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## DESIGNING PLEA BARGAINING FROM THE GROUND UP: ACCURACY AND FAIRNESS WITHOUT TRIALS AS BACKSTOPS

STEPHANOS BIBAS\*

### ABSTRACT

*American criminal procedure developed on the assumption that grand juries and petit jury trials were the ultimate safeguards of fair procedures and accurate outcomes. But now that plea bargaining has all but supplanted juries, we need to think through what safeguards our plea-bargaining system should be built around. This Symposium Article sketches out principles for redesigning our plea-bargaining system from the ground up around safeguards. Part I explores the causes of factual, moral, and legal inaccuracies in guilty pleas. To prevent and remedy these inaccuracies, it proposes a combination of quasi-inquisitorial safeguards, more vigorous criminal defense, and better normative evaluation of charges, pleas, and sentences. Part II then diagnoses unfair repercussions caused by defendants' lack of information and understanding, laymen's lack of voice, and the pub-*

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\* Professor of Law and Criminology; Director, Supreme Court Clinic, University of Pennsylvania Law School. Thanks to Jeff Bellin, Adam Gershowitz, and the *William & Mary Law Review* for organizing this terrific Symposium.

*lic's lack of information and participation. To prevent and fix these sources of unfairness, it proposes ways to better inform pleas and to make plea procedures more procedurally just.*

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*Because ours “is for the most part a system of pleas, not a system of trials,” it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process.... “[P]lea bargaining ... is not some adjunct to the criminal justice system; it is the criminal justice system.”*

—Justice Anthony Kennedy, *Missouri v. Frye*<sup>1</sup>

## INTRODUCTION

American criminal justice is badly misshapen. Over the centuries, Anglo-American jurists have constructed elaborate procedural safeguards around grand and petit juries.<sup>2</sup> Juries, and especially jury trials, were supposed to ensure fair process, accurate outcomes, and checks on abuse of power.<sup>3</sup> Thus, judges felt little pressure to superintend evidence gathering or assess each side’s stories before or at trial.<sup>4</sup> Our legal system put its faith in adversarial proceedings that culminated in vigorously fought trials, at which the collision of truth and error would ensure that factual, legal, and moral justice won out.

While the shell of an adversarial system remains, the core has been hollowed out. Plea bargaining began as a way for a few indisputably guilty defendants to resolve their cases quickly, saving everyone the time and expense of getting to a foreordained conclusion.<sup>5</sup> But the exception has swallowed the rule. Today, roughly 94 percent of adjudicated felony defendants plead guilty; only about 4 percent enjoy jury trials, and the rest have bench trials.<sup>6</sup> In misdemeanor cases, the disparity is even starker, with 99 percent or

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1. 132 S. Ct. 1399, 1407 (2012) (citation omitted) (first quoting *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012); then quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)).

2. See STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE*, at xix (2012). See generally LAURA I. APPLEMAN, *DEFENDING THE JURY: CRIME, COMMUNITY, AND THE CONSTITUTION* 15-36 (2015).

3. Cf. BIBAS, *supra* note 2, at 13-14.

4. See *infra* notes 42-43 and accompanying text.

5. Cf. BIBAS, *supra* note 2, at xviii.

6. SEAN ROSENMERKEL ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE [DOJ], NCJ 226846, *FELONY SENTENCES IN STATE COURTS, 2006—STATISTICAL TABLES 25 tbl.4.1* (2009), <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=2152> [<https://perma.cc/765Y-3NE6>] (reporting 94 percent guilty pleas, 4 percent jury trials, and 2 percent bench trials in state felony cases in 2006).

more pleading guilty.<sup>7</sup> Though petit juries are not quite extinct, they are an endangered species. To use John Langbein's example, petit juries are about as representative of New York's criminal courts as the hippopotamus in the Bronx Zoo is representative of New York City's wildlife—curious, anomalous spectacles.<sup>8</sup>

This plea-bargaining system was not planned, but jury-rigged. It grew up below the radar as a workaround that served all the insiders' interests.<sup>9</sup> Because it was supposed to be exceptional, no one bothered to build many safeguards into the process.<sup>10</sup> The few safeguards that exist are largely designed to ensure the centrality of jury trials. For example, at plea colloquies, judges typically dwell at length on each of the many trial rights that a defendant is giving up.<sup>11</sup> They say much less about the likely penalties, may require only a bare-bones allocution of factual and legal guilt, and do not have to speculate about the odds of conviction or the collateral consequences.<sup>12</sup>

Even as plea bargaining burgeoned, jury trials continued to matter for two important reasons. First, almost everyone trusted that trials remained as safety valves whenever guilt was in real doubt. The vast majority of defendants are factually and legally guilty, but surely, we assumed, those who are innocent would persist to vindicate their names at trial.<sup>13</sup> But the recent wave of DNA exonerations

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7. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2010 ANNUAL REPORT OF THE DIRECTOR 242-45 tbl.D-4 (2010), <http://www.uscourts.gov/statistics-reports/judicial-business-2010> [<https://perma.cc/NM9W-XW4T>] (reporting that of the 89,741 total defendants convicted and sentenced in federal criminal cases in fiscal year 2010, 97.4 percent (87,418) entered guilty pleas, 2.3 percent (2066) were convicted in jury trials, and less than 0.3 percent (257) were convicted in bench trials).

8. John H. Langbein, *On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial*, 15 HARV. J.L. & PUB. POL'Y 119, 121 (1992).

9. See BIBAS, *supra* note 2, at xvii-xx.

10. See Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1121-27 (2011).

11. The colloquy requirements in federal court are typical, dwelling mostly on the procedural rights waived. See FED. R. CRIM. P. 11(b); see also *Boykin v. Alabama*, 395 U.S. 238, 243 & n.5 (1969) (requiring that the record of a guilty-plea allocution reflect a defendant's affirmative waiver of his right to a jury trial, right to confront his accusers, and privilege against self-incrimination).

12. See Bibas, *supra* note 10, at 1124; see also *infra* notes 42-43 and accompanying text.

13. See *Brady v. United States*, 397 U.S. 742, 758 (1970) ("We would have serious doubts about this case if the encouragement of guilty pleas by offers of leniency substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn

has revealed many guilty-plea convictions of defendants who are factually innocent.<sup>14</sup> Though perhaps hard to believe, innocent people sometimes buckle under the overwhelming pressures and incentives to plead guilty.<sup>15</sup> If completely innocent people sometimes plead guilty, there must be many more people with plausible factual, legal, or equitable defenses who are pleading too, as well as those who may be guilty of lesser offenses or may merit lower punishments.

Second, observers generally assumed that plea bargaining occurred in the shadow of trial. That is, they assumed that jury trials exerted an outsized influence because plea bargaining both rationally forecasted the probability of conviction and likely sentence and resulted in deals proportionate to those rational expectations.<sup>16</sup> But my other scholarship has called into doubt both how representative the universe of tried cases is and how rational the bargaining process is. The lawyers' incentives, the limits on discovery, the pressures of pretrial detention, and the heuristics and biases that afflict decision making all warp the bargaining process and outcomes.<sup>17</sup>

When the Supreme Court formally blessed plea bargaining four decades ago, it did so on the key assumption that defense counsel would vigorously vindicate innocent clients.<sup>18</sup> But defense lawyers are often shockingly overworked, shamefully underfunded, and sometimes incompetent.<sup>19</sup> They have little ability to mount independent investigations and vigorous defenses, leaving the outcome

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themselves. But our view is to the contrary.”)

14. As of this writing, The National Registry of Exonerations lists 274 exonerations in cases in which the conviction was obtained by guilty plea. *Browse Cases: Detailed View*, NAT'L REGISTRY EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx> [https://perma.cc/6L9F-GXL6] (last visited Mar. 20, 2016) (filter “Tags” column with “P” selection) (reporting that there have been 274 exonerations in cases in which the conviction was obtained by a guilty plea); *id.* (filter “Tags” column with “P” selection; then filter “DNA” column with “DNA” selection) (reporting that 42 of the 274 exonerations involved DNA).

15. See Roger Koppl & Meghan Sacks, *The Criminal Justice System Creates Incentives for False Convictions*, 32 CRIM. JUST. ETHICS 126 (2013).

16. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2465 & n.2 (2004) (discussing scholarly articles that also treat plea bargaining as largely determined by rationally forecasting expected trial outcomes).

17. *Id.* at 2476-79, 2482, 2486, 2493-507, 2514, 2523.

18. See *Brady*, 397 U.S. at 758 (trusting that “adequate advice of counsel” would allay the risk that innocent defendants “would falsely condemn themselves”).

19. See generally STEPHANOS BIBAS & BENJAMIN BARTON, *REBOOTING JUSTICE* (forthcoming 2016) (manuscript at ch. 2) (on file with author).

to ride on the quality of police work.<sup>20</sup> Police, however, may jump to conclusions, focus in on one suspect too quickly, and not thoroughly investigate alibis and leads that might point to other culprits.<sup>21</sup>

In addition, bad defense lawyering, coupled with mystifying procedures and strong pressures to plead quickly, can make it hard for defendants to choose intelligently among the alternatives before them and understand the likely convictions, sentences, and consequences that would flow from each one.<sup>22</sup> The trial will never come, and even the plea colloquy may be too late. New safeguards need to be built in earlier to ensure that the investigation, negotiation, and consideration of pleas is done correctly up front.

Lamenting the death of jury trials is a bit like complaining about the weather. A cottage industry criticizes their demise, but mere mortals are incapable of resurrecting them from the dead. Instead, it is time to design a plea-bargaining system from the ground up and then put some of those ideas into practice.

The core goals of a criminal procedural system should be accuracy and fairness. The investigatory, bargaining, and advising processes should be (re)designed to ensure the factual, legal, and moral accuracy of the resulting convictions, sentences, and collateral consequences. Fairness requires that defendants have the knowledge and freedom needed to make intelligent choices among alternatives. It also means that defendants, victims, and other participants must have meaningful opportunities to be heard and that they receive fair, respectful treatment along the way.

A system designed from scratch would rely little, if at all, on adversarial trials that would probably never come, let alone on appeals and collateral attacks that would come much too late and require second-guessing low-visibility, off-the-record decisions. Instead, it would build in some quasi-inquisitorial process early on, include adversarial participation early enough to make a difference, and incorporate several types of meaningful screening. It is far more

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20. *See id.* (manuscript at 15-16, 18).

21. *See* DAN SIMON, *IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS* 22-24 (2012) (discussing how police are affected by confirmation bias).

22. *See* Stephanos Bibas, *The Supreme Court, 2011 Term—Comment: Incompetent Plea Bargaining and Extrajudicial Reforms*, 126 *HARV. L. REV.* 150, 150, 169-71 (2012) (explaining that defense counsel abilities vary widely and that counsel should explain the advantages and disadvantages of various plea bargains).

important and effective to get things right the first time than to spend years trying to reconstruct how things might have gone differently.

The remainder of this Symposium Article comprises two parts. Part I looks at how to design a more accurate plea-bargaining system. Limited information, the psychology of investigations, and constricted defense participation can make pleas factually inaccurate. And now that grand juries are meaningless and plea judges are largely passive, no system actor ensures that charges are equitable and fitting. Solutions could include making the investigative process more inquisitorial, giving defense lawyers greater roles and more information earlier on, loosening bail rules, and ensuring more rigorous, neutral screening.

Part II turns to promoting plea bargaining's fairness. Defendants understand little of what they are getting into and have little opportunity to speak and be heard. The same is true of victims and affected locals. Solutions ought to include providing better information and de-biasing about odds and likely outcomes in advance of pleas. Reforms could even include preparing presentence reports in advance of pleas to serious crimes. Lay participants should have greater opportunities to speak, and proceedings should be more public and transparent to foster oversight and public scrutiny.

#### I. ENSURING FACTUALLY, LEGALLY, AND MORALLY ACCURATE PLEAS

In recent years, the rise in DNA exonerations<sup>23</sup> has painfully exposed the shortcomings of criminal investigations and plea negotiations. Section A explores the psychological, structural, and other forces that hamper both those procedures and the weighing of the equities of bringing charges. Section B goes on to suggest a range of quasi-inquisitorial, adversarial, and other structural elements that could make judgments more factually and legally accurate as well as better tailored to each case's equities.

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23. See, e.g., *supra* note 14.



*A. Sources of Inaccuracy**1. Factual and Legal Inaccuracy*

Our system is built as an adversarial one.<sup>24</sup> Police measure their performance based in part on how many arrests they make and how many cases they close, and prosecutors count up convictions as notches on their belts.<sup>25</sup>

That adversarial mindset skews the state's development of its cases. Once initial evidence, hunches, or tips incline an investigator toward a suspect, the confirmation bias colors police officers' thoughts and investigations to reinforce their initial beliefs.<sup>26</sup> Thus, police jump to conclusions, develop tunnel vision, and fail to consider alternative possibilities, or to take them seriously.<sup>27</sup> Moreover, police officers, forensic scientists, and prosecutors have conflicting roles: on one hand, to determine objectively "whodunit," and on the other, to clear cases by arresting, charging, and convicting a suspect. Motivated reasoning may thus skew their truth-seeking findings toward their adversarial interests. The adversarial role, membership in the law-enforcement team, and anger at outrageous crime may further bias thinking.<sup>28</sup> This adversarial mindset would be more defensible if there were both an equal adversary on the other side ferreting out evidence of innocence, and a neutral adjudicator weighing it all in the end. Neither assumption, however, holds true anymore.

First, consider the feebleness of the adversarial process. Criminal defendants are generally poor, so most must rely on court-appointed counsel.<sup>29</sup> Only a sliver of them, such as white-collar defendants, can afford great lawyers and thorough investigations.<sup>30</sup> Setting this

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24. See BIBAS & BARTON, *supra* note 19 (manuscript at 14).

25. See generally Koppl & Sacks, *supra* note 15 (discussing how prosecutor and police incentives to get convictions lead to convictions of the innocent).

26. See SIMON, *supra* note 21, at 23.

27. See *id.* at 24.

28. See *id.* at 25-29.

29. See CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, DOJ, NCJ 179023, SPECIAL REPORT: DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000) ("At felony case termination, court-appointed counsel represented 82% of State defendants in the 75 largest counties in 1996 and 66% of Federal defendants in 1998.").

30. See *id.* at 3-4.

minority aside, defense lawyers have too many cases, too little time, too little pay, and too little support to investigate and advocate vigorously.<sup>31</sup> Rarely can they afford private investigators or forensic testing.<sup>32</sup> And flat- or capped-fee arrangements push attorneys toward supporting quick pleas.<sup>33</sup> Plus, investigation and prosecution are largely secret and opaque. Defense lawyers have little opportunity to de-bias officers and prosecutors by presenting opposing perspectives—the sort of information that jurors would have heard at trial.<sup>34</sup> In addition, criminal discovery is pretty weak and frequently waived.<sup>35</sup> In most jurisdictions, defendants have no right to the state’s inculpatory evidence, impeachment evidence, or evidence of affirmative defenses.<sup>36</sup> It is even unclear whether defendants have a right to classic *Brady* exculpatory evidence before they plead guilty.<sup>37</sup>

The lack of a neutral adjudicator, of course, is precisely what plea bargaining seeks to achieve in order to promote efficiency. The Supreme Court assumes that by admitting guilt, a defendant obviates further adjudication.<sup>38</sup> But innocent defendants plead guilty, and guilty-plea allocutions are too cursory to serve as much of a check.<sup>39</sup> Often, a defendant admits guilt in the most general terms, and the prosecution likewise refers vaguely to what witnesses and other evidence would show at trial. Courts supposedly insist on more, a “strong factual basis,” when a defendant enters an *Alford* plea—that is, pleads guilty while maintaining his innocence.<sup>40</sup> But despite

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31. See BIBAS & BARTON, *supra* note 19 (manuscript at 14-15).

32. See, e.g., *supra* notes 29-30 and accompanying text.

33. BIBAS & BARTON, *supra* note 19 (manuscript at 16-18).

34. See *id.*

35. See *id.* (manuscript at 14-15) (describing what defense attorneys need to do to zealously defend their clients and how they lack the time to fulfill this role).

36. The federal approach is typical in denying access to witnesses’ names or statements until trial. See Jencks Act, 18 U.S.C. § 3500(a) (2012) (barring compelled disclosure of government witness statements “until said witness has testified on direct examination in the trial of the case”); FED. R. CRIM. P. 16(a) (specifying government’s discovery obligation upon defendant’s request); *United States v. Ruiz*, 536 U.S. 622, 629-33 (2002) (rejecting a constitutional right to impeachment or affirmative-defense evidence in advance of a guilty plea).

37. For a discussion of the circuit split surrounding this issue, see Michael Nasser Petegorsky, Note, *Plea Bargaining in the Dark: The Duty to Disclose Exculpatory Brady Evidence During Plea Bargaining*, 81 FORDHAM L. REV. 3599, 3614-31 (2013).

38. *North Carolina v. Alford*, 400 U.S. 25, 37-38 (1970).

39. See *supra* note 11.

40. *Alford*, 400 U.S. at 38; see *id.* at 37-38.

these limitations in *Alford* itself, some courts allow *Alford* pleas even without any record evidence of guilt.<sup>41</sup>

Judges at plea colloquies are unaccustomed to verifying guilt and feel unable to do so. Generally, they have no evidence in the record, no access to discovery, and no sense of the victim, the defendant, and the circumstances of the alleged crime.<sup>42</sup> Judges thus defer to prosecutors and defense lawyers.<sup>43</sup> But with limited funding and constrained bargaining power, defense lawyers are not much of a counterweight.<sup>44</sup> In essence, the only adjudicator is the prosecutor, as Jerry Lynch memorably explained.<sup>45</sup> But an adversarially trained, adversarially minded prosecutor is a poor substitute for a defense lawyer, whose job is to push back, or a judge, whose job is to probe skeptically the weaknesses of each side's case.

## 2. Normative Inaccuracy

Even when the police have arrested and prosecutors have charged the right guy, they may be committing an injustice. In a series of important works, Josh Bowers has explained how criminal justice professionals tend to fixate on legal factors, like whether conduct violates a statute, and administrative considerations, such as maximizing arrest or conviction statistics.<sup>46</sup> They pay much less attention to normative guilt—that is, the equities.<sup>47</sup> Criminal statutes are broad or even overbroad, so they often criminalize conduct that is morally unobjectionable or borderline at best.<sup>48</sup> Factually guilty defendants thus often receive far more punishment than they really deserve.

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41. See *United States v. Tunning*, 69 F.3d 107, 111-12 (6th Cir. 1995); *Higgason v. Clark*, 984 F.2d 203, 207 (7th Cir. 1993); *Jones v. State*, 351 S.W.3d 784, 784 (Mo. Ct. App. 2011).

42. See *Bibas*, *supra* note 10, at 1142.

43. See *id.*

44. See *supra* notes 29-33 and accompanying text.

45. See Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117, 2118-23 (1998) (exploring the inquisitorial role of the prosecutor in criminal proceedings).

46. See Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 *COLUM. L. REV.* 1655, 1656-58 (2010).

47. *Id.*

48. See generally *id.*; Josh Bowers, *The Normative Case for Normative Grand Juries*, 47 *WAKE FOREST L. REV.* 319 (2012) [hereinafter Bowers, *The Normative Case*].

The historical safeguards for such blameless conduct have fallen away, one by one. The narrowness of common law crimes has eroded, as legislatures rush to enact new or broaden existing crimes, claim political credit, and give prosecutors new tools.<sup>49</sup> Police discretion not to arrest is weakened by incentives to boost arrest statistics.<sup>50</sup> Likewise, prosecutorial discretion—the choice not to charge—is weakened by similar incentives to rack up conviction statistics and by fixation on legal and administrative guilt.<sup>51</sup> Grand juries are dominated by prosecutors or bypassed entirely, and petit juries rarely enter the picture.<sup>52</sup> The broader trend at work, I have argued, is the professionalization of criminal justice, resulting in a mechanical, assembly-line approach to processing cases.<sup>53</sup> To speed up the assembly line, we have squeezed out individualized weighing of desert, remorse, reform, and similar particularistic moral values.<sup>54</sup>

### *B. Promoting Accuracy Early On*

One response to the problems of inaccuracy would be to import a European-style inquisitorial system. Many elements of inquisitorialism are indeed attractive. But the comparative law literature on legal transplants should breed skepticism about our ability to transplant a very different system of justice wholesale.<sup>55</sup> The soil of the American legal system is deeply adversarial.<sup>56</sup> America lacks the rigorously neutral training and career tracks for judges, investigating magistrates, and the like that would be needed for such a system to succeed, and filling these gaps from scratch would be

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49. See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 55-59 (1997).

50. See Koppl & Sacks, *supra* note 15, at 126 (discussing how police incentives to get convictions lead to convictions of the innocent).

51. See *id.*

52. See Kevin K. Washburn, *Restoring the Grand Jury*, 76 FORDHAM L. REV. 2333, 2352-53 (2008) (asserting that although the grand jury was intended to provide a check on the prosecutor, the prosecutor dominates these proceedings).

53. See BIBAS, *supra* note 2, at 15-26, 33, 38-40.

54. See *id.*

55. See generally 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 (2004) (cautioning against "Americanization" of foreign legal systems).

56. See BIBAS & BARTON, *supra* note 19 (manuscript at 14).

difficult.<sup>57</sup> Moreover, doing so would be somewhat at odds with the desire for normative accuracy, which calls for greater lay roles and political accountability.

Inquisitorialism can nevertheless play a part, so long as it is blended with other, more indigenous institutions, such as more robust roles for defense counsel. Requiring more neutral screens, second looks, and greater cooperation can do more to turn the current game of hiding the ball into a more collaborative discussion and shared search for truth.

### *1. Inquisitorial Measures*

To make plea bargaining more accurate, the system needs actors who are not hired, rewarded, or promoted for racking up convictions to be more actively involved. This goal requires developing independent departments or bodies outside the core institutions of police departments and prosecutors' offices, new bodies whose missions are not tied to arrests and convictions.

Foremost among the new independent bodies would be investigating magistrates. A judicial official, such as a magistrate, would take an active role in investigating, following up leads, sharing discovery, and framing the issues for potential adjudication. With the advent of FaceTime, Skype, and similar electronic communications, magistrates can interview many possible witnesses and review documents and records without leaving their chambers. The parties could suggest various witnesses, pieces of evidence, and lines of inquiry, and the magistrate could dig into and test each one. This alternative would pool efforts, greatly compensating for defense lawyers' limited time and attention to pursuing leads and alibis. It would also limit each side's ability to hide unfavorable evidence or spin a witness's story, as the magistrate would record the fruits of the investigation for the use of both sides.

Investigating magistrates could also take prompt depositions of victims, witnesses, and even the many defendants who waive their *Miranda* rights. After all, the defendant is generally the person who

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57. See Langer, *supra* note 55, at 11-13 (discussing how legal education and socialization within a particular legal system shapes views on various structural understandings such as the role of judges or how plea bargaining should proceed).

knows the most about the case. At the stationhouse, soon after arrest, an on-call magistrate could question the suspect. Statements would be audio- and video-recorded. Investigators would draw natural inferences from silence, or pin down a suspect's alibi and check it out promptly. Magistrate questioning would improve upon police questioning, which on occasion lets slip incriminating details and results in some false confessions.<sup>58</sup> The magistrate's involvement would be analogous to a double-blind experimental design; the magistrate is less likely to bias the outcome because he is not motivated to tally arrests and does not know the secret details of the crime.<sup>59</sup>

Police departments and prosecutors' offices could also appoint designated devil's advocates for moderately serious cases. The advocate's job would be to argue the weaknesses in each case, so police and prosecutors should carefully consider the other side. Psychology studies find that forcing a decision maker to "consider the opposite" is perhaps the best way to combat various psychological heuristics and biases.<sup>60</sup> It is hard to know how effective these advocates would be, however, at swimming upstream against the dominant culture within each office, just as internal affairs divisions have difficulty pushing back against internal misconduct.<sup>61</sup>

Prosecutors could also borrow from the playbook of former New Orleans District Attorney Harry Connick, Sr. They could institute hard-screening units, staffed by experienced trial attorneys, to

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58. See, e.g., Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1054 (2010) ("We often cannot tell what happened [in a false confession] from reading the written records. In many cases, however, police likely disclosed those details during interrogations by telling exonerees how the crime happened. Police may not have done so intentionally or recklessly; the study materials do not provide definitive information about the state of mind of the officers."); see also Koppl & Sacks, *supra* note 15 (discussing prosecutor and police incentives to get convictions).

59. Cf. Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 898-900 (1995) (proposing a system of stationhouse depositions). Amar and Lettow would radically revise existing self-incrimination doctrine to make such depositions admissible. See *id.* at 898-901. For present purposes, I do not need to go so far or disturb existing doctrine. The large majority of defendants already waive their *Miranda* rights and choose to speak with police. See Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 275-76 (1996). Such defendants would be the ones covered by my proposal.

60. See Bibas, *supra* note 16, at 2523; see also *id.* at 2523-25.

61. See Al Baker & Jo Craven McGinty, *N.Y.P.D. Confidential*, N.Y. TIMES (Mar. 26, 2010), <http://www.nytimes.com/2010/03/28/nyregion/28iab.html?pagewanted=all> [https://perma.cc/7LVM-XXMV].

speak with the witnesses and probe the weaknesses of each case before committing to charge and prosecute it.<sup>62</sup> Insisting on more evidence up front, before the office has committed itself to prosecute, delays the onset of tunnel vision and the confirmation bias, which leads prosecutors to interpret most of the evidence as supporting the initial charging decision.<sup>63</sup> Stricter screening also leads prosecutors to decline about half of the charges received, reserving prosecution for the strongest cases—those in which defendants are least likely to be innocent.<sup>64</sup>

Supervisory prosecutors could also create formal avenues for defense lawyers to make legal and normative arguments on behalf of their clients, much as well-connected ex-prosecutors already do informally.<sup>65</sup> As Jerry Lynch explains, allowing appeals of prosecutors' charging and plea-bargaining decisions can force them to justify their offers and weigh countervailing considerations *ex ante*.<sup>66</sup>

Judges can also be more active before and at plea colloquies. Al Alschuler and I have previously proposed relaxing the stringent judicial ban on all participation in plea discussions to allow judges to counterbalance prosecutors' unilateral offers and threats.<sup>67</sup> Being more active need not mean sacrificing neutrality.<sup>68</sup> If a defendant chose to reject a judge's advice to plead, the case could automatically be reassigned to a different judge for trial.<sup>69</sup> The late Bill Stuntz proposed requiring judges at plea colloquies to review guilty pleas' factual bases very carefully, with little deference.<sup>70</sup> Military courts already do this by reversing pleas whenever they are improvident.<sup>71</sup> Relatedly, I have supported banning *Alford* and *nolo contendere*

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62. Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 61-65, 71 fig.1 (2002).

63. *Id.*

64. *Id.*

65. See Lynch, *supra* note 45, at 2148-49.

66. *Id.* at 2125-29, 2148-49.

67. See Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1059-60 (1976); Bibas, *supra* note 16, at 2542-43; Bibas, *supra* note 22, at 168 & n.123.

68. See Bibas, *supra* note 22, at 168.

69. *Id.* at 168 & n.123; Bibas, *supra* note 16, at 2542-43.

70. WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 302-03 (2011).

71. *Id.*

pleas to ensure that the judge has unequivocally verified the defendant's guilt.<sup>72</sup>

Forensic and scientific experts can also be more inquisitorial. Crime labs can be moved out of police departments to become independent agencies or offices within the judiciary.<sup>73</sup> Courts can make greater use of their existing authority to appoint neutral experts, beholden to neither side, to test ballistics, drugs, biological evidence, mental illness, and other forensic issues.<sup>74</sup>

## 2. *More Vigorous Defense*

One of the best solutions to the problem of inadequate defense would be to greatly increase defender funding and greatly reduce caseloads.<sup>75</sup> This has long proven politically infeasible, however, so for the moment, I set it aside.<sup>76</sup>

More modestly, defenders could at least receive dedicated funding for private investigators and forensic testing. Given the popularity of crime dramas such as *CSI*,<sup>77</sup> forensic funding is less politically vulnerable to the charge that it gets guilty defendants off the hook, because the results seem more neutral and scientific.<sup>78</sup> Thus, it might well be more politically palatable than an overall funding increase.<sup>79</sup>

Also, police and prosecutors should greatly expand their information sharing with defense lawyers early on, disclosing not only exculpatory material (required by *Brady* and *Giglio*),<sup>80</sup> but also most

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72. See BIBAS, *supra* note 2, at 160.

73. See Craig M. Cooley, *Reforming the Forensic Science Community to Avert the Ultimate Injustice*, 15 STAN. L. & POL'Y REV. 381, 422-23 (2004).

74. See *id.*; see, e.g., FED. R. EVID. 706.

75. See Bibas, *supra* note 16, at 2476, 2479-80.

76. See Bibas, *supra* note 22, at 167.

77. See Sheila L. Stephens, *The "CSI Effect" on Real Crime Labs*, 41 NEW ENG. L. REV. 591, 591-93 (2007) (discussing how the popularity of the television show *CSI* is affecting the criminal justice system).

78. See Cooley, *supra* note 73, at 417-21.

79. See *id.*

80. See *Giglio v. United States*, 405 U.S. 150 (1972); *Brady v. United States*, 397 U.S. 742 (1970); see also Ben Grunwald, *An Empirical Study of Criminal Discovery: The Effects of Open File 9-12* (unpublished manuscript) (on file with author) (discussing decisions in *Giglio* and *Brady*).



of the inculpatory material.<sup>81</sup> This change would result in something much closer to an open-file discovery system in advance of plea bargaining, except that there would be safeguards against witness tampering.<sup>82</sup> For instance, in organized crime, gang, and drug cases, witnesses' names and addresses might not be disclosed at all, or their statements might be shown to defense counsel under strict protective orders against sharing those names with their clients.<sup>83</sup> Witness statements might also be locked in through videotaped depositions subject to cross-examination, so the statements would be admissible regardless, and there would be no incentive to tamper later.<sup>84</sup>

Bail reform would help defendants to consult with and assist their defense lawyers in investigating their cases. Greater use of ankle bracelets and GPS monitoring would relieve pressure to plead guilty, while freeing up defendants to serve as their own private investigators, locating alibi and other favorable witnesses.<sup>85</sup> Moreover, many innocent defendants probably plead guilty to misdemeanors in exchange for time served so they can just go home.<sup>86</sup> Bail reform that reduces or eliminates monetary bail for minor crimes would lessen instances of the most common wrongful convictions.<sup>87</sup>

### 3. *Better Normative Evaluation*

Finally, we could create or resurrect various structures for ensuring some focus on normative issues—whether a defendant deserves punishment, and if so, how much.<sup>88</sup> I have suggested letting citizen representatives rotate through police and prosecutors' offices.<sup>89</sup>

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81. See Grunwald, *supra* note 80 (manuscript at 19).

82. In Texas, the Michael Morton Act, which amended the Texas Code of Criminal Procedure, now guarantees defendants access to witnesses' names, addresses, and prior written or recorded statements, including police reports and the like, as well as other relevant documents and tangible objects, before any trial or guilty plea. See TEX. CODE CRIM. PROC. ANN. art. 39.14 (West 2015). Prosecutors must also disclose all exculpatory and impeachment evidence, regardless of how material it is. See *id.* These rights appear to be nonwaivable. See *id.*

83. See Grunwald, *supra* note 80 (manuscript at 13, 27-28, 30).

84. See SIMON, *supra* note 21, at 47-48.

85. See Bibas, *supra* note 16, at 2540.

86. See *id.* at 2491-93.

87. See *id.*

88. See Bowers, *The Normative Case*, *supra* note 48, at 349.

89. See BIBAS, *supra* note 2, at 148.

Normative grand juries, plea juries, or restorative sentencing juries could inject lay community voices into serious cases, ensuring that charges and punishments do not deviate too far from the community's shared sense of justice.<sup>90</sup> Whatever the institution, the goal is some check to force a fresh, critical look without the legal blinders that often push cases toward foreordained convictions and punishments.

## II. FAIRNESS: IMPROVING UNDERSTANDING, TRANSPARENCY, AND PARTICIPATION

For too long, the institution of plea bargaining has relied uncritically on analogies to the free market and contract law.<sup>91</sup> But poorly informed, poorly educated, and poorly represented defendants are far from the fully informed, rational actors of classical economic theory.<sup>92</sup> Moreover, bargaining is not just an economic transaction meant to maximize deterrence and minimize transaction costs; it is a political and moral drama that must do more to inform and include defendants, victims, and the public.<sup>93</sup>

### A. Sources of Unfairness

#### 1. Defendants' Lack of Information

Defendants who consider pleading guilty are often poorly informed. To bargain intelligently, they must first estimate the strength of the prosecution's case to forecast the likelihood of conviction and sentence.<sup>94</sup> Civil litigants enjoy broad pretrial discovery, so they have a pretty clear idea of the strength of each side's

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90. See APPLEMAN, *supra* note 2, at 132-58; BIBAS, *supra* note 2, at 148, 156-64; Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 144 (2004); see also Bowers, *The Normative Case*, *supra* note 48; Washburn, *supra* note 52, at 2378-88.

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

92. See Bibas, *supra* note 16, at 2467-68, 2494-97.

93. See Bibas & Bierschbach, *supra* note 90, at 112-13.

94. See Scott & Stuntz, *supra* note 91, at 1959.

evidence.<sup>95</sup> Witness depositions, interrogatories, and document discovery all focus the issues and narrow areas of disagreement.<sup>96</sup>

“Many criminal defendants have an advantage over ... civil [litigants],” as guilty defendants usually know their own guilt and have some awareness of the likely evidence for and against them.<sup>97</sup> Thus, they have a reasonable idea of the likelihood of conviction and expected punishment.<sup>98</sup> But innocent or mentally ill defendants, or those who were intoxicated during the crime, often know little about the prosecution’s case.<sup>99</sup>

As mentioned above, discovery in criminal cases does little to preview the other side’s position.<sup>100</sup> In most states, the parties cannot depose witnesses.<sup>101</sup> In many states, the parties do not even learn witnesses’ names and addresses, let alone their prior statements, until trial or the eve of trial.<sup>102</sup> In discovery, criminal “[d]efendants receive only their own statements and criminal records, documents and tangible objects, reports of examinations and tests, and expert witness reports gathered by the prosecution.”<sup>103</sup> As already mentioned, defendants have no right to examine evidence bearing on impeachment or affirmative defenses in time for plea bargaining, and it is not clear whether they have a right to classic exculpatory material.<sup>104</sup>

Defense lawyers can do little to mitigate these problems. They lack the state’s powers to issue search warrants and subpoenas, force possible witnesses to testify before a grand jury, and offer cooperation agreements or immunity.<sup>105</sup> They usually lack the resources to conduct thorough investigations, hire forensic experts, and run scientific tests.<sup>106</sup> They may also lack the time, as

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95. See Bibas, *supra* note 16, at 2493.

96. See *id.* at 2493-94.

97. *Id.* at 2494.

98. See *id.*

99. *Id.*

100. See BIBAS, *supra* note 2, at 63; see also *supra* notes 35-37 and accompanying text.

101. See Bibas, *supra* note 16, at 2493-94.

102. Cf. 18 U.S.C. § 3500 (2012); FED. R. CRIM. P. 26.2.

103. Bibas, *supra* note 16, at 2494; see also FED. R. CRIM. P. 16(a).

104. See *supra* notes 36-37 and accompanying text; see also Bibas, *supra* note 16, at 2494 & n.125.

105. See Lynch, *supra* note 45, at 2125.

106. See BIBAS & BARTON, *supra* note 19 (manuscript at 16); Grunwald, *supra* note 80 (manuscript at 35).

prosecutors sometimes make exploding offers that require pleading before there is time to investigate.<sup>107</sup> And when defense investigators do find and contact the prosecution's witnesses, they may not be able to persuade the witnesses to talk, even if those same witnesses are willing—or feel pressure—to talk to the police.<sup>108</sup>

As a result, defendants bargain blindfolded. Prosecutors can bluff or take advantage of defendants' fears.<sup>109</sup> They can even threaten the death penalty in murder cases simply as leverage to induce pleas.<sup>110</sup> These problems are particularly acute when defendants are innocent or risk averse, and when they are under indeterminate or unstructured sentencing systems, which make outcomes less predictable.<sup>111</sup>

## 2. Defendants' Lack of Understanding

Not only are defendants often in the dark about the evidence for and against them, but they also have difficulty understanding and evaluating plea deals and the likely consequences.<sup>112</sup> Plea colloquies are built around the trial rights that defendants are giving up, such as cross-examination, trial by jury, proof beyond a reasonable doubt, and the privilege against self-incrimination.<sup>113</sup> Rules of criminal procedure require judges to provide defendants with a laundry list of procedural rights at plea colloquies, resulting in a near-monologue interrupted only by the defendant's perfunctory "Yes" to each question.<sup>114</sup> This information comes too late in the process to make a difference; by the time of the plea colloquy, the plea is a *fait accompli*.<sup>115</sup> Moreover, defendants are probably overloaded with

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107. See Bibas, *supra* note 22, at 153.

108. See Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211, 213-17 (2012) (discussing public perceptions of criminal justice and the seeming necessity to cooperate with police and prosecutors).

109. See Bibas, *supra* note 16, at 2495.

110. See MARC L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES: CASES, STATUTES, AND EXECUTIVE MATERIALS 1150 (5th ed. 2015).

111. See Bibas, *supra* note 16, at 2495.

112. See *Brady v. United States*, 397 U.S. 742, 748 (1970).

113. See, e.g., *Boykin v. Alabama*, 395 U.S. 238, 243 (1969).

114. See, e.g., FED. R. CRIM. P. 11(b).

115. See Lynch, *supra* note 45, at 2122-23.

information during a plea colloquy. Humans are notoriously bad at digesting information that they hear once without seeing, and the problem must be even worse for laymen hearing technical legalese in a stressful situation.<sup>116</sup> As Omri Ben-Shahar and Carl Schneider have noted, excessive mandated disclosures can boomerang, as everyone just tunes out the fine print.<sup>117</sup>

Having just endured this laundry list of procedural irrelevancies, defendants have difficulty understanding and focusing on the substantive merits of the deal.<sup>118</sup> In most jurisdictions, judges may not take part in plea bargaining, and typically they do not forecast expected sentences.<sup>119</sup> They are supposed to rattle off the elements of the crimes, but defendants may find it hard to understand technical doctrines (such as mens rea and accomplice liability) and evaluate the proof needed for each one.<sup>120</sup> Defendants also do not know the typical bargains and sentences for their crimes.<sup>121</sup> And usually the colloquy does not cover so-called collateral consequences because they are nominally civil, such as deportation, sex-offender registration, or restrictions on residency or employment.<sup>122</sup> Under *Padilla v. Kentucky*, defense lawyers are supposed to advise their clients about deportability ahead of time,<sup>123</sup> but there is little safeguard to ensure that they have done so adequately or at all.

At bottom, what defendants really need is an informed forecast of the expected conviction and sentence (including collateral consequences), how they compare to those received by other defendants, and the risks and benefits of holding out or walking away.<sup>124</sup> Defense lawyers try to communicate their best estimates to their clients, but they may not be able to do much investigation and discovery, may not have enough time to counsel their clients and weigh options, and may even “meet ‘em and plead ‘em” at the initial

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116. See Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 716-19 (2011).

117. See *id.* at 720-22, 737-38.

118. See *id.* at 720-22, 725-27.

119. See, e.g., FED. R. CRIM. P. 11(c)(1) (forbidding judges to participate); MILLER & WRIGHT, *supra* note 110, at 1156.

120. See MILLER & WRIGHT, *supra* note 110, at 1141-42.

121. See Scott & Stuntz, *supra* note 91, at 1959.

122. See MILLER & WRIGHT, *supra* note 110, at 1142-43.

123. See 559 U.S. 356, 374 (2010).

124. See Bibas, *supra* note 22, at 165-67.

appearance.<sup>125</sup> They may be consciously or unconsciously biased by their workloads and incentives to close cases.<sup>126</sup> They may also sometimes find it difficult to build mutual trust and get their clients to understand the pros and cons of various options.<sup>127</sup>

### 3. *Laymen's Lack of Voice*

Laymen—defendants, victims, and locals affected by a crime—want their day in court. They may wish to accuse, deny, justify, excuse, vent, express sorrow, apologize, or forgive.<sup>128</sup> Crime wounds relationships among people, and speaking about crime is often an essential component of exposing and mending those frayed relationships.<sup>129</sup> Just as medical patients want doctors and nurses to listen to their symptoms and maladies, so too do those affected by crimes want their chance to be heard. They may expect a jury trial to give them that opportunity, only to learn that a plea bargain has already swept their case under the rug.<sup>130</sup> That sense of a stake in and ownership of a case often gets lost in legal discourse, as criminal justice professionals focus on the bottom-line likelihood of conviction and expected sentence.<sup>131</sup> But as Tom Tyler's work shows, giving participants voice is an important part of procedural justice—of treating participants fairly, respectfully, and with dignity.<sup>132</sup>

Unfortunately, the plea-bargaining system has terrible bedside manner. It focuses on the bottom line, to the exclusion of how it gets there.<sup>133</sup> Plea bargaining rushes cases along, foreclosing the opportunities to speak that laymen so desire.<sup>134</sup> It measures efficiency in days and dollars, not self-expression or reconciliation.<sup>135</sup> Thus, it has made far too little room for the parties even to encounter one

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125. See BIBAS & BARTON, *supra* note 19 (manuscript at 20).

126. See *id.* (manuscript at ch. 2).

127. See Bibas, *supra* note 16, at 2476-82, 2525-27.

128. BIBAS, *supra* note 2, at 159.

129. See Bibas & Bierschbach, *supra* note 90, at 109-18.

130. See *id.* at 136.

131. See Lynch, *supra* note 45, at 2140.

132. See TOM R. TYLER, WHY PEOPLE OBEY THE LAW 126-30 (2006).

133. See Bibas & Bierschbach, *supra* note 90, at 88.

134. See *id.*

135. See BIBAS, *supra* note 2, at 65.

another, let alone to engage in dialogue.<sup>136</sup> Defense lawyers tell their clients to stay quiet and script their plea allocutions, suppressing their voices.<sup>137</sup> Likewise, prosecutors displace victims and often fail to enforce victims' remaining rights to be heard.<sup>138</sup>

#### 4. *Opaque, Insular Criminal Justice*

Relatedly, plea bargaining has turned criminal justice from "educational social theater"<sup>139</sup> into an impersonal, lawyer-driven machine.<sup>140</sup> In the colonial era, victims, defendants, and community residents not only saw justice done but took part in doing it themselves.<sup>141</sup> Jury trials were public and transparent, letting everyone see that justice was done.<sup>142</sup> They were also participatory, letting everyone take turns in doing justice themselves.<sup>143</sup> That participation empowered victims, defendants, and jurors.<sup>144</sup> Jurors, in particular, engaged in self-government, checked abuses of governmental power, publicized crime problems, and underscored the community's moral judgment.<sup>145</sup>

Today, by contrast, plea bargaining is a remarkably insular, impenetrable system.<sup>146</sup> Backroom deals and corridor conversations determine defendants' fates, largely predestining the outcomes of courtroom proceedings.<sup>147</sup> Defendants receive take-it-or-leave-it deals, often with short deadlines, and they usually take them.<sup>148</sup> If victims have any say at all, it is a purely ceremonial role at sentencing after the parties have already prescribed the outcome.<sup>149</sup> Judges act largely as figureheads, and community members play no active

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136. See Bibas & Bierschbach, *supra* note 90, at 96-101.

137. See BIBAS, *supra* note 2, at 16-17, 56-57.

138. See *id.* at 16-17, 90.

139. *Id.* at xv.

140. See Bibas & Bierschbach, *supra* note 90, at 88-89.

141. See Washburn, *supra* note 52, at 2342-45 (discussing the history of the grand jury in colonial America and its checks against British rule).

142. See APPLEMAN, *supra* note 2, at 28-29.

143. See *id.* at 15.

144. See *id.*

145. See Washburn, *supra* note 52, at 2342-45.

146. See Wright & Miller, *supra* note 62, at 34.

147. See Lynch, *supra* note 45, at 2122-23.

148. See *id.* at 2132.

149. See Bibas & Bierschbach, *supra* note 90, at 99-100.

role.<sup>150</sup> As a result, defendants and victims may feel bewildered, as if they have either gotten away with something or been taken advantage of.<sup>151</sup> The public misunderstands and mistrusts the system, thinking defendants are (sometimes literally) getting away with murder.<sup>152</sup>

Our plea-bargaining system focuses on efficiency and therefore cuts corners, relying on expedients that may cost legitimacy.<sup>153</sup> For instance, charge bargains seem to lie about the crime actually committed.<sup>154</sup> *Alford* and no-contest pleas do so doubly and may seem to have convicted innocent defendants.<sup>155</sup> Excessive use of cooperation deals may breed resentment, as evidenced by the “Stop Snitching” movement.<sup>156</sup> As studies by Tom Tyler, Josh Bowers, and Paul Robinson show, sacrificing legitimacy may come at a high cost, undermining the law’s moral authority and the people’s willingness to comply with it.<sup>157</sup>

### *B. Reforms/Solutions*

Plea bargaining functions simultaneously as a private market and as public justice, so improvements should address both its private and public fairness.<sup>158</sup> Improving the market’s fairness requires ensuring that defendants receive and have the opportunity to digest better information about the merits of their deals and the likely alternatives to negotiated outcomes.<sup>159</sup> Improving justice means giving defendants, victims, and neighbors a day in court and helping them to reconcile, as well as to understand and influence,

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150. See APPLEMAN, *supra* note 2, at 137-39.

151. See Wright & Miller, *supra* note 62, at 33.

152. See ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE 115 (2009).

153. See BIBAS, *supra* note 2, at 64-65.

154. See *id.* at 45, 145; Wright & Miller, *supra* note 62, at 111-13.

155. See BIBAS, *supra* note 2, at 64-65, 70.

156. See NATAPOFF, *supra* note 152, at 114-26; Daniel C. Richman, *Cooperating Defendants: The Costs and Benefits of Purchasing Information from Scoundrels*, 8 FED. SENT’G REP. 292, 292-93 (1996).

157. *E.g.*, TYLER, *supra* note 132, at 125-34; Bowers & Robinson, *supra* note 108; Paul H. Robinson et al., *The Disutility of Injustice*, 85 N.Y.U. L. REV. 1940 (2010).

158. See BIBAS, *supra* note 2, at 64.

159. See Bibas, *supra* note 22, at 165-67.



the process.<sup>160</sup> That also means fighting the most hidden, insular, and dishonest kinds of plea bargains.

### 1. *Better-Informed Pleas*

Defendants need better information about the facts and the strength of the evidence against them.<sup>161</sup> The most obvious remedy is to liberalize both the amount and the timing of discovery, as discussed above.<sup>162</sup> Discovery must be ample and occur well in advance of a plea hearing.<sup>163</sup>

Defendants also need a sense of the best alternative to taking the deal before them.<sup>164</sup> Is there a mutually beneficial alternative, such as a cooperation deal? Does the deal trigger or avoid various collateral consequences, such as deportation? What are the dangers of cooperating and, conversely, the downsides if the defendant is not fully cooperative? Would holding out likely yield a better or worse deal? What are the odds of acquittal at trial and if convicted, what is the expected post-trial sentence?

In order to provide this information more effectively, defense counsel need better training, mentoring, and information sharing (and sometimes language skills, for clients who speak little English).<sup>165</sup> Judges and prosecutors can also help to ensure that defense counsel have communicated thoroughly.<sup>166</sup> In particular, prosecutors can use reverse proffer sessions to explain to defendants the strength of the evidence, the likelihood of conviction, the expected post-trial sentence, and the benefits of a deal.<sup>167</sup>

Lawyers can also do more to present this information effectively to defendants, who may be innumerate, illiterate, or speak little or no English.<sup>168</sup> All plea bargains should be in writing, ideally in plain English, with simple charts to explain any changes in charges and

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160. See Bibas & Bierschbach, *supra* note 90, at 112-13.

161. See Grunwald, *supra* note 80 (manuscript at 37-38).

162. See *id.* (manuscript at 39-40); see also *supra* Part II.A.1.

163. See Grunwald, *supra* note 80 (manuscript at 39-40, 43).

164. See *id.* (manuscript at 37-38).

165. See Bibas, *supra* note 22, at 167.

166. See *id.* at 169-71.

167. See *id.* at 167-68.

168. See *id.* at 167.

minimum, maximum, and expected sentences.<sup>169</sup> These charts should factor in probation, parole, and good-time credits, disclosing what portion of the sentence must be served—and what fraction typically is served—before a defendant is released.<sup>170</sup> Lawyers must translate technical descriptions of crimes into plain English so defendants understand the requirements for conspiracy or accomplice liability, for example.<sup>171</sup> Translations should be readily available for non-English speakers.

## 2. *Procedural Justice*

Fairness is also a matter of how the plea process treats defendants and other participants. Defendants should have opportunities to meet with their lawyers in person, or at least by videoconference, several times before pleading to build trust, discuss the facts, and evaluate plea offers.<sup>172</sup> That means abolishing “meet ‘em and plead ‘em” lawyering<sup>173</sup> except for the most minor misdemeanors. Defendants—and perhaps victims and neighbors—should receive plenty of advance notice of plea offers and court dates.<sup>174</sup> Defendants should have opportunities to allocute at plea hearings and at sentencing.<sup>175</sup> Defendants and victims should also have opportunities to meet and reconcile with one another, through victim-offender mediation or similar restorative justice conferences.<sup>176</sup>

The criminal justice system should likewise favor the most open and transparent forms of plea bargaining. The best pleas are ones that do not lie about or manipulate the charges or facts.<sup>177</sup> These include blind or open pleas, in which defendants plead guilty to the indictment, anticipating a sentence discount that is fixed or based

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169. *See id.*

170. *See id.* at 165-66.

171. *See id.* at 167.

172. *See Bibas, supra* note 16, at 2540 (describing how pretrial detention can prevent defendants from meeting with their lawyers, which makes them less able to evaluate plea offers and thus more willing to take those offers).

173. BIBAS & BARTON, *supra* note 19 (manuscript at 20).

174. *See Bibas & Bierschbach, supra* note 90, at 136 (discussing how victims and community members receive little notice of plea offers and convictions).

175. *See APPLEMAN, supra* note 2, at 149-58 (discussing the merits of allocution).

176. *See Bibas & Bierschbach, supra* note 90, at 130-34.

177. *See BIBAS, supra* note 2, at 145.

on an established judicial expectation.<sup>178</sup> At the other end of the spectrum are fact bargains, which lie about what happened, as well as *Alford* and no-contest pleas, which equivocate about defendants' guilt.<sup>179</sup> More generally, charge bargains obscure what really happened and mute the system's unequivocal finding of guilt.<sup>180</sup>

It is difficult to ensure that prosecutors have not manipulated the baseline through precharge bargaining, but rigorous charge screening by a different prosecutor could help to ensure that charges start at an appropriate level. Rationing cooperation agreements, restricting them to a distinct minority of overall cases, could also help limit the corrosive mistrust they breed and assuage the fears that the government is buying disloyalty or even engineering crimes.

#### CONCLUSION

Plea bargaining is a troubling way to dispense justice. Although it purports to be an adjunct to the criminal justice system, the Supreme Court rightly recognizes that bargaining has swallowed up most of the system. We can no longer count on jury trials as backstops, ensuring that bargains are fair and accurate because bargains are struck in the shadow of the adversarial process. To make it fairer and more accurate, plea bargaining requires better information, more participation, and a combination of inquisitorial and more vigorous adversarial safeguards. Even without returning to a world of jury trials, we could at least soften the worst aspects of our concessionary system of bargained-for justice.

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178. See Bibas, *supra* note 16, at 2535-38.

179. See BIBAS, *supra* note 2, at 160.

180. See *id.* at 145.

