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Fixed Justice: Reforming Plea-Bargaining With Plea-Based Ceilings

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Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings

Russell D. Covey*

The ubiquity of plea bargaining creates real concern that innocent defendants are occasionally, or perhaps even routinely, pleading guilty to avoid coercive trial sentences. Pleading guilty is a rational choice for defendants as long as prosecutors offer plea discounts so substantial that trial is not a rational strategy regardless of guilt or innocence. The long-recognized solution to this problem is to enforce limits on the size of the plea/trial sentencing differential. As a practical matter, however, discount limits are unenforceable if prosecutors retain ultimate discretion over charge selection and declination. Because the doctrine of prosecutorial-charging discretion is immune to challenge, conventional fixed discounts are doomed to failure.

This Article urges abandoning the effort to constrain prosecutors' discretion to make lenient plea offers and, instead, shifting regulatory focus to the creation of sentencing rules that prevent trial courts from imposing overly harsh trial sentences. This Article makes an original contribution to the plea-bargaining literature by demonstrating that effective enforcement of discount limits is possible through adoption of plea-based ceilings. Ceilings would limit sentence differentials by ensuring that trial sentences would not exceed plea sentences by more than a modest amount. Because ceilings focus on limiting punitive trial penalties rather than preventing overly lenient plea offers, ceilings are practically enforceable in a way that conventional fixed discounts are not and, thus, promise a method to improve the guilt/innocence sorting function of criminal procedure.

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I. INTRODUCTION

Plea bargaining dominates the modern American criminal process.¹ Upwards of 95% of all state and federal felony convictions are obtained by guilty plea.² The odds of fighting and winning a criminal case at trial have never been smaller, a fact attested to by the ever-shrinking number of defendants who successfully contest charges at trial. In 2004, out of 81,717 defendants whose cases were terminated in U.S. district courts, only 397 were acquitted after a jury

1. As one set of commentators rather blandly observed, “[t]he practice of exchanging punishment discounts for waivers of process is widespread.” 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, 962 (2005). Nationwide data shows that guilty-plea sentences are the least punitive and jury trial sentences the most punitive. *Id.* at 962-63. Or, as William Stuntz and Dean Scott more colorfully put it: “plea bargaining is . . . not some adjunct to the criminal justice system; it *is* the criminal justice system.” Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992). Without plea bargaining, the number of cases resolved through guilty pleas almost certainly would plummet, potentially resulting in system-wide gridlock. See Susan R. Klein, *Enhancing the Judicial Role in Criminal Plea and Sentence Bargaining*, 84 TEX. L. REV. 2023, 2023 (2006) (“[T]he American criminal justice system, like the civil system, would collapse if even a small percentage of suspects . . . demanded trials.”).

2. See BUR. OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2003, at 450 tbl. 5.46 (Ann L. Pastore & Kathleen Maguire eds., 31st ed. 2005), available at <http://albany.edu/sourcebook> (reporting state felony convictions); LEONIDAS RALPH MECHAM, ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR 245 tbl. D-4 (2005), available at <http://www.uscourts.gov/judbus2005/appendices/d4.pdf> (indicating that 95.7% of all convictions in U.S. district courts were obtained through guilty pleas).

trial, the fewest in more than a half-century.³ But not only acquittals are disappearing. The number of trial convictions in 2004 was also the lowest in nearly forty years.⁴

These statistics evidence the astonishing “triumph” of plea bargaining in American criminal procedure.⁵ The relentless rise in guilty plea rates might be less troubling if there were greater reassurances that defendants who plead guilty are, in fact, guilty. However, mounting evidence suggests that guilty pleas are not reserved only for the guilty.⁶ Nobody knows how many innocent defendants enter guilty pleas, but the number almost certainly is larger than has previously been acknowledged.⁷ Although the causes of false guilty pleas are undoubtedly numerous, economic analyses of plea bargaining provide a powerful explanation. Innocent defendants plead guilty, as do guilty defendants, because the alternative—contesting guilt at trial—is too risky.⁸ As one defense lawyer explained in counseling a client he believed was innocent to plead guilty to a misdemeanor to avoid trial on serious felony charges, “once a person is facing felony charges, the issue no longer is whether he did the crime; it’s how to limit the damage.”⁹ The usual way to limit the damage, of course, is to plea bargain.

3. See Sourcebook of Criminal Justice Statistics Online tbl. 5.22.2004 (2004), <http://www.albany.edu/sourcebook/pdf/t5222004.pdf>.

4. The 2276 persons convicted at trial in U.S. district courts in 2004 was, except for 2002 (when 2271 persons were convicted at trial), the lowest number since 1966. See *id.*

5. See GEORGE FISHER, PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 15-17 (2003) (documenting the ascendancy of plea bargaining since the mid-1800s to present).

6. See Albert W. Alschuler, *The Prosecutor’s Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 60-69 (1968) (providing anecdotal evidence that suggests that plea bargaining induces innocent defendants to plead guilty).

7. The prediction that large plea discounts induce innocent defendants to plead guilty is more than a product of economic theory. Ample anecdotal evidence demonstrates that defendants with strong defenses are induced to plead guilty in the face of large plea-bargained discounts. See *id.* Accumulating evidence in DNA exoneration cases as well as in major police scandals, such as those that occurred in the Los Angeles RAMPART division and in Tulia, Texas, demonstrates that innocent people do in fact plead guilty to obtain the benefits of plea bargains. See Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 531-36 (2005) (explaining that thirty-one of thirty-nine falsely accused defendants in the Tulia scandal pleaded guilty, as did a majority of exonerated defendants whose convictions were overturned based on revelations of police perjury and misconduct as a result of the Los Angeles RAMPART scandal).

8. See Scott & Stuntz, *supra* note 1, at 1912 (“Defendants accept bargains because of the threat of much harsher penalties after trial . . .”).

9. STEVE BOGIRA, COURTROOM 302: A YEAR BEHIND THE SCENES IN AN AMERICAN CRIMINAL COURTHOUSE 334 (2005).

Trials are intolerably risky for most defendants because the differential between plea sentences and trial sentences is enormous and growing.¹⁰ To stem this trend and to revive the criminal trial as a viable option for innocent defendants, the sentencing differential must be addressed.

Numerous commentators have proposed a variety of methods to reduce the sentence differential. Abolition of plea bargaining, advocated by some of plea bargaining's most prominent critics, by definition would erase any plea/trial sentence "differential."¹¹ A few jurisdictions have attempted abolition, at least in part, but those experiments have produced no lasting successes and certainly have not inspired widespread emulation.¹² Most observers of the criminal justice system have come to believe (rightly or wrongly) that abolition is simply not feasible.¹³ In recognition of the unlikelihood of abolition,

10. See *id.*

11. Although the plea bargaining literature is vast, the most prominent contemporary critics of plea bargaining are Albert W. Alschuler, who has produced an impressive and comprehensive indictment of plea bargaining in numerous works, and Stephen Schulhofer. See, e.g., Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652, 652 (1981) [hereinafter Alschuler, *Changing Debate*] (urging abolition of plea bargaining); Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1180 (1975) [hereinafter Alschuler, *Defense Attorney's Role*] ("[T]he plea bargaining system is an inherently irrational method . . . [,] destructive of sound attorney-client relationships."); Albert W. Alschuler, *Plea Bargaining and Its History*, 13 LAW & SOC'Y REV. 211, 212-21 (1979) [hereinafter Alschuler, *Plea Bargaining*] (challenging the historical justification for plea bargaining); Alschuler, *supra* note 6, at 52 ("[P]lea bargaining should be abolished."); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1037-38 (1984) (demonstrating that the abolition of plea bargaining is a real possibility); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1979 (1992) [hereinafter Schulhofer, *Plea Bargaining as Disaster*] ("[P]lea bargaining seriously impairs the public interest in effective punishment of crime and in accurate separation of the guilty from the innocent.").

12. Prominent attempts to abolish plea bargaining in whole or in part were pursued in Alaska in the mid-1970s and in El Paso, Texas (as to burglary) in the 1980s. See Teresa White Carns & John Kruse, *A Re-Evaluation of Alaska's Plea Bargaining Ban*, 8 ALASKA L. REV. 27, 33-34 (1991) (discussing the effects of the ban in Alaska); Robert A. Weninger, *The Abolition of Plea Bargaining: A Case Study of El Paso County, Texas*, 35 UCLA L. REV. 265, 275-78 (1987) (discussing the ban from 1978-84 in El Paso, Texas); see also *State v. Hessen*, 678 A.2d 1082, 1085-86 (N.J. 1996) (discussing New Jersey's ban on plea bargaining in municipal court from 1974 through 1990 and its continuing ban on plea bargaining in drunk driving cases).

13. See Nancy Amoury Combs, *Copping a Plea to Genocide: The Plea Bargaining of International Crimes*, 151 U. PA. L. REV. 1, 19-20 (2002) ("[E]ven the harshest critics of plea bargaining have limited their abolition proposals to cases involving the more serious crimes and have acknowledged that reducing or eliminating plea bargaining will require the expenditure of additional resources and the simplification of procedures."). John Langbein has provided a spirited argument that plea bargaining can be reduced or eliminated by simplifying trial procedure and points to Germany as a model. See John H. Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204, 204-05 (1979).

others have advocated a less radical approach to plea-bargaining reform involving so-called “fixed discounts.”¹⁴ Fixed discounts regularize the guilty-plea process by establishing a fixed and nonnegotiable discount for pleading guilty.¹⁵ In a fixed-discount system, defendants who plead guilty receive a set reduction in sentence in exchange for their guilty plea.¹⁶ To be effective, the fixed discount must be large enough to provide an incentive for guilty defendants to plead guilty, but it must not be so large that it induces all defendants, guilty and innocent alike, to relinquish their trial rights.¹⁷

Fixed discounts only work, however, if they are really fixed. Unfortunately, the Achilles’ heel of virtually all fixed-discount proposals offered to date is their utter failure to confront realistically the problem of enforcement. Most fixed-discount proposals assume that courts will police plea bargaining by rejecting guilty pleas whenever the terms of the plea are “overly lenient.”¹⁸ But this is a job judges are poorly suited to perform. Any system of fixed discounts that depends on preventing prosecutors from making and defendants from accepting overly lenient plea offers is doomed. Prosecutorial discretion over charging decisions, including the important discretion not to charge at all, is far too deeply embedded to be abolished, or even substantially limited.

This Article argues that fixed discounts offer the most promising practical solution to the plea-bargaining epidemic and that an effective fixed-discount system can be devised, but only if the traditional fixed-discount paradigm is radically shifted.¹⁹ Rather than try to constrain the discretion of prosecutors to make lenient plea offers (or of

Various jurisdictions’ bans on one type of bargaining, such as bans on sentence bargaining, are examples of this simplification.

14. See, e.g., Douglas D. Guidorizzi, Comment, *Should We Really “Ban” Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 EMORY L.J. 753, 782 (1998) (“The establishment of a set of written sentencing discounts . . . limits the concessions the prosecutor can offer for a guilty plea . . .”).

15. See *id.*

16. See *id.*

17. See *id.*

18. See, e.g., Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 CARDOZO L. REV. 2295, 2335 (2006) (“The partial ban system relies on courts to review the bargained-for sentences, requiring them to reject exceedingly lenient bargains.”).

19. Relevant statutory provisions in England and Wales, however, might do something similar: add a one-third “trial tariff” to plea offers where defendants are convicted at trial. See Candace McCoy, *Bargaining in the Shadow of the Hammer: The Trial Penalty in the USA*, in *THE JURY TRIAL IN CRIMINAL JUSTICE* 23, 26-27 (Douglas D. Koski ed., 2003) (comparing the U.S. plea-bargaining system with the “trial tariff” in the English and Welsh systems).

defendants to accept and judges to approve them),²⁰ which is a fool's errand, this Article argues that the better strategy is to attack the other pole of the differential. Accordingly, it proposes a way to eliminate the punitive trial sentences that coerce defendants to accept the plea-bargained alternative through adoption of a device referred to herein as "plea-based ceilings."

As the name suggests, plea-based ceilings would establish mandatory caps or ceilings on trial sentences. Pursuant to the ceiling, no defendant could receive a punishment after trial that exceeded the sentence he could have had as a result of a plea offer by more than a modest, predetermined amount. Ceilings would thus limit the sentencing differential and enforce a fixed discount by capping the punishment that could be imposed on the defendant who pleads not guilty.

This Article proceeds in five parts. Part II sets forth the long-recognized benefits that adoption of fixed plea discounts would bring to the plea-bargaining process. These benefits include: increased incentives for innocent defendants to contest their cases and for prosecutors to screen out weak cases from their dockets, diminished incentives to overcharge, and the elimination of bartering from the criminal justice process without the concomitant elimination of guilty pleas.

Notwithstanding these widely recognized benefits, fixed discounts have never been successfully implemented in the United States.²¹ Part III discusses why conventional fixed-discount proposals have not succeeded to date and why, as conventionally envisioned, they will not work. Part III examines in particular why the fixed-discount provisions embedded in the Federal Sentencing Guidelines have failed to have the beneficent effects lauded by fixed-discount advocates. Part IV then introduces the concept of plea-based ceilings and demonstrates how ceilings solve the problems of evasion and judicial oversight that plague conventional fixed-discount reforms.²² Part IV seeks to demonstrate that the structure of plea-based ceilings makes them especially difficult to circumvent, thereby substantially

20. That is, to place new external constraints apart from those that currently operate, i.e., the facts of the case and the range of penalties permitted by the penal code.

21. See *infra* notes 26-88 and accompanying text. Fixed-plea discounts have been implemented, albeit with limited success, in Italy. See Nicola Boari & Gianluca Fiorentini, *An Economic Analysis of Plea Bargaining: The Incentives of the Parties in a Mixed Penal System*, 21 INT'L REV. L. & ECON. 213, 217 (2001) (noting that only a very small percentage of cases are resolved in Italy through plea bargains).

22. See *infra* notes 89-147 and accompanying text.

enhancing their effectiveness to mitigate the worst features of the plea-bargaining system.

Part V expands on the discussion of the benefits that adoption of a plea-based ceiling system would bring. Part V demonstrates how plea-based ceilings would obviate the worst abuses of the present plea-bargaining system, including the use of the death penalty to induce guilty pleas and other coercive bargaining tactics. Finally, Part VI considers potential objections, including concerns that ceilings might unduly constrict judicial sentencing discretion, and addresses questions that might arise from the United States Supreme Court's recent decisions in *Blakely v. Washington*²³ and *United States v. Booker*²⁴ that implicate judicial sentencing discretion. It also briefly considers the problems that might be injected by the need to preserve inducements to cooperate.²⁵ Part VI finally touches on the most intangible and practical question: is this, or any plea-bargaining reform, possible? The Article suggests that reform is possible if, but only if, the political will to reform can be mustered.

II. HOW FIXED DISCOUNTS AMELIORATE PLEA BARGAINING'S FLAWS

Most commentators that have advocated reform of plea bargaining have begun by criticizing the dramatic gap between plea and trial sentences.²⁶ This differential, alternatively referred to as the "plea discount" or "trial penalty,"²⁷ depending on the perspective, is

23. 542 U.S. 296 (2004).

24. 543 U.S. 220 (2005).

25. See *infra* notes 192-208 and accompanying text.

26. See, e.g., Alschuler, *Changing Debate*, *supra* note 11, at 660 ("[N]either a guilty-plea defendant's possibly repentant state of mind nor the economic benefit that he may confer upon the state can justify the imposition of a less severe sentence than the one that he would have received had he exercised the right to trial.") Alschuler cites a study conducted by Hans Zeisel finding that "sentences of New York City defendants convicted at trial were 136% more severe than those proposed by prosecutors in pretrial offers to the same defendants." *Id.* at 653. He further describes the sentencing differential as shockingly large. *Id.* at 656. Another commentator characterizes plea bargaining as an essentially unilateral process by which the prosecutor coerces defendants to plead guilty, illustrating with a case in which the defendant rejected a plea offer carrying a prison term of two to six years and received, after conviction at trial, a term of forty to eighty years. See Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 39 (citing *People v. Dennis*, 328 N.E.2d 135, 136 (Ill. App. Ct. 1975)).

27. Plea discounts and trial penalties are simply two sides of the same coin, a logical conclusion many courts have reluctantly reached. See *Roberts v. United States*, 445 U.S. 552, 557 n.4 (1980) ("We doubt that a principled distinction may be drawn between 'enhancing' the punishment imposed upon the petitioner and denying him the 'leniency' he claims would be appropriate if he had cooperated."); *Coles v. United States*, 682 A.2d 167, 169 (D.C. 1996) ("The line between affording leniency to a defendant who has admitted guilt by pleading

indisputably the engine that drives the plea-bargaining machine.²⁸ Numerous commentators have argued that plea bargaining's worst effects could be eliminated by limiting or "fixing" the size of the plea discount.²⁹

In such a fixed-discount system, defendants who plead guilty would receive a standard, predetermined discount off the sentence they

guilty and punishing one who has denied his guilt and proceeded to trial is elusive, to say the least."). Nonetheless, courts have held that imposition of a trial penalty is improper even while permitting plea discounts. *See, e.g., United States v. Hutchings*, 757 F.2d 11, 14 (2d Cir. 1985) ("The '[a]ugmentation of sentence' based on a defendant's decision to 'stand on [his] right to put the Government to its proof rather than plead guilty' is clearly improper." (quoting *United States v. Araujo*, 539 F.2d 287, 292 (2d Cir. 1976))). In this Article, I refer to both plea discounts and trial penalties and mean by both phrases the difference between the plea and trial sentence. However, I calculate plea discounts from an *ex ante* position, and the trial penalty from an *ex post* position. As a result, the same sentence differential can be described mathematically in two different ways. Where the plea sentence is two years and the trial sentence three years, the defendant who pleads guilty receives a "plea discount" of 33% (because the sentence he receives is only two-thirds of the sentence he otherwise would have received), while the defendant who goes to trial and loses is subject to a trial penalty of 50% (because the sentence he receives is half again as bad as the sentence he could have had).

28. *See* Alschuler, *Changing Debate*, *supra* note 11, at 652 ("Criminal defendants today plead guilty in overwhelming numbers primarily because they perceive that this action is likely to lead to more lenient treatment than would follow conviction at trial."); Loftus E. Becker, Jr., *Plea Bargaining and the Supreme Court*, 21 LOY. L.A. L. REV. 757, 839 (1988) ("If plea bargaining is to exist at all, there must be some differential . . ."). Becker further notes:

Unless it is to be based on wholly illusory benefits, a functioning system of plea bargaining must provide defendants with an incentive to plead guilty. Therefore, defendants who insist on trial must suffer in some way if they are convicted. It is ordinarily assumed that this suffering will be in the form of harsher sentences, and in all probability this is often true.

Becker, *supra*, at 764 n.18.

29. *See* CHARLES E. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 284 (1978) (arguing that a "more effective solution would be to try to hold the 'price' of going to trial to a reasonable level" by limiting the difference in sentences after pleas and trial); Rudolf J. Gerber, *On Dispensing Injustice*, 43 ARIZ. L. REV. 135, 146-47 (2001) (arguing that deleterious effects of plea bargaining could be moderated by either "provid[ing] a preset discount for defendants who plead guilty" or with legislation that "prohibit[s] prosecutors from reducing a charge or a sentence more than one level or class below its original designation"); John Kaplan, *American Merchandising and the Guilty Plea: Replacing the Bazaar with the Department Store*, 5 AM. J. CRIM. L. 215, 222 (1977) (favoring a flat 50% reduction of sentences for defendants who plead guilty); Stephen J. Schulhofer, *Due Process of Sentencing*, 128 U. PA. L. REV. 733, 779-80 (1980) (arguing that guilty plea concessions should be limited to relatively small discounts to ensure fair results); James Vorenberg, *Decent Restraint of Prosecutorial Discretion*, 94 HARV. L. REV. 1521, 1560-61 (1981) ("If . . . most cases in which a plea bargain is made involve defendants whose conviction is virtually certain, a relatively modest, prescribed sentencing concession of ten or twenty percent of the sentence received for a guilty plea should induce the pleas needed to keep the docket manageable.").

would have received had they been convicted after a trial.³⁰ Alternatively, the size of the plea discount might be capped rather than fixed, as Oren Gazal-Ayal has recently proposed.³¹ Both fixed discounts and Gazal-Ayal's caps are based on similar logic: a limitation on prosecutors' discretion to offer overly large guilty-plea discounts can shape the strategic decisions of both defendants and prosecutors in ways that ultimately improve the plea-bargaining process and reduce the risk that innocent defendants will be induced to falsely plead guilty.

Fixed-plea discounts offer four primary benefits, which will be discussed in detail below. First, where large discounts are routinely offered, all defendants have strong incentives to plead guilty, including defendants in weak cases (presumably including a disproportionately large number of innocent defendants).³² Fixed discounts prevent prosecutors from offering discounts so large that innocent defendants are essentially coerced to plead guilty to avoid the risk of a dramatically harsher sentence. Second, because fixed discounts limit prosecutors' ability to dispose of weak cases through plea bargaining by changing the defendant's incentive structure, fixed discounts directly impact prosecutorial screening practices, creating strong incentives to dismiss weak cases rather than try them.³³ Third, fixed discounts reduce prosecutorial incentives to overcharge criminal defendants by eliminating the bargaining leverage that can be obtained through strategic overcharging.³⁴ Absent those incentives, a prosecutor is more likely to select charges based on the prosecutor's actual evaluation of the defendant's culpability. Fourth, precisely because the discounts are fixed and available to every defendant who decides to plead guilty rather than contest guilt at trial, fixed discounts put an end to "barter justice," an aspect of the criminal process that is highly corrosive to the system's legitimacy in the eyes of the public,

30. Suggested discounts range from 10-50% or higher. See, e.g., Kaplan, *supra* note 29, at 222 (urging a discount of 50%); Vorenberg, *supra* note 29, at 1560-61 (urging a fixed discount of 10-20%). The Guidelines incorporate an approximately 25-35% fixed discount for "acceptance of responsibility," universally understood to serve as code language for pleading guilty. See Oren Bar-Gill & Oren Gazal Ayal, *Plea Bargains Only for the Guilty*, 49 J.L. & ECON. 353, 355 (2006).

31. See Gazal-Ayal, *supra* note 18, at 2313-22 (arguing for a partial ban on plea bargaining whereby a prosecutor would not be able to offer a plea above a certain percentage of the posttrial sentence).

32. See *infra* notes 40-54 and accompanying text.

33. See *infra* notes 55-72 and accompanying text.

34. See *infra* notes 79-81 and accompanying text.

professionals who work in the criminal courts, and, perhaps most importantly, criminal defendants themselves.³⁵

A. Trial Selection Effects

Economists and lawyers applying economic analysis to plea bargaining provide a robust explanation for the high guilty-plea rate by focusing on plea bargaining's pricing mechanism.³⁶ According to this analysis, plea prices are the function of three inputs: the probability of conviction (POC), the anticipated sentence upon conviction at trial (ATS), and the resources saved by avoiding trial (R), where plea price $(P) = (POC)(ATS)/R$.³⁷ Both as a matter of formal theory and informal practice, the size of the discount necessary to induce a defendant to waive his right to trial is the "price" of the plea.³⁸ The rational calculus that induces most defendants to plead guilty flows directly from the formula that sets plea-bargain prices. Assuming that a defendant's primary goal is to minimize punishment, and setting aside the effects of cognitive biases like loss aversion, discounting, and risk-preference, rational defendants should prefer a guilty plea whenever the plea price falls below the expected sentence after trial (ETS).³⁹

As the pricing formula shows, plea prices will be higher where the evidence is weaker. For example, where the ATS upon conviction is ten years and the POC is 50%, a rational defendant whose sole goal is to minimize punishment should be preference-neutral between a

35. See *infra* notes 82-88 and accompanying text.

36. See Jennifer F. Reinganum, *Plea Bargaining and Prosecutorial Discretion*, 78 AM. ECON. REV. 713, 714 (1988).

37. Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 308-09 (1983) (noting that plea prices are set based on prosecutor's punishment-maximizing strategy, which includes sharing the resource gains obtained by foregoing trial); Reinganum, *supra* note 36, at 714 (describing expected trial sentence (ETS) as "the product of the probability of conviction and the anticipated sentence upon conviction at trial"—discounted by resource savings (R)); Scott & Stuntz, *supra* note 1, at 1941-42 (explaining that plea prices reflect estimated posttrial sentence, probability of conviction, and adjudication costs).

38. Big discounts represent high prices, and small discounts represent low prices.

39. Of course, sentence is merely one aspect of the defendant's total punishment "cost." The stigmatic and collateral consequences that accompany a conviction might far exceed the costs imposed by the sentence. Such additional costs are least important with respect to repeat offenders who have already absorbed the brunt of those costs as a result of earlier convictions. Although a more sophisticated economic analysis would factor in those costs, the basic incentive structure remains the same. Taking stigmatic and collateral consequences of convictions into account suggests that even greater discounts are necessary to induce defendants to plead guilty. For a more complete discussion of the impact of cognitive bias on plea bargaining, see Russell D. Covey, *Reconsidering the Relationship Between Cognitive Psychology and Plea Bargaining*, 91 MARQUETTE L. REV. 213 (2007).

plea-bargained sentence of five years and a trial.⁴⁰ Where the POC falls to only 20%, the preference-neutral plea price falls to two years. Because guilty pleas consume substantially fewer resources than trials, plea prices must also factor in resource savings. Although defendants and prosecutors alike share an interest in minimizing process costs,⁴¹ the lion's share of process costs are borne by the state, and, as a result, prosecutors typically gain more than defendants by avoiding trial.⁴² Guilty pleas must thus be twice discounted: once to reflect the possibility of acquittal and once more to reflect the premium the prosecutor is willing to pay to avoid incurring the resource costs of trial.⁴³ For a defendant that begins with a ten-year ATS and a 50% POC, the plea-pricing mechanism should produce a plea offer carrying a penalty somewhere between zero and five years.

Both parties are by definition better off plea bargaining than going to trial. The defendant's expected sentence after plea (EPS) is necessarily lower than his ETS, and the prosecutor obtains more value (that is, a higher ES/R) through bargaining than through trial. As a result, the plea-pricing model predicts that rational actors will always prefer to resolve their cases through guilty pleas rather than trials.⁴⁴

40. Risk preference can impact the attractiveness of economically equivalent offers. See Gene M. Grossman & Michael L. Katz, *Plea Bargaining and Social Welfare*, 73 AM. ECON. REV. 749, 755 (1983) (showing that differences in risk preference reduce the separating effect of guilty and innocent defendants through plea bargaining and, thus, reduce the utility of plea bargaining as a screening device).

41. See MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 199-240 (1979).

42. See Scott & Stuntz, *supra* note 1, at 1941 ("[A]djudication costs are disproportionately visited on prosecutors . . .").

43. Obviously, the prosecutor's sensitivity to resource costs is a critical determinant of the plea discount, because prosecutors who affirmatively desire trials will be unwilling to provide any process discount at all.

44. See Scott & Stuntz, *supra* note 1, at 1935-40. Some commentators point to this prediction as a flaw, because, in fact, not every case is resolved by plea bargaining. See, e.g., Chantale LaCasse & A. Abigail Payne, *Federal Sentencing Guidelines and Mandatory Minimum Sentences: Do Defendants Bargain in the Shadow of the Judge?*, 42 J.L. & ECON. 245, 249 (1999) (describing models based on minimizing expected sentences as not making useful predictions about the probability that a case is resolved by plea, because the model predicts that all cases are resolved by plea). This is not a valid criticism of the model, however. First, given plea rates exceeding 95%, the model's prediction comes quite close to actual practice. Second, the model helpfully supports the further prediction that cases that do not result in plea bargains are those in which the presuppositions of the theory are not satisfied, as in the case where one party is not acting rationally, where there is no agreement regarding the worth of the case or the punishment that will be imposed, or where external considerations intrude upon the calculations of the parties. For a compelling argument that such factors are in fact at work, see Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2469 (2004).

It is worth emphasizing that as long as plea discounts are proportioned to the POC, contrary to the conventional wisdom that trials are reserved for hard cases, there is no reason to believe that the cases that do go to trial are those in which the evidence is weakest or innocence most likely.⁴⁵ In an unfettered market, prosecutors can simply increase the discount in weak cases to the point where a rational defendant will accept the offer,⁴⁶ inducing defendants to enter guilty pleas even where the odds of acquittal are great because the consequences of a trial conviction are, although remote, intolerable.⁴⁷ In fact, as long as the strength of the evidence determines the price for guilty pleas, the only cases that rational defendants would take to trial are those in which (1) the parties have a significant⁴⁸ disagreement about the "worth of the case" (i.e., the ETS),⁴⁹ (2) at least one party is

45. Innocent defendants do not receive better plea offers than guilty defendants because prosecutors have no way to distinguish the two classes. Prosecutors therefore base their plea offers primarily on the data to which they do have access, i.e., the strength of the case. See Scott & Stuntz, *supra* note 1, at 1948 ("The structural dynamic of plea bargaining leads . . . to a single variable contract in which all defendants—whether guilty or innocent—are offered a sentence based upon the prosecutor's estimate of the strength of the case at the time of bargaining plus the expected savings in transaction costs . . .").

46. See Alschuler, *supra* note 6, at 60 ("The universal rule is that the sentence differential between guilty-plea and trial defendants increases in direct proportion to the likelihood of acquittal."). To address this concern, many commentators have argued that limitations on the inducements available to prosecutors should be imposed. See, e.g., Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550, 575 (1978) (arguing for small, set discounts); Becker, *supra* note 28, at 837 (pointing to two instances especially rife with the potential to extract guilty pleas from innocent defendants: (1) plea bargains induced by the threat of death penalty and (2) plea bargains induced by the promise of immediate release upon a plea of guilty, with the threat of continued pretrial incarceration if the plea is refused); King et al., *supra* note 1, at 991-92 (arguing for small fixed discounts but acknowledging practical obstacles posed by covert discounts and charge concessions).

47. The dynamic is illustrated by a now-familiar anecdote originally provided by a San Francisco defense attorney who had represented a defendant charged with rape. See Alschuler, *supra* note 6, at 61. The attorney was convinced that the man was innocent and would be acquitted at trial. *Id.* When the prosecutor offered the defendant a chance to plead guilty to simple battery, however, the defendant quickly took the deal notwithstanding his counsel's evaluation of the case, saying simply, "I can't take the chance." *Id.*

48. The disagreement must be significant in most cases because plea discounts usually exceed the discounted trial sentence by a substantial margin. Hence, small disagreements between the parties about the ETS should not prevent them from viewing any particular plea offer favorably.

49. $ETS = POC * ATS$. The parties' disagreement about the ETS might be a result of a disagreement about the strength of the evidence in the case or the likely sentence that will be imposed by the judge in the event of conviction.

not acting rationally,⁵⁰ or (3) at least one party affirmatively desires a trial for non-punishment-maximizing/minimizing reasons.

None of these circumstances provides much reason to believe that innocent defendants are more likely than guilty ones to demand trials.⁵¹ Although the only types of disagreements that will result in rejection of a plea bargain are those in which the government estimates the value of a case as worth more (carrying a higher ETS) than the defendant, that disagreement can take place at any point on the spectrum. Disagreements about case worth are just as likely to occur at the very top (death sentence versus life sentence, or 95% POC versus 75% POC), as they are at the bottom (short prison term versus probation, 30% POC versus 10% POC). It is not clear why disagreements at the low end of the spectrum would occur with any less frequency than at the high end, or that innocent defendants are any more likely to act irrationally in refusing a punishment-minimizing offer than guilty defendants. Indeed, for the same reasons that guilty persons are expected as a class to have higher discount rates and greater tolerances for risk-taking, guilty parties might be more likely than their innocent counterparts to reject irrationally what are objectively reasonable plea offers, further skewing the mix of cases selected for trial in the direction of guilty defendants.⁵² After all, the very decision to engage in criminal conduct might be said to reflect a deviation from what constitutes rational conduct.

True, some innocent defendants probably categorically refuse to plead guilty regardless of how good a deal is offered them. While those cases marginally increase the number of innocent people who insist on trial, prosecutors assuredly refuse sometimes to make reasonable plea offers where the evidence of guilt is strong, because they believe that such defendants' cases are best resolved by trial for policy reasons (e.g., public interest in airing of facts, commitment to resolution of certain types of cases or issues by juries), they want the practice, or simply because they wish to maintain a high "batting

50. By "not acting rationally," I mean not pursuing a course reasonably designed to minimize punishment, in the case of defendants, or to maximize the punishment/resources ratio, in the case of prosecutors. For an economic analysis of the prosecutor's incentives in these terms, see Easterbrook, *supra* note 37, at 290-98, 309-17.

51. See Schulhofer, *Plea Bargaining as Disaster*, *supra* note 11, at 2004 (noting that the plea-bargaining system selects cases for trial based not on likelihood of acquittal, but on degree of risk aversion of defendant, and noting that a fixed-discount system would change the predicted case selection).

52. See Bibas, *supra* note 44, at 2469 (describing various psychological barriers to rational plea-bargaining decision making by defendants); Covey, *supra* note 39, 218-23, 225-44.

average.”⁵³ Because there is no reason to believe that innocent defendants demand trials in weak cases more frequently than prosecutors demand trials of guilty defendants in strong cases, there is no reason to believe that, in the absence of restraints on bargaining, the mix of cases that go to trial will be weighted more heavily to innocent defendants than guilty defendants.⁵⁴

Fixed discounts address this problem by discouraging pleas in all cases in which the expected trial sentence falls below the fixed discount.⁵⁵ By preventing prosecutors from making offers sufficiently lenient to entice defendants in weak cases to plead guilty, fixed discounts create varying incentives to plead guilty depending on the strength of the evidence of guilt. As a result, implementation of a system of fixed-plea discounts should change the mix of defendants who take their cases to trial by encouraging persons most likely to be acquitted to forgo guilty pleas (because the available plea sentence would be higher than the ETS), while encouraging those with high POCs, that is, those most likely to be convicted at trial, to plead guilty.⁵⁶ Because weak cases are likely to include a disproportionate number of innocent defendants, fixed discounts should encourage a larger proportion of innocent defendants to refuse to plead guilty and

53. See Daniel S. Medved, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 137 (2004) (reporting practice in prosecutors' offices of publicly tracking prosecutor's win-loss records or maintaining "batting averages").

54. See Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining* (pt. 1), 76 COLUM. L. REV. 1059, 1126 (1976) (observing that because prosecutors provide larger "breaks" in weaker cases, "cases involving substantial legal and factual disputes seem every bit as likely to be compromised as cases that present no genuine issues").

55. See *id.* at 1127 (noting that defendants "whose prospects of acquittal were substantial" would be more likely to demand trial where plea discount is fixed). Gazal-Ayal's partial ban proposal operates on the same principle. See Gazal-Ayal, *supra* note 18, at 2301 n.12. The advantage the partial ban has over a fixed discount, however, is that it preserves flexibility in tailoring the size of the plea discount to the specifics of cases, ensuring that 98% POC cases are not given the same discount as 70% POC cases. See *id.*

56. See Schulhofer, *Plea Bargaining as Disaster*, *supra* note 11, at 2004-05 (advocating abolition of bargaining while retaining fixed discounts, but noting that such a reform would be "imperfect" unless attorneys' financial incentives were changed so that they did not have structural preference for settlement through plea bargaining). One could argue that this would be a mixed bag for such defendants. On the one hand, some innocent defendants who would have pleaded guilty would win acquittals. On the other hand, some innocent defendants who would have received a lenient deal would now be convicted and likely subject to a much harsher posttrial sentence. Those who advocate abolition of large plea discounts contend that such an outcome is more consistent with society's interests in ensuring that convictions "reflect guilt beyond a reasonable doubt." *Id.* at 2000. Schulhofer further notes that abolition of plea bargaining need not mean abolition of guilty pleas, only abolition of large plea discounts that induce guilty pleas. *Id.* at 2001 n.75.

to hold out for trial, where they will be acquitted in proportionately larger numbers.

B. Screening Effects

Although the change in the mix of cases that go to trial is significant, arguably the most important benefit of fixed discounts is its predicted impact on prosecutorial screening practices.⁵⁷ Recent scholarship has highlighted the critical linkage between plea bargaining and prosecutorial screening.⁵⁸ As Ronald Wright and Marc Miller persuasively demonstrate, where prosecutors devote more resources to screening out weak cases, the pressure to plea bargain correspondingly diminishes.⁵⁹ Where prosecutors fail to invest resources in early, accurate screening, prosecutors tend to rely on negotiation as the primary mechanism to resolve charges, thereby causing many of the negative effects noted by critics of plea bargaining.⁶⁰ Prosecutors can reduce their reliance on negotiated guilty pleas by adopting “hard screening” practices to ensure that solid evidence, likely to hold up at trial, supports the filed charges.⁶¹ Hard screening requires prosecutors to conduct careful, early evaluations of witnesses and other evidence, legal arguments and defenses available to defendants, and likely jury responses to cases, which permit prosecutors to make confident assessments of trial outcomes.⁶² Where prosecutors pursue cases in which the POC is high, defendants have little ability to negotiate large plea discounts because prosecutors are confident of obtaining a trial conviction. As a result, prosecutors who engage in hard screening will find it easier to limit plea bargaining, and defendants in those jurisdictions will be more likely to enter “open pleas”—that is, pleas of guilty as charged. Open pleas resemble fixed-discount pleas in that they are made in order to obtain much smaller and more predictable discounts from judges rather than large variable discounts from prosecutors.⁶³

57. See Bar-Gill & Gazal Ayal, *supra* note 30, at 354.

58. See Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 48-51 (2002).

59. See *id.* at 67-74.

60. *Id.* at 33. Reliance on negotiated pleas undermines public confidence in the criminal justice system and puts pressure on innocent defendants to plead guilty to lesser charges to avoid the risk of conviction at trial.

61. *Id.* at 32-33.

62. *Id.* at 57-58.

63. *Id.* at 73-74 (presenting evidence showing that “open plea” rate is much higher in New Orleans, where hard-screening practices coupled with restrictions on plea bargaining have been implemented, than in other jurisdictions).

Wright and Miller make a compelling case that adoption of hard-screening policies leads to fewer plea bargains and that the reduction in the number of plea bargains in weak cases will benefit innocent defendants.⁶⁴ In addition, as Wright and Miller have cogently argued, screening weak cases early in the process produces dividends later on: prosecutors can increase the conviction rate, decrease pressure to provide bargaining inducements or to look for ways to evade guideline sentences, decrease the disparity among defendants convicted of the same crimes, and enhance public perceptions of fairness in the criminal justice system.⁶⁵

Although these benefits can be obtained, as Wright and Miller advocate, by tightening screening processes rather than constraining plea-bargaining discretion, the arrow points in both directions.⁶⁶ If a constraint on the ability of prosecutors to dispose of their weak cases through plea bargaining were in place, prosecutors' incentives to devote more resources to screening would correspondingly increase. As scholars advocating fixed discounts have explained, when plea discounts are limited, prosecutors lose the ability to obtain cheap guilty pleas in weak cases.⁶⁷ To obtain convictions in such cases, prosecutors must go to trial. But rather than take a larger number of weak cases to trial, prosecutors would likely respond by screening out more of their weak cases. Assuming that probability of guilt and probability of conviction are positively correlated, the result would be a decrease in the number of innocent persons convicted.⁶⁸ Even a malicious prosecutor who did not consciously intend to reduce the number of weak cases filed would find her ability to pursue weak cases limited because the increase in resources required to prosecute those weak cases would necessarily reduce the total number of cases she could pursue.

Prosecutors, in other words, face a double incentive against pursuing weak cases where discounts are fixed. Not only must they expect to have to try more of them, but also they must expect to lose more of them precisely because the cases are weak. Given these changed incentives, we can readily predict at least two changes in prosecutorial conduct as a result of fixed discounts: prosecutors will

64. See *id.* at 94-95.

65. See *id.* at 84-103.

66. *Id.*

67. See Gazal-Ayal, *supra* note 18, at 2324-27.

68. See *id.* at 2295; see also Bar-Gill & Gazal Ayal, *supra* note 30, at 354 (proposing that prosecutors barred from offering sufficiently lenient plea bargains will be induced to substitute weaker cases with stronger cases rather than take the weak cases to trial).

screen out more weak cases from their files and will turn more weak cases into strong cases.⁶⁹ The latter can be accomplished, for example, by increasing the amount of investigatory resources devoted to weak cases. Although prosecutors might prefer to take a lenient plea to an underinvestigated case rather than to devote additional resources to the case, demanding that convictions be backed by strong evidence of guilt better serves the public interest in ensuring accurate convictions.⁷⁰ Encouraging more conservative charging practices can also strengthen weak cases. If prosecutors replace hard-to-prove high charges with easier-to-prove but less serious charges, the higher probability of conviction will make guilty pleas easier to obtain.

In short, imposing limits on plea bargaining through fixed discounts would necessitate reforms in prosecutorial screening just as much as tightened screening would lessen pressure to plea bargain. This is a significant insight. After all, there is no reason to believe that prosecutors have any particular interest in adopting hard-screening policies without some external inducement. Fixed-plea discounts would provide the required inducement by making it difficult to dispose of weak cases later.⁷¹ The more effective the fixed-discount system is—that is, the more difficult it is to negotiate a plea bargain that exceeds the maximum discount permitted—the stronger prosecutors' incentives are to screen out weak cases early rather than suffer the embarrassment of dismissing cases after charges have been filed or, worse yet, losing at trial.⁷² In sum, fixed discounts would compel prosecutors to diminish the number of weak cases they pursue by screening cases more carefully early in the investigative process,

69. Empirical studies demonstrate that strength of evidence in the case plays a strong role in prosecutorial charging decisions. See, e.g., LYNN M. MATHER, PLEA BARGAINING OR TRIAL?: THE PROCESS OF CRIMINAL-CASE DISPOSITION 41-44 (1979) (classifying strength of cases into three categories); FRANK W. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 21-23 (1969) (pointing to data that suggests "the use of a somewhat lower level of proof when the likelihood of a plea of guilty is greater than usual"); Celesta A. Albonetti, *Prosecutorial Discretion: The Effects of Uncertainty*, 21 LAW & SOC'Y REV. 291, 293 (1987) (citing numerous studies showing that prosecutors' charging decisions are affected by the strength of evidence).

70. See Wright & Miller, *supra* note 58, at 96-98.

71. Capping discounts, rather than fixing them, has the added advantage of preserving an unfettered plea-bargaining market in the strongest cases while preventing plea bargaining in the weakest cases.

72. This may not only reduce the number of cases on the prosecutors' dockets but also may induce prosecutors to change the overall mix of cases they pursue, by substituting strong cases for weak ones. Given the already high declination rate, there is no reason to assume that prosecutors already select the highest POC cases to pursue from among the broad spectrum. If prosecutors do not do so, then the adoption of fixed discounts need not diminish the total number of convictions.

making more conservative charging decisions, and investing more resources into the investigation of those cases to ensure that they do not get stuck with unpleadable and untriable cases later.

C. *Overcharging*

Fixed discounts also reduce the efficacy, and thus the frequency, of prosecutorial overcharging. Where there are no limits on the size of plea discounts, as is typically the case, prosecutors can be expected to, and do routinely, overcharge simply because overcharging gives prosecutors bargaining leverage.⁷³ In most cases, prosecutors overcharge not because they seek to impose unduly harsh sentences on defendants, but simply because of the bargaining leverage it provides.⁷⁴

Prosecutors can overcharge cases in at least two ways.⁷⁵ First, horizontal overcharging occurs when prosecutors pad charges with nonoverlapping counts of a similar offense type, or with multiple counts of the same offense type, where the underlying criminal conduct sought to be punished is adequately penalized by a single count.⁷⁶ The leverage gained by horizontal overcharging is especially powerful when the added counts carry mandatory minimum sentences that must be imposed consecutively. Second, vertical overcharging occurs when prosecutors charge a higher offense than the evidence reasonably supports.⁷⁷ When prosecutors engage in vertical

73. See *Bordenkircher v. Hayes*, 434 U.S. 357, 368 n.2 (1978) (Blackmun, J., dissenting) (pointing out that "prosecutors, without saying so, may sometimes bring charges more serious than they think appropriate for the ultimate disposition of a case, in order to gain bargaining leverage," but that such practices have never been "openly sanctioned" by the Supreme Court); Alschuler, *supra* note 6, at 90 (quoting a prosecutor admitting that overcharging is a "lever"); Gifford, *supra* note 26, at 43 ("Where there is doubt as to whether the defendant can be convicted on the original charge, it is often because the prosecutor has 'overcharged' to gain additional leverage to induce the defendant to plead to the 'real offense.'").

74. See Kaplan, *supra* note 29, at 217 (noting that prosecutors have strong interest in lobbying legislatures for harsher sentences, not because they wish to impose such sentences on defendants, but so that they can use them as a "club to coerce more guilty pleas").

75. See Alschuler, *supra* note 6, at 85-87 (discussing vertical and horizontal overcharging).

76. George Fisher's account of the rise of plea bargaining in Middlesex County, Massachusetts links its origins to liquor cases making the practice of horizontal overcharging possible. See FISHER, *supra* note 5, at 22-24. Plea bargaining was possible in these cases, Fisher explains, because prosecutors could charge multiple counts of liquor offenses, each of which carried a fixed fine of between two and six pounds upon conviction, and judges had little authority to alter the punishment. *Id.* Fisher found that deals in which multiple liquor counts were dropped in exchange for pleas to one or more remaining counts were among the earliest recorded examples of plea bargaining. *Id.*

77. Alschuler, *supra* note 6, at 86; Gifford, *supra* note 26, at 47-48.

overcharging, they pressure defendants to plead guilty to a lesser offense—often to the charge that absent strategic considerations would have been selected initially—simply to avoid risking conviction on the higher charge.⁷⁸ Both types of overcharging make it easier for prosecutors to induce defendants to plead guilty by increasing defendants' sentencing exposure at trial.

Fixed discounts discourage prosecutors from engaging in both types of strategic overcharging. Fixed discounts discourage vertical overcharging (assuming, of course, that fixed discounts cannot be circumvented through charge bargaining), by negating the leverage that accompanies pursuit of charges that are hard to prove but, in the event of conviction, carry extremely severe punishment.⁷⁹ Because the highest charge carries a low POC, when the plea discount is fixed, the prosecutor cannot offer a large enough discount to make a guilty plea to that charge attractive. She also has little incentive to pursue the charge at trial given its low likelihood of success. As a result, in a fixed-discount regime that bars charge bargaining, prosecutors can be expected to refrain from charging defendants with offenses they are unlikely to be able to prove at trial.

Fixed discounts render horizontal overcharging similarly unattractive for a different reason. Although the evidence might well permit convictions on redundant counts and increase the sentence a defendant receives upon conviction, as long as the prosecutor cannot bargain away the added counts, they do not increase bargaining leverage. Because the plea discount is fixed, the additional counts merely increase the plea sentence by the same proportion that they increase the trial sentence.⁸⁰ Therefore, the prosecutor obtains no

78. See Alschuler, *supra* note 6, at 86; Gifford, *supra* note 26, at 48.

79. Absent fixed or capped discounts, the addition of weak but more serious charges always results in an incremental increase of bargaining leverage, because the POC on those charges is always positive ($POC > 0$). Thus, the added ETS is also greater than zero, which at least marginally increases exposure and makes any particular plea offer proportionately more attractive.

80. For example, imagine a defendant charged with one count of an offense, carrying a mandatory five-year sentence and a POC of 50%. If the prosecutor charges a second count and the POC is unchanged by the addition of the second count, the defendant's ETS increases from 2.5 years to five years by the addition of the new count (assuming sentences are set consecutively). Absent discount limits, the additional count doubles the prosecutor's negotiating leverage. If the discount is fixed at 35%, however, the additional count does not change the defendant's bargaining incentives. With one count, the best offer the prosecutor can make is 3.25 years (assuming there is an available lesser charge not carrying the mandatory term which the prosecutor can offer), which exceeds the defendant's ETS. Addition of the second count increases the ETS to five years, but the fixed discount limits the plea offer to 6.5 years, which remains too high to induce a plea. See Gazal-Ayal, *supra* note

advantage in securing a guilty plea merely by charging extra counts of the same offense or additional overlapping offenses.⁸¹ In a fixed-discount regime, because overcharging does not increase bargaining leverage, the prosecutor will be less likely to engage in strategic charging behavior and more likely to make charging decisions based on her evaluation of what charges the evidence supports and the type of sentence she believes to be proportionate to the offense and the offender.

D. Barter Justice

To many, plea bargaining is unseemly not only because it leads to objectively bad outcomes but also because it gives justice the odor of a “Turkish bazaar,” cultivating cynicism and disrespect for the law among criminals and the public alike.⁸² There is widespread public sentiment that plea bargaining is inherently improper, creates disparities among similarly situated defendants, and, worse yet, rewards more facile bargainers with pleas that are in fact “bargains.”⁸³ What is more, as George Fisher has convincingly detailed, plea bargaining has transformed virtually every aspect of the system—from

18, at 2345 (noting that absent charge bargaining, increases or reductions in underlying charges have no effect on the decision to plea because “[t]he limited difference between the post-trial sentence . . . and the post-plea sentence for the same offense cannot induce him to plead guilty when the case against him is weak”).

81. George Fisher’s historical account of plea bargaining in Massachusetts provides solid evidence of this dynamic. See FISHER, *supra* note 5, at 52. By the 1840s, the incidence of charge bargaining in liquor prosecutions was relatively high. See *id.* After the state legislature, in 1852, barred prosecutors from selectively dismissing counts through the device of entering a “nolle prosequi,” charge bargaining virtually disappeared. See *id.* Fisher states that whereas prior to 1852, approximately 35% of liquor cases were resolved through plea bargains, between 1853 and 1910, only 4 of 602 liquor cases examined reflected charge bargaining. See *id.* While I say “no advantage” rather than “little advantage” because the ratio of plea sentence to trial sentence remains the same, the length of the trial sentence determines the magnitude of the absolute reduction, and a higher absolute reduction might matter. For example, a 35% reduction of a forty-year sentence (fourteen years) is far greater than the same reduction from a ten year sentence (3.5 years). These differences might well matter to individual defendants. However, it also remains true that the POC has a greater impact on absolute value when the potential punishment is higher, so that a mere 10% drop in POC in the forty-year case is worth four years of ETS, but only one year of ETS when the anticipated trial sentence is only ten years.

82. See JONATHAN D. CASPER, *AMERICAN CRIMINAL JUSTICE: THE DEFENDANT’S PERSPECTIVE* 76 (1972) (reporting based on interviews with criminal defendants that the plea-bargaining process reduces respect for the system as a whole); Scott & Stuntz, *supra* note 1, at 1912 (“The idea of allocating criminal punishment through what looks like a street bazaar has proved unappealing to most outside observers.”).

83. See Gerard E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off?*, 55 STAN. L. REV. 1399, 1401 (2003).

pretrial detention hearings to defense counsel compensation systems—into a mechanism to induce defendants, directly or indirectly, to plead guilty.⁸⁴ Some critics have also condemned plea bargaining for its secretive nature.⁸⁵ Because the bargaining process takes place out of the public eye, it effectively replaces “public assessment of evidence by lay adjudicators with a less transparent resolution by professional executive-branch law-enforcement officials,” depriving the public of the opportunity to evaluate the facts of individual cases and defendants’ culpability or defenses and depriving victims of a dignified acknowledgement of the pain they have suffered.⁸⁶

Fixed discounts address these process concerns. Like supermarket price tags, fixed discounts take the haggling out of the plea-bargaining process.⁸⁷ That is, fixed discounts permit the abolition of bargaining without abolishing the concessions needed to ensure that most cases are disposed of through guilty pleas rather than trials.⁸⁸ Abolishing bargaining without abolishing concessions preserves the resource savings that guilty pleas offer, while removing the aura of arbitrariness that surrounds the plea-bargaining process. At the same time, fixed discounts ensure that different defendants do not receive varying discounts, reducing the possibility of disparate treatment among similarly culpable defendants.

Fixed discounts also diminish the secretive nature of the bargaining process. Because the terms of plea bargains are fixed and not subject to negotiation, the decision to plead guilty or go to trial turns primarily on the value of contesting the case, which is almost entirely a function of the strength of the prosecutor’s evidence. Fixed discounts, therefore, decrease the need for secret deals negotiated out of the public eye. As a result, the factors underlying most guilty plea decisions would be significantly more transparent.

84. See FISHER, *supra* note 5, at 162-65; see also Peter A. Whitman, Note, *Judicial Plea Bargaining*, 19 STAN. L. REV. 1082, 1089 (1967) (criticizing judicial participation in plea bargaining because “[t]oler[ation] of a procedure which leads defendants to think of the judge as just one more official to be ‘bought off’ is clearly not conducive to respect for the law”). Alternatively, it may be that the hydraulic forces driving the rise of plea bargaining ensured that “only those institutions and devices that proved compatible with plea bargaining have survived and flourished.” Jennifer L. Mnookin, *Uncertain Bargains: The Rise of Plea Bargaining in America*, 57 STAN. L. REV. 1721, 1722-23 (2005) (book review).

85. Bibas, *supra* note 44, at 2475 (“[P]lea bargaining is a secret area of law . . .”).

86. Lynch, *supra* note 83, at 1401.

87. For a discussion of this idea, see Kaplan, *supra* note 29, at 218-24.

88. See Schulhofer, *Plea Bargaining as Disaster*, *supra* note 11, at 2004 (“By abolishing bargaining but not . . . concessions, a jurisdiction could retain control over its guilty plea rate and preserve its . . . level of resources committed to trials.”).

In sum, fixed discounts should encourage more innocent defendants to contest charges, induce prosecutors to screen cases more carefully, discourage overcharging, and diminish the perception that justice is a negotiable commodity often traded away in secret deals. In so doing, fixed discounts appear to provide solutions to many of the most trenchant criticisms levied against plea bargaining.

III. THE EASY EVASION OF CONVENTIONAL FIXED-DISCOUNT PROPOSALS

Fixed discounts are neither new nor entirely untested. The benefits detailed above have long been apparent to commentators, and calls for replacing laissez-faire plea bargaining with fixed discounts have been voiced since at least the early 1970s.⁸⁹ Some jurisdictions have adopted fixed discounts as a matter of practice if not formal policy.⁹⁰ More significantly, for twenty years, federal sentencing law has been engaged in a massive experiment with a partial fixed-discount system.⁹¹ Although they contain no express plea-bargaining provisions, the Federal Sentencing Guidelines (Guidelines) adopted a quasi-fixed-discount system by providing a two- to three-level reduction of offense level to defendants for “acceptance of responsibility.”⁹² The reduction for acceptance of responsibility is

89. See, e.g., Note, *Restructuring the Plea Bargain*, 82 YALE L.J. 286, 300-02 (1972) (providing the structure for a preplea conference).

90. See, e.g., Alschuler, *supra* note 54, at 1065 (noting the practice among some judges in Houston, Texas of recognizing unstated “bottoms” for different kinds of cases, below which judges would refuse to sentence, even if the prosecutor recommended leniency). In many jurisdictions, in which judges directly bargain with defendants, defendants are clear about the size of the discount they will receive, even if it varies from case to case. See *id.* at 1087-88. In some courts, judges will advise defendants before trial of the sentence they will receive both if they are convicted after trial and if they plead guilty prior to trial. See *id.*

91. See Schulhofer, *Plea Bargaining as Disaster*, *supra* note 11, at 2004 (describing the Guidelines system as an “imperfect” approximation of a fixed-discount system).

92. See U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2005). The 1987 version of section 3E1.1(a) originally provided: “If the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for the offense of conviction, reduce the offense level by 2 levels.” *Id.* § 3E1.1(a) (1987). This version further stated that the two-level reduction is neither contingent on a guilty plea, nor does a guilty plea automatically entitle a defendant to the reduction. *Id.* § 3E1.1(b)-(c). The commentary accompanying section 3E1.1 describes a guilty plea as merely “some evidence” of the defendant’s acceptance of responsibility. *Id.* § 3E1.1 cmt. 1. These reservations, however, have proved largely formalistic and are all but ignored in practice. The Guidelines were amended in 1992 to authorize an additional one-level reduction where the defendant’s guilty plea occurs sufficiently early to permit it to avoid trial preparation. See *id.* § 3E1.1(b) cmt. 2 (2005). As Nancy King and her coauthors explain, “the credits under U.S. Sentencing Guidelines Manual § 3E1.1 were designed both ‘as a reward for offenders who plead guilty and also as a recognition of the reduced culpability of offenders who acknowledged guilt.’” See King et

generally unavailable in practice unless an individual enters a guilty plea.⁹³ This provision grants an approximate 25-35% discount off the sentence the defendant would have received in its absence (i.e., after a trial conviction).⁹⁴

There is no indication that the fixed discounts in the Guidelines have had much of a moderating impact on the practice of plea bargaining in federal courts.⁹⁵ Indeed, the percentage of cases resolved by guilty pleas has reached all-time highs and the actual number of criminal cases tried has fallen to record lows.⁹⁶ Of course, it is possible that the guilty-plea rate has increased despite a decrease in plea bargaining rather than because of it, but this seems unlikely. Not only would this dynamic be counterintuitive, but also there is no indication that plea bargaining has diminished. Observers of the federal criminal system report that the plea-bargaining system is alive and well, despite the formal adoption of fixed discounts.⁹⁷ What happened?

In this Part, I will explore the major problems inherent in most fixed-discount schemes that make full and effective implementation

al., *supra* note 1, at 961 n.4 (quoting U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 29-30 (2004), http://www.ussc.gov/15_year/15year.htm).

93. The empirical evidence strongly supports the claim that section 3E1.1 has largely functioned as a reward for pleading guilty. See Michael M. O'Hear, *Remorse, Cooperation, and "Acceptance of Responsibility": The Structure, Implementation, and Reform of Section 3E1.1 of the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1507, 1539 (1997) (noting data showing that "eighty-eight percent of those who plead guilty receive a reduction, in comparison to only twenty percent of those who go to trial"). Some commentators, however, disagree that section 3E1.1 mainly functions as a reward for guilty pleas, pointing to data that suggest that federal judges have made available the acceptance of responsibility reduction to defendants who went to trial. See, e.g., Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post-Mistretta Period*, 91 NW. U. L. REV. 1284, 1299 (1997) (discussing data—albeit from an early post-Guidelines period—showing that in some districts judges granted acceptance of responsibility departures to more than 40% of defendants convicted at trial).

94. See Schulhofer & Nagel, *supra* note 93, at 1290.

95. See Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85, 112 (2005) (remarking that guilty pleas have increased in federal courts since the Guidelines were adopted).

96. Guilty pleas accounted for 87% of all federal convictions prior to the Guidelines implementation, and now account for 97% of all federal convictions, a figure so astoundingly high that some have declared "the virtual elimination of criminal trials in the federal system." *Id.* (quoting Marc L. Miller, *Sentencing Equality Pathology*, 54 EMORY L.J. (SPECIAL ISSUE) 271, 277 (2005)).

97. Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1252-53 n.150 (2004) (observing that the Guidelines are the principal cause of the increase in the federal guilty plea rate from 81% in 1980 to the present rate exceeding 95%).

impractical. Flaws inherent in those proposals help explain why the fixed-discount provisions of the Guidelines have not reduced the prevalence of plea bargaining.⁹⁸ As I discuss below, there are two primary weaknesses in conventional fixed-discount proposals, both of which are manifested in the Guidelines. First, conventional fixed discounts are easily evaded through substitute bargaining mechanisms, including charge and fact bargaining, and most fixed-discount proposals provide few effective mechanisms to prevent the parties from engaging in such alternative bargaining.⁹⁹ Second, fixed-discount proposals in general, and the Guidelines in particular, share a common flaw: it is practically impossible to provide effective judicial review of plea bargaining to ensure that it remains confined within fixed-discount limits. This is true for more or less the same reason that efforts to impose constraints on prosecutorial discretion generally have failed. The federal experience with fixed discounts demonstrates that, without some mechanism to limit evasion, the promised benefits of fixed discounts will remain illusory.¹⁰⁰

A. Evasion of Fixed Discounts Through Alternative Types of Bargaining

1. Charge Bargaining

One reason the fixed-discount provision of the Guidelines has played a minimal role in restraining plea bargains is that the use of guideline ranges, coupled with the power of prosecutors to make sentence recommendations, permit variation in the plea discount well above the two- to three-level decrease nominally available through section 3E1.1.¹⁰¹ Federal prosecutors can increase plea discounts while remaining within authorized guideline ranges simply by combining section 3E1.1 reductions with recommendations for sentences at the

98. I do not contend that the Guidelines were ever intended to reduce plea bargaining, only that prosecutors' response to the fixed-plea discount provisions in the Guidelines illustrates the evasive tactics that can be used to get around formal limitations on bargaining.

99. See Bibas, *supra* note 44, at 2535-36 (explaining the tendency of black markets to develop to circumvent formal limits on plea discounts); Klein, *supra* note 1, at 2040 (discussing the alternatives of charge bargaining, fact bargaining, and cooperation).

100. In this Article, I assume that the acceptance of responsibility provisions are applied uniformly to defendants who plead guilty and never to defendants who go to trial. Although this is not entirely accurate, I argue that structural flaws in the fixed-discount system have a much greater causal impact on the guilty-plea rate than does the inconsistent application of the provisions. For a more nuanced discussion of section 3E1.1, see O'Hear, *supra* note 93, at 1508-10 (focusing on the origin, status, and future of section 3E1.1).

101. See Schulhofer & Nagel, *supra* note 93, at 1290 ("Our research uncovered unequivocal evidence that bargaining and charging practices undercut the Guidelines.").

lower end of the guideline ranges.¹⁰² Doing so produces maximum potential discounts, averaging around 75% at the upper end of the guideline scale and even higher discount rates at the lower end.¹⁰³ At the inception of the Guidelines system, the official policy of the Department of Justice (DOJ) instructed its attorneys to rely primarily on these tools to induce guilty pleas.¹⁰⁴

But the variability caused by the range/recommendation features of the Guidelines pales in comparison to that caused by charge bargaining, which has posed a persistent problem for plea-bargaining reform. Jurisdictions that have tried to ban plea bargaining in part or in whole have seen their efforts fail as sentence bargaining is displaced by charge bargaining,¹⁰⁵ and virtually every commentator who has advocated for fixed discounts has recognized that limiting or preventing charge bargaining is a prerequisite.¹⁰⁶ A fixed-discount system predicated on limiting the size of sentencing discounts cannot work as long as charge bargaining is permitted. After all, a bargain to charge only one rather than two counts of an offense or a bargain to charge an offense carrying a lesser penalty often has the same ultimate

102. *See id.*

103. For example, the difference between a defendant with a criminal history category of II and an offense level of thirty-four, who receives the maximum guideline sentence, and the same defendant who receives a three-level reduction for acceptance of responsibility and the minimum guideline sentence, is eighty-nine months (121 months versus 210 months). At lower offense levels, the discount is even more dramatic—1200% in some cases, and represents the difference between probation and prison in others. *See* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 92, at 211, sentencing table (1987).

104. *See* Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 506 (1992) (discussing how the DOJ “Redbook” set forth these instructions in its hundred-page guideline sentencing handbook for federal prosecutors).

105. In Minnesota, for instance, after that state implemented a sentencing-guideline system that contained a fixed discount for pleading guilty, the number of cases resolved through sentence bargains “fell from 60[%] to 26%,” while the number of cases resolved through charge bargains “rose from 21[%] to 31%.” *See* Schulhofer & Nagel, *supra* note 93, at 1287 (citing MINN. SENTENCING GUIDELINES COMM’N, THE IMPACT OF THE MINNESOTA SENTENCING GUIDELINES: THREE YEAR EVALUATION 71 (1984)). Schulhofer & Nagel discuss similar findings that were reported in Pennsylvania following its adoption of sentencing guidelines. *See id.* at 1288.

106. *See, e.g.,* Gazal-Ayal, *supra* note 18, at 2340 (stating that “[a]s long as charge bargaining goes on unrestricted, the efficacy of” a policy that restricts discount size is undermined); *see also* Gifford, *supra* note 26, at 80 (proposing the use of “modest sentence discounts” to encourage guilty pleas coupled with a ban on charge bargaining, explaining that “[t]o continue to allow charge reductions and dismissals would enable plea bargaining participants to circumvent the regulated process of determining sentence concessions”).

impact on the defendant's punishment as an agreement to limit or reduce a sentence.¹⁰⁷

The DOJ itself has consistently stated that charge bargaining should remain limited and that “*readily provable* serious charges should *not* be bargained away.”¹⁰⁸ Nonetheless, charge bargaining has proved highly resistant to regulation. Not only is charge bargaining not banned as a matter of practice in federal prosecutors’ offices, it is, according to two federal prosecutors describing plea bargaining in the District of Columbia, “at the core of most plea agreements.”¹⁰⁹ Empirical evidence indicates that charge bargaining is not only prevalent in the federal system but also has a major impact on plea-bargained sentences.¹¹⁰

There are two main reasons why federal policies purporting to discourage charge bargains have proven ineffective. First, although the DOJ frowns on dropping “readily provable” charges, the line prosecutor’s determination of which charges are “readily provable” and which are not is difficult to second-guess.¹¹¹ Prosecutors can always defend decisions to accept guilty pleas to lesser charges based on their assertion that the higher charge, while colorable, was not “readily provable.”¹¹² Second, federal prosecutors have enormous power to

107. See William J. Stuntz, *The Pathological Politics Of Criminal Law*, 100 MICH. L. REV. 505, 519-20 (2001) (“By [increasing the number of charges filed], prosecutors can, even in discretionary sentencing systems, significantly raise the defendant’s maximum sentence, and often raise the minimum sentence as well. The higher threatened sentence can then be used as a bargaining chip, an inducement to plead guilty.”). Stuntz further comments that “[r]aising the threatened sentence raises the cost of going to trial just as effectively as raising the likelihood of conviction.” *Id.* at 531.

108. U.S. DEP’T OF JUSTICE, PROSECUTOR’S HANDBOOK ON SENTENCING GUIDELINES AND OTHER PROVISIONS OF THE SENTENCING REFORM ACT OF 1984, at 46 (1987).

109. Mary Patrice Brown & Steven E. Bunnell, *Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia*, 43 AM. CRIM. L. REV. 1063, 1066-67 (2006). Brown and Bunnell describe charge bargaining as setting forth the charges to which a defendant agrees to plead guilty and the charges that the government in exchange agrees not to prosecute. See *id.*

110. See Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 943-44 (2006) (citing Paul J. Hofer, *Federal Sentencing for Violent and Drug Trafficking Crimes Involving Firearms: Recent Changes and Prospects for Improvement*, 37 AM. CRIM. L. REV. 41, 53-57 (2000) (discussing a study showing that in more than half of the cases in which defendants were initially charged with gun offenses that carry mandatory minimum consecutive sentences, the gun charges were dismissed, indicating their function as charge-bargaining chips)). An earlier study by Stephen Schulhofer and Ilene Nagel found that the Guidelines were circumvented because sentences lower than could be justified under the Guidelines occurred in approximately “20-35% of the cases resolved through guilty plea.” See Schulhofer & Nagel, *supra* note 93, at 1290.

111. See Nagel & Schulhofer, *supra* note 104, at 507 (describing a prosecutor’s broad discretion in determining which charges are readily provable).

112. See *id.*

determine sentences through their discretion to select charges, and they use that power to induce defendants to plead guilty.¹¹³ Notwithstanding the United States Federal Sentencing Commission's (Commission) effort to reduce the impact of charging decisions, the selection of charges makes a major difference with respect to the defendant's sentence after trial.¹¹⁴

In theory, "real offense sentencing" could limit prosecutorial power over sentences through charge selection. As the Commission noted, a "pure" system of "real offense" sentencing would "base sentences upon the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted."¹¹⁵ Real offense sentencing would render charge bargaining obsolete because specific charging decisions would have no impact on ultimate sentences. Such a system, however, appears to be far too complex to implement as a practical matter. After exploring such a system, the Commission expressly declined to adopt one because it found the project hopelessly complicated and cumbersome.¹¹⁶ The Commission instead opted for a "charge offense" system, supplemented by several real offense sentencing features that it claimed would reduce the impact of charging formalities.¹¹⁷ These features included apportioning punishment based on real offense conduct, such as the offender's role in the offense, the presence of a gun, or the amount of drugs sold or money stolen.¹¹⁸

These modest constraints have done little to contain prosecutors' almost absolute power to control sentencing outcomes through charging decisions (and hence almost unchecked ability to control the size of sentence discounts through charge bargaining). However, even where the real offense conduct provisions of the Guidelines could

113. See Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471, 1507-08 (1993).

114. See *id.* 1506-12 (describing how a "prosecutor's choice of charge dictates the narrow sentencing range from which the judge could select a sentence" with dramatically different outcomes depending on charge selection).

115. U.S. SENTENCING GUIDELINE MANUAL, *supra* note 92, at 5 (1987). The Commission contrasts such sentencing with "charge offense" sentencing, which is based "upon the conduct that constitutes the elements of the offense with which the defendant was charged and of which he was convicted". See *id.*

116. See Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 10-12 (1988) (discussing the Commission's reasoning).

117. See *id.* (describing federal charge offense system as a "compromise" that "looks to the offense charged to secure the 'base offense level'" and "then modifies that level in light of several 'real' aggravating or mitigating factors").

118. See *id.*

impose bargaining constraints, prosecutors have found ways to evade them.¹¹⁹

2. Fact, Guidelines Factor, and Cooperation Bargaining

Where the Guidelines' use of real offense conduct limits the impact of charge bargaining on actual sentences, federal prosecutors can shift the emphasis of bargaining to the facts relevant for sentencing. It is not clear how widespread fact bargaining actually is,¹²⁰ and, as a formal matter, DOJ policy prohibits "fact bargaining."¹²¹ Nonetheless, sentencing stipulations regarding the facts that are "readily provable" appear to play a major role in the plea-bargaining process.¹²² Indeed, "most federal plea agreements" include sentencing stipulations regarding such issues as the amount of loss, the number of victims, or other factual issues that impact the Guidelines sentence.¹²³ Although sentencing judges (and probation officers responsible for preparing presentence reports for them) are not bound by the factual stipulations in plea agreements, judges usually accept the stipulated facts as a practical matter.¹²⁴ The assumption that judges would routinely undertake an independent and thorough evaluation of the "real" facts of cases has proved mistaken.¹²⁵ As one commentator stated, "[t]hat judges would actually learn about all of a defendant's 'relevant conduct' was simply a matter of faith—faith that was probably misplaced notwithstanding the efforts of probation officers to serve judges in this regard."¹²⁶

119. See Brown & Bunnell, *supra* note 109, at 1067 (describing the Guidelines as based on "real offense conduct, not the number or, for the most part, the nature of the charges").

120. See Schulhofer & Nagel, *supra* note 93, at 1292 (concluding that fact bargaining does not appear to be as "prevalent" as in earlier time periods).

121. See Brown & Bunnell, *supra* note 109, at 1069-70 (citing U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 1-7.530 (2003)).

122. See *id.* at 1068.

123. *Id.*

124. *Id.*; see also Schulhofer & Nagel, *supra* note 93, at 1300 ("Many judges think of fact-finding in the sentencing hearing as a time-consuming nuisance . . . [and] prefer to rely on the parties to settle the facts before sentencing.").

125. See Schulhofer & Nagel, *supra* note 93, at 1300.

126. Daniel Richman, *Institutional Coordination and Sentencing Reform*, 84 TEX. L. REV. 2055, 2066 (2006). Judicial oversight of guilty pleas can be further limited through use of so called "(C) pleas." See Brown & Bunnell, *supra* note 109, at 1070-72. A plea negotiated pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure is further insulated from judicial review because such plea agreements may specify specific sentences or sentencing ranges, may stipulate that certain provisions of the guidelines or sentencing factors do or do not apply, and may bind judges who accept such pleas to observe those agreements. See FED. R. CRIM. P. 11(c)(1)(C); Brown & Bunnell, *supra* note 109, at 1070-72.

Guidelines-factor bargaining—a cross between charge bargaining and fact bargaining—is probably even more frequently used to enhance sentence differentials than pure fact bargaining.¹²⁷ Guidelines-factor bargaining occurs when the parties reach negotiated agreements regarding which Guidelines factors will apply—such as the defendant’s “role in the offense” or whether a gun was “brandished.”¹²⁸ Negotiated resolution of disputes over Guidelines-factor applications can have a substantial impact on the defendant’s ultimate sentence. Even where a negotiated agreement regarding the application of the Guidelines factors does not bind the court, judges rarely decline to follow the parties’ joint recommendation as to application of Guidelines factors, “even if it is factually dubious.”¹²⁹

Cooperation bargaining has also played a major role in federal plea bargaining.¹³⁰ The Guidelines permit judges to depart downwardly from the presumptively applicable guideline range where defendants provide “substantial assistance” to prosecutors.¹³¹ Defendants remain ineligible for sentence reductions for their cooperation unless the government provides a so-called “5K letter,” signifying the prosecutors’ satisfaction with the degree of cooperation provided by the defendant.¹³² In addition, federal law authorizes judges to waive otherwise applicable mandatory minimum sentences upon recommendation from the prosecutor based on the prosecutor’s representation that the defendant has provided substantial assistance in the prosecution of another criminal defendant.¹³³ As a result, cooperation bargaining permits prosecutors to offer defendants substantially larger plea discounts than they would otherwise receive, and the structure of the Guidelines ensures that prosecutors have total control over whether downward departures are available to cooperating defendants.¹³⁴ Prosecutors use that power to ensure that plea discounts

“(C) Pleas” may require downward departures from the otherwise mandatory guideline sentence, thereby providing another escape hatch from the fixed-discount system. *See* Brown & Bunnell, *supra* note 109, at 1070-72.

127. Schulhofer & Nagel, *supra* note 93, at 1292-93.

128. *Id.*

129. *Id.*

130. *See* Brown & Bunnell, *supra* note 109, at 1088 (showing that in the District of Columbia, approximately 25% of defendants receive downward departures as a result of cooperation agreements).

131. U.S. SENTENCING GUIDELINES MANUAL, *supra* note 92, at § 5K1.1.

132. *Id.*

133. *See* 18 U.S.C. § 3553(e) (Supp. V 2005).

134. *See* Daniel C. Richman, *Cooperating Clients*, 56 OHIO ST. L.J. 69, 108-09 (1995) (noting that the structure of cooperation discounts ensures that “if the government improperly seeks to prevent [a cooperating defendant] from being ‘paid’ for his cooperation, sentencing

of sufficient magnitude are available to induce guilty pleas on desired terms.¹³⁵

Of course, cooperation bargaining is not in itself a bad thing. Cooperation bargaining is undoubtedly an essential tool of law enforcement, especially important in complex investigations of white collar crime, racketeering, and drug smuggling practices that otherwise would be difficult or impossible to prosecute.¹³⁶ Nonetheless, cooperation bargaining further weakens the fixed-discount provisions of the Guidelines.

In sum, the widespread evasion by federal prosecutors of the discount limitations in the Guidelines results from the wide variety of charge-, fact-, Guidelines-factor-, and cooperation-bargaining tactics that can be used to get around conventional fixed-discount systems. Conventional fixed-discount proposals fail to take into account the problem of evasion and offer little capacity to monitor or prevent the use of such evasive tactics.¹³⁷

B. Judicial Incapacity To Review Charging Decisions

The primary reason regulation of charge bargaining and other kinds of alternative bargaining is so difficult stems from the institutional capacity of courts. It has long been settled that separation of powers principles prohibit the judiciary from forcing the executive to prosecute a charge it prefers to ignore, and judicial oversight of prosecutorial charge discretion is virtually nonexistent.¹³⁸ Largely because judges are recognized to be poorly situated to conduct independent evaluations of prosecutorial-charging decisions or the

judges may be unable to show him the leniency he otherwise would have received" (emphasis added)).

135. See *id.* at 72.

136. See John C. Jeffries, Jr. & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095, 1103-09 (1995) (discussing the importance of cooperation bargaining to organized crime prosecutions).

137. Arguably, *United States v. Booker*, 543 U.S. 220 (2005), which rendered the Guidelines advisory, has modestly weakened the importance of these sentencing stipulations. But, because federal judges continue to rely on the Guidelines to determine what sentences are reasonable, there is little evidence that *Booker* has substantially affected federal fact-bargaining practices. See Brown & Bunnell, *supra* note 109, at 1088 (explaining that the biggest effect of *Booker* on plea bargaining was to increase the use of "(C) Pleas"—a device, ironically, that provides the plea-bargaining parties with more, not less, control over sentencing outcomes than in the pre-*Booker* period when "(C) pleas" were more infrequent).

138. See John Gleeson, *Sentence Bargaining Under the Guidelines*, 8 FED. SENT'G REP. 314, 314 (1996) (noting that prosecutors can always dismiss charges in response to a court's rejection of a plea bargain).

factual bases for those charges.¹³⁹ As one court noted, “[i]n the absence of statutorily defined standards governing reviewability, or regulatory or statutory policies of prosecution, the problems inherent in the task of supervising prosecutorial decisions do not lend themselves to resolution by the judiciary.”¹⁴⁰ Such evaluations would require access to sophisticated investigative tools and the use of “resource-intensive investigative techniques” that neither judges nor probation officers usually have.¹⁴¹ For similar reasons, judges are not in a strong position to police the plea-bargaining process in general and charge bargaining in particular.¹⁴² With crowded dockets and little personal or institutional investment in the resolution of particular cases, judges lack incentives to probe the recesses of plea agreements. If an agreement is good enough for the parties, it will almost always be good enough for the judge.¹⁴³ As a result, the requirement that judges approve plea bargains before they take effect imposes little actual constraint on the plea-bargaining process.

The limited ability of judges to review charging decisions is a major problem for most fixed-discount systems. Most commentators advocating fixed discounts have assumed that judges would determine whether a plea agreement was excessively lenient (or in rarer cases, whether it was excessively harsh) and reject plea bargains that

139. Alschuler, *Trial Judge's Role*, *supra* note 54, at 1075 n.59 (“A trial judge is plainly in no position to evaluate the strength of the government’s evidence in a pending case . . .”); Brown & Bunnell, *supra* note 109, at 1068 (explaining that the judge typically relies on the parties’ stipulation of the facts); Gifford, *supra* note 26, at 87 (noting that courts traditionally “have regarded the actions of the prosecutor as virtually unreviewable”).

140. *Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375, 380 (2d Cir. 1973).

141. See Nancy J. King, *Regulating Settlement: What Is Left of the Rule of Law in the Criminal Process?*, 56 DEPAUL L. REV. 389, 395-96 (2007) (noting that trial judges would require information based on “adequately funded investigations” to oversee accuracy of representations in plea agreements effectively).

142. See Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 CAL. L. REV. 539, 629 (1990) (stating that prosecutorial discretion makes charge bargaining “more difficult for judges to control than sentence bargaining”).

143. Richman states that this was precisely the finding of a report by the Commission, which noted that “resource limitations and a reluctance to reject agreements . . . made judicial rejection of plea agreements that undermined the guidelines relatively rare.” See Richman, *supra* note 126, at 2070 (quoting U.S. SENTENCING COMM’N, *supra* note 92, at 84); see also King, *supra* note 141, at 396 (stating that the problem with relying on judges to scrutinize plea agreements is that “judges are under more pressure to facilitate deals than to scrutinize them”). Of course, there are exceptions. See, e.g., *United States v. Jacobo Castillo*, 496 F.3d 947, 950-51 (9th Cir. 2007) (considering jurisdiction to hear appeal in a case where the sentencing judge declined to impose a sentence within negotiated range).

incorporate too great (or too small) a discount.¹⁴⁴ But reliance on judges to perform this task is unrealistic. Difficulties in making such evaluations arise from, among other things, the problem of developing a metric to measure whether a sentence is “exceedingly lenient” and the difficulty of forecasting expected trial sentences at plea hearings. More fundamentally, judges cannot evaluate how lenient any particular plea bargain is without knowing what implicit or explicit promises have been made about the strength of the evidence and which, if any, charges have been declined.¹⁴⁵ Potential charging decisions can vary widely, and prosecutors are assumed to have virtually unchecked authority to select charges within the wide band of available options.¹⁴⁶

This is not to say that judges have no role to play in plea-bargaining reform. More active judicial review of guilty pleas could have a positive impact on plea bargaining.¹⁴⁷ Judges, however, are in a weak position either to assess the extent and impact of charges that could have been filed but were not, or to challenge the accuracy of stipulated facts in the plea agreement. Thus, because they can only assess information presented to them by the parties or gathered by probation officers, judges simply are not institutionally equipped to make any ultimate determination regarding whether a plea bargain represents a large or a small plea discount, even if they cared to.

In the next Part of the Article, I explain how a true fixed-discount system—one that is much harder to evade and courts could realistically manage—could be devised and implemented through the use of plea-based ceilings.

IV. HOW PLEA-BASED CEILINGS SOLVE THE FIXED-DISCOUNT PROBLEM

In a standard fixed-discount system, like that incorporated into the Guidelines, the discount for guilty pleas is supposed to be

144. See, e.g., Gazal-Ayal, *supra* note 18, at 2335 (proposing that to enforce a ban on overly lenient plea bargains would require judges to evaluate plea bargains and to determine just how lenient any particular bargain actually is). However, he admits that this is a difficult task: “it is hard to determine whether a certain sentence is exceedingly lenient.” *Id.*

145. See *id.* at 2335-40.

146. See MARC L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES: PROSECUTION AND ADJUDICATION, CASES STATUTES, AND EXECUTIVE MATERIALS 167 (2005).

147. See Julian A. Cook, III, *Crumbs from the Master's Table: The Supreme Court, Pro Se Defendants and the Federal Guilty Plea Process*, 81 NOTRE DAME L. REV. 1895, 1897 (2006) (arguing that judges should provide more searching reviews of the voluntariness of guilty pleas in plea hearings mandated by Rule 11 of the Federal Rules of Criminal Procedure).

invariable.¹⁴⁸ But the prosecutor's ability to make near-binding sentencing recommendations and to engage in charge, fact, and cooperation bargaining render actual discounts potentially much greater and substantially more variable.¹⁴⁹ This variability of course undermines the very purpose of fixed discounts, creating disparity among similarly situated defendants and destabilizing the incentives of innocent defendants to contest charges and of prosecutors to screen out low-probability conviction cases. Because charge and fact bargaining in particular are tactics deployed largely below judges' "radar screens," as long as prosecutors can use these tactics to increase discount size, there is little hope that a workable fixed-discount regime can be implemented. Plea-based ceilings, however, offer a solution to this enforcement problem by limiting prosecutors' ability to offer such inducements.

A. *How They Work*

The idea underlying plea-based ceilings is straightforward. Plea-based ceilings guarantee defendants that they will not receive a sentence following a trial conviction that is more severe than any plea offer made to them, adjusted upward by the appropriate fixed discount. To illustrate how this might function in practice, imagine a defendant charged with bank robbery. Say that the defendant's criminal history and the facts of the crime would normally result in a ten-year trial sentence and that the jurisdiction adopted a fixed discount of 33%. During bargaining, prosecutors offer the defendant a five-year deal.¹⁵⁰ With ceilings, the defendant could accept the offer or proceed to trial when, if convicted, he would face a maximum sentence capped by the plea-based ceiling at 7.5 years—that is, the same five-year sentence he

148. For instance, in the federal system the fixed discount for "acceptance of responsibility" is approximately 25-35% lower than the trial sentence. See Schulhofer & Nagel, *supra* note 93, at 1290.

149. See *supra* text accompanying notes 101-137.

150. My analysis assumes that the prosecutors' plea-bargaining offers are binding and will be followed by sentencing judges. That assumption, although usually technically false, is an accurate characterization of most actual practice. See Alschuler, *supra* note 46, at 567 ("[J]udges usually follow the course of least resistance and simply ratify the prosecutors' sentencing [recommendations]."); Alschuler, *Trial Judge's Role*, *supra* note 54, at 1064 (citing a study of courts in Houston, Texas that shows that in a sample of eighty-two felony guilty-plea cases, in which prosecutors had offered sentence recommendations, the court imposed the recommended sentence in eighty cases); Welsh S. White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439, 443 (1971) ("While the assistant prosecutor's sentence recommendation is not binding, Philadelphia judges generally adhere to it.").

would have received had he accepted the plea offer, adjusted upward to reflect the absence of the fixed discount.¹⁵¹ The plea-based ceiling, in other words, mimics what conventional fixed discounts do (had he pled guilty, he would have received a 33% discount), except it works backwards. As a result, in a ceiling system, the defendant would know exactly what he risked in declining the plea offer, permitting him to calibrate more carefully his decision of whether to risk trial.

Like fixed discounts in general, plea-based ceilings would dramatically curtail prosecutors' ability to induce defendants in weak cases to plead guilty. As noted above, because the prosecutor is bound by whatever plea offer she makes, it is very hard for her to make an offer that is sufficiently lenient to induce a defendant in a weak case to plead guilty.¹⁵² If the prosecutor has a 10% chance of convicting the defendant on a charge that carries a ten-year term, her offer of six months might look good in a world without ceilings, but if the six-month offer creates a nine-month ceiling on the sentence the defendant could receive upon conviction at trial, then the inducement to plead guilty disappears. The defendant is markedly better off declining the plea offer and holding out for a trial. Although the defendant's initial ETS was one year, the defendant's ceiling-adjusted ETS falls to a mere 0.9 months, or roughly three days, after the plea offer.¹⁵³ Rational defendants should be willing to go to trial under these changed conditions. As a result, plea-based ceilings eliminate the power of lenient plea offers to induce guilty pleas in weak cases.

The same is not true, however, in strong cases. Consider a defendant with an 80% POC. In that case, if the prosecutor offered the defendant the same five-year deal and the defendant rejected the offer, the maximum trial sentence would still be 7.5 years, and with an 80% POC, the defendant would have a substantially higher ETS of six years. This defendant would be better off (although only marginally) taking the plea offer than going to trial. A defendant who calculated the odds of conviction at near-certain (99%), would have an even stronger incentive to take the plea offer, since his ETS of 7.42 years exceeds the plea offer by nearly 50%. These discounts might well be large enough to induce defendants to plead guilty. Where the

151. A 5-year sentence is 66.66% of a 7.5-year sentence, or a 33.33% discount.

152. This is assuming that at least the most egregious systemic pressures to enter guilty pleas are not operative, including situations where defendants held in pretrial detention can gain immediate release by pleading guilty in exchange for a sentence of time served. For a discussion of the myriad ways in which the criminal justice system induces defendants to plead guilty, see Covey, *supra* note 39.

153. $(6 \text{ months}) \cdot (.1(\text{POC}))(1.33 \text{ (ceiling adjustment)})$.

probability of conviction is high, experience indicates that defendants do accept plea bargains, even if the offered concessions are minor.¹⁵⁴

A jurisdiction that implemented a ceiling system would of course first need to determine an appropriate "plea discount."¹⁵⁵ This itself might prove politically difficult.¹⁵⁶ To achieve a sufficiently high guilty-plea rate, the discount might have to be set much higher than 33%. As the data presented in Part II shows, the typical differential may exceed 100%, and discounts fixed below that range might (indeed, should) generate lower guilty-plea rates and higher trial rates.¹⁵⁷ Jurisdictions would then face the difficult situation of responding to increased trial demands or frankly acknowledging the existence of an embarrassingly high plea discount.

Ideally, a compromise might be struck that reduces the differential below its current high rate, while making accommodation for a marginally lower guilty-plea rate.¹⁵⁸ Because the point at which it is rational for a defendant to plead guilty is a strict function of the size of the posttrial penalty, considerations regarding the kinds of cases that should *not* settle should govern the size of the discount. If the trial penalty is fixed at 50% (comparable to a 33% plea discount), then the

154. See Alschuler, *supra* note 54, at 1080 n.71 ("[F]ederal defendants often do agree to plead guilty in exchange for insubstantial concessions simply because the likelihood of conviction at trial is so high.").

155. As noted previously, prosecutors have proposed discount rates ranging from as low as 10% to quite high levels. Judge Easterbrook has suggested that present-value discounting might necessitate very high discount rates. See Easterbrook, *supra* note 37, at 313 (postulating that defendants with a 75% POC and a present-value discount rate of 10% would equate a 50-year trial sentence with a present-value sentence of 7.43 years). The discount necessary to achieve an administratively manageable plea rate might differ from jurisdiction to jurisdiction. See Alschuler, *supra* note 54, at 1124 (discussing a proposal to set the standard discount rate in each jurisdiction based on the collective view of judges as to what level would lead to an "administratively acceptable" volume of guilty pleas").

156. Public recognition of the existence of any discount for guilty pleas raises uncomfortable issues about the morality and constitutionality of plea discounts and trial penalties. Open acknowledgment of the existence of a very large discount, moreover, which might be necessary in some high-volume jurisdictions to obtain an "acceptable" guilty-plea rate, might be too embarrassing for policymakers to tolerate. On the other hand, as some fixed-discount advocates have pointed out, frank recognition of the costs of operating a system based on guilty pleas might have a salutary effect. At least one commentator has argued that plea discounts should be fixed in order to enhance certainty regarding the consequences of pleading guilty and thereby increase the number of guilty pleas. See Tom Lininger, *Bearing the Cross*, 74 *FORDHAM L. REV.* 1353, 1416 (2005) (arguing that fixing a standard discount for guilty pleas will result in more pretrial dispositions and less cross-examination of accusers).

157. See *supra* text accompanying notes 1-25.

158. Jurisdictions could accommodate lower guilty-plea rates either by increasing resources (e.g., trying more cases or devoting more resources to investigation) or by filing fewer cases and pursuing less serious charges in the cases that are filed.

only cases in which accepting the plea offer is the rational strategy are cases in which the defendant will be convicted at least two out of three times (i.e., POC is 0.667 or greater).¹⁵⁹ If the trial penalty were increased to 100%, then defendants would be better off pleading guilty rather than going to trial in all cases where the POC was at least 0.50.¹⁶⁰ With a 100% trial tax, the 80% POC defendant offered a five-year plea deal would have a sizeable incentive to take the deal, because his ETS otherwise is eight years. Ideally, the plea discount should not exceed the point at which prosecutors can induce guilty pleas in cases in which it is more likely than not that the defendant will be acquitted at trial.¹⁶¹ Precluding guilty pleas in cases where the POC falls below 50% is consistent with prosecutorial guidelines that suggest that prosecuting such cases is unethical.¹⁶² As noted above, the size of the plea discount will predictably determine the number and types of cases resolved through plea bargaining. As such, it will have important effects on both the mix of cases that go to trial and on prosecutorial screening decisions.

In addition to setting the discount size, the jurisdiction would also need to ensure that prosecutors memorialize the plea-bargain terms in writing and present them in a way that provides defendants with an adequate opportunity to accept or reject them. The memorialization requirement is necessary to ensure that judges have a clear record to calculate the plea-ceiling sentence. Written plea agreements are also wise because they facilitate enforcement of any disputed terms, regardless of whether the sentence is imposed immediately on the basis of the plea bargain or after a trial, a point which federal policymakers at the DOJ have long recognized.¹⁶³ Written plea offers must include all terms. There can be no "secret deals," and

159. Again, this assumes that the defendant's goal was pure sentence minimization.

160. The 50% mark probably constitutes the floor for cases that can ethically be prosecuted.

161. This threshold is reached where the discount rate is 50% (i.e., the trial penalty is 100%).

162. See U.S. ATTORNEYS' MANUAL § 9-27.220 (2003) ("[N]o prosecution should be initiated against any person unless the government believes that the person probably will be found guilty by an unbiased trier of fact.").

163. See Memorandum from John Ashcroft, Attorney General, U.S. Dep't of Justice, on Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing, to All Federal Prosecutors 5 (Sept. 22, 2003), available at <http://f11.findlaw.com/news.findlaw.com/hdocs/docs/doj/ashcroft92203chrghmem.pdf> (instructing that plea agreements should be in writing or stated on the record); see also Brown & Bunnell, *supra* note 109, at 1066 (stating that the use of written plea agreements is standard practice in all cases); Schulhofer & Nagel, *supra* note 93, at 1295 ("Nearly all offices require that plea agreements normally be in writing, and most have review procedures of one sort or another.").

prosecutors cannot make a plea offer available only if the defendant agrees first to accept it.¹⁶⁴ Defendants must remain free to decline plea offers until formal acceptance of the plea. Prosecutors should not be permitted to make the extension of a plea offer contingent on its acceptance. If prosecutors are able to do so, plea ceilings will not work. Finally, ceiling jurisdictions would have to ensure that written plea offers are admissible at sentencing.¹⁶⁵

B. Why Ceilings Are Easier To Enforce and Harder To Evade

Although plea-based ceilings promise many of the benefits that conventional fixed discounts offer, there are important differences. First, plea-based ceilings would be not only far easier for judges to monitor and to enforce but also harder for prosecutors to evade through charge or fact bargaining than conventional fixed discounts. Second, unlike conventional fixed discounts, plea-based ceilings would not circumscribe sentencing discretion by limiting the scope of practical outcomes that can be achieved through plea bargaining. Plea-based ceilings would preserve the flexibility of prosecutors and, to a lesser extent, judges to take a wide range of relevant factors into account in determining the ultimate sentence.¹⁶⁶

164. This requirement would necessitate vigilant policing. The formal procedures suggested here would preserve the defendant's ability to decline a plea offer at the plea hearing. It is easy to imagine, however, that prosecutors might agree to make offers only when defense counsel promises not to later demand a trial and to enforce those understandings by refusing to make plea offers to clients represented by lawyers who have reneged on such promises previously.

165. Some courts have barred defendants from offering evidence of plea offers at trial. *See, e.g.,* United States v. Verdoorn, 528 F.2d 103, 107 (8th Cir. 1976) ("Meaningful dialogue between the parties would, as a practical matter, be impossible if either party had to assume the risk that plea offers would be admissible in evidence."). For further discussion of this case, see Todd W. Blanche, Note, *When Two Worlds Collide: Examining the Second Circuit's Reasoning in Admitting Evidence of Civil Settlements in Criminal Trials*, 67 BROOK. L. REV. 527, 545-56 nn.95-98 (2001). In addition, some states bar the use of statements made by the parties during plea negotiations. *See, e.g.,* Newell H. Blakely, *Article IV: Relevancy and Its Limits*, 30 Hous. L. REV. 281, 448-49 (1993) (discussing Texas's ban on the use of such statements). These rules are generally crafted to protect defendants from government use of incriminating concessions, and are usually directed to the use of such statements for evidentiary purposes during trial, not for sentencing purposes. *See id.*

166. Nonetheless, as with any attempt to regulate plea discounts, legal prohibitions against punitive-charging practices would be essential. Protections stronger than what current constitutional law provides must be fashioned to prevent strategic or vindictive postoffer charging conduct in the event that a favorable plea offer was rejected. For example, prosecutors cannot be permitted to amend an assault charge to a murder charge in the event that an initial offer to plead guilty to assault is declined. *See supra* notes 137-147 and accompanying text.

Plea-bargaining reforms that rely on fixed discounts or partial bans require careful judicial scrutiny of prosecutorial decision making to be effective.¹⁶⁷ As noted above, however, such scrutiny is not realistic.¹⁶⁸ Judges are not institutionally suited to evaluate plea bargains to determine whether any particular plea agreement provides the defendant with an overlarge discount from the expected trial sentence. Plea-based ceilings avoid these problems.

Judicial oversight is simple in a plea-based ceiling system because ceilings focus judicial attention on hard facts. Upon presentation of a written plea offer at the sentencing hearing, judges would merely need to ensure that the trial sentence did not exceed the plea-offer sentence by more than the fixed discount. Because sentences are capped by the written plea terms offered by prosecutors, judges would not need to speculate about what charges the prosecutor might have brought or what facts the prosecutor might have alleged to determine whether the disparity between the plea-bargained sentence and the trial sentence was excessive.¹⁶⁹ Instead, the judge would only need to review the set of charges and the factual allegations underlying them that the prosecutor would have accepted to dispose of the case, determine what sentencing exposure that package entailed, and ensure that the sentence imposed does not exceed that amount by more than the ceiling permits.¹⁷⁰ That type of review falls well within the traditional scope of judicial competence.

Not only would judges be able to enforce ceilings easily, prosecutors would have more difficulty evading the plea-based ceilings because they are keyed off the end product that the prosecutor most

167. See Gazal-Ayal, *supra* note 18, at 2335 (explaining that his proposed “partial ban system relies on courts to review the bargained-for sentences, requiring them to reject exceedingly lenient bargains”).

168. See *supra* text accompanying notes 57-72.

169. As one scholar noted in discussing the problems associated with counterfactual inquiries: “It challenges the imagination of the trier to probe into a purely fanciful and unknowable state of affairs. He is invited to make an estimate concerning facts that concededly never existed. The very uncertainty as to what *might* have happened opens the door wide for conjecture.” Wex S. Malone, *Ruminations on Cause-in-Fact*, 9 STAN. L. REV. 60, 67 (1956).

170. For example, a defendant who was offered an opportunity to plead guilty to one count of a charge carrying a ten-year maximum sentence in exchange for a recommended three-year term, who declined the offer, who contested guilt at trial, and who was convicted of that charge at trial could simply introduce evidence of the plea agreement at his sentencing hearing. Assuming a 50% trial penalty (i.e., a 35% plea discount), the plea ceiling would cap his posttrial sentencing exposure at 4.5 years. The judge would then impose a sentence of 4.5 years or less, based on a full consideration of the record and any mitigating circumstances that might call for leniency.

desires: the plea agreement itself. Prosecutors could not get plea agreements without first making (or acquiescing to) plea offers. With plea-based ceilings, prosecutors with weak cases could not induce defendants to plead guilty by making an excessively large plea offer because the same lenient plea offer would also protect the defendant from receiving a substantially harsher penalty after trial.¹⁷¹ Regardless of whether the prosecutor sought to induce the plea through an overlarge sentence discount or by dismissing charges carrying overly large upward-sentencing exposure, barring imposition at trial of any sentence higher than the plea offer, adjusted upward to reflect the absence of a plea discount, would enforce the fixed discount. As a result, charge concessions would provide prosecutors no more bargaining leverage than sentence concessions.

Obviously, plea-based ceilings would have a dramatic impact on the kinds of plea offers a prosecutor would be willing to make in the first instance. In a plea-based ceiling system, the prosecutor could not make extremely lenient plea offers in order to induce a guilty plea because this would simultaneously reduce the defendant's incentive to avoid trial without changing the likelihood of conviction. Because a lenient offer would not result in a plea agreement, the prosecutor will be far less likely to make such an offer, unless she believed it represented a substantively fair outcome.

1. Declinations as a Plea-Bargaining Chip

One of the subtler ways prosecutors induce guilty pleas is by agreeing to defer or decline charges.¹⁷² To be effective, ceilings must be responsive not only to charge or sentence reductions from charges that have been filed but also to charge declinations that occur before charges are filed, including both express and tacit declinations. Express declinations represent formal promises by the government not to bring certain charges.¹⁷³ The prosecutor's ability to decline to file

171. That is, unless the process costs of contesting the charge outweigh the costs of conviction and punishment, which will often be true where minor crimes are concerned. See FEELEY, *supra* note 41, at 199-240.

172. See Frase, *supra* note 142, at 612 (“[D]eclinations are often delayed until shortly before trial, as part of the plea bargaining process.”); Benjamin M. Greenblum, Note, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1869 (2005) (describing deferred prosecutions as “an intermediate option between declination and plea bargaining”).

173. Many jurisdictions require prosecutors to make a formal record of negotiated declinations. For example, Rule 11(c) of the Federal Rules of Criminal Procedure mandates that the parties make a record of express declinations. See FED. R. CRIM. P. 11(c)(1)(A)-11(c)(2) (noting that plea agreements may include agreements specifying charges the

charges poses one of the greatest hurdles to any conventional discount scheme. Like charge bargains generally, courts have little ability to determine the substantive merits of declined charges. Some express declinations are included in plea agreements, notwithstanding that the prosecutor had a strong case on the declined charge and could have prosecuted.¹⁷⁴ Others are included even though the prosecutor lacked a sufficient evidentiary basis to pursue the charge, merely to assuage an anxious defendant or to satisfy a defense attorney's need to justify a fee to her client.¹⁷⁵ As a result, it is almost impossible to tell if a declination represents a substantial or de minimis discount and, therefore, whether the charges to which the defendant has agreed to plead guilty represent a large or small discount from the expected trial sentence.

With ceilings, however, express declinations are easily handled. If a plea offer includes a promise not to file particular charges, then any sentence obtained after trial could not exceed in magnitude the adjusted plea sentence, notwithstanding that the charge or charges on which the defendant ultimately was convicted at trial might otherwise have required a higher term.¹⁷⁶ In a ceiling system, judges would need to ignore any cumulative increase that accompanied a conviction on any counts that were contemplated for dismissal as part of a plea offer.¹⁷⁷

government will "not bring" and requiring parties to disclose plea agreements in open court when the plea is offered).

174. See Marc L. Miller & Ronald F. Wright, *The Black Box: The Reasons Behind Prosecutors' Declination Choices 1-7* (July 5, 2006) (unpublished paper prepared for University of Texas Empirical Law Conference, on file with author), *available at* <http://ssrn.com/abstract=916061>.

175. Marc Miller and Ronald Wright have reported data from the New Orleans District Attorney's office indicating that the single most stated reason given for declining charges was that the district attorneys were "prosecuting on other charges" and that the second most common reason was "evidentiary flaws." *Id.* at 5. Plea bargains that include declinations of charges falling into the first category clearly provide a meaningful benefit to many defendants, whereas those falling into the second may not. See *id.* at 7-10. Albert Alschuler has documented various aspects of plea bargaining, including agreements reached to drop irrelevant charges or counts, motivated by criminal defense lawyers' need to appear effective to their clients. See Alschuler, *Defense Attorney's Role*, *supra* note 11, at 1205-06, 1211.

176. In other words, if a defendant were charged with two counts of an offense, each carrying a mandatory minimum sentence of five years to be served consecutively, and if the prosecutor offered to dismiss one count in exchange for a guilty plea to the other, which the defendant refused, and if the defendant were convicted on both counts, the defendant could not be sentenced to any term greater than the plea ceiling, notwithstanding the fact that his sentence might well fall below the mandatory minimum term otherwise required.

177. There is precedent for the exercise of such judicial authority. In California, for instance, state courts routinely strike prior felony convictions in "three-strikes" cases in order

Some might object that overriding the prosecutor's charging strategy in this manner infringes prosecutorial-charging discretion. But far from trenching upon the prosecutor's charging power, enforcement of ceilings merely holds prosecutors accountable for their plea offers. If prosecutors wish to obtain convictions and sentences on multiple counts, each of which carries a minimum sentence, they may do so simply by making no plea offer inconsistent with that outcome. But when prosecutors offer to dismiss counts in exchange for guilty pleas and when the deal provides the defendant with an opportunity to receive a sentence below what otherwise would be the mandatory minimum trial sentence, the prosecutors evidence their true beliefs about the magnitude of a fair and proportionate sentence. Their plea offers would directly contradict any later claim that longer sentences are required. Ceilings would limit prosecutors' bargaining power but not their fundamental discretion to seek whatever outcome the evidence, the circumstances of the offense, and the record of the offender, in their judgment, dictate.

2. Off-the-Record Bargains

Tacit declinations present a harder problem. Prosecutors have long used deferred filing of guilty pleas for sentencing—so-called “on-file” charging—pre-plea diversion, and other tactics to induce defendants to plead guilty or to accept some other sanction without trial.¹⁷⁸ Whereas courts have the capacity to at least try to regulate charge dismissals, it is much harder to regulate decisions not to file charges in the first place. Where no record of the declination exists,

to obviate the otherwise mandatory application of three-strikes sentences. See, e.g., *People v. Superior Court (Romero)*, 917 P.2d 628, 635, 649 (Cal. 1996). Under California law, a court hearing a three-strikes case has the authority to strike allegations of prior convictions “in the interests of justice.” See *id.* The court held that the three-strikes law, imposing substantially enhanced sentences on repeat offenders, did not preclude the court from striking allegations of prior convictions, even in the absence of a motion requesting that action by the prosecuting attorney. *Id.*; see also *Ewing v. California*, 538 U.S. 11, 17 (2003) (recognizing the power of California trial courts to vacate allegations of prior felony convictions sua sponte). Enforcing plea ceilings by effectively striking the penal consequences of added counts would be justified by the same basic considerations of justice and proportionality.

178. See FISHER, *supra* note 5, at 84 (describing the benefits of putting cases on hold). Where the offense is relatively minor, prosecutors might draft charges but place them in the defendant's file rather than file them in court, as long as the offender agrees to seek counseling, make restitution, or simply not to reoffend. Such tools continue to play an important part of the prosecutor's arsenal in lower state courts. See FEELEY, *supra* note 41, at 175.

there is little basis to assess its impact on sentence.¹⁷⁹ While such informal resolution of charges is less common with respect to more serious offenses, prosecutors continue to make use of the declination power to increase their bargaining leverage, and conventional fixed-discount schemes provide no mechanism to prevent them from doing so.¹⁸⁰

In a ceiling system, prosecutors undoubtedly would be tempted to circumvent fixed discounts by dismissing counts or declining to file charges with the tacit understanding that such dismissals or declinations are the quid pro quo for a guilty plea to the remaining charge(s). There are two ways to minimize such evasive tactics.

First, bargaining transparency could be enhanced. Indeed, increased transparency is critical to any type of plea-bargaining reform, whether based on ceilings, caps, or conventional discounts.¹⁸¹ As Stephanos Bibas has warned, without heightened transparency of the criminal justice system, insiders will quickly find ways to subvert reforms that trench upon their interests.¹⁸² Prosecutors and defense lawyers should be strongly urged—indeed, required—to reveal all material terms of plea bargains, express and implied alike, in open court. As noted above, defendants have a strong interest in ensuring that the terms of plea bargains are set forth clearly, because the lack of a clear record of the terms of plea agreements makes it much more difficult to enforce those agreements in the event of breach by the government. At the same time, prosecutors, as officers of the court, have an obligation to refrain from conduct that undermines the stated purposes of sentencing.

Second, recognizing that ceilings necessarily bar imposition of any sentence based on post-plea-bargaining, upward-charge revisions would limit the prosecutor's ability to use tacit declinations as bargaining leverage. Ceilings would thus prevent prosecutors from using declinations coupled with threats to file new or amended charges as a club to induce guilty pleas. *Bordenkircher v. Hayes* illustrates the

179. See, e.g., Miller & Wright, *supra* note 174, at 3 (describing declination as "hidden from all traditional legal review yet fundamental to the operation of American criminal justice systems").

180. See Bibas, *supra* note 110, at 946-47 (noting that prosecutors use low-visibility strategies such as declination and charge bargaining to subvert attempts to regularize plea bargaining).

181. See *id.* at 913-18.

182. See *id.* at 932 (noting insiders' ability to "find new procedural ways to subvert even mandatory laws" intended to reform the system).

unfairness of this tactic.¹⁸³ In *Bordenkircher*, the defendant, a two-time prior offender, was charged with issuing a forged check for \$88.30.¹⁸⁴ Although the prosecutor could initially have charged Hayes under the state's habitual criminal statute, which carried a mandatory life sentence, the prosecutor instead offered him a chance to plead guilty to the simple offense and receive a recommended five-year sentence.¹⁸⁵ When he refused, however, the prosecutor made good on his threat and filed a superseding indictment, charging Hayes as a habitual criminal.¹⁸⁶ Hayes lost at trial and was sentenced to a mandatory life term.¹⁸⁷ Although the Supreme Court upheld the conviction and sentence, commentators almost uniformly have condemned the case as a classic example of strategic and unfair charging behavior.¹⁸⁸ By sanctioning these prosecutorial tactics, the Court's decision in *Bordenkircher* significantly weakened defendants' bargaining power.¹⁸⁹ This type of strategic charging seriously threatens any type of fixed-discount system. An effective fixed-discount regime requires limits not only on plea discounts as to charges that were filed but also on upward revisions of charges after plea negotiations fail. Without such limits on postnegotiation charging, prosecutors can easily evade the discounts.

183. 434 U.S. 357 (1978).

184. *Id.* at 358.

185. *Id.*

186. *Id.* at 359.

187. *Id.*

188. See, e.g., Michael M. O'Hear, *The End of Bordenkircher: Extending the Logic of Apprendi to Plea Bargaining*, 84 WASH. U. L. REV. 835, 848-49 (2006) (criticizing the Court's acceptance of plea threats). As Scott and Stuntz observed, as long as prosecutors can penalize a defendant's refusal to plead guilty by seeking substantially harsher penalties, defendants have little freedom to refuse plea offers: "Hayes might not have accepted that deal, but every future defendant is likely to do so and do so quickly." Scott & Stuntz, *supra* note 1, at 1964.

189. Likewise, in *Riggs v. Fairman*, the defendant was charged with petty theft and was offered an opportunity to plead guilty to a charge carrying an five-year term. 399 F.3d 1179, 1181 (9th Cir. 2005). After Riggs declined the deal on his counsel's advice, the prosecutor amended the indictment and charged Riggs as a three-strikes offender under California's three-strikes law. *Id.* Riggs was convicted and received a sentence of twenty-five years to life. *Id.* In the course of habeas proceedings, Riggs adduced evidence that the prosecutor's office had a policy of routinely offering defendants like Riggs an opportunity to plead guilty to a non-three-strikes offense, which, if not promptly accepted, would forever disappear. *Id.* at 1188 n.3.

In light of such policies, few defendants will decline plea offers regardless of the viability of their defenses, knowing the hazards such a decision entails. Indeed, in *Riggs*, counsel's recommendation to decline the plea offer was deemed constitutionally ineffective representation and a violation of the Sixth Amendment. *Id.* at 1184.

The inherent logic of fixed discounts should preclude the use of tactics like those on display in *Bordenkircher*. In *Bordenkircher*, the Court declined to overturn the prosecutor's obviously punitive decision to amend the indictment in retaliation for the defendant's refusal to plead guilty in large part because the prosecutor could have charged the defendant under the habitual criminal statute to begin with, and *that* decision would have been unreviewable.¹⁹⁰ True enough. But in any plea-bargaining regime that recognized fixed discounts, the prosecutor could not *both* have charged Hayes as a habitual criminal and made the five-year plea offer, since such a discount is precisely the type of overlarge inducement that fixed discounts aim to bar. Because, in a fixed-discount world, the prosecutor could not have engaged in *that* plea-bargaining conduct, it follows that she should not be able to achieve the same result merely by reversing the order of events. Thus, fixed discounts in general and plea-based ceilings in particular should necessarily entail barring the government from threatening to bring harsher charges if a guilty plea is not forthcoming. A ceiling system therefore would require legislatures or courts to implement rules barring post-plea-rejection upward-charge revision, at least where the upward revisions are predicated on the same factual transaction or course of conduct underlying the initially filed charge(s).¹⁹¹

190. 434 U.S. at 364 ("[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."). Moreover, Máximo Langer argues that the prosecutor's conduct in *Bordenkircher* was wrongful because the application of the Habitual Criminal Act to Hayes' case was disproportionate to his degree of culpability. Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 240-42 (2006). The problem with using such judgments to regulate plea bargaining is the absence of any available metric to gauge proportionality in charging other than what is set forth in the statutes and applicable guidelines. The metric the Court used in *Bordenkircher* was not grounded in an assessment of the proportionality of applying the Habitual Criminals Act in Hayes's case, but merely its legality. Because Hayes's conduct was prosecutable under the Act, the Court concluded that the prosecutor was perfectly within his rights to charge Hayes with its violation. See *Bordenkircher*, 434 U.S. at 364.

191. Such rules would be harder to develop, or to police, when unrelated conduct is the subject of an implied bargain. For example, when a defendant, charged with robbing bank *A*, rejects a plea offer and is subsequently charged with robbing bank *B* as well, courts might have a hard time determining whether a new post-offer-rejection charge is a punishment for rejecting the plea offer or unrelated to the defendant's refusal. The most optimistic view of the prospects of reform in that situation is that courts might be encouraged to take a close look at whether the information supporting the new charge was available to the government at the time the initial plea offer was made. In such a situation, the government might carry the burden to demonstrate that the new charges were not filed for punitive purposes. See, e.g., *Blackledge v. Perry*, 417 U.S. 21, 27-29 (1974) (disfavoring upward revision of a

V. THE HAPPY CONSEQUENCES OF PLEA-BASED CEILINGS

Adoption of plea-based ceilings would go a long way toward achieving real reform of plea bargaining. As noted above, ceilings would force a change of the mix of cases in which defendants opt for trial and, as a collateral consequence, induce prosecutors to change the way they screen cases.¹⁹² They would also discourage the use of tactics that subject defendants to duress or which are plainly strategic or vindictive, including the use of death threats to induce guilty pleas, a practice the Supreme Court long ago found to be legally unsettling, if not demonstrably unconstitutional.¹⁹³ In addition, ceilings would force the formal acknowledgement of what already is true in fact: plea-bargained sentences, not posttrial sentences, are the true sentencing baseline.¹⁹⁴

A. *Ending Bargaining Duress and Vindictive Charging*

Plea-based ceilings would throw a wrench into some of the most notorious plea-bargaining tactics. Take exploding plea offers, for instance. Exploding plea offers—one-time offers that, if not promptly accepted, are gone forever—are standard tools in most prosecutors’

misdemeanor charge to a felony charge after the defendant requested a jury trial, unless the prosecutor could establish that a change in the charges was based on some factor other than the defendant’s exercise of his procedural rights). The Supreme Court, however, thus far has declined to place any similar limits on the prosecutor’s pretrial discretion to add or reduce charges based on the defendant’s exercise or waiver of procedural rights. See *United States v. Goodwin*, 457 U.S. 368, 382-84 (1982) (refusing to apply a presumption of vindictiveness to pretrial dispositions). Alternatively, it might be conceded that such tactics simply cannot be entirely abolished, but that they at least are available only in the smaller subset of cases in which multiple, nonfactually related crimes can be charged.

192. See *supra* notes 150-165 and accompanying text.

193. Compare *North Carolina v. Alford*, 400 U.S. 25, 28-39 (1970) (affirming a guilty-plea conviction as voluntary and intelligent when the defendant pled guilty to a second-degree murder charge in exchange for the dismissal of a first-degree murder charge carrying a potential death penalty, notwithstanding the defendant’s insistence that he was actually innocent), with *United States v. Jackson*, 390 U.S. 570, 572 (1968) (holding a statute unconstitutional because it permitted the imposition of a death sentence only upon the jury’s recommendation, imposing “an impermissible burden upon the exercise of a constitutional right”). But see *Brady v. United States*, 397 U.S. 742, 747 (1970) (explaining that *Jackson* did not rule “that all pleas of guilty encouraged by the fear of a possible death sentence are involuntary pleas” and, thus, invalid).

194. As Alschuler points out, the conceit that the sentence differential awards defendants who plead guilty with a discount rather than assesses the defendant who goes to trial and loses with a penalty is premised on the notion that the trial sentence is the “just” or “appropriate” sentence. See Albert W. Alschuler, *Straining at Gnats and Swallowing Camels: The Selective Morality of Professor Bibas*, 88 CORNELL L. REV. 1412, 1414 n.10 (2003). Systemic tolerance of “lenient” sentences for the 94% of defendants that plead guilty, however, belies the notion that the trial sentence represents the baseline. See *id.* at 1412 n.1.

plea-bargaining arsenal.¹⁹⁵ Prosecutors typically make such exploding offers very early, before they have invested substantial resources in the case, and these offers force defendants to make critical decisions under intense pressure and in the absence of full information.¹⁹⁶ Under a plea-based ceiling system, the coercive effect of exploding offers would be greatly reduced. Because a plea offer, once made, imposes a hard ceiling on the ultimate sentence, the prosecutor's one-time offer never quite explodes. Ceilings thus protect defendants' ability to make uncoerced decisions about whether to accept a plea offer or go to trial without the fear that declining the offer will trigger excessively punitive consequences.

This does not mean that incentives to plead early could not be utilized. First, prosecutors can always encourage defendants to accept an early offer by threatening to take it off the table, forcing the defendant to weigh whether the benefits of trial outweigh the benefits of the plea discount. Second, ceilings would not preclude the use of codified incentives that permit prosecutors to increase the size of the fixed discount to reward early pleas.¹⁹⁷ For instance, the Guidelines reward defendants who enter early guilty pleas with an additional one-level reduction.¹⁹⁸ Like the Guidelines, the plea discount could include an incentive for early pleas that save the government the costs of trial preparation. If the proper sentence reduction for timely acceptance of responsibility is approximately one-third of the total sentence reduction available for pleading guilty, as it is under the Guidelines, then a ceiling system could incorporate such an incentive simply by increasing the size of the trial penalty ultimately imposed by an additional one-third if a defendant rejects an early offer. In other words, prosecutors would be able to make a later plea offer that is one-third higher without changing the defendant's ultimate incentive to plead guilty.¹⁹⁹

Ceilings also should necessarily bring an end to one of the most corrosive and unseemly practices known to plea bargaining: inducing guilty pleas by threatening defendants with death sentences if they

195. For a discussion on exploding plea offers, see Covey, *supra* note 39, at 243.

196. *See id.*

197. *See* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 92, § 3E1.1(b) (providing an additional one-level discount for timely acceptance of responsibility).

198. *See id.*

199. For instance, a defendant who received an early two-year plea offer and who rejected it might face a trial sentence ceiling of 3.5 years, based on a trial penalty of 75%, whereas a defendant who received an initial offer of two years just prior to trial might face a trial sentence of only three years, or a 50% trial penalty.

contest the charges and are convicted at trial.²⁰⁰ If prosecutors extend an offer to plead guilty to any death-eligible defendant in a capital case in exchange for a life sentence or less, ceilings should bar the prosecutor from pursuing a death sentence if the case goes to trial. The difference between life and death defies reduction into any conventional discounting scheme, and the basic structure of ceilings is inconsistent with a penalty scheme that threatens only those who exercise their trial rights with the death penalty. Such a reform, moreover, is more consistent with the basic principles that guide post-*Furman* capital jurisprudence.²⁰¹ As the Supreme Court has stated, capital punishment must be reserved for the worst of the worst.²⁰² Where prosecutors are willing to permit a defendant to plead guilty and receive a life sentence or less, by definition, the prosecutors themselves signal that the case does not involve the worst kind of defendant. The defendant's decision to exercise his constitutional rights cannot be relevant to any rational determination of whether the defendant's crimes merit the ultimate punishment.²⁰³

200. There is ample evidence that prosecutors use the threat of capital punishment to induce defendants to plead guilty. *Sloan v. Estelle*, 710 F.2d 229, 231-32 (5th Cir. 1983) (observing that the prosecutor threatened to seek the death penalty if the defendant refused the plea bargain); Scott W. Howe, *The Value of Plea Bargaining*, 58 OKLA. L. REV. 599, 623 (2005) ("The Court's decisions contemplate . . . that many who deserve the death penalty will not receive that sanction, precisely because they will plea bargain to avoid it."); David McCord, *Lightning Still Strikes: Evidence from the Popular Press that Death Sentencing Continues To Be Unconstitutionally Arbitrary More than Three Decades After Furman*, 71 BROOK. L. REV. 797, 862 n.202 (2005) (reporting the finding from a study examining the distribution of defendants in death-penalty cases that the decision to spare a defendant is usually the result of a plea bargain); see WELSH S. WHITE, *LITIGATING IN THE SHADOW OF DEATH* 145 (2006) (citing a Georgia attorney estimating that "75 percent of the defendants who have been executed since 1976 could have avoided the death sentence by accepting a plea offer"). But see Ilyana Kuziemko, *Does the Threat of the Death Penalty Affect Plea Bargaining in Murder Cases? Evidence from New York's 1995 Reinstatement of Capital Punishment*, 8 AM. L. & ECON. REV. 116, 116 (2006) (concluding, based on a study of New York cases, that "the death penalty leads defendants to accept plea bargains with harsher terms, but does not increase defendants' overall propensity to plead guilty").

201. See *Furman v. Georgia*, 408 U.S. 238, 240 (1972) (holding that an arbitrary imposition of the death penalty violates the Eighth Amendment).

202. See *Zant v. Stephens*, 462 U.S. 862, 877 (1983) (holding that, to be constitutional, a death-penalty scheme "must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder").

203. Given that the decision to contest charges at trial has little relevance to a determination of whether any particular defendant is the "worst of the worst," using capital sentences as leverage to induce guilty pleas injects enormous disparity in death-penalty outcomes. See McCord, *supra* note 200, at 820 (condemning "[t]he Court's refusal to oversee prosecutorial decision-making" as "a heavy blow to robust death sentence ratios because significantly more defendants are shielded from death sentences by prosecutorial decisions than by sentencer decisions").

Because plea-based ceilings would effectively bar prosecutors from making plea offers in any case where they wish to seek a death sentence or to keep that option open, the threat of capital punishment would lose its value as leverage in securing guilty pleas in serious cases, perhaps undermining one of its principal uses. But as the Supreme Court implied in *United States v. Jackson*, guilty pleas induced by penalty schemes that impose capital punishment only on those who refuse to plead guilty raise fundamental due process concerns.²⁰⁴ The reasoning behind the Court's conclusion in *Jackson* has never been extended to the practice of permitting defendants to escape capital punishment by pleading guilty, but it should be.²⁰⁵ Failure to put an end to this practice is one of the many shameful aspects of the Court's generally embarrassing plea-bargaining jurisprudence. Ceilings would require prosecutors to separate the decision to plea bargain from the decision to pursue capital punishment, improving the accuracy of the death penalty by ensuring that the determination of which persons are most deserving of the death penalty is not a function of which defendants assert their right to trial.

B. Recognizing Plea-Bargained Sentences as the True Sentencing Baseline

The reform proposed here would have one other significant consequence: it would change sentencing baselines from trial sentences to plea-bargained sentences. Plea-bargained sentences reflect society's (or at least prosecutors' and judges') estimate of the appropriate punishment in standard cases. Plea-based ceilings formalize this tacit assumption by treating bargain sentences as the legal baseline while preserving the government's ability to seek higher sentences where circumstances warrant.²⁰⁶ Because most criminal

204. 390 U.S. 570, 583 (1968) (holding that the Federal Kidnapping Act, which permitted a possible death penalty upon conviction at trial but precluded a death sentence after a guilty plea, imposed an unconstitutional burden on a defendant's assertion of the constitutional right to jury trial).

205. See, e.g., *Brady v. United States*, 397 U.S. 742, 757-58 (1970) (upholding the conviction of a defendant who pled guilty to avoid a death sentence, even though the statutory provisions, providing a death sentence only for those who are convicted at trial, were later found unconstitutional); *North Carolina v. Alford*, 400 U.S. 25, 39 (1970) (upholding the guilty plea of a defendant who claimed to be innocent and only pled guilty to avoid the death penalty).

206. Conceptually, this change is similar to that predicted by critics of plea bargaining, who urge total abolition. As Albert Alschuler has argued, if plea bargaining were abolished altogether and all cases went to trial, by definition there no longer would be a distinction

convictions are obtained through pleas rather than trials, most sentences are plea-bargained sentences.²⁰⁷ Nonetheless, we continue to operate under the fiction that the “just” sentence is the much harsher and rarely imposed trial sentence. In a world without plea bargains, every defendant would receive the same baseline sentence, and that sentence undoubtedly would approximate the sentence now awarded to defendants who plead guilty. If for no other reason, limits on prison capacities would preclude the alternative.

A system of plea-based ceilings triggers a similar result by linking posttrial sentences to plea-bargained sentences. If the statutory sentencing range for a particular offense directs a judge to impose a ten-year sentence, but prosecutors routinely plead out those cases for two-year terms, it is far fairer, and more honest, to recognize the two-year sentence as the baseline penalty for that offense. Certainly, such recognition is consistent with the goal of reducing disparity in sentencing, which underlies most sentencing-guidelines systems.

This change of focus would likely instigate far-reaching changes in the way that prosecutors think about the plea-bargaining process. Unlike some other reform proposals, ceilings would not directly limit or constrain the prosecutor’s discretion to offer negotiated dispositions that reflect what they understand or believe to be a fair punishment for the defendant’s crime.²⁰⁸ Prosecutors would be free to craft plea offers regardless of whether the offer represents a large or small discount from the expected trial sentence. The only thing prosecutors could not do in a ceiling system is seek, after a trial conviction, a substantially harsher disposition than was offered pretrial. Ceilings would prevent prosecutors from abusing discretion when it is used to “buy” or “barter” for guilty pleas with large plea discounts and, thus, bring an end to the tawdriest aspects of the plea-bargaining transaction. However, ceilings would still allow prosecutors to craft appropriate dispositions that accord with their moral convictions.

between the sentence a typical defendant would receive after pleading guilty and the sentence such a defendant would receive after conviction at trial. See Alschuler, *supra* note 6, at 52.

207. See *supra* text accompanying notes 2–4.

208. See Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2127 (1998) (noting that prosecutors typically “are not seeking simply to maximize the amount of jail time that can be extracted from their adversaries” but rather “undertake to determine . . . whether the evidence truly demonstrates guilt, and if so, what sentence is appropriate”).

VI. COMPLICATIONS AND OBJECTIONS

Implementation of a plea-based ceiling system would face several types of objections. First, just as judges vehemently objected to the limitations on their discretion imposed by the Guidelines, they undoubtedly would object to plea-based ceilings.²⁰⁹ But—to be cavalier—so what? Judges' objections did not prevent Congress from implementing the Guidelines, and they should not prevent reform-minded legislators from adopting ceilings either.²¹⁰

A more substantive objection might be not that ceilings would not be well-received by judges, but that plea ceilings would limit judicial sentencing discretion to an excessive extent. One of the main critiques of the Guidelines was that, by limiting judges' power to sentence outside the guideline ranges, the Guidelines transferred too much power to prosecutors over sentencing outcomes.²¹¹ Although plea-based ceilings appear to heighten that effect, this is largely illusory. Prosecutors already have the power to determine sentence through charge, sentence, and cooperation bargaining, and as noted above, judges have little power and even less incentive to reject those deals.²¹² Even when the prosecutors' bargains do not formally bind judges—as where prosecutors simply agree to make a sentencing recommendation—judges, in practice, virtually always follow those recommendations.²¹³ Moreover, rigid sentencing guidelines already limit judicial sentencing discretion.²¹⁴ Where guidelines require judges to impose sentences within a narrow range and where most permissible guideline adjustments require factual findings or prosecutorial consent, as do downward departures for substantial assistance, judicial sentencing discretion appears to play a quite minor role. Plea-based ceilings will not upset the current distribution of authority over sentencing.

209. If judges didn't like their prescribed discretion under the mandatory guideline regime, they would like a plea-ceiling system even less. For documentation of judges' complaints, see Kate Stith & José A. Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1247, 1255-56 (quoting judges complaining that guidelines reduce their role to that of "notary public" or "accountant").

210. *See id.*

211. *See* Standen, *supra* note 113, at 1475 (stating that the Guidelines have given more control to the prosecutor).

212. *See supra* text accompanying notes 138-147.

213. *See* Alschuler, *supra* note 54, at 1059, 1065 (noting the rarity of judicial deviation from a prosecutor's sentence recommendation and that "judges almost automatically ratify prosecutorial charge reductions and sentence recommendations").

214. *See* Stith & Cabranes, *supra* note 209, at 1255-56.

An observer familiar with the Court's recent cases expanding judicial discretion might fashion a somewhat different objection. In *Blakely*²¹⁵ and *Booker*,²¹⁶ the Supreme Court held that sentencing-guideline schemes that empower judges to impose heightened punishment on defendants based on facts not found by the fact finder beyond a reasonable doubt violate defendants' Sixth Amendment rights. Do the principles underlying those cases create any possible constitutional obstacles for a system of plea-based ceilings?

To the extent that *Booker* increases sentencing uncertainty, it marginally undermines the viability of conventional fixed discounts.²¹⁷ This is because the mathematical precision of the prediction that fixed discounts will induce defendants in low POC cases to decline plea offers is diminished when anticipated trial sentences are unpredictable.²¹⁸ Because the ETS reflects the product of two variable inputs (the POC and the ATS), an increase in the uncertainty of either value makes it correspondingly harder to calculate ETS. To the extent that *Booker* makes sentencing predictions harder, it decreases the efficacy of any fixed-discount system predicated on making predictions about trial sentences. Because ceilings are keyed to plea offers rather than predictions about trial sentences, however, unlike conventional fixed discounts, the expansion of judicial sentencing discretion brought about by *Blakely* and *Booker* would not affect plea ceilings.

Indeed, although conventional fixed-discount schemes are harder to implement after *Blakely* and *Booker*, the legal grounding for a ceiling system would be bolstered. In a world in which mandatory guidelines require courts to impose sentences within narrowly fixed ranges, as in the pre-*Booker* federal system, ceilings could create a potential conflict; if the ceiling sentence fell below the guideline minimum, a downward departure would be required in order to give the ceiling effect. In the post-*Booker* world, however, deviation from the narrow guideline range is no longer presumptively unlawful. Indeed, respecting the ceiling is entirely consistent with the purposes of the Sentencing Reform Act.²¹⁹

215. *Blakely v. Washington*, 542 U.S. 296, 313 (2004).

216. *United States v. Booker*, 543 U.S. 220, 228 (2005).

217. See Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 207 (2006) (noting that after *Booker*, both "the trial sentence and the plea discount are more difficult to estimate").

218. See *id.*

219. For a discussion on the purpose of the Sentencing Reform Act, see U.S. SENTENCING COMM'N, *supra* note 92, at 2-13.

A third and very different objection might be that the rigorous enforcement of fixed discounts is hard to square with cooperation bargaining. After all, it is the large discounts that prosecutors dangle before defendants that induce them to enter into probably distasteful and sometimes very dangerous cooperation agreements.²²⁰ There are a variety of methods, however, that could be used to accommodate cooperation bargaining in a ceiling system. One might, for example, permit or require judges to waive an otherwise applicable ceiling when a cooperation agreement was part of an initial plea offer and when the prosecutor adduced evidence at the sentencing hearing that the defendant had breached the agreement. In such instances, the sentencing court would impose sentence on the full slate of counts proved at trial. There might be a concern that such an arrangement would require advance specification of the presumptive punishment the defendant would receive as a result of his agreement in the event that he upholds his side of the bargain. Federal cooperation practice is structured precisely to avoid specifying the cooperator's discount because of the damaging use to which such information could be put in impeaching the cooperating witness.²²¹ The answer to that problem, however, is to permit cooperation agreements that leave the plea sentence unspecified and that allow judges to depart without limitation, as they may under current federal law, in response to a 5K letter at the plea hearing.²²² Careful safeguards, however, would have to be erected to ensure that cooperation bargaining does not become the Trojan Horse that undermines ceilings.²²³

As the above discussion demonstrates, plea-based ceilings are imaginable. They are possible to implement and pose few structural incompatibilities with the criminal justice system as it now exists. But is there any practical hope that this—or any—plea-bargaining reform might actually be implemented?

Calls to reform plea bargaining have echoed throughout the halls of academia for decades, with little discernible impact. Some reform

220. See Richman, *supra* note 134, at 72 (noting that defendants who “snitch” “often face economic or physical retaliation and social ostracism” but that cooperation can bring a much larger sentence discount than an ordinary guilty plea).

221. See *id.* at 73 (explaining that, in a typical cooperation agreement, “the extent of [the sentencing] break will often be unknown until sentencing, which typically will not occur until after he has rendered his assistance to the government”).

222. See U.S. SENTENCING GUIDELINES MANUAL, *supra* note 92, § 5K1.1.

223. Safeguards might include limiting the number of cases in which cooperation bargains would be permitted or mandating that prosecutors adduce affirmative evidence that defendants receiving cooperation discounts actually provided useful information or evidence.

proposals, such as abolition of plea bargaining, have foundered because of a widespread belief that no matter how great the benefits of abolition, they cannot justify the costs.²²⁴ Indeed, most observers of the criminal justice system cannot begin to conceive of abolition given a criminal justice infrastructure built upon the assumption of a 90% or higher guilty-plea rate. There also is reason to doubt that abolition, even if possible, would improve outcomes. At least some scholarly analysis indicates that the existence of plea bargaining improves the accuracy of outcomes.²²⁵ But virtually no one contends that plea bargaining as it is now practiced cannot be improved, and the recurrent calls for fixed-plea discounts underscore the belief of many knowledgeable observers that placing firm limits on plea discounts to ameliorate plea bargaining's most detrimental effects is a good idea.

Implementing reform, however, requires legislatures to unravel the Gordian knots they have tied in the criminal justice system, knots that appear motivated by and certainly have the effect of maximizing prosecutorial plea-bargaining leverage. Legislators have shown remarkably little inclination to restrict prosecutorial bargaining power.²²⁶ The proliferation of sentences carrying mandatory minimum sentences, the inflation in sentence severity, the starvation of criminal defense services for the poor, and a host of other phenomena all have contributed to the elevation of plea bargaining to the king's seat in the criminal justice system.

Plea-bargaining reform will never be successful, no matter how beneficent the expected effects, unless politicians perceive political gain in reform. Fixed-discount systems, including ceilings, should in theory be saleable to the public if lawmakers are willing to do the selling. After all, fixed discounts prevent prosecutors from allowing defendants to escape serious criminal charges with relatively light punishments, addressing precisely that aspect of plea bargaining that the public most typically condemns.²²⁷ The political winds, however, continue to blow in the wrong direction.²²⁸ DNA-triggered exonera-

224. See, e.g., Gazal-Ayzal, *supra* note 18, at 2299 (“[A] total ban on plea bargaining is hardly feasible in the overloaded American criminal justice system.”).

225. See, e.g., Scott & Stuntz, *supra* note 1, at 1913-17 (arguing that resource savings resulting from plea bargaining permit more complex, accuracy-enhancing trial procedures and ultimately improve the sorting function of criminal process).

226. See Richman, *supra* note 126, at 2073.

227. See Howe, *supra* note 200, at 599 (“The public tends to believe that bargaining treats defendants too leniently.”).

228. See Markus Dirk Dubber, *Recidivist Statutes as Arational Punishment*, 43 BUFF. L. REV. 689, 689 (1995) (noting that the “voting population shows no interest in enforcing” limits on state punishment); Lynch, *supra* note 208, at 2137 (noting “political tendency in the

tions of innocent defendants might eventually have some impact on changing the public mood, but countervailing fears about criminal activity in an age of terrorism may well drown out more mundane evidence of the criminal justice system's failings.

VII. CONCLUSION

Plea-bargaining reform is possible. As I have argued here, plea-based ceilings provide one mechanism to monitor and control plea discounts. The benefits accompanying plea-based ceilings would be substantial: innocent defendants would be more likely to contest their cases; prosecutors would be discouraged from overcharging cases and induced to screen cases more thoroughly; and some of the most egregious bargaining tactics, including coercing defendants to plead guilty in order to avoid the death penalty, would be rendered obsolete. Although judges might initially chafe at the limitation imposed on their sentencing discretion, the benefits predicted from ceilings should become apparent to them, not the least of which is shifting the emphasis of the criminal justice system away from the relentless task of inducing guilty pleas. Judges, no less than any other participants in our plea-saturated system, should appreciate the importance of that goal.

United States over the past quarter century" is characterized by competition among politicians to enact "ever more numerous, more severe, and more expansive criminal laws, in an effort to appear tough on crime").