical assumption that “[d]efendants advised by competent counsel and protected by other procedural safeguards are ... unlikely to be driven to false self-condemnation.”¹⁷ Policymakers have similarly treated guilty pleas as tantamount to admissions of guilt by, for example, denying postconviction DNA testing to those who had pleaded guilty,¹⁸ and generally leaving unclear the extent to which those who have pleaded guilty are even eligible for postconviction relief.¹⁹ Further restrictions may be imposed if courts adhere to plea waivers of access to an appeal or postconviction remedies.²⁰

As I will argue in this Article, those confession-based justifications for plea bargaining are simply not supported. To be sure, plea bargains are justified on many other important grounds, particularly because they are efficient, avoid uncertainties of outcomes at trial, and permit choice, compromise, and flexibility.²¹ The most

14. Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957, 968 (1989).

15. *Id.* at 969.

16. Joshua Marquis, *The Myth of Innocence*, 95 J. CRIM. L. & CRIMINOLOGY 501, 509 n.56 (2005).

17. *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978); *see also Brady*, 397 U.S. at 758 (finding low likelihood that defendants “would falsely condemn themselves”).

18. *See* Rebecca Stephens, *Disparities in Postconviction Remedies for Those Who Plead Guilty and Those Convicted at Trial: A Survey of State Statutes and Recommendations for Reform*, 103 J. CRIM. L. & CRIMINOLOGY 309, 315-17 (2013). Thirteen states explicitly permit postconviction DNA testing to be granted to those who had pleaded guilty, two of which make DNA testing nonwaivable. *Id.* at 315. One state explicitly bars such testing by statute, while courts in three other states have interpreted their statutes in that manner. *Id.* at 316. Many more states have statutes requiring that identity have been at issue, and many interpret such provisions to restrict testing to those who pleaded guilty; still others have statutes that refer to a trial. *Id.* at 317.

19. *Id.* at 321-22.

20. *Id.* at 324-25.

21. *See* Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1975

recent Supreme Court rulings display somewhat more of this realism. In *Missouri v. Frye*, the Court emphasized that admissions by defendants (not confessions) may be self-serving compromises: “The potential to conserve valuable prosecutorial resources and for defendants to admit their crimes and receive more favorable terms at sentencing means that a plea agreement can benefit both parties.”²² Recent plea bargaining scholarship has also reflected more of the same realism. The many critics of plea bargaining point out how even the innocent may plead guilty to avoid higher penalties at a trial, with the resulting process empowering the prosecutor and largely eliminating judicial oversight.²³ Some of those critics believe that since “admissions” of guilt are important to plea bargaining, defendants should not be allowed to plead guilty while also asserting innocence.²⁴ Others go further and argue that those who plead guilty have, in effect, confessed, and as a result, should not be able to obtain DNA testing that might later prove innocence.²⁵ Plea bargains are not confessions, but part of their power and seeming legitimacy comes from the defendant admitting to guilt in court—or at least appearing to do so.

Challenging the assumption that plea bargaining derives its legitimacy from an admission of guilt is one prominent reason why I view it as particularly important to understand that plea bargains are not “more” than confessions, but are in fact much less than confessions. To be sure, confessions themselves may be produced under undocumented, unreliable, and coercive conditions, as I have detailed elsewhere.²⁶ As described in the first Part of this Article, the confession analogy completely breaks down upon a close

(1992); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1910 (1992).

22. 132 S. Ct. 1399, 1407 (2012).

23. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2518 (2004); Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1252-53 (2004).

24. See Stephanos Bibas, *Bringing Moral Values into a Flawed Plea-Bargaining System*, 88 CORNELL L. REV. 1425, 1426 (2003) (“[A]dmissions of guilt, even if made initially to reap rewards, break down denial mechanisms and open the way to healing and reform.”).

25. See JH Dingfelder Stone, *Facing the Uncomfortable Truth: The Illogic of Post-Conviction DNA Testing for Individuals Who Pleaded Guilty*, 45 U.S.F. L. REV. 47, 48-49 (2010) (relying on finality and cost arguments, not confession or admission-related arguments).

26. See *supra* note 13 and accompanying text.

examination.²⁷ A hearing at which a judge approves a plea bargain does not involve a full-blown confession to the facts of the crime. Rather than confess in front of an inquisitor, defendants typically make only quite limited admissions of guilt during plea bargains.²⁸

Judges may ask a defendant to provide an “allocution” before pleading guilty, but the admission of guilt need not be under oath or very detailed, and it may just involve an in-court agreement that the defendant committed acts satisfying the legal elements of the crime.²⁹ As I describe in the first Part,³⁰ in federal court, and in many state courts, judges need only assure themselves of some “factual basis” for the crime, and it need not be based on any meaningful review of the evidence.³¹ Indeed, the defendant may say little or nothing at all of any substance. Practices range widely, and some courts even tolerate plea bargains en masse with nothing particularly individualized about the process.³² The government’s recitation of the facts can provide the basis for the plea, as can other evidence from police or probation officer reports. The defendant agrees to receive a conviction and sentence, which can bring with it prison time and a range of collateral consequences. Those consequences formally attach to the conviction itself and are not a confession to the underlying facts of the crime because those facts may not have been determined with any specificity. If a plea bargain is a confession or an admission, it is often one stating, “I did it,” with “it” being the legal definition of the crime, but not what was actually done or how or why.

The confession model of plea bargaining is important enough that some critics of plea bargaining fiercely object to *nolo contendere* pleas, in which the defendant makes no admission but simply does not contest the charges, or *Alford* pleas, in which the defendant asserts innocence but accepts a plea.³³ Yet, I argue the distinction between a guilty plea and a *nolo contendere* or *Alford* plea is finer

27. See *infra* Part I.A.

28. See *infra* notes 52, 59-62 and accompanying text.

29. See *infra* note 61 and accompanying text.

30. See *infra* Part I.B.

31. See FED. R. CRIM. P. 11(b)(3).

32. See generally BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* (2011).

33. See *infra* Part I.C.

than is often supposed.³⁴ After all, even a full plea bargain may contain only limited admissions regarding the elements of the crime, and not factual findings that would be determined at an administrative hearing, much less those determined in a criminal trial. As a result, the settlement of a criminal case does not contain many admissions that could be legally relevant in future litigation. As in a civil settlement, which does not resolve any factual issues unless the agreement specifically states otherwise, a criminal settlement that does not purport to make factual findings or resolve legal claims similarly does not resolve “issues” that are precluded from further litigation.³⁵

When plea bargains typically contain only formulaic legal admissions to elements of the crime for the limited purpose of resolving the criminal charges in the case, as I describe at the end of the first Part of this Article, they have limited preclusive impact on future cases.³⁶ The modern trend is to find that issues are not precluded by a guilty plea, except perhaps as to the elements of the charged offenses—and there the distinction between pleas and *Alford* pleas entirely vanishes, because courts hold that an *Alford* plea is also conclusive as to the elements of the offense.³⁷ Treating guilty pleas as convictions, but not as admissions or confessions, fits with a model prioritizing practical settlements, not adjudication.

The analogy to confession is not only inapt and misleading, but, as I describe in Part II of this Article, it also obscures important solutions to the growing problem of tailoring collateral consequences of pleas.³⁸ The problem with the lack of adjudicated facts arises when others later seek to attach a wide range of collateral consequences

34. See *infra* Part I.C.

35. A civil settlement precludes litigation of the claim but will not normally have issue-preclusive effect unless it is clear from the agreement that the parties intended it to have such an effect. See *Arizona v. California*, 530 U.S. 392, 414 (2000).

36. See *infra* Part I.D.

37. See *infra* Parts I.C-D.

38. See *infra* Part II. For just a few examples of the burgeoning academic literature, see, for example, Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789 (2012); Paul T. Crane, *Charging on the Margin*, 57 WM. & MARY L. REV. 775 (2016); Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809 (2015); Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. (forthcoming 2016); Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457 (2010); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277 (2011).

to that prior criminal conviction. When the conviction without a trial was based on very little information, courts are placed in a difficult position because they have little factual record to rely upon. The conviction is a blunt and yet relatively empty instrument—an “I did it” admission. Courts and administrative agencies have struggled with whether to impose particular collateral consequences on convictions that were plea-bargained, precisely because the facts of the crime were not determined and cannot be determined easily. And precisely because they can rest on bare admissions, criminal judgments following pleas are treated as less final and conclusive than judgments following criminal trials.

In order for fact-finding to have preclusive effect, judges would have to conduct a more trial-like hearing process to produce a more robust record and ensure that the relevant issues were actually litigated. The burden of doing so is a reason why courts have resisted attaching preclusive effects to guilty pleas. More careful development of the factual record could help prevent guilty pleas by innocent defendants, but it would conversely create more opportunities to specifically preclude defendants in future cases. The convictions could have more serious consequences down the road, but perhaps that result could produce useful reforms to plea bargaining and to the collateral consequences that attach to criminal convictions.³⁹ In order to secure informed and detailed admissions, plea bargains would have to be based on detailed admissions from the defendant, and not just outside information, like that from a presentence report.⁴⁰

More robust plea hearings would require more of an investment of judicial resources, and such investments are sometimes made.⁴¹ For example, in the corporate prosecution setting, such detailed admissions are a commonplace aspect of plea agreements, and the useful result is that the criminal judgment has more finality—it rules out subsequent efforts to avoid liability for the criminal conduct detailed in the agreement, but it also permits careful tailoring

39. *See infra* Part II.B.

40. *See infra* Part II.

41. *See infra* Part II.B.

of collateral consequences in areas in which corporate defendants may risk suspension or debarment by regulatory authorities.⁴²

In the context of street crimes or less serious crimes, bare pleas may make far more sense, but I conclude this Article by arguing that more careful thought on what facts should support convictions that result in collateral consequences may justify developing a factual record that permits a more nuanced determination of which collateral consequences should attach to which factual categories of convicts. Creating defined tiers of plea bargaining in which more information could inform decisions of whether to attach more severe collateral consequences could not only reduce overbroad consequences of convictions but also add accuracy to the plea-bargaining process upon which our criminal justice system now almost entirely depends.

I. PLEA BARGAINS AS CONFESSIONS

A. *Plea Bargains Regulated as Confessions*

The early Supreme Court rulings on plea bargains, running through the early 1970s, emphasized that plea bargains would be regulated similarly to confessions. Plea bargains were compared to confessions, and there, plea bargains came out favorably in the comparison. After all, a confession might occur after many hours of harsh interrogation by police in an isolated room. In contrast, plea bargaining produces a confession in open court, with counsel at the defendant's side, and a judge to oversee the process. The Supreme Court therefore emphasized that in a guilty plea, the defendant admits guilt, but only "voluntarily," as in a properly admitted confession.⁴³ The full quotation from the Court's 1927 decision in *Kercheval v. United States* reads as follows:

A plea of guilty differs in purpose and effect from a mere admission or an extra-judicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court

42. See *infra* notes 137-39 and accompanying text.

43. "Admissibility of a confession must be based on a 'reliable determination on the voluntariness issue which satisfies the constitutional rights of the defendant.'" *Boykin v. Alabama*, 395 U.S. 238, 242 (1969) (quoting *Jackson v. Denno*, 378 U.S. 368, 387 (1964)).

has nothing to do but give judgment and sentence. Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences.⁴⁴

In its opinion, the Court emphasized that a plea bargain involves more in the way of process than in an informal interrogation setting—and in 1927, before *Miranda v. Arizona*, there was not the same right to counsel during an interrogation.⁴⁵ In contrast to an interrogation, a guilty plea can be entered only on advice of counsel and typically only with the presence of counsel.⁴⁶

Nor is plea bargaining regulated like a confession. Unlike in the case of a confession, in which a police interrogation may be inherently coercive, the voluntariness analysis in a plea bargain is different. The Supreme Court does not find inherently coercive the threat of a far more severe punishment at trial. For instance, threatening a suspect with the death penalty during a custodial interrogation is different from threatening such a sentence during plea bargaining.⁴⁷ Even after a confession that was unconstitutionally coercive, the Court has said a valid plea may follow.⁴⁸

An interrogation is regulated differently from plea bargaining procedures. Police may question a suspect informally, and outside the presence of counsel.⁴⁹ Police may use threats, but if doing so overcomes the suspect's will, then the resulting confession may be excluded at any trial.⁵⁰ However, not all interrogations produce confessions, much less convictions.⁵¹ In contrast, all plea bargains

44. 274 U.S. 220, 223 (1927).

45. See generally 384 U.S. 436 (1966).

46. Perhaps the Court gives undue "talismanic significance to the presence of counsel" as well. *McMann v. Richardson*, 397 U.S. 759, 778 (1970) (Brennan, J., dissenting).

47. See *Brady v. United States*, 397 U.S. 742, 749-50 (1970).

48. See *Parker v. North Carolina*, 397 U.S. 790, 796 (1970); see also *McMann*, 397 U.S. at 770 (refusing a withdrawal of plea when counsel "misjudged the admissibility of the defendant's confession").

49. See *Salinas v. Texas*, 133 S. Ct. 2174, 2177-78 (2013) (addressing questioning outside of custody); *Pennsylvania v. Muniz*, 496 U.S. 582, 601-02 (1990) (addressing questioning during booking).

50. See *Haynes v. Washington*, 373 U.S. 503, 514 (1963) (finding confession involuntary based on "threat of continued incommunicado detention"); see also *Lynumn v. Illinois*, 372 U.S. 528, 534 (1963).

51. Of course, interrogations do not always result in law enforcement securing inculpatory

result in convictions. They do not, I argue, themselves produce confessions.

The act of confessing, however, has been seen as crucial to plea bargaining. As the Supreme Court stated in its decision in *Brady v. United States*: “Central to the [guilty] plea and the foundation for entering judgment against the defendant is the defendant’s admission in open court that he committed the acts charged in the indictment.”⁵² That rationale has helped to support the Court’s ruling in *United States v. Ruiz* not to require prosecutors to provide during plea bargaining impeachment evidence found in discovery.⁵³ If the defendant has relevant information and is confessing to that guilt in court, then perhaps contrary evidence is, by the same token, less relevant.⁵⁴

Moreover, “because a guilty plea is an admission of all the elements of a formal criminal charge,” the Court has said “it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.”⁵⁵ Nevertheless, the plea does not waive Fifth Amendment privilege, as the Supreme Court held in *Mitchell v. United States*.⁵⁶ In *Mitchell*, the defendant admitted that she had engaged in “some of” the charged conduct, and the judge ultimately concluded that there was a factual basis for the offense.⁵⁷ The Government argued that by making that statement, she had waived Fifth Amendment privilege and the right to remain silent at the sentencing hearing.⁵⁸ The Court emphasized that the plea colloquy is a “narrow inquiry” in which the defendant may say little

information. See Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 280 (1996) (suggesting a “success” rate of 64 percent but noting other studies with varying results).

52. *Brady*, 397 U.S. at 748.

53. See *United States v. Ruiz*, 536 U.S. 622, 629-30 (2002). It remains contested in the lower courts whether prosecutors must disclose exculpatory evidence during plea bargaining. See, e.g., Samuel R. Wiseman, *Waiving Innocence*, 96 MINN. L. REV. 952, 992 (2012). For an example of a court reviewing the different holdings of other jurisdictions, see *Buffey v. Ballard*, No. 14-0642, 2015 WL 7103326 (W. Va. Nov. 10, 2015) (“Having scrutinized the reasoning of other jurisdictions, this Court finds that the better-reasoned authority supports the conclusion that a defendant is constitutionally entitled to exculpatory evidence during the plea negotiation stage.”).

54. See *Ruiz*, 536 U.S. at 629-30.

55. *McCarthy v. United States*, 394 U.S. 459, 466 (1969).

56. 526 U.S. 314, 324 (1999).

57. *Id.* at 318-19.

58. See *id.* at 319-20.

or may simply make a “joint statement” along with the prosecution.⁵⁹ And “the defendant who pleads guilty puts nothing in dispute regarding the essentials of the offense.”⁶⁰ The Court noted that “a guilty plea is more like an offer to stipulate than a decision to take the stand.”⁶¹

However, an admission to having engaged in acts that satisfy the formal elements of a criminal charge is not a full confession describing the facts of what was done or why. An admission to having satisfied the elements of the crime also does not reach the question of whether any defenses might defeat criminal liability. As Professor Kevin C. McMunigal has pointed out, the defendant may be pleading guilty to elements that are objective or that involve facts that are necessarily known to the defendant; it would be “paradoxical ... to rely on someone charged with failing to recognize or observe the norms of reasonable conduct or belief to perform the task of factually assessing what those norms are.”⁶²

In *Missouri v. Frye*, the Court emphasized that admissions by defendants may be compromises that benefit all sides: “The potential to conserve valuable prosecutorial resources and for defendants to admit their crimes and receive more favorable terms at sentencing means that a plea agreement can benefit both parties.”⁶³ The Court merely noted that defendants “admit their crimes,” without characterizing such admissions as confessions, and making clear that defendants may be incentivized to do so in order to obtain a more lenient sentence.⁶⁴

Apart from the differing procedures regulating confessions and plea bargains, the substance of the two is very different. On the one hand, a confession may be detailed, consisting of statements describing a crime, and may be used in codefendants’ cases. On the other hand, as developed further in the next Section, the Supreme Court does not demand a full confession to enter a plea bargain, just a highly legalistic admission.

59. *Id.* at 322-23.

60. *Id.* at 323.

61. *Id.*

62. McMunigal, *supra* note 14, at 979.

63. 132 S. Ct. 1399, 1407 (2012).

64. *Id.*

B. Factual Basis

At a plea hearing, or colloquy, the judge supervises a discussion of the plea with the defendant, defense counsel, and prosecutors. The judge does not participate in plea discussions, at least in federal court.⁶⁵ However, the judge must approve the plea, ensuring that it is voluntary, and then inform the defendant of the essential elements of the crime and the constitutional rights waived.⁶⁶ The defendant then admits to guilt of acts satisfying those elements of the crime.

In the federal system, “[b]efore entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.”⁶⁷ As Professor John Douglass highlights, “In federal cases, Rule 11 sets no standard for the type of evidence, degree of detail, or standard of proof necessary to establish a factual basis.”⁶⁸ And as Professor Julie O’Sullivan explains, “Although judges may ask a defendant to ‘allocute,’ that is, to concede guilt, there is no judicial ‘trial’ or even a cursory review of evidence.”⁶⁹ The federal rule does not specify that any particular type of inquiry be made as to that factual basis.⁷⁰ As the Supreme Court has noted, one way to find out whether there is a factual basis for the plea is to ask the defendant to speak about the crime.⁷¹ The Court has also stated that it does not question “the authority of a district court to make whatever inquiry it deems necessary in its sound discretion to assure itself the defendant is not being pressured to offer a plea for which there

65. See FED. R. CRIM. P. 11(c)(1) (“An attorney for the government and the defendant’s attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions.”).

66. See *id.* r. 11(b).

67. *Id.* r. 11(b)(3).

68. John G. Douglass, *Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining*, 50 EMORY L.J. 437, 482 n.197 (2001).

69. Julie R. O’Sullivan, *The Last Straw: The Department of Justice’s Privilege Waiver Policy and the Death of Adversarial Justice in Criminal Investigations of Corporations*, 57 DEPAUL L. REV. 329, 361 (2008).

70. See FED. R. CRIM. P. 11.

71. See *Santobello v. New York*, 404 U.S. 257, 261 (1971) (“Fed. Rule Crim. Proc. 11, governing pleas in federal courts, now makes clear that the sentencing judge must develop, *on the record*, the factual basis for the plea, as, for example, by having the accused describe the conduct that gave rise to the charge.”).

is no factual basis.”⁷² But even if the judge engages in such questioning, the defendant need not be under oath,⁷³ and state courts need not follow that rule.⁷⁴ Judges should assure “that there is sufficient evidence upon which the defendant could be convicted if he or she elected to stand trial.”⁷⁵

Under Federal Rule of Criminal Procedure 11(b)(3), the judge must determine the “accuracy” of the plea. As the Supreme Court has described, “[t]he judge must determine ‘that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty.’”⁷⁶ The purpose of determining accuracy in these proceedings is to “ensure that ‘the court make clear exactly what a defendant admits to, and whether those admissions are factually sufficient to constitute the alleged crime.’”⁷⁷

But the factual basis need not come from the defendants’ admissions. It cannot come from statements made during the process of negotiating the plea (more akin to an interrogation, if one is pushing the confession analogy, perhaps too far), at least when settlement negotiations are not normally admissible evidence.⁷⁸ The factual

72. *Mitchell v. United States*, 526 U.S. 314, 324 (1999).

73. See FED. R. CRIM. P. 11(f) advisory committee’s note to 1974 amendment (“Where inquiry is made of the defendant himself it may be desirable practice to place the defendant under oath.”). Indeed, the drafters in the U.S. House of Representatives noted, “[t]he Committee does not intend its language to be construed as mandating or encouraging the swearing-in of the defendant during proceedings in connection with the disclosure and acceptance or rejection of a plea agreement.” H.R. REP. NO. 94-247, at 7 n.9 (1975).

74. See *Gaddy v. Linahan*, 780 F.2d 935, 943 n.8 (11th Cir. 1986) (finding that Rule 11 is not binding on state courts); *Ames v. N.Y. State Div. of Parole*, 772 F.2d 13, 15 (2d Cir. 1985) (“The State court’s inquiry did not have to be patterned after Fed. R. Crim. P. 11.”); *Smith v. Scully*, 614 F. Supp. 1265, 1269 (S.D.N.Y. 1984) (“[The] requirement that federal judges satisfy themselves that there is a factual basis for the plea is [not] a statutory restatement of a constitutional requirement.”).

75. STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY 65 (AM. BAR ASS’N 1999).

76. *McCarthy v. United States*, 394 U.S. 459, 467 (1969) (quoting FED. R. CRIM. P. 11 advisory committee’s note).

77. *United States v. Mastrapa*, 509 F.3d 652, 659-60 (4th Cir. 2007) (quoting *United States v. DeFusco*, 949 F.2d 114, 120 (4th Cir. 1991)). The Advisory Committee noted that the 1966 amendments introducing the factual basis requirement would serve to “protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge.” FED. R. CRIM. P. 11 advisory committee’s note to 1966 amendment.

78. See FED. R. EVID. 410 (providing that conduct or statements made during plea negotiations are not normally admissible evidence against the defendant who participated in the plea process); see also *id.* r. 408 (providing that conduct or statements during civil

basis can instead come entirely from the government's recitation of the facts.⁷⁹ A presentence report from the probation office may be a particularly important source of factual support in federal cases.⁸⁰

In state courts, which need not, and sometimes do not, impose the same "factual basis" requirement as in federal court,⁸¹ the evidentiary support similarly can come from a variety of sources, including police and probation reports. As the Arizona Supreme Court put it: "The evidence of guilt may be derived from any part of the record including presentence reports, preliminary hearing transcripts, or admissions of the defendant."⁸² One survey in Indiana found loose compliance with the factual basis requirement, due in part to a lack of procedural requirements under state law.⁸³ Federal courts of appeals are split on whether a plea really does preclude appeal as to the factual basis.⁸⁴ Regardless, any error in producing a sufficient factual basis for the plea can be considered harmless, perhaps because examination of other evidence, such as a presentence report, would provide a sufficient basis.⁸⁵ For these reasons, scholars have called for greater factual review of the factual basis of guilty pleas.⁸⁶

settlement negotiations are not admissible).

79. See *United States v. Ozuna-Cabrera*, 663 F.3d 496, 501 (1st Cir. 2011).

80. See Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and its Dynamics in the Post-Mistretta Period*, 91 NW. U. L. REV. 1284, 1292 (1997) ("Probation officers are likely to call misleading facts to the attention of the court, and because the parties understand this, overtly inaccurate factual stipulations now seem less common. There is a sense among some probation officers that the parties have simply gotten better at hiding the facts, but this impression is intrinsically difficult to verify. In any event, fact bargaining does not appear nearly so prevalent as it seemed in our pre-*Mistretta* research.").

81. STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY, *supra* note 75, at 64, 66-68; see, e.g., *Stepp v. State*, 686 S.W.2d 279, 280 (Tex. App. 1985) ("Texas courts are not bound to follow Federal Rule 11.").

82. *State v. Salinas*, 887 P.2d 985, 987 (Ariz. 1994).

83. See Earl G. Penrod, *The Guilty Plea Process in Indiana: A Proposal to Strengthen the Diminishing Factual Basis Requirement*, 34 IND. L. REV. 1127, 1138-43 (2001); see also Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 212-13 (2006).

84. See generally Kristen N. Sinisi, *The Cheney Dilemma: Should a Defendant Be Allowed to Appeal the Factual Basis of His Conviction After Entering an Unconditional Guilty Plea?*, 59 CATH. U. L. REV. 1171 (2010).

85. See, e.g., *United States v. Field*, 39 F.3d 15, 17 (1st Cir. 1994); *United States v. Adams*, 961 F.2d 505, 510-12 (5th Cir. 1992) (per curiam).

86. See, e.g., John L. Barkai, *Accuracy Inquiries for All Felony and Misdemeanor Pleas: Voluntary Pleas but Innocent Defendants?*, 126 U. PA. L. REV. 88 (1977); Steven Schmidt, Note, *The Need for Review: Allowing Defendants to Appeal the Factual Basis of a Conviction After*

Others such as Professor Samuel Wiseman have criticized waivers of access to DNA testing in plea agreements.⁸⁷

Indeed, perhaps judges should more carefully ensure that factual admissions are detailed or that there is a strong factual basis for a guilty plea to avoid the case from being derailed on appeal or post-conviction. Despite innocence, a defendant might plead guilty for a wide range of reasons, including misunderstanding what is required by the elements of the offenses, misunderstanding what intent is required, or being persuaded by incentives such as the possible penalty at trial.⁸⁸ I have previously examined a set of cases in which convicts later exonerated by DNA testing had pleaded guilty, as innocent people may have rationally declined to risk a trial.⁸⁹

Judges have treated as nonwaivable other terms in plea agreements, such as ineffective assistance claims (as Professor Nancy King has explored⁹⁰), or conflicts of interest by counsel (with some courts, like the Second Circuit, adopting detailed procedures to ensure a valid waiver⁹¹). At the same time, plea bargains involve waivers of a host of criminal procedure rights.⁹² Why the same attention is not necessarily paid to procedures surrounding the development of the factual basis of the plea, much less analysis of the substance or the weight of that evidence, suggests a reluctance to do broader fact-finding absent a trial. Further costs and benefits of expanding the inquiry into the factual basis—making a plea bargain more of a confession—are discussed later in this Article.

Pleading Guilty, 95 MINN. L. REV. 952, 958-59 (2010).

87. See Samuel R. Wiseman, *Waiving Innocence*, 96 MINN. L. REV. 952, 958-59 (2012).

88. See FED. R. CRIM. P. 11 advisory committee's note to 1966 amendment; see also Barkai, *supra* note 86, at 95 n.35.

89. GARRETT, *supra* note 32, at 150-53. Among the first 250 DNA exonerations, sixteen pleaded guilty and had no trial; ten of the sixteen had already confessed. Of the first 330 DNA exonerations, 8 percent, or twenty-seven, had pleaded guilty, while the others were convicted at a criminal trial (four additional individuals had trials on some charges but pleaded guilty to additional charges). Brandon L. Garrett, *Convicting the Innocent Redux*, in *WRONGFUL CONVICTIONS AND THE DNA REVOLUTION: TWENTY-FIVE YEARS OF FREEING THE INNOCENT* (Daniel Medwed ed., forthcoming).

90. For an excellent discussion on this topic, see Nancy J. King, *Plea Bargains that Waive Claims of Ineffective Assistance—Waiving Padilla and Frye*, 51 DUQ. L. REV. 647 (2013).

91. See *United States v. Curcio*, 680 F.2d 881, 885-91 (2d Cir. 1982).

92. See *United States v. Mezzanatto*, 513 U.S. 196, 209-10 (1995) (“The plea bargaining process necessarily exerts pressure on defendants to plead guilty and to abandon a series of fundamental rights.”).

C. Nolo and Alford Pleas

A nolo contendere plea provides an admission just for purposes of the case, or “a consent by the defendant that he may be punished as if he were guilty and [as] a prayer for leniency.”⁹³ As the Supreme Court has put it, “[l]ike the implied confession, this plea does not create an estoppel, but, like the plea of guilty, it is an admission of guilt for the purposes of the case.”⁹⁴ As a result, such a plea cannot be used in a subsequent civil or criminal case. A nolo plea contains no requirement that there be an adequate factual basis for the plea.⁹⁵

In contrast, an *Alford* plea permits the defendant to do more than not contest the charges, but rather he may outright assert innocence.⁹⁶ *Alford* pleas are rare; many states do not permit them, and federal prosecutors do not use them.⁹⁷ What makes *Alford* pleas interesting, though, is how they illustrate how a confession or admission need not play any role in a plea-bargained conviction. For an *Alford* plea there is no confession and no admission, only a factual basis. As the Supreme Court explained in *North Carolina v. Alford*: “An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.”⁹⁸

Indeed, the Court suggested such a plea was appropriate even in that case in which there was “overwhelming” evidence of guilt.⁹⁹ So

93. *North Carolina v. Alford*, 400 U.S. 25, 36 n.8 (1970).

94. *Hudson v. United States*, 272 U.S. 451, 455 (1926).

95. *See Alford*, 400 U.S. at 36 n.8.

96. *Id.* at 37-38.

97. *See* U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-16.015 (1997), <http://www.justice.gov/usam/usam-9-16000-pleas-federal-rule-criminal-procedure-11#9-16.015> [<https://perma.cc/LJX3-WS26>] (“United States Attorneys may not consent to the plea known as an Alford plea ... except in the most unusual of circumstances and only after recommendation for doing so has been approved by the Assistant Attorney General responsible for the subject matter or by the Associate Attorney General, the Deputy Attorney General, or the Attorney General.”).

98. *Alford*, 400 U.S. at 37. The Court stated that there may be a factual basis even if the defendant maintains innocence: “[W]hile most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty.” *Id.*

99. *See id.*

a judge must arguably do more to assure factual basis for a plea in which the defendant asserts that there is no factual basis for a plea. As a result, some courts attach the same finality to an *Alford* plea as to any other guilty plea.

D. No Preclusion Without Confession

What is necessarily decided by a guilty plea? The res judicata, or claim preclusive effect, of a conviction is clear—the Double Jeopardy Clause bars retrial of the same crime, whether an acquittal or a conviction results from a criminal proceeding.¹⁰⁰ However, apart from claim preclusion, the collateral estoppel, or issue preclusion, remains far less clear. The great proponent of attaching issue preclusion to guilty pleas was Professor Alan Vestal, who argued repeatedly in his writing and before the American Law Institute as the Second Restatement of Judgments was being drafted that: “If the defendant in entering a plea of guilty really admits the truthfulness of the charge, then should not the admission be binding when it becomes a judgment?”¹⁰¹

There are four traditional requirements for collateral estoppel or issue preclusion:

- (1) [T]he issues in both proceedings must be identical, (2) the issue in the prior proceeding must have been actually litigated and actually decided, (3) there must have been a full and fair opportunity for litigation in the prior proceeding, and (4) the issue previously litigated must have been necessary to support a valid and final judgment on the merits.¹⁰²

A guilty plea raises particular problems regarding the second requirement, whether any given issue was “actually litigated,” because a plea involves a settlement of an action instead of litigation.¹⁰³ Guilty pleas are further problematic with respect to the

100. See U.S. CONST. amend. V.

101. Allan D. Vestal, *Issue Preclusion and Criminal Prosecutions*, 65 IOWA L. REV. 281, 295 (1980); see also Allan D. Vestal, *The Restatement (Second) of Judgments: A Modest Dissent*, 66 CORNELL L. REV. 464, 466-97 (1981); Allan D. Vestal & John C. Coughenour, *Preclusion/Res Judicata Variables: Criminal Prosecutions*, 19 VAND. L. REV. 683, 715-16 (1966).

102. *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 44 (2d Cir. 1986).

103. *Id.*

fourth requirement, whether any particular determination was “necessary” to the judgment.¹⁰⁴ A settlement, such as in a civil case, does not typically resolve or decide any issues, unless the agreement makes clear that the parties intend such an effect.¹⁰⁵ For those reasons, Professor David Shapiro urged the Advisory Committee on Rules of Criminal Procedure to reject issue preclusion for guilty pleas when “an issue had never been subjected to an adversary contest leading to a judicial determination.”¹⁰⁶

As described, the charging instrument (such as the indictment) may include detailed descriptions of the facts, but the defendant may not admit to any or all of that conduct, or the same charges, when pleading guilty. Courts must instead begin with what was said during the plea colloquy. However, not much may have been said. As Professor Shapiro put it: “[T]he requirement of a factual basis, even when enforced rigorously, differs in important ways from an adjudication of guilt after trial. The evidence in support of the charge may be summarized by a person who would not be competent to testify—the prosecutor or arresting officer, for example.”¹⁰⁷ As discussed above, no issues may have been necessarily decided beyond the agreement that the elements of the crime were met.

The Second Restatement of Judgments rejected Professor Vestal’s position that plea bargains should have issue-preclusive effect:

104. *Id.*

105. See *Arizona v. California*, 530 U.S. 392, 414 (2000) (“[S]ettlements ordinarily occasion no *issue preclusion* ... unless it is clear ... that the parties intend their agreement to have such an effect.”). “In the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated. Therefore, the rule of this Section [describing issue preclusion’s domain] does not apply with respect to any issue in a subsequent action.” RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. e (AM. LAW INST. 1982); see also 18A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4443 (2d ed. 2002) (“In most circumstances, it is recognized that consent agreements ordinarily are intended to preclude any further litigation on the claim presented but are not intended to preclude further litigation on any of the issues presented. Thus consent judgments ordinarily support claim preclusion but not issue preclusion.”); cf. *United States v. Int’l Bldg. Co.*, 345 U.S. 502, 505 (1953) (finding that stipulations to tax violations in certain years did not resolve other years not in question in the first case, but were “only a *pro forma* acceptance by the Tax Court of an agreement between the parties to settle their controversy for reasons undisclosed”).

106. David L. Shapiro, *Should a Guilty Plea Have Preclusive Effect?*, 70 IOWA L. REV. 27, 28 (1984).

107. *Id.* at 42-43.

A defendant who pleads guilty may be held to be estopped in subsequent civil litigation from contesting facts representing the elements of the offense. However, under the terms of this Restatement such an estoppel is not a matter of issue preclusion, because the issue has not actually been litigated, but is a matter of the law of evidence beyond the scope of this Restatement.¹⁰⁸

Thus, the fact that courts may treat the elements of the offense as having been admitted to is not a matter of issue preclusion at all. Today, as traditionally, courts mostly interpret plea agreements narrowly when considering their preclusive effect. Scholars that have advocated for broader collateral estoppel have done so only as to the elements of the offense, or factual status that was found as part of the offense, in line with the suggestion in the Restatement.¹⁰⁹ As to those elements of the offense, as the Second Circuit Court of Appeals has put it, the plea is “as conclusive as a jury verdict.”¹¹⁰

However, equating a plea with a jury verdict goes too far. Courts have assumed that a prosecutor cannot assert issue preclusion on an element of a criminal offense in a subsequent prosecution.¹¹¹ Even as to the elements of the offense, at best, the defendant may have admitted to committing acts that satisfy the elements, but there was no legal judgment to that effect. A defendant typically will not be asked whether any defenses might have negated a finding of guilt; defenses are waived when a defendant pleads guilty, and so were not “actually litigated” and therefore are not precluded in subsequent litigation.¹¹² As a result, as one federal district court has noted: “While the guilty plea may be considered as evidence against the defendant in later proceedings, [the] defendant should still have

108. RESTATEMENT (SECOND) OF JUDGMENTS § 85 cmt. b (AM. LAW INST. 1982).

109. See, e.g., Richard B. Kennelly, Jr., Note, *Precluding the Accused: Offensive Collateral Estoppel in Criminal Cases*, 80 VA. L. REV. 1379, 1427 (1984) (“[The use of estoppel] should be expanded from the relatively few cases and applications where it has been used so far to include more substantive elements of offenses, where appropriate.”).

110. *LaMagna v. United States*, 646 F.2d 775, 778 (2d Cir. 1981).

111. See 18B CHARLES ALAN WRIGHT ET AL., *supra* note 105, § 4474 (“[I]ssue preclusion cannot be applied against a criminal defendant as to any element of the offense.” (citing *Simpson v. Florida*, 403 U.S. 384, 386 (1971))); see, e.g., *United States v. Smith-Baltiher*, 424 F.3d 913, 920 (9th Cir. 2005) (citing cases from other circuits rejecting collateral estoppel regarding elements of criminal offenses and adopting that rule, noting: “[T]he government likewise concedes that the use of offensive collateral estoppel is not proper.”).

112. RESTATEMENT (SECOND) OF JUDGMENTS § 85 cmt. b (AM. LAW INST. 1982).

the opportunity to contest facts concerning the elements of the offense or possible defenses.”¹¹³ As another court has described, “[i]n determining what facts and issues are precluded in a civil action that is based on an underlying criminal conviction, a court may look to the judgments of conviction, plea agreements, and facts presented by the government during a Rule 11 hearing.”¹¹⁴

The Supreme Court made clear in its ruling in *Haring v. Prosise* that other collateral legal issues, apart from the elements of the offense, are not typically decided prior to a guilty plea, and may not be precluded in subsequent litigation.¹¹⁵ This issue often arises when a person convicted of resisting arrest, or some other crime following an interaction with law enforcement, sues for civil rights violations, such as excessive force.¹¹⁶

However, as the Restatement suggests, apart from issue preclusion, perhaps “the law of evidence” might permit subsequent use of a criminal conviction.¹¹⁷ Thus, as the Supreme Court has determined, “statements or admissions made during the preceding plea colloquy are later admissible against the defendant, as is the plea itself.”¹¹⁸ Guilty pleas may not be confessions, but they may contain admissions. Prior convictions can be admitted as evidence in subsequent civil or criminal proceedings. At trial, just the fact of the conviction itself, and not the underlying conduct, may be admissible.¹¹⁹ And further, there may be a concern with prejudice due to the admission of a prior conviction.¹²⁰ However, any underlying facts

113. *Greenhut v. Hand*, 996 F. Supp. 372, 377 (D.N.J. 1998).

114. *Buchanan Cty. v. Blankenship*, 496 F. Supp. 2d 715, 720 (W.D. Va. 2007).

115. *See* 462 U.S. 306 (1983). In contrast, if there was actual litigation of a motion to suppress prior to the guilty plea, then the legality of the search or seizure would have been actually decided in the prior litigation.

116. It is a separate requirement that to challenge a conviction in an action under § 1983 that “necessarily demonstrates the invalidity of the conviction,” the litigant must have had that prior conviction terminated in favor of the accused. *Heck v. Humphrey*, 512 U.S. 477, 481-82 (1994).

117. RESTATEMENT (SECOND) OF JUDGMENTS § 85 cmt. b (AM. LAW INST. 1982).

118. *Mitchell v. United States*, 526 U.S. 314, 324 (1999).

119. *See* FED. R. EVID. 803(22) (“Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused.”).

120. The argument is that under Rule 609, untried prior convictions should not necessarily

admitted as part of a plea bargain may be admissible hearsay evidence, if the facts were “essential” to the judgment in the criminal case.¹²¹ As a result, the more detailed the admissions are in a plea hearing, the likelier it is that such admissions could be used in, say, subsequent civil proceedings.

Further, some courts depart from the Restatement, either because state law does so or out of a desire to avoid the unseemly inconsistency between the statements made by a person in contradiction of the guilty plea. Courts simply do not like the idea of a person “taking back” a confession. As one leading treatise puts it, “[g]uilty pleas have been used to support issue preclusion, often in circumstances that drip with the desire to prevent flat-out inconsistency.”¹²² There is no inconsistency, however, if the plea is not considered to have ever been a confession at all.

II. COLLATERAL CONSEQUENCES OF ADMISSIONS

The assumption about admissions is “that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true.”¹²³ That assumption may not hold true for plea bargains. Indeed, following the Supreme Court’s decision in *Padilla v. Kentucky*, in which the Court questioned the line between direct and collateral consequences of a conviction,¹²⁴ a defense lawyer would have to advise a client carefully before permitting the client to make admissions or other statements that could bring with them either additional direct or collateral consequences following the conviction. Attaching greater significance to admissions during the plea process would therefore complicate plea hearings. And yet a wide range of consequences attach to a guilty plea, placing burdens on the plea process that it cannot easily bear, at least not in the vast majority of cases in which expedited process is desired. A tiered plea process—demanding greater accuracy for

be available for impeachment. See generally Montré D. Carodine, *Keeping It Real: Reforming the “Untried Conviction” Impeachment Rule*, 69 MD. L. REV. 501 (2010).

121. FED. R. EVID. 803(22); see, e.g., *Scholes v. Lehmann*, 56 F.3d 750, 762 (7th Cir. 1995).

122. 18A WRIGHT ET AL., *supra* note 105, § 4474.1.

123. FED. R. EVID. 804(b)(3) advisory committee’s note (citing *Hileman v. Nw. Eng’g Co.*, 346 F.2d 668 (6th Cir. 1965)).

124. 559 U.S. 356, 359-60 (2010).

more serious crimes and sentence—may be desirable, and implementing such a system reflects some of the practices in which prosecutors demand detailed admissions when they believe it is important to achieve a clear public acceptance of responsibility.

A. Sentencing

The lack of facts supporting a guilty plea becomes important almost immediately after it is entered if the plea bargain does not include a sentence as part of the bargain (and in federal court, the judge must conduct the sentencing). Courts have struggled with whether facts can be the basis for an enhanced sentence when the defendant did not admit to them (like with *Alford* pleas).¹²⁵ When a plea bargain is not a confession, the sentence cannot as easily reflect admitted conduct by the defendant. Instead, sentencing must be conducted based on other evidence in the record, such as the police reports and the presentence report. At sentencing, the defendant also has a great incentive to speak about the crime and provide the court with mitigating information. Because sentencing may be more fact-intensive, perhaps it makes sense to conduct a more factually intensive plea hearing at the outset, rather than postpone the more robust hearing for sentencing.

Prior convictions may also be used at sentencing; the U.S. Sentencing Guidelines¹²⁶ centrally depend on prior criminal history to calculate sentences.¹²⁷ Further, whether the defendant made admissions is also highly relevant at sentencing; the Guidelines demand additional clarity in that context but provide that a downward departure may be warranted “[i]f the defendant *clearly* demonstrates acceptance of responsibility for his offense.”¹²⁸ By placing a premium

125. See Anne D. Gooch, Note, *Admitting Guilt by Professing Innocence: When Sentence Enhancements Based on Alford Pleas Are Unconstitutional*, 63 VAND. L. REV. 1755, 1790 (2010) (“Any conduct for which a prosecutor plans to seek an enhancement must not only be in the record, but also must be an element that the defendant’s *Alford* plea necessarily established. In other words, it has to be necessary to the conviction.”); see also *United States v. Martinez*, 30 F. App’x 900, 905 (10th Cir. 2002); *United States v. Mackins*, 218 F.3d 263, 268 (3d Cir. 2000).

126. U.S. SENTENCING GUIDELINES MANUAL (U.S. SENTENCING COMM’N 2014), <http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/GLMFull.pdf> [<https://perma.cc/9LMB-GJDF>].

127. See *Almendarez-Torres v. United States*, 523 U.S. 224, 243-44 (1998).

128. U.S. SENTENCING GUIDELINES MANUAL, *supra* note 126, § 3E1.1(a) (emphasis added).

on acceptance of responsibility in order to obtain parole, our system also demands detailed and well-supported confessions even further down the line.¹²⁹

One reason courts have shied away from preclusion following guilty pleas, apart from the basic due process concerns, is that “[t]he prospect of being collaterally estopped at some future date may discourage criminal defendants from settling criminal charges by pleading guilty.”¹³⁰ Obviously, “Rule 11 safeguards are not tantamount to the full panoply of protections afforded by a jury trial.”¹³¹ The Tenth Circuit has noted, “[w]hile we do not question the adequacy of the ‘factual basis’ requirement in the context of accepting a guilty plea, it is a lower standard than the ‘beyond a reasonable doubt’ standard required to satisfy the due process requirements of a criminal trial.”¹³²

B. Rethinking Collateral Consequences of Pleas

The bare factual support of most guilty pleas means that collateral consequences may not always be so easily imposed, should those collateral consequences require some careful assessment of what the criminal actually did. The Supreme Court has departed from typical rules of deference and finality and adopted a modified categorical approach in the deportation context. The Court’s approach permits civil immigration authorities to “look to the facts and circumstances underlying an offender’s conviction” in order to decide if, despite the ineligible crime of conviction, the person might nevertheless be deportable.¹³³ The Court has explained that if a guilty plea is at issue, it can be resolved by examining the plea agreement, plea colloquy, or “some comparable judicial record” of “the factual basis for the plea.”¹³⁴ Why can this be done? After all, “a deportation proceeding is a civil proceeding in which the Government

129. See generally Daniel S. Medwed, *The Innocent Prisoner’s Dilemma: Consequences of Failing to Admit Guilt at Parole Hearings*, 93 IOWA L. REV. 491 (2008).

130. *United States v. Gallardo-Mendez*, 150 F.3d 1240, 1243 (10th Cir. 1998) (citing *Kennelly*, *supra* note 109, at 1421-22).

131. *Id.* at 1245.

132. *Id.*

133. *Nijhawan v. Holder*, 557 U.S. 29, 34 (2009); see also *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010).

134. *Shepard v. United States*, 544 U.S. 13, 26 (2005).

does not have to prove its claim “beyond a reasonable doubt.”¹³⁵ In contrast, courts have been very clear that the guilty plea itself does not resolve through issue preclusion the question of, for example, the person’s status as a noncitizen.¹³⁶

Those cases raise the broader question of whether collateral consequences should always attach to felony convictions when so much may be negotiated, so little attention may be paid to the factual basis, and the judgment may not be a good proxy for the seriousness of the actual conduct. Still greater concerns arise as to misdemeanor convictions, for which the process provided may be quite negligible. The collateral consequences may be (and should be) an important part of the calculus when deciding whether to plead guilty. Demanding more detailed admissions might still permit more finely-tuned collateral consequences and fewer collateral consequences that apply in a blanket fashion to all felony convictions, or broad categories of felony convictions.

These changes might encourage a rethinking of convictions themselves as a status. When civil agencies like immigration authorities seek to look for facts “behind” the conviction, or executives seek to impose “mercy” based on facts outside the record, they are potentially treating the status of convict as quite over- and underinclusive. Failing to look behind the status and bluntly imposing strict collateral consequences on broad categories of prior convictions can impose still greater unjustified costs.

To be sure, civil enforcement agencies such as immigration authorities can sometimes use discretion to decide whether to attach a collateral consequence for nonmandatory consequences. Immigration agencies may use discretion to decide whether to seek deportation of individuals who have committed deportation-eligible but not deportation-mandatory offenses, and they may seek to consider a range of factors aside from the nature of the prior convictions. Developing more facts as part of the record at the guilt

135. *Nijhawan*, 557 U.S. at 42.

136. See Michelle S. Simon, *Offensive Issue Preclusion in the Criminal Context: Two Steps Forward, One Step Back*, 34 U. MEM. L. REV. 753, 756-57 n.15 (2004) (citing federal cases); see, e.g., *Gallardo-Mendez*, 150 F.3d at 1243; *United States v. Pelullo*, 14 F.3d 881, 897 (3d Cir. 1994) (refusing to allow offensive issue preclusion); *United States v. Harnage*, 976 F.2d 633, 636 (11th Cir. 1992). Earlier cases predating the *Second Restatement* sometimes came out the other way. See, e.g., *Hernandez-Uribe v. United States*, 515 F.2d 20, 22 (8th Cir. 1975); *Pena-Cabanillas v. United States*, 394 F.2d 785, 788 (9th Cir. 1968).

phase may further aid in such considerations earlier on in the process, just as developing a more detailed presentence report may aid in sentencing. More finely grained and individualized collateral consequences could make our system of punishment fairer, but such an effort might be hard to administer absent more information generated during plea bargaining.

Nor are fact-intensive plea bargains impossible to secure. For example, they are routinely secured in federal corporate prosecutions, in which detailed statements of facts are often appended to both plea agreements and deferred nonprosecution agreements with corporations.¹³⁷ Federal prosecutors, well aware that corporations may face civil suits relying on the conduct in question, nevertheless demand that corporations face the potentially preclusive effects of those admissions (although their preclusive effect may be in doubt, given the nonlitigation of the statements, and for reasons described here).¹³⁸ Since corporations cannot serve jail time, civil liability may add to the deterrent effect of the punishment imposed. Prosecutors therefore hold corporations to those statements in the sense that they forbid companies from publicly disavowing any of the admissions in those statements of facts, lest the company breach the agreement and face more severe consequences.¹³⁹ The goal seems to be to create a detailed public record of the wrongdoing at a corporation that might otherwise not come to light absent a criminal trial. Large-scale corporate cases may be well worth that investment, and producing the factual record in writing, in a public document, and largely outside the plea hearing process (although corporate plea agreements are also commonly quite detailed¹⁴⁰) does not impose substantial costs.

Similar methods could be used in other serious criminal cases. Given the costs of overincarceration, conducting more fact-finding

137. See *supra* text accompanying notes 41-42.

138. For a description of the practice, see BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 49-80 (2014), and Brandon L. Garrett, *Corporate Confessions*, 30 CARDOZO L. REV. 917, 918-21 (2008).

139. See Garrett, *supra* note 138, at 921-26.

140. An example is the Siemens plea, described in detail in GARRETT, *supra* note 138, at 147-76. Though the plea hearing was short, prosecutors submitted a thirty-nine page statement of facts accompanying the plea. See Plea Agreement, United States v. Siemens Aktiengesellschaft, No. 1:08-cr-00367-RJL (D.D.C. Dec. 15, 2008), http://lib.law.virginia.edu/Garrett/plea_agreements/pdf/siemens.pdf [<https://perma.cc/JL3C-VY4D>].

during plea bargaining, particularly in more serious cases, could be well worth the investment. Doing so would not turn plea bargaining into an inquisitorial process, and would not necessarily demand more of a detailed “confession,” but it could mean that judges would more carefully ensure a factual basis for a plea. Pushing that process from the presentence report backward to the plea itself could improve accuracy in the most serious cases.

CONCLUSION

Professor John Langbein famously compared plea bargaining to torture, and argued that proof beyond a reasonable doubt cannot exist in a summary plea-bargaining process.¹⁴¹ That being the case, could a less summary process better develop a factual basis for a conviction? There would be costs; the Supreme Court has long emphasized, as it did in *Santobello v. New York*, that “[i]f every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.”¹⁴² Moreover, the relevant actors’ goal may not be accurate individual case adjudication, as Professor Issa Kohler-Hausmann has developed in the context of misdemeanor dockets, but rather other supervisory goals.¹⁴³

If the plea process were enhanced, it might then place even more weight than is deserved on the notion that a “confession” can occur in the courtroom. Perhaps placing less weight on the notion that a plea bargain should involve a confession or admission should mean instead that we should not be so worried about defense assertions of innocence accompanying guilty pleas, as Professor Josh Bowers

141. John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 15 (1978).

142. 404 U.S. 257, 260 (1971).

143. See Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 686 (2014).

has argued.¹⁴⁴ Such a shift may be all the more appropriate if all guilty pleas are, in a way, like *nolo contendere* and *Alford* pleas.

Prosecutors can produce detailed statements of facts and admissions, as is routine in some corporate prosecutions.¹⁴⁵ Doing so may add more legitimacy to the process, adding genuine factual support to the “horse trading” that dominates the plea bargaining practice.¹⁴⁶ To be sure, “the taking of a guilty plea is not the same as an adjudication on the merits after full trial.”¹⁴⁷ Nevertheless, far more rigorous standards for assuring a sound factual basis for a guilty plea would not necessarily impose undue costs, to the extent that the same information may be important at sentencing and upon probation.

A guilty plea is final because it is legal, not because it is a confession, or even necessarily a particularly accurate or complete admission. Without establishing some kind of an inquisitorial process, a plea could nevertheless involve far more detailed procedures for eliciting and supporting a defendant’s admissions. Short of a confession, the factual basis requirement could be elevated, perhaps under the Due Process Clause or as a matter of sound policy, to a requirement of form but also of real substance. Doing so would raise the cost of plea bargaining but permit more careful calibration of punishment and collateral consequences.

The notion that those who plead guilty should be cut off from appellate or postconviction claims, including claims of innocence, is deeply troubling, particularly to the extent that it relies on some

144. Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1176 n.294 (2008) (“[A] ludicrous hours-long lawyer-client face-off where the partner refused to permit the client to plead guilty unless the client would stop privately protesting innocence and admit to having done ‘something wrong.’”); see also STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION § 5.3 (AM. BAR ASS’N 1971) (“If the accused discloses to the lawyer facts which negate guilt and the lawyer’s investigation does not reveal a conflict with the facts disclosed but the accused persists in entering a plea of guilty, the lawyer may not properly participate in presenting a guilty plea, without disclosure to the court.”).

145. See *supra* notes 137-40 and accompanying text.

146. See *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (“To a large extent ... horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is.” (alteration in original) (quoting Scott & Stuntz, *supra* note 21, at 1912)). See generally Gregory M. Gilchrist, *Plea Bargains, Convictions and Legitimacy*, 48 AM. CRIM. L. REV. 143 (2011).

147. *Ohio v. Johnson*, 467 U.S. 493, 500 n.9 (1984).

notion of a confession as a rationale. And collateral consequences should not typically attach to entire categories of convicts, uninformed by the factual circumstances or factual support. Whether refinements and enhancements to the plea-bargaining process are introduced more broadly, one myth can be dispelled once and for all: a guilty plea is not and should not be regarded as a type of confession.