

PLEA BARGAINING AND THE SUBSTANTIVE AND
PROCEDURAL GOALS OF CRIMINAL JUSTICE: FROM
RETRIBUTION AND ADVERSARIALISM TO PREVENTIVE
JUSTICE AND HYBRID-INQUISITORIALISM

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ABSTRACT

Plea bargaining and guilty pleas are intrinsically incompatible with the most commonly-accepted substantive and procedural premises of American criminal justice: Plea bargaining routinely results in punishment disproportionate to desert, and guilty pleas are an insult to procedural due process. This Article argues that the only way to align plea bargaining with our criminal justice premises is to change those premises. It imagines a system in which retribution is no longer the lodestar of punishment, and in which party-control of the process is no longer the desideratum of adjudication. If, instead, plea bargaining were seen as a mechanism for implementing a sentencing regime focused primarily on individual crime prevention rather than retribution—as in the salad days of indeterminate sentencing—and if it were filtered through a system that is inquisitorial (that is, judicially-monitored) rather than run by the adversaries, it would have a greater chance of evolving into a procedurally coherent mechanism for achieving substantively accurate results.

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INTRODUCTION

Plea bargaining and guilty pleas are intrinsically incompatible with the most commonly-accepted premises of American criminal justice. The practice of negotiating an admission of guilt in exchange for a lowered charge or sentence cannot be reconciled with either a retributively-based criminal law or an open, confrontational procedure. It inevitably results in sentences or the threat of sentences that are disproportionate to desert, using a process that ignores the panoply of constitutional rights that are viewed as the linchpin of American justice.¹

In light of this country's high crime rates and the expense of its trials, plea bargaining may be a necessary institution.² But if so, it would ideally function in a manner that is as congruent as possible with the criminal justice system's goals. Unfortunately, restructuring plea bargaining so that it better fits the retributive and adversarial tenets of American criminal justice is impossible. Defendants will not agree to a plea offer unless they can be assured the resulting sentence will be less harsh than what they would receive after conviction at trial, a dynamic that seriously undermines the retributive notion that there is a single "just" punishment for every offender; rather, there are at least two, often wildly disparate, possible punishments in plea-bargained cases. And prosecutors will not offer a plea that does not include, as a condition, that the defendant waive virtually all adjudicatory rights and agree to a verdict delivered at a pro forma hearing that is a far cry from the classic adversarial trial.³ Plea bargaining as practiced today encourages the parties to adopt positions that are antithetical to the most important goals of the system.

This Article argues that the only way to align plea bargaining with the substantive and procedural premises of American criminal justice is to change those premises. It imagines a system in which

1. See *infra* Part I.B.

2. See Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), <http://www.nybooks.com/articles/archives/2014/nov/20/why-innocent-people-plead-guilty/> [<https://perma.cc/7XDL-YF5N>] (explaining how plea bargaining offers an over-burdened criminal justice system a "way out").

3. See *infra* notes 41-46 and accompanying text.

retribution is no longer the lodestar of criminal punishment, and in which party control of the process is no longer the desideratum of adjudication. If, instead, plea bargaining were seen as a mechanism for implementing a sentencing regime focused primarily on individual crime prevention rather than retribution—as in the salad days of indeterminate sentencing—and if it were filtered through a system that is inquisitorial (that is, judicially-monitored) rather than run by the adversaries, it would have a much greater chance of evolving into a procedurally coherent mechanism for achieving substantively accurate results. Plea bargaining would become disposition bargaining, in which the defendant would agree to participate in a structured risk management program in exchange for a suspended sentence, a specific sentence length, more time spent in community alternatives to prison, or certain prison conditions. At the same time, all defendants—not just those who refuse to plea bargain—would go to trial, because an inquisitorial system does not permit guilty pleas. While such a system would require the prosecution to prove its case to a judge with respect to both guilt and punishment, it could still promote efficiency through dispositional bargains that encourage defendants to admit their criminal conduct and to give up their right to a jury

Implementing this regime would require a reorientation of the criminal justice system. But, as a substantive matter, this reoriented system would not be significantly different from what now occurs in this country through diversion programs and specialized fora, such as drugs courts and, as a procedural matter, it would be very similar to the process found in several European countries. Part I explains why plea bargaining does not fit well with the current system, either substantively or procedurally. Part II elaborates how plea bargaining would work in a prevention-oriented, inquisitorial regime, using examples from both the United States and Europe. Finally, Part III responds to some of the theoretical and practical objections to this approach.

I. PLEA BARGAINING TODAY

As Justice Kennedy stated in *Lafler v. Cooper*, “criminal justice today is for the most part a system of pleas, not a system of trials.”⁴ Whether excusable or not, that development is understandable. The huge increase in criminal cases since the 1960s,⁵ combined with the expense, in both time and money, of full-blown jury trials, has made plea bargaining the primary engine of American criminal justice,⁶ the mechanism for resolving over 95 percent of all criminal cases.⁷ Unfortunately, that engine pushes the system down a different track than the one our preeminent substantive and procedural traditions would seem to dictate.

A. *Plea Bargaining and Desert*

The substantive goals of the American criminal justice system are multifold: retribution, deterrence, incapacitation, and rehabilitation are the usual objectives given. But for the past forty years or so, the predominant goal has been retribution.⁸ Deterrence and other forms of prevention are important, but legislators, either following or leading the public, have made giving offenders what they deserve their top punishment priority,⁹ and many scholars have jumped on the

4. 132 S. Ct. 1376, 1388 (2012).

5. In 1960, the FBI reported 2,019,600 index crimes; by 1972, the number was 5,891,900. FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 1972: UNIFORM CRIME REPORTS 61 tbl.2 (1973).

6. Writing over thirty years ago when trials were simpler than they are now, Albert Alschuler stated: “[T]he American jury trial now has become so complex that our society usually refuses to provide it. Reluctant to reconsider our expensive trial procedures, we press most defendants to forgo even the more expeditious form of [bench] trial that defendants once were freely afforded as a matter of right.” Albert W. Alschuler, *Implementing the Criminal Defendant’s Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 971-72 (1983).

7. Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1138 (2011) (“[T]oday, 95 percent of criminal convictions result from guilty pleas and only 5 percent result from trials. Plea bargaining is no longer a negligible exception to the norm of trials; it is the norm.”) (footnote omitted).

8. See Sara Steen & Rachel Bandy, *When the Policy Becomes the Problem: Criminal Justice in the New Millennium*, 9 PUNISHMENT & SOC’Y 5, 6 (2007).

9. See *id.* at 5 (“Over the past three decades, legislators have created a conversation [about punishment] in which the inclusion of principles other than retribution and revenge

retributive bandwagon.¹⁰ Some have even argued that blameworthiness, as determined by the general population, should usually be the only punishment consideration, on the assumption that crime prevention goals can often be achieved through sentences based on desert.¹¹

Unfortunately for this point of view, plea bargaining regularly results in disproportionate punishments.¹² Plea bargaining creates a fundamental problem for retributivism because, for bargaining to work, there must be a significant divergence between the sentence that results from a plea and the sentence that results from trial.¹³ Perhaps the sentence proffered by the bargaining prosecutor is retributively appropriate, perhaps the sentence that can be imposed at trial is, or perhaps neither is. The important point is that, at best, only one of these sentences can reflect a defendant's true desert. While most retributivists are willing to contemplate a sentencing range for a given crime, those sentencing variations are meant to recognize that different offenders charged with the same crime might warrant different punishments, not that the *same* offender can receive divergent sentences.¹⁴

is virtually impossible."); *see also* Barbara S. Barrett, *Sentencing Guidelines: Recommendations for Sentencing Reform*, 57 MO. L. REV. 1077, 1079-80 (1992) (discussing determinate sentencing as an example of the "move to retribution as the dominant sentencing goal" since the 1960s).

10. *See* Chad Flanders, *Retribution and Reform*, 70 MD. L. REV. 87, 119-20 (2010) (discussing the "retributivist revival" among scholars); Michael Tonry, *Introduction: Thinking about Punishment*, in *WHY PUNISH? HOW MUCH? A READER ON PUNISHMENT* 3, 6 (Michael Tonry ed., 2011) ("By 1980 [m]ost writing on punishment philosophy and theory had a pronounced retributive slant.").

11. *See* Paul H. Robinson, *The Role of Moral Philosophers in the Competition Between Deontological and Empirical Desert*, 48 WM. & MARY L. REV. 1831, 1836 (2007) ("[S]trong arguments suggest greater utility in a distribution based on shared intuitions of justice than in a distribution based upon optimizing deterrence, rehabilitation, or incapacitation.").

12. *See* H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63, 73 (2011) (discussing the reasons that plea bargains lead to disproportionate punishments).

13. *See* David Brereton & Jonathan D. Casper, *Does It Pay to Plead Guilty? Differential Sentencing and the Functioning of Criminal Courts*, 16 LAW & SOC'Y REV. 45, 45 (1981) ("It is this sentence differential (whether conceived of as a reward to guilty pleaders or as a punishment of those who waste the court's time by 'needless' trials) which has traditionally been seen as the engine driving the plea-bargaining assembly line.").

14. *See* Michael S. Gelacak et al., *Departures Under the Federal Sentencing Guidelines: An Empirical and Jurisprudential Analysis*, 81 MINN. L. REV. 299, 319-20 (1996) ("[T]he twenty-five percent spread in the Guidelines sentencing range provides courts with enough

To facilitate bargaining, some retributivists might be willing to countenance a small differential between the plea and trial sentence. But in practice that option is rarely available, apparently because a greater differential is needed to encourage guilty pleas.¹⁵ It is well documented that the trial penalty can be three to four times the plea bargain deal (in *Lafler*, for instance, the plea offer/trial differential was more than 350 percent¹⁶), and it rarely falls below a 15 percent increase.¹⁷ Even under the federal sentencing guidelines—a regime that requires prosecutors to adhere to a narrow retributive range for a particular crime—the formal discount for a guilty plea is substantial (25 to 35 percent), and presumably well beyond what even a flexible retributivist would permit.¹⁸

As a result, bargaining practices routinely make a joke out of the conceit that our system is founded on desert. Take the most famous case in this regard, *Bordenkircher v. Hayes*.¹⁹ There, the prosecution told Paul Hayes, charged with his third offense (a forgery), that if he did not plead guilty and accept a five-year sentence, then he faced trial under a three-strikes statute that required life in prison upon conviction; Hayes refused the deal, was convicted, and was sentenced to life.²⁰ Most would agree that the life sentence was

flexibility to individualize sentences for offenders whose criminal conduct and criminal history are similar.”).

15. See Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1271 (2008) (concluding from empirical analysis that, “[t]o achieve a sufficiently high guilty-plea rate, the discount might have to be set much higher than 33%”).

16. See *Lafler v. Cooper*, 132 S. Ct. 1376, 1383 (2012). *Lafler* was charged with assault with intent to kill and three other offenses. *Id.* The prosecutor offered to dismiss two of the charges and recommend a sentence of 51 to 85 months to the judge; when *Lafler* refused the deal, he was tried on all counts, convicted, and sentenced to 185 to 360 months. *Id.*; see also, Andrew Chongseh Kim, *Underestimating the Trial Penalty: An Empirical Analysis of the Federal Trial Penalty and Critique of the Abrams Study*, 84 MISS. L.J. 1195, 1199-200 (2015) (finding that the federal trial penalty averages 64 percent).

17. See, e.g., Nancy J. King et al., *When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States*, 105 COLUM. L. REV. 959, 992 (2005) (finding increases in sentences for those who go to trial ranging “from 13% to 461% in Washington, from 58% to 349% in Maryland, and from 23% to 95% in Pennsylvania”).

18. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2488-89 (2004). Bibas notes that informal discounts are often far greater, especially in connection with charge bargaining. *Id.* at 2536.

19. 434 U.S. 357 (1978).

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

disproportionate to Hayes's crimes; indeed, one can make a plausible argument that even the five-year sentence offered by the prosecution was disproportionate, especially if the focus is solely on the forgery. But the important point is not that the legislature may have ignored retributive ideals in authorizing these sentences. It is that, rather than pursue the just disposition, whatever it may be, the institution of plea bargaining requires prosecutors to be willing to seek two entirely different sentences, at least one of which will be disproportionate to the defendant's culpability.

Usually, of course, defendants like Hayes take the deal, sometimes because it provides more certainty, but most often because it is simply too good to turn down. As Federal District Court Judge Jed Rakoff recently noted, "in 2012, the average sentence for federal narcotics defendants who entered into any kind of plea bargain was five years and four months, while the average sentence for defendants who went to trial was sixteen years."²¹ Significant differentials also occur in "substantial assistance" cases. For instance, Gordon Shuster was a big-time drug manufacturer and dealer, charged with multiple drug offenses.²² But his cooperation with the authorities in helping to nab other, lesser players in his drug empire allowed him to avoid incarceration completely.²³

From a purely retributive perspective, the practice of reducing a sentence or charge in exchange for a guilty plea or information is unjustifiable. The mere fact that the defendant is willing to plead guilty has little or no bearing on an offender's desert. Even if one were to accept the disputed notion that remorse is relevant to desert,²⁴ and the even more questionable assumption that a guilty plea signals genuine remorse,²⁵ the mitigating impact of the agreement

21. Rakoff, *supra* note 2.

22. See *United States v. Mezzanatto*, 513 U.S. 196, 197-98 (1995).

23. See Christopher Slobogin, *The Story of Rule 410 and United States v. Mezzanatto: Using Plea Statements at Trial*, in EVIDENCE STORIES 103, 124 (Richard Lempert ed., 2006); see also Ian Weinstein, *Regulating the Market for Snitches*, 47 BUFF. L. REV. 563, 608 (1999) ("The average difference between cooperation and non-cooperation sentences in narcotics trafficking cases is more than five years and as the sentences grow, so do the reductions.").

24. See Dean J. Spader, *Megatrends in Criminal Justice Theory*, 13 AM. J. CRIM. L. 157, 168 (1986) ("Factors dealing with the present, such as the defendant's ... repentance and desire to make restitution ... are not truly compatible with pure desert sentencing.").

25. Even the American Bar Association recognizes as much. See STANDARDS FOR CRIMINAL JUSTICE §§ 14-1.8(a)(i), 14-1.8(a)(iii) (AM. BAR ASS'N 1980) (noting that a guilty plea may not

to plead guilty cannot account for such a huge windfall.²⁶ When, as in Shuster's case, the discount results from providing the government "substantial assistance" in solving other crimes or fingering other criminals, the insult to retributivism is even more flagrant. Willingness to rat on one's colleagues in crime often has nothing to do with an individual's culpability for his or her current charge, and, as in Shuster's case, may even be inversely related.²⁷ Yet a significant number of plea deals are based on cooperation.²⁸

One might try to salvage the situation, at least outside substantial assistance cases, by positing that the reduced charges or sentences that occur in plea bargained cases reflect true desert, while the initial charge is merely a negotiating ploy.²⁹ But if that were true, in the 5 percent or so of the cases in which defendants reject the plea and are convicted, the resulting sentence would, by definition, be disproportionate. Furthermore, if the prosecutor's offer reflects true desert, defendants have a good argument that they should receive an even better deal. After all, by pleading guilty and obviating trial they are giving the prosecutor something of value; in return, they should receive punishment that is more lenient than

indicate true repentance).

26. See Daniel Givelber, *Punishing Protestations of Innocence: Denying Responsibility and Its Consequences*, 37 AM. CRIM. L. REV. 1363, 1382 (2000) ("The practice of differential sentencing makes far more sense as punishment for anti-social behavior [going to trial] than it does as either a reward to those willing to forgo a right or as a legitimate penal response to the defendant's character.").

27. See Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 211-12 (1993) (discussing the "cooperation paradox" created by sentencing departures for substantial assistance in cases in which "[t]he highly culpable offender may be the best placed to negotiate a big sentencing break"). As Schulhofer notes, "Minor players, peripherally involved and with little knowledge or responsibility, have little to offer and thus can wind up with far more severe sentences than the boss." *Id.* at 212.

28. See Rajan S. Trehan, *An "Unfortunate Bit of Legal Jargon": Prosecutorial Vouching Applied to Cooperating Witnesses*, 114 COLUM. L. REV. 997, 998 (2014) ("In 2012, approximately twelve percent of all defendants sentenced in the federal system cooperated with the government, and some likely assisted in multiple matters."). At the same time, defendants who refuse to cooperate with the prosecution may be punished disproportionately. See Aaron M. Clemens, *Removing the Market for Lying Snitches: Reforms to Prevent Unjust Convictions*, 23 QLR 151, 179-80 (2004) (describing cases in which defendants who refused to cooperate received extra-long sentences because of their "arrogant" refusal to help prosecute others).

29. See Gerard E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off?*, 55 STAN. L. REV. 1399, 1401-02 (2003) ("[T]here is no reason to assume that offenders who receive 'plea bargained' dispositions are receiving any lower a sentence or charge of conviction than the system as a whole regards as appropriate for their case.").

they deserve. In practice, plea bargaining often works in that fashion. A negotiated sentence will be significantly lower than desert would dictate, or at least lower than what the public thinks offenders deserve,³⁰ simply because efficiency becomes the preeminent concern (which helps explain the hundreds of thousands of non-prosecutions on low-level charges).³¹

However, it should also be recognized that the negotiated sentence or charge could also be much *higher* than desert dictates (as might be the case with the five-year sentence offered in *Hayes* and many of the drug cases noted by Judge Rakoff).³² As William Stuntz has argued, prosecutors often push legislators to enact extremely harsh sentences and easier-to-prove crimes to provide leverage during bargaining.³³ That means that even bargained-for punishment can be well above the optimum desert threshold.

The best attempt to reconcile retributivism with plea bargaining comes from Michael Cahill.³⁴ Cahill recognizes that under an “absolutist” retributive model in which every offender must receive his or her just desert, plea bargaining, witness immunity, downward departures for substantial assistance, and any other failure to impose deserved punishment would be “categorically” banned.³⁵ However, Cahill claims that under what he calls “consequentialist

30. See Roland Acevedo, Note, *Is a Ban on Plea Bargaining an Ethical Abuse of Discretion? A Bronx County, New York Case Study*, 64 *FORDHAM L. REV.* 987, 992 (1995) (“A large portion of the public disapproves of plea bargaining because it perceives the process as being too lenient on defendants.”).

31. See Wayne A. Logan, *Policing Identity*, 92 *B.U. L. REV.* 1561, 1589 (2012) (“Today, large percentages of the many millions of arrests occurring annually nationwide for felonies and misdemeanors alike do not result in prosecution, much less conviction.”).

32. See Caldwell, *supra* note 12, at 73 (“[N]egotiations are fundamentally skewed in ways that may lead ... to guilty defendants serving sentences disproportionate to their crimes.”); see also Rakoff, *supra* note 2 (discussing the inordinate power prosecutors have to structure plea deals).

33. WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 260-65 (2011) (describing how “criminal liability rules grew broader, the number of overlapping criminal offenses mushroomed, and the definition of crimes grew more specific” (and thus easier to prove), in part so that legislators could look tough on crime and in part because “broader and more specific substantive law was a means of inducing guilty pleas”); see also *United States v. Kupa*, 976 F. Supp. 2d 417, 420 (E.D.N.Y. 2013) (“To coerce guilty pleas, and sometimes to coerce cooperation as well, prosecutors routinely threaten ultra-harsh, enhanced mandatory sentences that *no one*—not even the prosecutors themselves—thinks are appropriate.”).

34. See Michael T. Cahill, *Retributive Justice in the Real World*, 85 *WASH. U. L. REV.* 815 (2007).

35. See *id.* at 854.

retributivism,” prosecutors could “forgo punishment (or accept reduced punishment) for some offenders, if doing so would enhance the total measure of desert-based punishment” among all offenders.³⁶ For example, prosecutors could reduce sentences below the proper deserved disposition if that reduction freed up resources for prosecuting offenders who would otherwise not be prosecuted, or if it provided evidence (as in substantial assistance cases) that allowed conviction of an otherwise unconvictable offender.³⁷

Consequential retributivism may make sense on a conceptual level. To work, however, it requires figuring out how many “desert-units” are lost in connection with a particular reduction for a particular crime. For instance, if the goal is to convict a person charged with armed robbery who insists on going to trial, a consequential retributivist needs to determine how much desert can be sacrificed through bargaining in other cases in an effort to free up the resources necessary to proceed with the prosecution. To get those resources is it permissible, for example, to extract a guilty plea from a murderer by reducing his deserved sentence by 50 percent, or from six burglars by reducing their deserved sentences by 30 percent? There is no discernible way of answering these questions. If, instead, convicting someone through another’s substantial assistance is the goal, imponderables again arise. For instance, to convict a drug kingpin with a lieutenant’s testimony, how far may prosecutors reduce the lieutenant’s just sentence? As Cahill notes, the type of calculus required by these questions is very difficult.³⁸ Additionally, we have to assume that prosecutors would recognize and reliably engage in the type of tradeoffs just described. And, of course, we must also endorse the significant predicate assumption that there is agreement on the deserved amount of punishment in the first place.³⁹

36. *Id.* at 835.

37. *See id.*

38. *Id.* at 867 (“The very notion of calculating the value of desert along some metric that would enable its comparison to other goods, like crime reduction or cost savings, might seem either odd or patently impossible.”).

39. *See* Chad Flanders, *Can Retributivism Be Saved?*, 2014 BYU L. REV. 309, 312 (“The fact that retributivism places so much emphasis on proportionality (or fairness) in punishment, but cannot offer much illumination about what proportionality is—or how to achieve it—is a key insight that something has gone wrong with retributive theory, even on its own terms.”).

More importantly, even if consequential retributivism can be made to work, it is an outright admission that desert is at best only an important consideration that can be sacrificed in individual cases. If real-world practice—in which almost *all* criminal cases are resolved through punishment reductions that presumptively depart from desert—is any indication, that sacrifice is routine. Furthermore, if consequential retributivism is truly consequential, it justifies prosecutors in pursuing charges like those in *Hayes* that punish far too *harshly*.⁴⁰ After all, such tactics will scare defendants into pleading guilty and thus conserve resources for other cases.

B. Plea Bargaining and Due Process

Plea bargaining also makes a mockery of our procedural traditions. For all practical purposes, prosecutors, not judges or juries, control the adjudication process.⁴¹ And because so many criminal cases are resolved through plea, very few defendants ever exercise their rights to remain silent, testify, confront accusers, or be heard by a jury during a public trial. Rather, these rights are merely bargaining chips to be used in negotiations with the prosecutor, and are relinquished on a routine basis.⁴²

Less well-recognized is the fact that, at an alarmingly increasing rate, prosecutors are requiring defendants who want to benefit from a plea to waive rights that are not intrinsically forfeited through a plea.⁴³ For instance, plea agreements often include waivers of the

40. See Cahill, *supra* note 34, at 855 (“[A] sacrifice of desert is allowed in one case if it enables a more-than-offsetting gain in another case.”).

41. See Lucian E. Dervan, *Bargained Justice: Plea Bargaining’s Innocence Problem and the Brady Safety-Valve*, 2012 UTAH L. REV. 51, 61 (“[A] general consensus has evolved within plea bargaining scholarship that plea bargaining became a dominant force as a result of prosecutors gaining increasing power and control in an ever more complex criminal justice system.”).

42. See Daniel C. Richman, *Bargaining About Future Jeopardy*, 49 VAND. L. REV. 1181, 1237 (1996) (“[I]n a criminal justice system in which plea bargaining is the dominant mode of adjudication, the chief significance of a much-vaunted constitutional right may lie in its value as a bargaining chip.”).

43. Susan R. Klein et al., *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73, 76 (2015) (“As we transformed from an adversary process where guilt was determined by trial to an administrative process where guilt and penalties are determined by negotiation, many prosecutors began demanding waiver of all constitutional criminal procedure rights, not just the trial and investigative-related ones

“*Brady* right” (the right to exculpatory evidence), the right to effective assistance of counsel, and the right to appeal.⁴⁴ Prosecutors have also been known to use waivers as a way of avoiding constitutional claims that can establish unfavorable precedent.⁴⁵ And because prosecutors can make pleas so attractive, defense attorneys often give up these constitutional claims; to insist on bringing them might even be unethical, given defense counsel’s obligation to get the best possible deal for their clients.⁴⁶

Remarkably, all of this appears to be constitutional. In *Mezzanatto v. United States*, the Supreme Court permitted waiver of the protection in the Federal Rules of Evidence against trial use of statements made during plea bargaining.⁴⁷ In the course of doing so it stated, “[t]he plea bargaining process necessarily exerts pressure on defendants to plead guilty and to abandon a series of fundamental rights, but we have repeatedly held that the government ‘may encourage a guilty plea by offering substantial benefits in return for the plea.’”⁴⁸

As this statement from *Mezzanatto* suggests, plea waivers—waivers that ensure that constitutional rights are not exercised in over 90 percent of criminal cases—are entirely consistent with

inherent in replacing the trial with the plea.”).

44. *See id.* at 85, 87 (documenting that, of the federal plea agreements studied, roughly 25 percent waived discovery rights and 35 percent waived ineffective counsel claims); *Preliminary Proceedings: Guilty Pleas*, 33 GEO. L.J. ANN. REV. CRIM. PROC. 363, 386-88 n.1338 (2004) (listing cases holding that pleading defendants may waive right to appeal). *But see* Bloomberg BNA, *Plea Bargains: Justice Tells Prosecutors to Stop Requiring Ineffectiveness Waivers as Part of Plea Deals*, 96 CRIM. L. REP. 115 (2014) (reporting new Justice Department policy stating that prosecutors should no longer demand waivers of Sixth Amendment ineffective assistance challenges).

45. Pamela Metzger, *The Case for a Collective Gideon* (forthcoming 2016) (manuscript at 5) (on file with author) (asserting that prosecutors make plea bargains to “avoid the litigation of meritorious claims when they are unwilling to risk establishing a precedent that would damage the government’s institutional interests”).

46. *Id.* (“Defense attorneys must abandon meritorious claims with institutional impact when they are offered a plea bargain that advance[s] their client’s individual interests.”).

47. *See* 513 U.S. 196 (1995); *see also* FED. R. EVID. 410 (prohibiting use at trial of statements made during plea bargaining).

48. *Mezzanatto*, 513 U.S. at 209-10 (quoting *Corbitt v. New Jersey*, 439 U.S. 212, 219 (1978)); *see also* *Peretz v. United States*, 501 U.S. 923, 936 (1991) (“The most basic rights of criminal defendants are ... subject to waiver.”). *Mezzanatto* intimated that rights or evidentiary protections that are crucial to the “reliability of the factfinding process” might not be waivable. *See Mezzanatto*, 513 U.S. at 204-05. Whether the Court would apply that exception to claims that are not plea intrinsic is not clear.

adversarialism as it is practiced in the United States. That is because the key tenet of American adversarialism is that the parties, not the courts, are in charge of producing the information necessary for adjudication.⁴⁹ Although this party-driven process is nowhere required in the Constitution,⁵⁰ it has become so firmly ensconced in the American criminal justice system that defendants are even allowed to plead guilty while maintaining their innocence—so-called *Alford* pleas.⁵¹ Where the parties control the adjudicatory input, waivers that truncate or eliminate the trial process are not only justified, they become an entitlement, regardless of the validity of the state's or the defendant's case.⁵²

As a result, the findings of fact that emerge from plea bargaining are not subject to any meaningful testing. While the arraignment judge must find a factual basis for the plea, this requirement can be satisfied merely by asking the parties in charge of evidence production—the prosecutor and the defense attorney—if such a basis exists.⁵³ And not even that much is required for the facts underlying the sentence.⁵⁴ De facto, criminal verdicts and sentences are simply

49. The Honorable Gerald W. Hardcastle, *Adversarialism and the Family Court: A Family Court Judge's Perspective*, 9 U.C. DAVIS J. JUV. L. & POL'Y 57, 64-65 (2005) (“[T]he adversarial process grants the parties control over the process[,] and the decision-maker, whether a judge or a jury, controls over the decision.”).

50. See Darryl K. Brown, *Judicial Power to Regulate Plea Bargaining*, 57 WM. & MARY L. REV. 1225, 1257-68 (2016) (explaining how the Supreme Court's recent decisions granting prosecutors complete charging discretion run counter to both constitutional language and traditional English practice).

51. See *North Carolina v. Alford*, 400 U.S. 25, 37 (1970) (“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.”).

52. See Nancy Jean King, *Priceless Process: Nonnegotiable Features of Criminal Litigation*, 47 UCLA L. REV. 113, 180 (1999) (“[I]t is almost as if the Constitution is not the supreme law of the land, but merely an expensive option-package that a defendant can purchase if he does not want the models available on the lot for a discount.”).

53. See Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 140 (2004) (noting that at guilty plea hearings, “defendants provide very brief factual statements explaining what they did, which are often written by their lawyers”); Brandon L. Garrett, *Why Plea Bargains Are Not Confessions*, 57 WM. & MARY L. REV. 1415, 1417-18 (2016) (“[P]lea 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 under oath and typically without support from an extensive factual record.”).

54. See *Libretti v. United States*, 516 U.S. 29, 38, 43 (1995) (holding that since Rule 11's factual basis requirement applies only to “plea[s] of guilty,” courts must ascertain only the

arrangements between the parties, with the court and the courtroom process playing a minor role.

Perhaps none of this would be cause for concern if it produced reliable results. But, as already discussed, plea bargaining often results in “inaccurate” punishment of the guilty, at least when measured on the retributive metric.⁵⁵ Of at least equivalent concern is the fact, confirmed through both field and laboratory research, that the combination of uncertain trial outcomes and enticing plea offers leads *innocent* people to plead guilty.⁵⁶ When clearly innocent people are found guilty because the prosecutor is able to offer them a Hobson’s choice, both the procedural and substantive tenets of criminal justice are victims.⁵⁷

II. PLEA BARGAINING REIMAGINED

The system is willing to put up with these flagrant assaults on its substantive and procedural underpinnings because efficiency has become king.⁵⁸ Without plea bargaining the system would likely collapse.⁵⁹ Yet plea bargaining cannot work without desert-

facts underlying the criminal offense, not those relating to punishment, and at most need only obtain “a stipulation of facts” supporting a recommendation).

55. See *supra* Part I.A.

56. See Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant’s Dilemma: An Innovative Empirical Study of Plea Bargaining’s Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1, 34, 36 (2013) (detailing a laboratory study finding that over 50 percent of the “innocent” subjects pleaded guilty and accepted minimal punishment to avoid more aversive treatment); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1313 (2012) (“[I]nnocent misdemeanants routinely plead guilty to get out of jail because they cannot afford bail.”); D. Michael Risinger, *Tragic Consequences of Deadly Dilemmas: A Response to Allen and Laudan*, 40 SETON HALL L. REV. 991, 996 (2010) (estimating an “absolute floor” of 4.5 percent wrongful convictions resulting from guilty pleas in serious felony cases).

57. It has been argued that false pleas are preferable to trials that may not result in acquittals, especially for misdemeanants who are recidivists. See Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1120-22 (2008). But this reasoning cannot justify false pleas for those charged with serious offenses. In any event, false pleas offend retributive justice and result in a bizarre regime that, as Bowers puts it, asks us “to reconceive of false pleas as legal fictions and to require defense lawyers to advise and assist innocent defendants who wish to mouth dishonest on-the-record words of guilt.” *Id.* at 1121.

58. See Mirjan Damaska, *What Is the Point of International Criminal Justice?*, 83 CHI.-KENT L. REV. 329, 340 (2008) (concluding that the only viable justification for plea bargaining is efficiency).

59. See Laurie L. Levenson, *Peeking Behind the Plea Bargaining Process: Missouri v. Frye and Lafler v. Cooper*, 46 LOY. L.A. L. REV. 457, 459-60 (2013) (discussing how plea bargaining

distorting discounts between bargained-for sentences and trial sentences and without some mechanism for truncating adjudication, which under the current system means guilty pleas and the attendant waivers of trial and appellate rights. Plea bargaining's insult to retributivism and to our most treasured constitutional rights is inevitable in a high-prosecution, adversary-driven system like ours.

But the criminal justice system does not have to be focused on retributivism as the linchpin of punishment or on adversary-controlled adjudication as the method of resolving disputes. In other work, I have argued that a system bottomed on "preventive justice," similar to that originally contemplated by indeterminate sentencing policies, is preferable to a punishment regime based primarily on desert.⁶⁰ In a preventive justice regime, the emphasis at sentencing would be on the individual prevention goals of rehabilitation, specific deterrence, and incapacitation. Desert would still play the dominant role in crime definition, but its role at sentencing would be minimal, primarily focused on fixing sentencing maxima.⁶¹ General deterrence would not be an explicit goal but rather a by-product of the preventive dispositions imposed. The focal point of adjudication, once it is established that an individual has committed a crime, would be the individual's risk and ways of managing that risk, ideally aided by actuarial or structured evaluation techniques—often referred to as "risk-needs" assessment.⁶²

In another work, I have also argued for the adoption of an inquisitorial procedure that relies primarily on judicial rather than party-control of the adjudication process.⁶³ In that type of system,

is "a system that is tolerated because, without it, our criminal justice system would be so overwhelmed that it would collapse").

60. Christopher Slobogin, *Prevention as the Primary Goal of Sentencing: The Modern Case for Indeterminate Dispositions in Criminal Cases*, 48 SAN DIEGO L. REV. 1127, 1130 (2011).

61. Christopher Slobogin, *Empirical Desert and Preventive Justice: A Comment*, 17 NEW CRIM. L. REV. 376, 379 (2014) (outlining the role retribution would play in a preventive justice system).

62. For a relatively recent description of risk-needs assessment by its progenitors, see generally JAMES BONTA & D.A. ANDREWS, RISK-NEED-RESPONSIVITY MODEL FOR OFFENDER ASSESSMENT AND REHABILITATION (2007), <http://www.pbpp.pa.gov/Information/Documents/Research/EBP7.pdf> [<https://perma.cc/UDD9-LAH8>].

63. Christopher Slobogin, *Lessons from Inquisitorialism*, 87 S. CAL. L. REV. 699, 699 (2014).

guilty pleas—but not plea bargaining—would be abolished. At the resulting trials, the parties would still be allowed to produce and question witnesses, and juries would still be the default decision maker. But judges would have the power to call their own witnesses, subpoena other evidence, and question all who appear to testify. As occurs in Europe, the judge would both begin the questioning and have the authority to ask questions following those from the attorneys.⁶⁴

While both of these proposals are controversial, both are feasible and can be implemented without violating the Constitution. Part III briefly rehearses support for these two claims. But first, here in Part II, I imagine what plea bargaining would look like in a preventively-oriented, hybrid-inquisitorial regime. At first glance, plea bargaining appears to be a very poor fit with a regime that authorizes sentences that the parties cannot predict and a procedure that does away with guilty pleas. But, in fact, past and current practices in this country suggest plea bargaining and preventive justice can work well together. And practice in Europe, particularly in Germany, suggests that plea bargaining and inquisitorial procedures can have a symbiotic relationship as well.

A. Plea Bargaining and Preventive Justice

A sentencing regime focused on preventive justice could, on the books, look much like the sentencing provisions of the original Model Penal Code (MPC), promulgated by the American Law Institute (ALI) in 1960.⁶⁵ Unlike the narrow, retributively-defined sentence ranges called for under the recently revised MPC sentencing provisions,⁶⁶ the original MPC scheme established wide sentencing ranges for felonies that all began at one year and increased in breadth according to crime severity, with the caveat that even one-year sentences could be reduced in light of the crime and the history and character of the defendant.⁶⁷ The sentence range for

64. *See id.* at 716.

65. *See* MODEL PENAL CODE (1962).

66. *See* MODEL PENAL CODE: SENTENCING § 6.09 (2012).

67. MODEL PENAL CODE § 6.12 (1962) (allowing reductions if sentence is “unduly harsh” in light of “the nature and circumstances of the crime and ... the history and character of the defendant”).

first-degree felonies was one to twenty years; for second-degree felonies, one to ten years; and third-degree felonies, one to five years.⁶⁸ Although the judge imposed the sentence, the parole board determined its ultimate length, on the theory that individual prevention should be the primary goal of sentencing.⁶⁹ As Herbert Wechsler wrote in his 1961 defense of this system:

Even when aided by a competent presentence study and report, the court is poorly equipped at the time of sentence to make solid and decisive judgments on the period required for the process of correction to realize its optimum potentiality or for the risk of further criminality to reach a level where release of the offender appears reasonably safe. The organs of correction, on the other hand, are best equipped to make decisions of this order and to make them later on in time, in light of observation and experience within the institution.⁷⁰

This type of regime was quite popular in the United States in the decades prior to the original MPC's enactment.⁷¹ Enthusiasm for it has since withered, in part because of distrust of parole boards and concerns about the efficacy of rehabilitation—matters that are addressed further in Part III. But perhaps the most important—and certainly the most neglected—explanation of why indeterminate sentencing in its pure form did not find a solid foothold in this country is that it makes plea bargaining very difficult. If the length and nature of sentences are determined by back-end decision makers, then prosecutors have little of substance to offer defendants prior to trial, making plea bargaining hard to sustain.

68. *Id.* § 6.06.

69. *See id.* § 6.10 (authorizing release by parole board before end of maximum sentence); *id.* § 305.9 (providing that prisoners shall be released as soon as they become eligible for parole, unless analysis of their risk, their need for in-prison treatment, or the effect of release or respect for the law and institutional discipline dictates otherwise).

70. Herbert Wechsler, *Sentencing, Correction, and the Model Penal Code*, 109 U. PA. L. REV. 465, 476 (1961).

71. *See* Douglas A. Berman, *Re-Balancing Fitness, Fairness, and Finality for Sentences*, 4 WAKE FOREST J.L. & POL'Y 151, 157 (2014) ("As the rehabilitative ideal grew in prominence throughout the 1900s, trial judges in federal and state systems were afforded nearly unfettered discretion to impose upon criminal defendants just about any prison term selected from within wide statutory ranges, and parole officials exercised similar discretion concerning actual release dates.") (footnote omitted).

In his mammoth study on plea bargaining in the nineteenth and twentieth centuries, George Fisher documented this dynamic.⁷² Based on his examination of practice in Massachusetts, California, Illinois, and New York, Fisher concluded that “[t]he demise of the indeterminate sentence, one of the most promising of the late nineteenth century’s progressive brainchildren, bears the mark of plea bargaining’s malice.”⁷³ Because indeterminate sentencing robs both prosecutors and judges of the power to control sentence lengths, it “would have hobbled the plea-bargaining regime,” and thus was resisted by both groups.⁷⁴

However, Fisher’s study also reveals that some forms of this resistance, in effect, allowed indeterminate sentences to co-exist with plea bargaining. For instance, in states where indeterminate sentence provisions applied only if the defendant went to state prison, prosecutors and defendants agreed to non-prison dispositions, either in less secure institutions or under probationary conditions.⁷⁵ Prosecutors also prevailed upon parole authorities to release pleading defendants when the minimum sentence expired if they met certain conditions, such as behaving in prison or successfully completing treatment.⁷⁶

These adjustments to the system signal a way in which plea bargaining could work within an indeterminate sentencing regime. In those cases involving very high risk offenders, the prosecutor might not be willing to bargain at all. In other cases, however, the prosecutor might offer the defendant probation, a partially suspended sentence, a minimum security setting, or the minimum prison term, contingent upon the defendant admitting criminal conduct, waiving the right to jury, and completing a designated risk management program. Risk management programs might include substance abuse

72. See George Fisher, *Plea Bargaining’s Triumph*, 109 YALE L.J. 857, 860 (2000).

73. *Id.* at 860.

74. *Id.*

75. See *id.* at 1047-49, 1055-56 (describing Fisher’s study of nineteenth- and early twentieth-century practice in Massachusetts’s indeterminate sentencing regime, in which the percentage of state prison sentences decreased as a result of plea bargaining, and a study in California in the early 1970s, during the heyday of indeterminate sentencing in that state, which indicated that “[t]he most important axis along which plea bargaining took place became the distinction between a state-prison term and no state-prison term”).

76. See *id.* at 1054, 1057 (describing practice in Illinois and California in which “some judges and prosecutors appealed to parole authorities to stand by promises made in the course of plea negotiations that the defendant would walk free on a certain date”).

treatment, vocational training, anger management, and a host of other rehabilitation efforts, either within or outside of prison.⁷⁷ If the defendant accepted the offer, and the judge signed off on the agreement (a particularly important aspect of the inquisitorial regime described in more detail below), then the parole board would be bound by the arrangement. If the program was not completed successfully, then the terms of the agreement would establish the consequence: jail time, revocation of probation and imprisonment, more onerous prison conditions, or extension of the prison sentence, with ultimate control of the sentence once again in the hands of the parole board.

Fisher's research indicates that this type of agreement can work because prosecutors are able to make a concrete promise, up-front, despite a sentencing structure featuring a back-end decision maker. Modern practice confirms that observation. The agreements reached in a preventive justice regime would probably not be that different from those obtained today in the run-of-the-mill misdemeanor or lower level felony case.⁷⁸ They would be even closer in form to those that occur on a routine basis in today's drug courts, where either sentencing or prosecution is suspended if the defendant agrees to undergo substance abuse treatment and successfully completes it.⁷⁹

77. For specific risk management programs, see generally WHAT ELSE WORKS?: CREATIVE WORK WITH OFFENDERS (Jo Brayford et al. eds., 2010); James McGuire, *What Works in Correctional Intervention? Evidence and Practical Implications*, in OFFENDER REHABILITATION IN PRACTICE: IMPLEMENTING AND EVALUATING EFFECTIVE PROGRAMS 25 (Gary A. Bernfeld et al. eds., 2001). In general, programs that are therapeutic rather than punitive, aim at high-risk offenders, and take place in the community are the most effective at reducing risk. See Brandon C. Welsh et al., *Promoting Change, Changing Lives: Effective Prevention and Intervention to Reduce Serious Offending*, in FROM JUVENILE DELINQUENCY TO ADULT CRIME: CRIMINAL CAREERS, JUSTICE POLICY, AND PREVENTION 245 (Rolf Loeber & David P. Farrington eds., 2012).

78. Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 464 (2008) ("In misdemeanor and other low-level cases, the defendant is apt to receive a sentence of straight probation or a relatively brief period of closer supervision.").

79. See RYAN S. KING & JILL PASQUARELLA, THE SENTENCING PROJECT, DRUG COURTS: A REVIEW OF THE EVIDENCE 3 (2009), http://www.sentencingproject.org/doc/dp_drugcourts.pdf [<https://perma.cc/S35H-PAXX>] (describing one model of drug court as "deferred prosecution or diversion"—where successful completion of the program avoids prosecution—and a second model as "post-adjudication"—where defendants plead guilty but avoid sentence and perhaps have their conviction expunged if they successfully complete the program). The regime envisioned here is closer to the post-adjudication model, although the plea of guilty would be replaced by a trial. See *infra* Part II.B.

Although this plea-bargaining regime thus has analogues in current practice, it also differs from today's bargaining system in at least two significant ways. First, plea bargaining in a preventive regime can be more easily justified as a theoretical matter. While any divergence between a bargained disposition and a post-trial disposition automatically tramples on the retributive ideal, such a difference is not innately inconsistent with the avowed purpose of punishment in a preventive regime, because individual prevention can plausibly be pursued in so many ways. Specific deterrence, rehabilitation, and incapacitation can be accomplished through imprisonment, alternatives to prison, and various types of rehabilitation programs in and outside of prison walls, over varying periods of time and, depending upon the offender, with varying degrees of success.⁸⁰ Consider again, for instance, the case of Paul Hayes, who before his forgery charges had been convicted of both robbery and detaining a female (a lesser form of rape). One appropriate preventive disposition in a case like his might be the maximum term (presumptively five years under the old MPC, subject to reduction by the parole board) because his recidivism suggests he was at a relatively high risk to reoffend. But, depending on the results of a risk-needs assessment, a prosecutor might also be willing to offer someone like Hayes a shorter prison term, in combination with restitution to the victim of the forgery and participation in an academic or vocational training program.⁸¹

In short, a significant divergence between a disposition offered during bargaining and the disposition that results when there is no bargain does not offend the preventive goal as easily as the retributive one. The difficulty of ascertaining risk and the fact that it is contingent on numerous factors, often seen as bugs of a preventive system, are actually useful features. They allow for experimentation by the parties and flexibility in disposition.⁸²

80. While I have argued that disposition in a preventive regime is subject to a least drastic means analysis and thus generally may not be any more restrictive than is necessary to achieve the government's preventive aim, Slobogin, *supra* note 60, at 1138, this principle is not violated if the defendant refuses a less drastic form of intervention.

81. On the effectiveness of such programs, see generally Doris Layton MacKenzie, *The Effectiveness of Corrections-Based Work and Academic and Vocational Education Programs*, in *THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS* 492, 512 (Joan Petersilia & Kevin R. Reitz eds., 2012).

82. *Cf.* Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and the Emergent*

A second feature of a preventive regime that is obviously different from current practice in many jurisdictions is that bargaining takes place in the shadow of an indeterminate sentencing system in which defendants who do not bargain have their ultimate disposition determined by a parole board. In such a regime, many defendants will be most interested in trading for dispositional certainty and a particular dispositional environment, and only secondarily for a reduction in sentence length. Indeed, the *duration* of an offender's sentence might be roughly the same regardless of whether a bargain occurs;⁸³ in both bargained and non-bargained cases, a risk assessment—by the prosecutor and the parole board, respectively—will play the predominant role.

Because of this possible durational similarity between a bargained and parole board sentence, plea bargaining in a preventive justice regime would be less one-sided. The prosecutor would not be able to threaten draconian post-trial determinate sentences of the type involved in *Hayes* and in Judge Rakoff's drug cases because there would be no such sentences. At most, the prosecutor would only be able to suggest that a failure to accept an offer will expose the defendant to a particular maximum sentence, the full imposition of which will depend on an uncertain parole process.

Under these circumstances, innocent people will be less likely to plead guilty and guilty people will be less likely to accept unduly harsh offers. Further, given the prosecution's relatively reduced leverage, negotiations are likely to be more meaningful than the take-it-or-leave-it phenomenon that characterizes pretrial bargaining today. Of course, such a system would probably also produce fewer plea agreements overall. But if Fisher's findings are correct about how plea bargaining worked 100 years ago, deals will still be common.⁸⁴ While some defendants will be willing to gamble on the parole board, others who are risk averse will want the certainty of

Experimentalist Government, 53 VAND. L. REV. 831, 840 (2000) (describing the advantages of an "experimentalist architecture" of adjudication that changes in response to interactions between government and monitored individuals).

83. According to Fisher, the usual practice under indeterminate sentencing regimes in the early twentieth century was to release prisoners at the completion of the minimum term. See Fisher, *supra* note 72, at 1050.

84. See *id.* at 1053, 1056-57 (summarizing reasons why plea bargaining and indeterminate sentences co-existed).

the plea agreement rather than the uncertainty of the indeterminate sentence, especially if less of the sentence is spent in prison.⁸⁵

Substantial assistance situations like Shuster's should also be handled differently in a preventive regime, although whether they *would* be would depend on judicial willingness to curb prosecutorial enthusiasm for deals in such cases. As it does today, bargaining in a preventive regime might sometimes revolve around the extent to which the defendant gives up co-conspirators. But unlike consequential retributivism, a preventive justice regime that is functioning as it should would not rely on manipulation of criminal defendants to achieve results in other cases. Rather, in such a regime substantial assistance reductions would occur only to the extent that the provision of information about accomplices decreased the *defendant's* threat to society, by helping to eradicate the group criminality that contributed to his or her own criminal conduct. The most incorrigible defendants (like Shuster?⁸⁶) would not have significant bargaining power, while bit players in the criminal enterprise would have more leverage, a result that is a good thing from *both* a public safety and a retributive perspective. The obvious obstacle to this outcome is that prosecutorial need for information—something drug kingpins are more likely to have than their underlings—might subvert these objectives.⁸⁷ If so, it would be up to the judge to prevent skewed deals, which is more likely in the inquisitorial process described below, in which judges are charged with carrying out a meaningful assessment of plea agreements.

In sum, plea bargaining can work in a preventive justice regime, even though a back-end decision maker determines the default sentence relying on future-oriented factors relevant to specific deterrence, rehabilitation, and incapacitative objectives. Bargaining in

85. Further, a reduction in the amount of plea bargaining could enhance efficiency. Darryl K. Brown, *The Perverse Effects of Efficiency in Criminal Process*, 100 VA. L. REV. 183, 186 (2014) ("Plea bargaining ... can perversely increase demand for criminal prosecutions" because it facilitates them) (emphasis omitted).

86. See Slobogin, *supra* note 23, at 124 n.36 (noting that, while he served no prison time after the deal described earlier, *see supra* text accompanying note 23, Shuster was arrested again for manufacture of methamphetamine and received a seventeen-year sentence).

87. *But see* Frank O. Bowman, III, *Departing Is Such Sweet Sorrow: A Year of Judicial Revolt on "Substantial Assistance" Departures Follows a Decade of Prosecutorial Indiscipline*, 29 STETSON L. REV. 7, 48-50 (1999) (disputing the existence of the "cooperation paradox," the aforementioned phenomenon of offering those who commit the most serious crimes significant reductions in sentence for substantial assistance).

the shadow of indeterminacy can induce defendants to admit guilt and waive their right to a jury trial, because it makes attractive those offers that promise a certain or relatively unrestrictive disposition. And in contrast to the impossibility of simultaneously satisfying both the theory-based demands of retributivism and the practical requirements of plea bargaining, dispositions in a preventive regime—whether or not the result of a bargain—can be consistent with the substantive goals of the system. To ensure those goals are met, the pure adversarialism of the current system might be modified as well.

B. Plea Bargaining and Inquisitorialism

Plea bargaining designed to produce a guilty plea is both a natural outgrowth of and deeply inimical to adversarial rights. As described earlier, plea bargaining and guilty pleas are consistent with the adversarial tenet that the parties control evidence production. But their end result is the waiver of trial rights and, increasingly, rights-waivers that are not intrinsic to a guilty plea.

At first glance, plea bargaining might seem inconsistent with inquisitorialism as well. After all, plea bargaining can, in effect, moot the case before it gets to the judge, who is supposed to control the inquiry in an inquisitorial regime. But a more accurate statement about inquisitorialism's interaction with plea bargaining is that it bans guilty pleas.⁸⁸ Inquisitorialism does not prohibit plea bargaining, but rather the American practice of giving dispositive effect to whatever the parties decide about guilt and disposition, in agreements reached in the backrooms of police stations or in prosecutors' offices rather than in open court.⁸⁹

Consider, for instance, the law regulating bargaining in Germany (admittedly, not always followed in practice⁹⁰). Under the relevant

88. Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L.J. 1, 11 (2004) ("The inquisitorial procedural structure ... does not include the concept of the 'guilty plea'; it only includes the concept of 'confession.'").

89. Máximo Langer, *The Rise of Managerial Judging in International Criminal Law*, 53 AM. J. COMP. L. 835, 843 (2005) (noting how, in an inquisitorial system, "[i]f an admission of guilt happens during the pre-trial phase, the case still must go to trial before the judge can make a final determination").

90. For caveats to the description that follows, see *infra* notes 91, 94, 96.

statute, as construed by Germany's Constitutional Court, negotiations between the prosecution and the defense are permitted and even encouraged, but all negotiations must be on the record.⁹¹ Further, whatever the result of the negotiation, both guilt and disposition are ultimately to be determined by the court after trial.⁹² According to the Constitutional Court, the statute "unequivocally rejects the idea that the verdict in a criminal case can be legitimized by the mere consensus of the participants rather than through an independent investigation into the facts of the case."⁹³ No case may be truncated through a guilty plea, nor may it be based on the type of barebones factual basis inquiry that is routinely accepted as sufficient in American courts; "[e]ven a detailed confession delivered in open court does not necessarily suffice."⁹⁴ The notion that a person can plead guilty while maintaining innocence, which makes sense in a system like ours that allows the parties to control disposition, is "incomprehensible" to German judges.⁹⁵ Also of note, bargains are not supposed to include waivers of the right to appeal.⁹⁶ In a truly inquisitorial regime based on judicial discovery of

91. See Thomas Weigend & Jenia Iontcheva Turner, *The Constitutionality of Negotiated Criminal Judgments in Germany*, 15 GERMAN L.J. 81, 91, 104 (2014) (describing subsection (2) of section 257c of the German Code of Criminal Procedure and indicating that "the German Constitutional Court has required that the content and outcome of any negotiations be placed on the record"). The authors also note, however, that practice in Germany often departs from the requirements that negotiations be recorded and that the judge independently assess the evidence. See *id.* at 92-93.

92. See *id.* at 84.

93. *Id.* at 97; see also Erik Luna, *Prosecutor King*, 1 STAN. J. CRIM. L. & POL'Y 48, 75 (2014) ("German prosecutors must wait until the main proceeding in the district court to formalize the defendant's admission of guilt, and any deal must reflect the state of the evidence collected in the case.").

94. Weigend & Turner, *supra* note 91, at 97. However, the practice in non-felony cases is much closer to the party-controlled American practice. See Stephen C. Thaman, *The Penal Order: Prosecutorial Sentencing as a Model for Criminal Justice Reform?*, in *THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE* 156, 157-58 (Erik Luna & Marianne L. Wade eds., 2012).

95. See Weigend & Turner, *supra* note 91, at 103.

96. *Id.* at 104 (noting that the German Court "emphasized ... that appeals waivers not be made part of a negotiated judgment"). Such waivers can still occur, but only after the court has approved the agreement, informs the defendant that any waiver of appeal is non-binding, and obtains from the defendant an affirmative statement that appeal is still waived. REGINA RAUXLOH, *PLEA BARGAINING IN NATIONAL AND INTERNATIONAL LAW* 101-03 (2012) (describing new legislation establishing this requirement but also noting doubt as to whether judges and lawyers will adhere to it).

the truth, waivers of rights that are not plea intrinsic make no sense.

So constructed, an inquisitorial procedure should enhance reliability in at least two ways. First, it would more likely produce a vigorous inquiry into the facts relevant both to guilt and sentence. The hybrid-inquisitorial procedure proposed here is, ironically, more likely than current American practice to ensure that adversarial rights such as the right to confront witnesses are exercised in bargained cases. The prosecution would always have to present its case in court, and the defense would always have the opportunity to challenge it there. Even if the defendant has admitted guilt and the parties have agreed to a disposition based on a set version of the facts, the court has authority to conduct its own inquiry.⁹⁷ Because of this judicial oversight, the inquisitorial procedure is more likely than American practice to produce well-honed punishments.⁹⁸ It is also more likely to expose whether improper agendas—for instance, excessively harsh bargains based on misinformation from the prosecution or inappropriate leniency based on substantial assistance from serious offenders—are driving any bargains that are reached.⁹⁹

The second reliability-enhancing aspect of inquisitorialism as it applies to plea bargaining is its stance toward waivers. Waivers of the right to remain silent and of the right to a jury would be permitted given their tangential connection to fact-finding. But inquisitorial judges frown upon waivers of rights that protect against unreliable verdicts.¹⁰⁰ Thus, challenges alleging the discovery of

97. See Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 229 (2006) (noting the “rarity of fact bargaining in Germany,” given the parties’ knowledge of the judge’s oversight).

98. *Id.* at 200 (arguing that judicial involvement in bargaining “can render the final disposition more accurate”).

99. *Cf.* Bibas, *supra* note 18, at 2475-76 (“In plea bargaining ... [t]he paucity of hard legal rules ... leaves more room for favoritism, favor-seeking, and connections to operate.... [P]rosecutors who are tempted to cut corners find it easier to avoid pursuing every lead and pressing every advantage during plea bargaining. At public trials, in contrast, concern for reputation and for avoiding acquittals checks prosecutors’ desires to minimize effort.”) (footnotes omitted); Uzi Segal & Alex Stein, *Ambiguity Aversion and the Criminal Process*, 81 NOTRE DAME L. REV. 1495, 1549 (2006) (arguing for giving pleading defendants a right to a bench trial to “divest the prosecution of its power to force defendants into harsh and inefficient plea bargains”).

100. See *supra* note 96; see also Jenia I. Turner, *Plea Bargaining and Disclosure in Germany and the United States: Comparative Lessons*, 57 WM. & MARY L. REV. 1549, 1554-55 (2016) (“German courts and legislators have continually and unequivocally affirmed the

exculpatory evidence, deficient counsel, or biased or scientifically invalid risk assessments could not be foreclosed by a bargain. This perception of certain rights as “public” rather than “personal” is much more consistent with the way American judges viewed process rights prior to the rise of plea bargaining.¹⁰¹

The discussion to this point has admittedly ignored one key difference between the hybrid-inquisitorialism practiced in Europe and how it would play out in the United States. Prosecutors in Germany are supposed to charge the highest offense the evidence supports and stick to that charge even during bargaining (although, again, they do not always do so in fact).¹⁰² In contrast, given the United States Supreme Court’s interpretation of separation of powers doctrine, prosecutors in this country are the ultimate arbiters of the charging process, and thus can dismiss, reduce, or enhance charges virtually at will.¹⁰³ This ability to manipulate the charge, and thereby influence the sentence, undermines judicial ability to control the ultimate outcome.

However, in a preventive justice system of the type proposed here, judges would still wield substantial power. Not only would the judge have the authority to demand evidence supporting any pretrial deal and the authority to dismiss weakly supported or duplicative charges, the court would also have broad discretion to fashion the ultimate sentence in those cases in which the prosecutor dismisses charges that are warranted by the defendant’s behavior. For instance, in a regime modeled on the original MPC’s sentencing provisions,¹⁰⁴ if the prosecutor seeking an agreement offered to reduce a first-degree felony to a second-degree felony (and thus reduce the maximum penalty from twenty to ten years), an American judge

defendant’s right to inspect the evidence early in the pretrial process, and the scope of this right has expanded over time.... The idea of bargaining away the right to discovery ... would be incomprehensible to German courts and practitioners.”).

101. Indeed, for nineteenth-century judges, waiver of constitutional rights “simply was not permissible, with or without consideration.” King, *supra* note 52, at 120.

102. Jenia Iontcheva Turner, *Prosecutors and Bargaining in Weak Cases: A Comparative View*, in THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE, *supra* note 94, at 102, 106-10.

103. See *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (“[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”). For a critique of this position, see Brown, *supra* note 50.

104. See *supra* text accompanying notes 65-70.

could not reinstate the first-degree charge, given the prosecutor's control over charging. But the judge would have control over the sentence within the ten-year maximum, and thus could reject any disposition the parties agreed upon. Aware of this power, bargaining attorneys would be less likely to offer (in the case of prosecutors) or accept (in the case of defense attorneys) lopsided deals. The judge's ability to jettison dispositions within the wide ranges associated with preventive justice would counteract, if not nullify, the prosecutor's ability to control the charge. As Professor Turner has noted with respect to the typical practice in Germany, given judges' "vast sentencing discretion" in that country, "the dismissal of 'collateral' charges does not have a significant influence on the ultimate sentence."¹⁰⁵

Of course, an inquisitorial process is more cumbersome because it requires a trial in every case and would also permit more appeals asserting rights that go to reliability issues. But, as a number of scholars have argued well before me,¹⁰⁶ this trial orientation does not have to lead to a collapse of the system. Bargained cases of the type described in this Article would still often avoid the major expense of the American system—the jury trial (and the attendant inefficiency of jury-centric rules of evidence)—and would be triggered by the defendant's willingness to admit wrongdoing.¹⁰⁷

Moreover, if the inquisitorial process is combined with a preventive justice regime, proceedings should be even more streamlined. In bargained cases, many trials would resemble sentencing hearings, which should be lean affairs if a competent risk-needs

105. Turner, *supra* note 97, at 228.

106. See Alschuler, *supra* note 6, at 1048 ("[T]he proposed system of jury waiver bargaining ... would permit trial judges to discourage the use of an extraordinarily expensive trial mechanism in cases presenting only insubstantial issues, and it would provide a safety valve that would enable these judges, within limits established by law, to match resources to caseloads."); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 2005 (1992) ("[W]ith reliance on a system of adversarial trials before a judge sitting without a jury, such a reform would require an increase of only about 20% in the judicial resources devoted to the adjudication stage; stated as a percentage of total judicial resources, the required increase would be even smaller.").

107. A number of studies have shown that bench trials, while longer than guilty plea hearings, are substantially shorter than jury trials. See Comment, *Constitutional Alternatives to Plea Bargaining: A New Waive*, 132 U. PA. L. REV. 327, 349-51 (1984) (describing studies in Pittsburgh, Baltimore, Detroit, and Philadelphia and concluding, in sum, that bench trials lasted about twice as long as plea hearings but only one-tenth as long as a jury trial).

assessment has been carried out; in such cases, the judge's primary job is to double-check the bargain. When there is no bargain, the judge's job will be even easier; if conviction occurs, he or she need merely assign the appropriate sentencing range because the parole board will ultimately decide the sentence.

Finally, and perhaps most importantly, prosecutors who know every case will go to trial are less likely to pursue prosecutions of dubious or easily diverted cases. Given the system's documented tendencies toward overcriminalization and overcharging,¹⁰⁸ fewer prosecutions would not only result in greater efficiency but might be welcome for independent reasons as well. In any event, the important point for present purposes is that an inquisitorial regime is not likely to lead to collapse of the adjudication process.

III. OBJECTIONS

This Article has already tried to rebut concerns about how preventive justice and inquisitorial practices would interact with plea bargaining. But it does not address more fundamental worries about whether these substantive and procedural goals are worth pursuing or are possible to implement. Opponents of preventive justice argue that it relies on flawed, possibly unconstitutional, risk assessment techniques and on an overly optimistic view of rehabilitation programs;¹⁰⁹ additionally, they contend that it is highly vulnerable to disparity in punishment and the whims of parole board members,¹¹⁰

108. See Kyle Graham, *Overcharging*, 11 OHIO ST. J. CRIM. L. 701, 703 (2014) (noting the difficulty of determining when "overcharging" occurs but finding, based on a study of eight years of charging practices by federal prosecutors, "patterns of charging and conviction ... that raise yellow, if not red, flags regarding systemic overcharging"); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 704, 717 (2005) (noting that "the United States has experienced a dramatic enlargement in governmental authority and the breadth of law enforcement prerogatives" and describing this "overcriminalization phenomenon" as the result of: "(1) untenable offenses; (2) superfluous statutes; (3) doctrines that overextend culpability; (4) crimes without jurisdictional authority; (5) grossly disproportionate punishments; and (6) excessive or pretextual enforcement of petty violations").

109. See FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE* 72-73 (1981) (arguing that rehabilitation programs seldom work and tend to be very costly).

110. *Id.* at 42-43, 49, 57 (arguing that the indeterminate regime needed to implement rehabilitation programs leads to unequal treatment, demoralized offenders, and cynicism about the system).

and, of course, point out that it is inimical to retributive punishment.¹¹¹ The constitutionality of inquisitorial practices has also been called into question,¹¹² and traditional inquisitorialism has been said to be unduly threatening to subjective, if not objective, justice.¹¹³ Because I have dealt with these concerns at length in other works, I will not repeat those arguments here. However, this Part does identify and briefly respond to three sets of criticisms, organized under the headings of constitutional, accuracy, and implementation objections. In the course of doing so, this Part of the Article provides more detail as to how a preventively-oriented, inquisitorial regime would work.

A. *Constitutional Objections*

While the Eighth Amendment ban on cruel and unusual punishment has been construed to require some degree of proportionality, it does not dictate that retributivism drive sentencing policy, at least outside of the death penalty context.¹¹⁴ Even in the latter setting, the Supreme Court has routinely sanctioned sentences based primarily or solely on dangerousness.¹¹⁵ At the same time, indeterminate sentencing should not be immune from constitutional monitoring. I have argued that, although such sentencing is not

111. *But see* Michael M. O'Hear, *Beyond Rehabilitation: A New Theory of Indeterminate Sentencing*, 48 AM. CRIM. L. REV. 1247, 1253 (2011) (arguing that "indeterminate sentencing's apparent conflict with retributivism rests largely on the mistaken premise that retributivism necessarily and inflexibly demands that the same degree of suffering be imposed on all criminals who are guilty of the same offense," and that release can be "earned" in a way consistent with an expanded view of retributivism).

112. *See* *Blakely v. Washington*, 542 U.S. 296, 313 (2004) ("Our Constitution ... do[es] not admit the contention that facts are better discovered by judicial inquisition than by adversarial testing before a jury.").

113. JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* 81-96 (1975) (reporting laboratory research concluding that participants preferred a process in which they controlled the development and selection of facts, to one where an independent officer did so).

114. *See* John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 903 (2011) (describing "the Court's deliberate effort to limit proportionality review to a narrow range of cases, almost all of which involve the death penalty").

115. *See* *Jurek v. Texas*, 428 U.S. 262, 277 (1976) (White, J., concurring) (upholding "a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" as an aggravating factor justifying a death sentence) (citation omitted).

unconstitutional, the Due Process Clause requires that the nature and duration of an indeterminate disposition be roughly proportional to the offender's risk—measured in terms of both its probability and magnitude of harm—and must also be the least drastic method of dealing with that risk.¹¹⁶ While a defendant would probably be estopped from attacking an accepted offer on those grounds, an offender serving an unbargained-for sentence should be able to mount a due process challenge to unduly prolonged or restrictive sentences.

A separate constitutional question is whether the risk-needs assessment that forms the basis for preventive justice depends on suspect criteria. Although no structured assessment instrument currently in use relies on race as a risk factor, some of these instruments put considerable weight on age and gender (with youth and maleness elevating risk). The best instruments also look at socioeconomic status, employment and marital history, diagnosis (for example, psychopathy and substance abuse), the presence of antisocial attitudes and acquaintances, and a host of other factors that are immutable, have little to do with blameworthiness, or both.¹¹⁷ A number of writers have suggested that reliance on these factors is unconstitutional or in some other way illegitimate.¹¹⁸

116. See Slobogin, *supra* note 60, at 1134-40 (citing, inter alia, the holding in *Jackson v. Indiana*, 406 U.S. 715, 738 (1972), that due process requires that confinement bear a “reasonable relation” to the government’s purpose).

117. See generally HANDBOOK OF VIOLENCE RISK ASSESSMENT (Randy K. Otto & Kevin S. Douglas eds., 2010) (describing numerous actuarial and structured risk assessment instruments); Michael S. Caudy et al., *How Well Do Dynamic Needs Predict Recidivism? Implications for Risk Assessment and Risk Reduction*, 41 J. CRIM. JUST. 458, 459 (2013) (noting that most risk evaluations consider antisocial attitudes, antisocial associates, antisocial personalities, and criminal history, and that many also consider substance abuse, family characteristics, education, employment, and lack of prosocial leisure or recreation).

118. For the strongest argument for this proposition, see Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 821-41 (2014) (arguing that risk assessment instruments that include age, gender, and socioeconomic factors as risk factors violate equal protection). Starr also argues that many of these factors can be proxies for race. See *id.* at 838 (“[T]he socioeconomic and family variables that [risk instruments] include are highly correlated with race, as is criminal history, so they are likely to have a racially disparate impact.”). But recent research suggests that, with at least some instruments, the latter outcome is unlikely. See Jennifer Skeem & Christopher Lowenkamp, *Risk, Race & Recidivism: Predictive Bias and Disparate Impact* 37 (2015), <http://ssrn.com/abstract=2687339> [<https://perma.cc/NLY5-DSJL>] (describing an analysis of a widely used risk assessment instrument and concluding that “risk assessment instruments *can* be free of predictive bias and *can* be associated with small mean score differences by race”).

The constitutional argument is difficult to make. Eliminating consideration of those risk (and protective) factors that have proven predictive validity would seriously curtail the efficacy of the risk assessment and undermine the state's interest in carrying out its prevention objective.¹¹⁹ Thus, even if use of age and gender in this context implicates equal protection analysis,¹²⁰ and even if one accepts the doctrinally suspect proposition that use of socioeconomic considerations is entitled to heightened scrutiny,¹²¹ reliance on such factors is justified when it serves the compelling state interest of efficiently allocating resources aimed at protecting the public from serious criminal acts.¹²² Risk assessment that allows identification of low risk offenders might also help achieve another important aim—the mitigation of mass incarceration—but only if it is not arbitrarily circumscribed.¹²³

The subconstitutional concerns that punishment in a preventive regime is based on conditions over which a person has little or no control and on generalizations that fail to take into account individual differences are also overblown.¹²⁴ As I have noted elsewhere,

119. Melissa Hamilton, *Risk-Needs Assessment: Constitutional and Ethical Challenges*, 52 AM. CRIM. L. REV. 231, 281 (2015) (“Simply discarding politically sensitive variables and their proxies from risk-needs tools can critically jeopardize predictive ability.”); *see also id.* at 247-50 (debunking on several grounds the one study Professor Starr relied upon to support the opposite contention).

120. Discrimination based on gender is subject to intermediate scrutiny. *United States v. Virginia*, 518 U.S. 515, 532-33 (1996). To date, discrimination based on age receives rational basis review. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976).

121. Professor Starr cites Supreme Court and lower court cases that indicate that basing a criminal justice decision on indigency alone is unconstitutional. Starr, *supra* note 118, at 830-36. But she neglects Supreme Court and lower court cases that require intentional discrimination, that reject proxy analysis, that allow decisions to be based on stereotypes about gender, and that, in any event, at most require rational basis review for all the listed categories except gender. *See* Hamilton, *supra* note 119, at 247-50 (elaborating on these responses to Professor Starr's argument).

122. *Cf.* OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 32 (Am. Bar Ass'n ed., 2009) (1881) (stating that crime prevention is “the chief and only universal purpose of punishment”).

123. John Monahan & Jennifer L. Skeem, *Risk Assessment in Criminal Sentencing*, 12 ANN. REV. CLINICAL PSYCHOL. (forthcoming 2016) (manuscript at 10.20), <http://www.annualreviews.org/doi/pdf/10.1146/annurev-clinpsy-021815-092945> [<https://perma.cc/2DSP-8QWV>] (“Political advocates who agree on little else have coalesced in proposing that the way to unwind mass incarceration in America without jeopardizing the country's historically low crime rate is to make risk assessment much more prominent in sentencing criminal offenders.”).

124. *See* Daniel S. Goodman, Note, *Demographic Evidence in Capital Sentencing*, 39 STAN. L. REV. 499, 508-16 (1987) (arguing that, in the criminal justice system, reliance on factors

risk-based dispositions are ultimately based on a prediction of what a person will do, not what he or she is. Immutable risk factors are merely evidence of future conduct, in the same way that various pieces of circumstantial evidence that are not blameworthy in themselves—for example, presence near the scene of the crime or possession of a weapon—can lead to a finding of guilt.¹²⁵ Furthermore, the one category of risk factors that most opponents of modern risk assessment would permit predictors to consider—criminal history—is also closely associated with socioeconomic status and, yes, race.¹²⁶ Short of abandoning risk assessment entirely, the constitutional and ethical issues are unavoidable.

Finally, concern about the generalizations upon which risk assessment relies can and should be alleviated by two aspects of well-run risk management programs: individuals should always be able to present evidence of protective factors that are not considered in the risk assessment protocol,¹²⁷ and assessment of risk should be continuous, taking into account participation in rehabilitation efforts and the like.¹²⁸ In a truly indeterminate regime, any given risk assessment can only “enhance” a sentence for a short period of time.

Thus, the Constitution does not prohibit indeterminate sentencing. Nor should it pose an impediment to the judiciary-oriented procedural proposals made here. On several occasions, the Supreme Court has maintained that our system of justice is adversarial

over which a person has no control is impermissible); *see also* John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391, 427-28 (2006) (same); Brian Netter, *Using Group Statistics to Sentence Individual Criminals: An Ethical and Statistical Critique of the Virginia Risk Assessment Program*, 97 J. CRIM. L. & CRIMINOLOGY 699, 706-20 (2007) (same).

125. *See* Christopher Slobogin, *Risk Assessment*, in THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS, *supra* note 81, at 196, 201-02.

126. *See* Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 GEO. L.J. 2419, 2468 (1996) (noting the “presumptions of guilt that attach because of class and race”). Indeed, consideration of criminal history alone may even exacerbate the socioeconomic and racialized aspects of punishment. Modern risk assessment requires much more individualization. *See supra* text accompanying note 117.

127. *See* CHRISTOPHER SLOBOGIN, PROVING THE UNPROVABLE: THE ROLE OF LAW, SCIENCE, AND SPECULATION IN ADJUDICATING CULPABILITY AND DANGEROUSNESS 125-26 (2007) (making the argument for an evidentiary rule allowing the individual to control when individualized risk factors may be introduced, analogizing to the character evidence rule).

128. *See* Slobogin, *supra* note 60, at 1149-51 (arguing that periodic review is constitutionally required).

rather than inquisitorial.¹²⁹ But those references were made in support of adversarial guarantees such as the right of confrontation and the right to remain silent;¹³⁰ the Court has never addressed the role of the judge during adjudication.¹³¹ In any event, the proposed regime retains confrontation and compulsory process rights, and, as under the present system, allows the defendant to remain silent without repercussions, at least if he or she is not interested in a deal.¹³² If anything, the proposed hybrid regime *enhances* trial rights like the right of confrontation by ensuring that a trial occurs in every case. The key difference is that the judge is authorized to confront the witnesses first, and can compel the appearance of witnesses and the production of evidence that neither party wants to introduce.¹³³

B. Accuracy Objections

Assessments of risk and treatability, which are crucial to preventive justice, are far from perfect.¹³⁴ However, the development of actuarially-based risk assessment instruments has appreciably improved our ability to separate out high-risk and low-risk individuals

129. See David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1642-56 (2009) (describing cases in which the Court has supported the confrontational model and rejected inquisitorialism).

130. See *Crawford v. Washington*, 541 U.S. 36, 50 (2004) (stating that hearsay was “the principal evil at which the Confrontation Clause was directed”); *Malloy v. Hogan*, 378 U.S. 1, 7 (1964) (stating that because “the American system of criminal prosecution is accusatorial, not inquisitorial, ... the Fifth Amendment is its essential mainstay”).

131. Some lower courts have expressed concern about judicial involvement in questioning witnesses. See, e.g., *United States v. Hickman*, 592 F.2d 931, 933 (6th Cir. 1979) (“[G]reat care must be taken by a judge to always be calmly judicial, dispassionate and impartial.”) (internal quotation marks omitted). However, judicial questioning is permitted by the rules of evidence. See, e.g., FED. R. EVID. 614(b) (“The court may examine a witness regardless of who calls the witness.”). Moreover, in the plea bargaining context, the danger of a jury misreading the judge is non-existent.

132. Although I do not delve into the issue here, as part of the move toward inquisitorialism I have defended elimination of the right to silence at trial as well, assuming impeachment based on prior crimes is prohibited. See Slobogin, *supra* note 63, at 727-30.

133. See Rudolf B. Schlesinger, *Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience*, 26 BUFF. L. REV. 361, 367 (1977). On whether the judge could or would do so without access to the prosecutor’s dossier, as occurs in Europe, see Slobogin, *supra* note 63, at 719-20 (arguing that a dossier-driven process is possible in the United States).

134. For a summary of research see Slobogin, *supra* note 125, at 200-01.

and identify ways of reducing risk.¹³⁵ The accuracy question should also be asked comparatively. Culpability calibrations, which are essential to a well-run retributivist regime, particularly so under consequential retributivism, are mere guesswork,¹³⁶ moreover, once made, they definitively determine the sentence.¹³⁷ Risk assessment, by contrast, at least attempts to be scientifically-based, is robustly testable, and, in an indeterminate regime, would be subject to periodic review so that mistakes or changes in risk can be discovered.

Some have resisted actuarially-oriented assessments of risk and treatment needs on the ground that making such predictions about individuals based on data about groups is incoherent or impossible.¹³⁸ That contention, which suggests that all actuarial-type reasoning is off-base, has been roundly rebutted as a matter of statistical inference.¹³⁹ It is also contradicted by research that routinely

135. *Id.* at 200 (noting that false positive rates using unstructured evaluation techniques tend to be over 50 percent, whereas more recent studies, usually evaluating the accuracy of actuarial or structured professional judgment protocols, produce false positive rates between 15 and 50 percent).

136. The best effort at this calibration, in ordinal terms, comes from Paul Robinson and his colleagues. *See, e.g.*, Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829, 1848-65 (2007) (showing high reliability in laypersons' rankings of various crimes). But agreement about the appropriate *sentence* to impose for a given crime is much harder to come by, even with respect to the most common crimes. *See* Christopher Slobogin & Lauren Brinkley-Rubinstein, *Putting Desert in its Place*, 65 STAN. L. REV. 77, 94-96 (2013) (showing low consensus on punishment level for the same crimes depicted in Robinson & Kurzban, *supra*).

137. In some regimes that are ostensibly retributivist, sentences can be reduced through earning good time credits or "second look" judicial review after a certain period of time. *See* Margaret Colgate Love & Cecelia Klingele, *First Thoughts About "Second Look" and Other Sentence Reduction Provisions of the Model Penal Code: Sentencing Revision*, 42 U. TOL. L. REV. 859, 861 (2011) (describing three such options considered by the drafters of the revision to the MPC's sentencing provisions). But such credits are automatic assuming good behavior and thus, in effect, are determined at the front end, and second look reviews are rare.

138. *See* David J. Cooke & Christine Michie, *Limitations of Diagnostic Precision and Predictive Utility in the Individual Case: A Challenge for Forensic Practice*, 34 LAW & HUM. BEHAV. 259, 272 (2010) ("[I]t is clear that predictions of future offending cannot be achieved, with any degree of confidence, in the individual case."); Stephen Hart, *Evidence-Based Assessment of Risk for Sexual Violence*, 1 CHAP. J. CRIM. JUST. 143, 164 (2009) ("It is impossible to directly measure (using some technology) or calculate (using some natural law) the specific probability or absolute likelihood that a particular offender will commit ... violence, and even impossible to estimate this risk with any reasonable degree of scientific or professional certainty.")

139. R. Karl Hanson & Philip D. Howard, *Individual Confidence Intervals Do Not Inform Decision-Makers About the Accuracy of Risk Assessment Evaluations*, 34 LAW & HUM. BEHAV.

finds actuarial prediction to be superior to “individualized” clinical prediction.¹⁴⁰ Perhaps most importantly, clinical prediction, based on an expert’s idiosyncratic choice of risk factors, is as prone to reliance on stereotypes about gender, age, and socioeconomic factors as actuarial prediction;¹⁴¹ the primary difference is that actuarial assessment rests on empirical findings and, because it relies on structured instruments, is generally much more accessible to outside observers.

While claims that risk-needs assessments are untenable can thus be parried, the accuracy objection does dictate that the best risk-needs assessment instruments be used. The recent trend toward evidence-based correctional policy, while consistent with a preventive regime, has been hasty. Some instruments are poorly validated, are focused solely on risk to the exclusion of needs, or are incompetently administered.¹⁴² The hybrid-inquisitorial procedure advocated here will make risk assessment more transparent and subject it to judicial and adversarial testing on a routine basis. That process should appreciably improve the risk assessment enterprise.

A related accuracy concern has to do with the parole board. One of the reasons indeterminate sentencing fell into disfavor was the

275, 277 (2010) (Cooke & Michie’s and Hart’s declaration, “[i]f true ... would be a serious challenge to the applicability of any empirically based risk procedure to any individual for anything.”); Peter B. Imrey & A. Philip Dawid, *A Commentary on Statistical Assessment of Violence Recidivism Risk*, 2 STAT. & PUB. POL’Y 1, 1 (2015) (finding the arguments of Hart et al. “seriously mistaken in many particulars” and stating that the arguments should “play no role in reasoned discussions about violence recidivism risk assessment”).

140. See Eric S. Janus & Robert A. Prentky, *Forensic Use of Actuarial Risk Assessment with Sex Offenders: Accuracy, Admissibility and Accountability*, 40 AM. CRIM. L. REV. 1443, 1455-58 (2003).

141. Barbara Underwood, *Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgment*, 88 YALE L.J. 1408, 1427 (1979) (“Although the clinician need not identify in advance the characteristics he will regard as salient, he must nevertheless evaluate the applicant on the basis of a finite number of salient characteristics, and thus, like the statistical decisionmaker, he treats the application as a member of a class defined by those characteristics.”).

142. See Hamilton, *supra* note 119, at 283 (noting complaints about “certain risk instruments having been normed on foreign samples yet indiscriminately scored on domestic offenders, high rates of false positives, exaggerations of predictive validity measures, evidence of adversarial bias in scoring, the lack of standardization in sufficiently training raters, and the inherent inability of group-based statistics to permit individualized predictions of risk”); Jennifer L. Skeem & John Monahan, *Current Directions in Violence Risk Assessment*, 20 CURRENT DIRECTIONS PSYCHOL. SCI. 38, 41 (2011) (“[E]ven well-validated instruments offer little direct validity data for the treatment-relevant variables they include.”).

documented tendency of parole boards to act in a biased, arbitrary manner.¹⁴³ However, if parole boards are conceived of as part of the risk management team, they would look and act quite differently than the parole boards of the mid-twentieth century. Not only would they rely on modern risk assessment, but they would also be composed primarily of experts in risk-needs assessment, rather than laypeople and correctional officials.¹⁴⁴

Finally, with respect to concerns about the procedure proposed in this Article, inquisitorial trial procedures are hard to fault from an accuracy perspective. It is well-established that inquisitorial procedures are more likely to achieve what researchers have called “objective justice”—that is, results that are closer to ground truth—because they reduce the influence of bias and misdirection that adversarialism seems to encourage.¹⁴⁵ As indicated earlier, the main criticism of inquisitorialism has instead been that it falls short in ensuring “subjective justice,” because the litigants feel they are not given sufficient voice. However, research in both the laboratory and the field indicates that the type of hybrid procedure proposed here, in which the parties retain the opportunity to present evidence, is at least as likely to satisfy the subjective perceptions of the litigants as a purely adversarial regime.¹⁴⁶

143. See Steven L. Chanenson, *Guidance from Above and Beyond*, 58 STAN. L. REV. 175, 187 (2005) (“Parole release has historically been an unstructured and wildly discretionary power, subject to the same kinds of irrationalities and abuses that afflict old-style, fully discretionary judicial sentencing on the front end.”); Kevin R. Reitz, *Questioning the Conventional Wisdom of Parole Release Authority*, in THE FUTURE OF IMPRISONMENT 199, 228 (Michael Tonry ed., 2004) (recognizing that parole boards have a history of poor process and patronage appointments).

144. See Stefan J. Bing, Note, *Reconsidering State Parole Board Membership Requirements in Light of Model Penal Code Sentencing Revisions*, 100 KY. L.J. 871, 888 (2012) (arguing that, given the movement toward evidence-based sentences, parole boards should include “social scientists in the fields of sociology, psychology, or statistics”).

145. See Slobogin, *supra* note 63, at 711-12 (reporting research showing that the inquisitorial system is less likely to create biased evidence, and noting that even THIBAUT & WALKER, *supra* note 113, concluded that “an ‘autocratic’ procedure ‘is most likely to produce truth’”).

146. *Id.* at 710-11; see also Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 ANN. REV. L. & SOC. SCI. 171, 175 (2005) (summarizing research and concluding that “autocratic, inquisitorial-style procedures (with less process control than the adversarial model) are rated more favorably when they provide opportunities for voice”).

C. Implementation Objections

Could preventive justice and inquisitorial adjudication become a reality? There are grounds for optimism on this score. As evidenced by the original MPC, this country has had considerable experience with indeterminate sentencing, and even today a majority of states have retained at least some version of it, most with parole boards in place.¹⁴⁷ Mandatory minimum and maximum sentences would have to be abolished, and truth-in-sentencing rules eliminated. These are significant moves, but they are already underway in some states.¹⁴⁸ And versions of inquisitorialism are prevalent not only in Europe but in pockets of this country as well.¹⁴⁹

The more difficult implementation issue might be acquiring the right personnel to run the system. Risk-needs assessments, done correctly, require extensive training and expertise.¹⁵⁰ Risk management—whether it takes place in an institution or the community—also requires significant investment in staff and resources.¹⁵¹ Consider, for instance, this description of the requirements for a prototypical drug court, from the Department of Justice:

147. Chanenson, *supra* note 143, at 186-87 (“Although discretionary parole release is largely off the national sentencing reform radar, it remains a vital part of American criminal justice. In fact, indeterminate sentencing regimes—that is, systems with discretionary parole release—continue to be the most common approach to sentencing in the United States.”) (footnotes omitted).

148. See Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1602-03 (2012) (recounting efforts to eliminate mandatory minima, increase diversion, and promote early release).

149. Perhaps the most obvious example is the juvenile court, at least as originally conceived. See DEAN J. CHAMPION & G. LARRY MAYS, TRANSFERRING JUVENILES TO CRIMINAL COURTS: TRENDS AND IMPLICATIONS FOR CRIMINAL JUSTICE 38-39 (1991); see also *infra* text accompanying notes 150-52.

150. See Patricia Harris, *What Community Supervision Officers Need to Know About Actuarial Risk Assessment and Clinical Judgment*, 70 FED. PROBATION 8, 13 (2006) (describing ways training can improve risk assessments).

151. For instance, one of the most successful community-based risk management programs, “multisystemic therapy” (MST), is “an intensive family- and community-based treatment that addresses the multiple determinants of serious antisocial behavior in juvenile offenders” and requires therapists to develop “[i]ntervention strategies [that] are integrated into a social ecological context and include strategic family therapy, structural family therapy, behavioral parent training, and cognitive behavior therapies.” CHRISTOPHER SLOBOGIN & MARK R. FONDACARO, JUVENILES AT RISK: A PLEA FOR PREVENTIVE JUSTICE 136-37 (2011) (reprinting description from MST website).

(1) Integration of ... treatment with justice system case processing; (2) Use of a nonadversarial approach, in which prosecution and defense promote public safety while protecting the right of the accused to due process; (3) Early identification and prompt placement of eligible participants; (4) Access to a continuum of treatment, rehabilitation, and related services; (5) Frequent testing [to ensure the treatment program is being followed]; (6) A coordinated strategy among judge, prosecution, defense, and treatment providers to govern offender compliance; (7) Ongoing judicial interaction with each participant; (8) Monitoring and evaluation to measure achievement of program goals and gauge effectiveness; (9) Continuing interdisciplinary education to promote effective planning, implementation, and operation; and (10) Partnerships with public agencies and community-based organizations to generate local support and enhance drug court effectiveness.¹⁵²

Drug courts of this sort have been found to be effective at reducing recidivism,¹⁵³ as have many other modern correctional programs, contrary to the 1970s mantra that “nothing works.”¹⁵⁴ But the success of such programs depends heavily on the right treatment personnel and the right institutional arrangements. Certainly, the current operation of the parole system—whether it involves release decision making, parolee supervision, or when and how parole is revoked—leaves much to be desired.¹⁵⁵

152. Richard S. Gebelein, *The Rebirth of Rehabilitation: Promise and Perils of Drug Courts*, SENT’G & CORRECTIONS, May 2000, at 3, <https://www.ncjrs.gov/pdffiles1/nij/181412.pdf> [<https://perma.cc/XS2N-KN9A>] (numbering added to text).

153. 2 C. WEST HUDDLESON III ET AL., NAT’L DRUG CT. INST., PAINTING THE CURRENT PICTURE: A NATIONAL REPORT CARD ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURT PROGRAMS IN THE UNITED STATES (Nov. 1, 2008), http://www.nadcp.org/sites/default/files/ndci/PCPII_web%5B1%5D.pdf [<https://perma.cc/4QC6-CMT7>] (finding that drug courts are a more cost effective method of dealing with drug problems than either prison or probation); Steven Belenko, *Research on Drug Courts: A Critical Review*, 1 NAT’L DRUG CT. INST. REV. 10, 37-38, 47 (1998), http://www.ndci.org/sites/default/files/ndci/NDCR_volume1_issue1.pdf [<https://perma.cc/FS38-5Y4S>] (reviewing thirty evaluation reports covering twenty-four drug courts and finding significant success at reducing repeat offending, but also noting that most of the surveys have been somewhat ad hoc and anecdotal).

154. Francis T. Cullen & Cheryl Lero Jonson, *Rehabilitation and Treatment Programs*, in CRIME AND PUBLIC POLICY 293, 303 (James Q. Wilson & Joan Petersilia eds., 2011) (reporting that “most ... mean effect sizes represent recidivism reductions in the 20 percent range, varying upward to nearly 40 percent”).

155. See Tonja Jacobi et al., *The Attrition of Rights Under Parole*, 87 S. CAL. L. REV. 887,

Further, as number (2) above suggests, in the typical bargained case the defense, prosecution, and judge would be part of the risk management team. That enterprise might require lawyers to internalize a significant shift from the adversarial mindset, at least at the pretrial stage.¹⁵⁶ More radically, at trial the judge would no longer be the passive decision maker or referee that American judges are today, but would take a very active role in the adjudication process. Assumption of that role would require significant training and reorientation if experience in Europe is any guide.¹⁵⁷ Judges might also find it beneficial to become involved in the bargaining process prior to trial, as occurs in Germany and some American states.¹⁵⁸ Whether American judges—who, unlike German judges, are subject to periodic election in many jurisdictions¹⁵⁹—would be willing to undertake such an activist, more-transparent role in shaping criminal dispositions is open to question.¹⁶⁰

975 (2014) (describing the relaxation of Fourth, Fifth, and Sixth Amendment rights at parole revocation proceedings; the often trivial actions that can result in revocation; police abuse of the authority to monitor parolees; and concluding that “[a] solution[] to the harms of parole that are detailed in this Article have to involve rethinking all of the institutions that contribute to the problem”).

156. See Luna, *supra* note 93, at 74 (describing the role of prosecutors in continental systems as “judicial professionals”); cf. Kara Gleckler & T.J. Oram, Comment, *An Analysis of the Constitutional Issues Implicated in Drug Courts*, 42 IDAHO L. REV. 471, 512-15 (2006) (describing the differing roles of judges and lawyers in drug courts).

157. See Slobogin, *supra* note 63, at 719-20 (noting that “[a]n inquisitional judge must be able to plan the trial, conduct much of the questioning, and ensure that witnesses are handled in as objective a fashion as possible,” but also arguing, based on evidence from various settings, that American judges are up to the task); Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 517-18 (1992) (“[T]he Continental system relies heavily upon the skill, motivation, discipline, and integrity of its professional judges [and] high standards of selection, training, and performance.”).

158. See Turner, *supra* note 97, at 219-20 (Germany), 238-43 (Florida), 247-52 (Connecticut); see also Rishi Raj Batra, *Judicial Participation in Plea Bargaining: A Dispute Resolution Perspective*, 76 OHIO ST. L.J. 565, 566 (2015) (finding that judicial involvement in bargaining is quite common in some jurisdictions).

159. David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 266 (2008) (“[R]oughly ninety percent of state general jurisdiction judges are currently selected or retained” through an election process).

160. I take an optimistic view on this score. See Slobogin, *supra* note 63, at 719-20. Several commentators have advocated various forms of more vigorous judicial involvement, at least in plea bargaining. See, e.g., Daniel S. McConkie, *Judges as Framers of Plea Bargaining*, 26 STAN. L. & POLY REV. 61, 65 (2015) (arguing for a pre-plea proceeding where, after party presentations, the judge would indicate two sentences, one if there is an agreement and one if the case goes to trial); Rakoff, *supra* note 2 (arguing that magistrate judges should hear arguments from prosecutors and defense attorneys and make nonbinding sentencing

Finally, a potential constitutional problem with a properly run preventive justice system that was not flagged earlier must be noted. If plea bargaining of the type described in this Article is to work, expert input on the defendant's risk and the type of programs that are likely to reduce it is needed not only in parole proceedings, but also at the pretrial stage. This sort of pre-bargain assessment might raise Fifth Amendment issues, because the best risk and needs assessments usually involve participation of the defendant. But several considerations mitigate this concern. Most obviously, when the defendant consents to an interview, which may often occur when guilt is obvious, the Fifth Amendment could be said to be waived. This rationale may explain why, even under current practice, several states and the federal courts permit pre-bargain reports as a means of expediting the process.¹⁶¹ Self-incrimination concerns might also be alleviated by division of bargaining and adjudication responsibilities within the prosecutor's office.¹⁶² In cases in which bargains are sought but the Fifth Amendment remains an obstacle to face-to-face interviews with the defendant, the relevant risk assessments might have to rely on publicly available data such as prior record, prior treatment attempts, and the like. Fortunately, several risk assessment instruments rely solely on such information.¹⁶³

The reorientation outlined above would be difficult. But imagining a system of preventive justice and inquisitorial procedure is a worthwhile thought experiment for a number of reasons, not the

recommendations); see also Albert Alschuler, *The Trial Judges' Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1123-24 (1976) (arguing for an approach similar to McConkie's proposal).

161. 6 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 808 (3d ed. 2007).

162. Cf. Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 874 (2009) (arguing for the segregation of "individuals who make investigative and advocacy decisions ... from those who make adjudicative decisions, the latter of which should be defined to include some of the most important prosecutorial decisions today, including charging, the acceptance of pleas, and the decision whether or not to file substantial assistance motions").

163. See, e.g., Dana Anderson & R. Karl Hanson, *Static-99: An Actuarial Tool to Assess Risk of Sexual and Violent Recidivism Among Sexual Offenders*, in HANDBOOK OF VIOLENCE RISK ASSESSMENT, *supra* note 117, at 251, 253 (listing the ten risk factors on the Static-99, all of which ask for information that can be obtained from records). A final option is to abandon the right to remain silent at the adjudication stage. See Slobogin, *supra* note 63, at 727-30.

least of which is the serious mismatch between plea bargaining on the one hand and retributive and adversarial justice on the other.

CONCLUSION

Plea bargaining dominates the criminal justice system, in a way that undermines the substantive and procedural goals of our criminal justice system. In *Lafler v. Cooper*, Justice Scalia appeared to recognize this point:

In many—perhaps most—countries of the world, American-style plea bargaining is forbidden in [serious] cases ..., even for the purpose of obtaining testimony that enables conviction of a greater malefactor, much less for the purpose of sparing the expense of trial....

... It presents grave risks of prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense; and for guilty defendants it often—perhaps usually—results in a sentence well below what the law prescribes for the actual crime. But even so, we 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.¹⁶⁴

As Justice Scalia implied, it would be more consistent with our stated substantive ideals to abandon plea bargaining and insist on the charge and sentence that reflect an individual's desert. But given the realities of our crime problem, we probably must instead resort to plea bargaining. For plea bargaining to work, there must be a difference between the bargained-for disposition and the disposition that occurs when a defendant refuses to waive trial rights. That difference cannot be justified in a retributive regime, or can only be justified through a complicated minimization of desert as the primary goal. In contrast, plea bargaining makes sense in a criminal justice system oriented toward preventive justice, because the bargain/no bargain differential focuses on different ways of reducing risk, some of which are likely to be more attractive to

164. 132 S. Ct. 1376, 1397 (2012) (Scalia, J., dissenting).

defendants than rolling the dice on an indeterminate sentence controlled by the parole board.

Similarly, it would be more consistent with our stated procedural ideal to require every case to be adjudicated in front of a jury during a public, adversarial trial. But again, our crime rates and, to use Scalia's words, "our long and expensive process,"¹⁶⁵ appear to make achievement of this ideal unrealistic. The best way to ensure that adversarial trial rights are honored is to *abandon* a central tenet of American adversarialism—party control of the evidence—and allow judges freer rein during adjudication. With the judge in control, evidence beyond the slight factual basis now offered would have to be presented on both guilt and sentencing issues, even in cases in which the parties have bargained away the right to jury, the right to remain silent, and particular charges or sentences in an effort to streamline the adjudication process. Moreover, those adversarial rights that are not plea intrinsic, such as the right to effective assistance of counsel, could never be the subject of a bargain.

Plea bargaining recognizes that, in the typical case, the principal decision will be about disposition rather than guilt. If that is so, it makes sense to shift criminal justice power from lawyers and juries to experts and judges, especially if the disposition is aimed at achieving preventive goals like rehabilitation and specific deterrence. Preventive justice and inquisitorialism not only can coexist with plea bargaining, but should enhance its ability to arrive at efficient, accurate results.

165. *Id.*

