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Lying at Plea Bargaining

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LYING AT PLEA BARGAINING

Thea Johnson *

ABSTRACT

This Article describes the regular use of lying during plea bargaining by criminal justice stakeholders and the paradox it presents for those who care about creating a fairer criminal legal system. The paradox is this: lying at plea bargaining allows defendants the opportunity to negotiate fair resolutions to their cases in the face of a deeply unfair system, even as that lying makes way for—and sustains—the problematic system it seeks to avoid.

The Article lays out a taxonomy of lying at plea bargaining by organizing the types of lies into three categories: lies about facts, lies about law, and lies about process. The criminal justice system produces a litany of injustices. Implicitly authorized, systemic lying offers a means of dealing with these perceived injustices. But lying also obscures the system from public view by hiding and relieving pressure points via plea bargaining.

What seems like the natural solution—to make the system more transparent and less flexible—would likely harm individual defendants. If lying at plea bargaining disappeared tomorrow, many defendants would suffer dire consequences, such as deportation for minor charges or subjection to outrageous mandatory minimum sentences. These defendants would lose their ability to avoid the

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injustices of the system. Yet lying at plea bargaining is the result of a series of interlocking mandatory laws and rules that many stakeholders believe are deeply unfair and should be reformed. Thus, lying at plea bargaining is both a means of avoiding injustice and a force prohibiting meaningful reformation of the laws and rules that produce such injustice. Examining this paradox leads to the conclusion that reform must focus on overhaul, not piecemeal correction. In a system so entangled that lying is the only way to reach a just resolution, solutions that focus simply on producing more transparency or flexibility are unlikely to lead to meaningful transformation.

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INTRODUCTION

In 2017, a defendant was charged in Virginia with transporting marijuana; he eventually pleaded guilty to trafficking a different type of drug, despite the fact that all parties, including the court, agreed he possessed only marijuana.¹ That same year in New York, a defendant faced animal cruelty charges, which through a bit of legal alchemy became a trespass conviction, although the defendant did not, in fact, commit a trespass.² Ten years earlier in Kansas, a court allowed another defendant to plead guilty to attempted second-degree unintentional murder, even while acknowledging that no such crime existed in the statute books.³ In each of these cases, the defendant pleaded guilty on the record to a lie: to a crime he did not commit, to a crime that did not reflect the true nature of his conduct, and even to a crime that did not exist.

But each of these lies also achieved something important for the defendant and the other stakeholders in the plea process. They allowed the parties to resolve the cases in a way that led them to some rough form of justice—a justice that would not be available if the case had been resolved with a plea that did not rely on a lie. The process therefore allowed the parties to sidestep the law without changing the law. Indeed, this is what plea bargaining achieves every day in courtrooms across the country. It provides a mechanism to negotiate around—often unfair—laws. At the same time, it helps keep those laws intact by diverting problems with their impact into the realm of plea bargaining rather than law reform.

This Article explores lying at plea bargaining to tell a story about plea bargaining more broadly. Indeed, the lies described here *are* plea bargaining, not a secretive adjunct to the process. But the focus on lying centers our attention on the paradox at the heart of plea bargaining: pleas help resolve injustice, while making sure the laws that create such injustice remain unchanged. And the lies that the

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1. Commonwealth v. Ayala, 99 Va. Cir. 374, 374–75 (2018).
 2. People v. Freeman, 52 N.Y.S.3d 340, 341–42 (App. Div. 2017).
 3. McPherson v. State, 163 P.3d 1257, 1261, 1264 (Kan. Ct. App. 2007).

parties tell at plea bargaining serve as the most powerful case study for this paradox.

To demonstrate this paradox, this Article does two things. First, it identifies a taxonomy of lies one sees at plea bargaining. These lies fall into three broad categories: lies about facts, lies about law, and lies about process. Depending on one's perspective, the criminal justice system produces a litany of injustices.⁴ Implicitly authorized, systemic lying⁵ offers a means of dealing with these perceived injustices, and as the taxonomy below demonstrates, lying assists stakeholders in avoiding the results of unfair laws or inequitable outcomes. In many cases, the stakeholders in charge of producing those inequitable outcomes simply work around the system through often invisible lies.

4. Here is just a brief list of some of the injustices that the criminal system has either produced or exacerbated. Studies have found that explicit and implicit bias create unequal outcomes for Black defendants. *See generally, e.g.*, BESIKI KUTATELADZE, WHITNEY TYMAS, & MARY CROWLEY, VERA INST. OF JUST., RACE AND PROSECUTION IN MANHATTAN (2014), https://www.vera.org/downloads/Publications/race-and-prosecution-in-manhattan/legacy_downloads/race-and-prosecution-manhattan-summary.pdf [https://perma.cc/R87C-L366] (finding that race played a role in prosecutorial decision-making at nearly every step of the criminal process). Poor communities of color are often fined in predatory ways. *See, e.g.*, C.R. DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 52–54 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/GZ5R-KENU]. Children have been put on the sex offender registry. Sarah Stillman, *The List*, NEW YORKER (Mar. 6, 2016), <https://www.newyorker.com/magazine/2016/03/14/when-kids-are-accused-of-sex-crimes> [https://perma.cc/8J5L-K3S8] (detailing the stories of individuals on sex offender registries for sexual conduct they engaged in while teens or pre-teens). And grandmothers who committed small infractions discover that they will be deported to countries they have never known. *See* Richard Gonzales, *Immigrant Felons and Deportation: One Grandmother's Case*, NPR (Apr. 9, 2016, 9:25 AM), <https://www.npr.org/2016/04/09/473503408/immigrant-felons-and-deportation-one-grandmothers-case-for-pardon> [https://perma.cc/TXT8-EW69]. There is also strong evidence that innocent men have been put to death. *E.g.*, Maurice Possley & The Marshall Project, *A Dad Was Executed for Deaths of His 3 Girls. Now a Letter Casts More Doubt.*, WASH. POST (Mar. 9, 2015), https://www.washingtonpost.com/politics/letter-from-witness-casts-further-doubt-on-2004-texas-execution/2015/03/09/d9ebdab8-c451-11e4-ad5c-3b8ce89f1b89_story.html [https://perma.cc/DXQ7-MWS9]. From a victim's rights perspective, the case of Jeffrey Epstein makes clear that justice is also often in short order for victims. *See* Dave Davies, *Everyone Heard About Jeffrey Epstein's Enablers. Few Listened to His Victims*, NPR (July 20, 2021, 11:44 AM), <https://www.npr.org/2021/07/20/1017968999/jeffrey-epsteins-victims-speak-out-in-perversion-of-justice-by-julie-k-brown> [https://perma.cc/79BA-VDY5] (discussing how Jeffrey Epstein pleaded guilty in 2006 to a 13-month jail sentence for sexual activity with dozens of teenage girls); *Who Was Jeffrey Epstein? The Financier Charged with Sex Trafficking*, BBC (Dec. 29, 2021), <https://www.bbc.com/news/world-us-canada-48913377> [https://perma.cc/357L-88FD].

5. I borrow this term from Julia Simon-Kerr, who coined the term in her piece, *Systemic Lying*, 56 WM. & MARY L. REV. 2175 (2015).

Thus, untruthful plea bargains allow defendants to avoid sex offender registration, deportation, severe prison sentences, or fines. In some cases, untruthful pleas have even allowed innocent defendants to avoid the death penalty.⁶

Second, this Article explores the paradox that these lies reveal and what they tell us about the prospects of meaningful criminal justice reform. For many defendants, lying offers the only way to escape injustice in their individual cases. Yet such lying makes it impossible to fundamentally improve the broader criminal system, which would make the lies unnecessary in the first place. Or put another way, lawyers have created strategies to resolve cases fairly in an unfair system, and these strategies exist because the modern plea process is simultaneously very flexible and not transparent. These strategies obscure how the system would function if it worked as designed, making it difficult or even impossible to transform the unfair laws and policies that lawyers and judges find themselves scrambling to work around.

The taxonomy then leads to a critical finding for criminal justice reformers, local and federal legislators, and a public with a renewed interest in the criminal system. In any given jurisdiction, the scope and size of the current criminal system is profound, characterized by thousands of criminal statutes, numerous sentencing schemes, and a bewildering array of collateral consequences. Although, in theory, these “inputs” should produce a defined set of potential “outputs” (in other words, the charges, sentences, and other penalties that an individual defendant faces), they do not. Instead, as seen in the examples at the start of this Article, the parties involved stretch and bend each individual case until they reach a desired resolution.

This flexibility without boundaries is made possible by the lack of transparency at plea bargaining. Both those working inside the criminal system and those peering in have no real understanding of how this morass of laws would work if plea bargaining did not serve

6. Gerald L. Shargel, *West Memphis Three Freed Using Rare Alford Legal Plea*, DAILY BEAST, <https://www.thedailybeast.com/west-memphis-three-freed-using-rare-alford-legal-plea> [<https://perma.cc/444D-R2TJ>] (July 13, 2017, 8:27 PM).

as a safety valve for many of its worst features. That said, although efforts to make the system more transparent (and, by extension, less flexible) would result in fewer lies and a better understanding of the system, these efforts would also do tremendous harm to individual defendants. If we imagine lying at plea bargaining disappearing tomorrow, defendants throughout the criminal system would lose their primary means of circumventing the injustices of the system. They would feel real, immediate harm.

Hence, the paradox also presents a reformer's dilemma that pits transparency and truth against flexibility and individualized notions of justice. Lying at plea bargaining continues because it allows defendants the opportunity to negotiate fair resolutions to their cases in the face of an unfair system, even as that lying makes way for—and sustains—the unfair laws it seeks to avoid. In an entrenched system, should a reformer who cares about justice embrace transparency or keep the system functioning as is? This dilemma reflects real debates among lawyers and policymakers, both seeking a path towards fairer outcomes.

As this Article demonstrates, the dichotomy between saving the system or the individuals who are processed through that system often ignores broader visions of transformation that do not fit neatly into either category. The Movement for Black Lives and abolitionist movements present at least one such reimagining, which highlight how reform around the edges does not address the systemic injustice at the core of our criminal system. Indeed, we must recognize that the lies in the taxonomy described here are workarounds for a system so barbaric that lawyers are willing to lie to help defendants avoid the worst of it. Such a system will not be fixed through more transparency or more flexibility for the stakeholders. Rather, the paradox presented here calls for a reconceptualization of the system as a whole.

Part I of this Article explores the ways in which trials—the natural comparison point for pleas—constrain and discourage outright lying. It then identifies the characteristics of the plea process that make lying both possible and probable. Part II details the taxonomy of plea bargaining lies, which include lies about facts, lies about law, and lies

about process. Finally, Part III explores how this taxonomy of lies demonstrates the paradox of plea bargaining, namely that the strategies lawyers have come up with to avoid the injustices of the system are the same strategies that make the system unknowable to those outside of it, thus allowing the core injustice of the criminal system to survive. Part III then offers some solutions to improve the current model but makes clear that such solutions will not disentangle the laws, sentencing schemes, and mandatory collateral consequences that encourage lying in the first place.

I. TRIALS, PLEAS, AND LIES

In 1966, the Supreme Court declared that “[t]he basic purpose of a trial is the determination of truth”⁷ This purported goal of the criminal system makes sense. A system that seeks truth will likely produce just results. Truth does not guarantee justice but “is an essential precondition for it. Public legitimacy, as much as justice, demands accuracy in verdicts.”⁸

Even though trials are largely vanishing from the criminal system,⁹ scholars and courts have examined plea bargaining and its relationship to trials because the comparison remains useful. There is a large body of constitutional and procedural law that has developed around trials with the goal of making trial outcomes fairer and more accurate. The

7. *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 416 (1966).

8. LARRY LAUDAN, TRUTH, ERROR, AND CRIMINAL LAW: AN ESSAY IN LEGAL EPISTEMOLOGY 2 (2006).

9. *Vanishing Trials*, NAT’L ASS’N CRIM. DEF. LAWS., <https://www.nacdl.org/Landing/Vanishing-Trials> [<https://perma.cc/L8KS-JRQY>] (showing that in fiscal year 2018, 90% of federal criminal cases ended in guilty pleas, 8% of cases were dismissed, and only 2% went to trial); Benjamin Weiser, *Trial by Jury, a Hallowed American Right, Is Vanishing*, N.Y. TIMES (Aug. 7, 2016), <https://www.nytimes.com/2016/08/08/nyregion/jury-trials-vanish-and-justice-is-served-behind-closed-doors.html> [<https://perma.cc/TM5B-8QMY>] (documenting that even in Manhattan Federal District Court, criminal trials are exceedingly rare, with one judge recalling only one criminal trial in his four years on the bench). In addition, there were no criminal trials in Santa Cruz County in Arizona from 2010 until at least 2012. Marisa Gerber, *No Criminal Trials Held in Santa Cruz County Since 2010*, NOGALES INT’L, https://www.nogalesinternational.com/scv_sun/news/no-criminal-trials-held-in-santa-cruz-county-since/article_2651fbde-5269-11e1-b903-0019bb2963f4.html [<https://perma.cc/NR99-ZBVE>] (Nov. 21, 2012); see generally Robert J. Conrad, Jr. & Katy L. Clements, *The Vanishing Criminal Jury Trial: From Trial Judges to Sentencing Judges*, 86 GEO. WASH. L. REV. 99 (2018) (discussing the various factors why federal criminal trials have decreased over several decades).

outcomes produced by plea bargaining have received much less attention from courts. Thus, scholars and courts ask: what trial rights should extend to a defendant at plea bargaining? Is plea bargaining done in the shadow of the trial? What is the goal of plea bargaining beyond trial avoidance? And most importantly, should plea bargaining's basic purpose be the determination of truth?

Truth-seeking is a foundational goal of the trial, even though, as a practical matter, the truth may not always emerge. There are many ways in which the legal system messages that trials are truth-seeking endeavors. For instance, truth appears as a core principle of the adversarial system throughout opinions by the Supreme Court and lower courts;¹⁰ the overarching logic of the rules of evidence places truth as a central value;¹¹ and studies on public perceptions note that trials are understood to be spaces where truth emerges.¹² As such, explicit lies are generally prohibited at trials, and there are many ways

10. *E.g.*, *Shott*, 382 U.S. at 416; *United States v. Bryant*, 439 F.2d 642, 648 (D.C. Cir. 1971) (“The purpose of the [prosecutor’s duty to disclose exculpatory evidence] is not simply to correct an imbalance of advantage, whereby the prosecution may surprise the defense at trial with new evidence; rather, it is also to make of the trial a search for truth informed by all relevant material, much of which, because of imbalance in investigative resources, will be exclusively in the hands of the Government.”), *abrogated by Arizona v. Youngblood*, 488 U.S. 51 (1988); *Commonwealth v. Mitchell*, 781 N.E.2d 1237, 1250 (Mass. 2003) (“The duties imposed on a criminal defense lawyer (zealous advocacy, preservation of client confidences, avoidance of a conflict of interest) and the constitutional rights granted a defendant (effective legal representation, opportunity to testify in his own defense, right to a fair trial) are circumscribed by what we demand of honorable lawyers and the core principle of our judicial system that seeks to make a trial a search for truth.”); *Commonwealth v. Iseley*, 615 A.2d 408, 414 (Pa. Super. Ct. 1992) (“[G]iven that the accuracy of any subsequent trial (should the prosecution ever reach that stage) is dependent upon the ever fading memories and increasingly uncertain availabilities of the necessary witnesses, the power to prolong the prosecution could serve as a Sword of Damocles for the guilty defendant to suspend over the very heart of the trial, the search for truth.”); *Commonwealth v. Wall*, 606 A.2d 449, 457 (Pa. Super. Ct. 1992) (“In Pennsylvania, we have come to resolve this question [on the rape shield law] through a relatively elaborate procedure which is designed to ensure that no evidence of the victim’s sexual history is introduced unless and until it can be established that to exclude such evidence would lay victim to the very *raison d’être* of the trial itself: the pursuit of truth. The process begins with the defendant submitting a specific proffer to the court of exactly what evidence he or she seeks to admit and precisely why it is relevant to the defense.” (emphasis omitted)); *People v. Molina*, 468 N.Y.S.2d 551, 559 (Crim. Ct. 1983) (“The trial of a criminal charge should be a sober search for truth”), *rev’d*, 494 N.Y.S.2d 606 (App. Div. 1985).

11. FED. R. EVID. 102 (“These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.”).

12. Tom R. Tyler & Justin Sevier, *How Do the Courts Create Popular Legitimacy?: The Role of Establishing the Truth, Punishing Justly, and/or Acting Through Just Procedures*, 77 ALB. L. REV. 1095, 1095–96 (2014).

in which trials require the truth. Witnesses must testify under oath¹³ and can be punished with a perjury charge if they fail to tell the truth.¹⁴ In theory, evidence rules exclude unreliable evidence and highlight reliable evidence.¹⁵ A series of ethical rules also require candor by the parties before the tribunal.¹⁶ Finally, cross-examination is intended to be an “engine” for truth-seeking, allowing adverse parties to root out dishonesty or other flaws in witness testimony.¹⁷ Thus, trials are the means by which we discover *what really happened* in a criminal case, even though truth is not always prioritized at trial or may not be absolutely knowable.¹⁸

13. FED. R. EVID. 603.

14. Allison Douglis, Note, *Disentangling Perjury and Lying*, 29 YALE J.L. & HUMANS. 339, 353 (2017).

15. See, e.g., FED. R. EVID. 602 advisory committee’s note to 1972 proposed rule (“[T]he rule requiring that a witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact’ is a ‘most pervasive manifestation’ of the common law insistence upon ‘the most reliable sources of information.’” (alteration in original) (quoting EDWARD W. CLEARLY, VAUGHN C. BALL, RALPH C. BARNHART, KENNETH S. BROUN, GEORGE E. DIX, ERNEST GELLHORN, ROBERT MEISENHOLDER, E.F. ROBERTS ET AL., MCCORMICK ON EVIDENCE § 10, at 20 (2d ed. 1972))); FED. R. EVID. 702 (requiring expert testimony have indicia of reliability for admission). *But see*, e.g., Kenneth S. Klein, *Truth and Legitimacy (in Courts)*, 48 LOY. U. CHI. L.J. 1, 22 (2016) (“[I]n contrast to hearsay and character evidence rules, . . . ‘exclusion of relevant evidence’ Rules are not attempting to increase the likelihood that a trial outcome will correspond with what actually happened. Rather, these Rules make the exact opposite choice—these Rules keep out evidence that does bear on determining what happened, and they do so on the assumption that, while such evidence would be helpful, there nonetheless are valid reasons to ignore it.” (emphasis omitted)).

16. See, e.g., MODEL RULES OF PRO. CONDUCT r. 3.3 cmt. 2 (AM. BAR ASS’N 2020) (“This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process.”).

17. See *Davis v. Alaska*, 415 U.S. 308, 316 (1974) (“Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.”).

18. For instance, many forms of reliable, trustworthy evidence are excluded. Reliable evidence of a crime may be suppressed if a court finds that a defendant was searched in violation of the Fourth Amendment. See generally, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961) (finding prosecution’s use of evidence of obscene material obtained through a search without a search warrant violated the Fourth and Fourteenth Amendments). The rules of evidence and the Constitution exclude certain types of testimony, even where there is a little doubt that the testimony is trustworthy. See *Crawford v. Washington*, 541 U.S. 36, 39–40, 61 (2004) (finding prosecution’s use of spouse’s recorded statements to police when spouse did not testify violated the Confrontation Clause because confronting witnesses via cross-examination, not a judge, determines reliability of evidence). Deeply flawed forensic science, which often borders (or crosses) the line into pseudo-science, has been used in trials for decades, and rules of evidence tend not to prohibit such bunk. See, e.g., Jessica D. Gabel, *Realizing Reliability in Forensic Science from the Ground Up*, 104 J. CRIM. L. & CRIMINOLOGY 283, 286 (2014) (“Unreliable science presents itself in a virtual smorgasbord of ways, from the routine (contamination) to the egregious (forensic misconduct) and everything in between (misrepresented or exaggerated results, misinterpretation of results, lack of research

But plea bargaining as a practice does not share the deep roots of trials. Plea bargaining only became commonplace in the 1920s¹⁹ and did not receive a stamp of approval from the Supreme Court until 1970.²⁰ Plea bargaining became popular in the early twentieth century for two reasons: first, because it allowed judges and lawyers to hide their own corrupt practices—namely, using bribes to grant defendants a beneficial plea deal—and second, because the normalized use of pleas allowed courts an efficient means of dealing with the burdens of a rapidly expanding criminal system.²¹ The history of plea bargaining demonstrates that pleas were always open to manipulation and corruption.²² As a result, early courts were suspicious of plea bargaining.

A modern view of plea bargaining shows that as a matter of law and practice, those fears were well-founded; it is much easier to lie during a guilty plea than to lie at trial. This is because the plea process, unlike the trial, is both a flexible instrument for resolving cases and often hidden from public view. As Jenia I. Turner wrote in her review of the many problems produced by plea bargaining’s lack of transparency, “[t]he opacity of plea bargaining stands in marked contrast to the constitutional commitment to public criminal proceedings, enshrined

for basic assumptions, unqualified analysts, inconsistent lab practices).”). In addition, in both practice and according to the Federal Rules of Evidence and most state rules, trial judges leave it to the parties to determine how to present their cases. *See* FED. R. EVID. 102. This means that a neutral judge does not decide what evidence should be presented to the jury to prove the “truth.” Rather, she relies on the adversaries to make those calls, even while we understand that the parties may not be motivated to present a full picture of the case.

19. Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 26–29 (1979); *see also* Lucian E. Dervan, *Class v. United States: Bargained Justice and a System of Efficiencies*, 2018 CATO SUP. CT. REV. 113, 121 (“[I]n the early 20th century, bribes were sometimes used to secure ‘bargains’ containing reduced sentences. This was particularly prevalent in Chicago, where ‘fixers,’ located in front of the courthouse, arranged deals for defendants. . . . [A]s overcriminalization became more prominent in the United States after the turn of the century, court systems in the early 1900s became overburdened and unable to process the increasing number of cases appearing on the dockets. This issue was particularly pronounced during the [P]rohibition era as the number of offenses and offenders swelled. In response, prosecutors began offering defendants incentives to plead guilty to help clear dockets and reduce caseloads.” (footnotes omitted)).

20. *Brady v. United States*, 397 U.S. 742, 758 (1970).

21. Dervan, *supra* note 19.

22. *See* Alschuler, *supra* note 19, at 19–22.

in the Sixth Amendment right to a public trial and the First Amendment right of public access to the courts.”²³

Constitutionally, plea bargains have few formal requirements. The primary requirement, with some exceptions,²⁴ is that the defendant accepts guilt.²⁵ Plea bargains involve the waiver of several rights, such as the right to a trial or the right to confront one’s accusers.²⁶ Like other constitutional waivers, the defendant can only give up such rights if the plea is made “voluntarily, knowingly and intelligently.”²⁷ One basic premise of a guilty plea is that to secure the bargain of a plea, the defendant relinquishes, among other rights, his trial and appeal rights.²⁸ This practice has, of course, resulted in fewer appeals on

23. Jenia I. Turner, *Transparency in Plea Bargaining*, 96 NOTRE DAME L. REV. 973, 975 (2021).

24. For example, *Alford* pleas allow the defendant to enter a plea without admitting guilt. *See generally* *North Carolina v. Alford*, 400 U.S. 25 (1970). Such pleas will be discussed in greater depth in Part II.C.2.

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

26. *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995) (citing *Boykin v. Alabama*, 395 U.S. 238, 243 (1969)).

27. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (defining the requirements for the waiver of a constitutional right); *see also Brady*, 397 U.S. at 748 (“Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.”). The requirements for a knowing and voluntary plea include that defendants must understand what rights they are giving up, *Boykin*, 395 U.S. at 243 & n.5 (explaining that a guilty plea waiver involves the waiver of many constitutional rights, including “[the] privilege against compulsory self-incrimination, [the] right to trial by jury, and [the] right to confront [one’s] accusers” (quoting *McCarthy v. United States*, 394 U.S. 459, 466 (1969))); the defendant must also know what he is pleading to, *Henderson v. Morgan*, 426 U.S. 637, 645 (1976) (finding that a guilty plea is invalid “unless the defendant received ‘real notice of the true nature of the charge against him’” (quoting *Smith v. O’Grady*, 312 U.S. 329, 334 (1941))); the defendant must also understand the direct consequence of the plea, as well as the immigration consequences of the plea, *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010).

28. *Boykin*, 395 U.S. at 243; *United States v. Ruiz*, 536 U.S. 622, 633 (2002) (“[T]he Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant.”). Some states have laws that preclude a defendant from challenging guilt after a plea, even where there is later evidence of innocence. *People v. Reed*, 2019 IL App (4th) 170090, ¶ 21, 125 N.E.3d 480, 485 (finding a defendant who pleads guilty may not raise a post-conviction claim of actual innocence); *People v. Tiger*, 110 N.E.3d 509, 516 (N.Y. 2018) (“[A] guilty plea entered in proceedings where the record demonstrates the conviction was constitutionally obtained will presumptively foreclose an independent actual innocence claim.”); *Owusu v. Warden*, No. CV154007214, 2018 Conn. Super. LEXIS 3678, at *5 (Conn. Super. Ct. Nov. 2, 2018) (“[A] valid guilty plea[] constitute[s] a waiver of the right to bring [a] . . . claim of actual innocence.”); *see also Sari Horwitz, DOJ to Amend Competent Counsel Waiver Practices as Holder Prepares to Step Down*, WASH. POST (Oct. 14, 2014), https://www.washingtonpost.com/world/national-security/doj-to-amend-competent-counsel-waiver-practices-as-holder-prepares-to-step-down/2014/10/14/465efbde-53ba-11e4-809b-8cc0a295c773_story.html [https://perma.cc/27BE-ZUL8] (noting federal prosecutors may “no longer ask criminal defendants to waive their future claims of ineffective assistance of counsel in plea agreements”).

issues involving plea bargains and further hid the realities of the plea system.

But the Supreme Court jurisprudence on this issue only tells a sliver of the story. Plea bargaining is a local creature. As Andrew Manuel Crespo explains, plea bargaining is controlled not only by substantive and constitutional criminal law but also by the “subconstitutional procedural law of the states—an interlocking set of legal frameworks that comprises the law of joinder and severance, the law of preclusion, the law of cumulative sentencing, the law of pretrial charge review, the law of dismissal and amendment, and the law of lesser offenses.”²⁹ Although these interlocking legal frameworks constrain prosecutors to some extent, they also make plea bargains more difficult to understand and regulate in any sort of generalized way.

Beyond the law, the local practice of judges and attorneys also control plea bargaining. Within the same courthouse, one judge may agree to accept *Alford* pleas,³⁰ while another may not. Some judges insist on a full memorialized record for every plea, whereas others merely accept the agreements of the parties.³¹ As one judge in Ohio put it, there are “disparate judicial philosophies that exist and operate among the hundreds of state court judges regarding the judge’s role in the plea negotiation process[,] . . . [and] each individual judge has his or her own approach [to the plea process]”³²

The formal and informal policies of a prosecutor’s office also play a critical role in regulating plea bargains, and those policies are difficult to pin down with any sort of specificity. Although some prosecutors have recently prioritized publishing their office policies,³³ many

29. Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1306 (2018).

30. An *Alford* plea is a plea that allows a defendant to accept a conviction while claiming innocence on the record. See *infra* Part II.C.2.

31. Jenia I. Turner, *Virtual Guilty Pleas*, 24 U. PA. J. CONST. L. 211, 227–28 (2022) (noting that judges may not require the parties to produce a factual record, even where local rules of criminal procedure require production).

32. Michael P. Donnelly, *Truth or Consequences: Making the Case for Transparency and Reform in the Plea Negotiation Process*, 17 OHIO ST. J. CRIM. L. 423, 427 (2020).

33. Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 7–12 (2019) (describing efforts toward greater transparency on charging policies taken

formal policies remain secret, available only to the attorneys in the office.³⁴ In addition, unwritten policies may exist in a particular office. Rachael Rollins, the former District Attorney for Suffolk County in Massachusetts, noted that her open policy of not charging certain types of crimes explicitly adopted the unspoken policies of her predecessors.³⁵ The fact that she publicized a previously secret policy makes clear how difficult it is to understand the local level regulation of plea and charge bargaining. Even more narrowly, individual prosecutors—despite office-wide policies—may have their own sense of justice in any individual case and therefore their own internal rules for plea bargaining.³⁶

This combination of lax constitutional norms and wide-ranging procedural rules, along with a nearly endless number of formal and informal policies governing any particular jurisdiction, means that plea bargaining is, *at best*, loosely regulated. Plea bargaining has, in fact, become much more like a system of civil settlement with the parties negotiating along multiple paths.³⁷ Although there is evidence that

by two elected progressive prosecutors: Kim Foxx, who has publicized revised charging policies of the Cook County State Attorney’s office; and Larry Krasner, who published a memo to prosecutors in the Philadelphia District Attorney’s office revising charging and sentencing policies for “marijuana possession, possession of marijuana paraphernalia, or prostitution” to “divert more cases and . . . offer more plea deals that would result in lower sentences” and “charge only the level of homicide that can be proven beyond a reasonable doubt” to prevent “overcharging to gain an advantage at the plea-bargaining stage,” as well as requiring prosecutors to obtain Krasner’s approval “on any plea offer that exceeds fifteen to thirty years in prison”).

34. Brad Heath, *Rules to Keep Federal Prosecutors in Line Revealed*, USA TODAY, <https://www.usatoday.com/story/news/2015/03/03/justice-department-discovery-policies-released/24239225/> [<https://perma.cc/7YC5-8J84>] (Mar. 30, 2015, 5:44 PM).

35. Rachael Rollins, Suffolk Cnty. Dist. Att’y, Panel Remarks at NYU School of Law’s Center on the Administration of Criminal Law Conference: Plea Bargaining: Reforming an (Un)Necessary Evil?, at 6:00–7:32, 15:33, 19:25–22:15 (Apr. 8, 2019), <https://www.law.nyu.edu/centers/zimroth/events/plea-bargaining> (click on video “Whither the Prosecutor?”).

36. Heidi Altman, *Prosecuting Post-Padilla: State Interests and the Pursuits of Justice for Noncitizen Defendants*, 101 GEO. L.J. 1, 36 (2012) (studying the varying ways that Brooklyn prosecutors dealt with defendants facing immigration consequences); Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1163–65, 1180–88 (2013) (discussing how Los Angeles prosecutors are willing to take into account immigration consequences when deciding plea offers versus Maricopa County, Arizona, where prosecutors actively use immigration consequences as a means of enforcing federal immigration law).

37. Richard Lorren Jolly & J.J. Prescott, *Beyond Plea Bargaining: A Theory of Criminal Settlement*, 62 B.C. L. REV. 1047, 1073 (2021) (noting that although in criminal law the parties cannot reach full settlement without the agreement of the judge, they “partially” negotiate in many ways, for instance by

lawyers in specific jurisdictions often ascribe a “set price” to certain charges that provide the parties some guidance on the likely sentence offer in a case,³⁸ it remains difficult to say how a specific set of charges and a defendant’s particular background will calculate at plea bargaining. In this environment, lying can flourish.

II. A TAXONOMY OF LYING

In both legal³⁹ and philosophical⁴⁰ literature, there are various views of what constitutes a lie, and as other scholars have observed, identifying and evaluating lying is a common problem in the legal system,⁴¹ not just during plea bargaining. For the purposes of the taxonomy of lies below, I adopt the “correspondence” theory of truth, which holds that “a belief is true if there exists an appropriate entity—a fact—to which it corresponds. If there is no such entity, the belief is false.”⁴² Correspondence theory looks to the world, using facts as its

agreeing to modify the procedures, the substantive issues to be resolved, or the potential outcomes available).

38. *Id.* at 1062 (noting that system resources influence the “going rate for settling” a case); Bryan C. McCannon, *Prosecutors and Plea Bargains*, in *A SYSTEM OF PLEAS: SOCIAL SCIENCE’S CONTRIBUTIONS TO THE REAL LEGAL SYSTEM* 56, 56, 59, 71–72 (Vanessa A. Edkins & Allison D. Redlich eds., 2019).

39. Here is a small sample of the many articles that attempt to define and interrogate the idea of truth and lies in the legal system. *See generally* Lisa Kern Griffin, *Honesty Without Truth: Lies, Accuracy, and the Criminal Justice Process*, 104 CORNELL L. REV. ONLINE 22 (2018); Douglass, *supra* note 14; Ariel Porat & Omir Yadlin, *A Welfarist Perspective on Lies*, 91 IND. L.J. 617 (2016); W. Bradley Wendel, *Whose Truth? Objective and Subjective Perspectives on Truthfulness in Advocacy*, 28 YALE J.L. & HUMANS. 105 (2016); Michael S. Moore, *the Plain Truth About Legal Truth*, 26 HARV. J.L. & PUB. POL’Y 23 (2003); W. William Hodes, *Seeking the Truth Versus Telling the Truth at the Boundaries of the Law: Misdirection, Lying, and “Lying with an Explanation,”* 44 S. TEX. L. REV. 53 (2002).

40. *See generally* SISSELA BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* (1978) (discussing certain kinds of lies and why people lie).

41. *See* Courtney M. Cox, *Legitimizing Lies*, 90 GEO. WASH. L. REV. (forthcoming 2022) (manuscript at 6–11), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3800537 [<https://perma.cc/NV8T-3M9B>] (discussing different philosophies and methods for determining what is lying).

42. Michael Glanzberg, *Truth*, STAN. ENCYC. PHIL. ARCHIVE (emphasis omitted), <https://plato.stanford.edu/archives/fall2018/entries/truth/> [<https://perma.cc/Q32R-859X>] (Aug. 16, 2018). For a lie to exist, there must be some conception of truth. When it comes to truth, the most significant theories in contemporary literature are the correspondence, coherence, and pragmatist theories of truth, each of which assumes that the concept of truth exists. *Id.* I also acknowledge that there are various versions of “truth” in a courtroom. As one scholar put it, “[t]rial courts concern themselves daily with three very different meanings of truth that are not necessarily compatible: veracity, accuracy and a just (or true) verdict.” Marilyn J. Ireland, *Deconstructing Hearsay’s Structure: Toward a Witness Recollection*

benchmarks of truth, to verify a given belief as true.⁴³ It is enough to say that, as with a trial, there is an expectation that a rough correspondence exists between the elements of a crime a defendant pleads to and the acts he committed. And where parties knowingly enter pleas that have no such correspondence, there is lying in plea bargaining.

The lies I discuss here are of a different nature than legal fictions, a commonly used device in the legal system that allows the system to function. Legal fictions are not meant to deceive; rather, both those inside and outside of the process understand the role of the legal fiction in the transaction or resolution.⁴⁴ Lying at plea bargaining, on the other hand, is deception. Even if all criminal justice actors involved understand that the plea may be a lie, the plea deceives the outside world. The record of conviction reflects not the truth as the parties believe it to be, but rather the agreement they crafted. The lie at plea bargaining is transformed into truth for all future purposes.⁴⁵

Plea bargains based on lies do not reflect the parties' understanding of the truth of the defendant's conduct. Meaning, at least one or more of the parties—defense attorney, prosecutor, or judge—know or genuinely believe that the plea is not a reflection of the defendant's conduct. Yet they allow the plea to proceed. I borrow the term “genuinely believe” from the legal ethicist Marvin Frankel to indicate something beyond mere speculation or guesswork.⁴⁶ We often suspect something might be true or false based on gut feeling or a survey of the facts, but genuine belief signifies that the party, after a full review of the available evidence, *truly believes* the plea does not indicate

Definition of Hearsay, 43 VILL. L. REV. 529, 546 (1998). By embracing the correspondence theory, my focus here is on accuracy and on the veracity of the statements made by stakeholders as to the accuracy of the verdict. I reject that a just verdict is necessarily a “true” one, even while I acknowledge there may be justice in a false verdict. For more on how to define lies, see Cox, *supra* note 41 (manuscript at 9–14).

43. Glanzberg, *supra* note 42.

44. Legal fictions are a commonly used device in the legal system, which are not actually meant to deceive anyone, but rather assist the parties in establishing certain rights or responsibilities. Thea Johnson, *Fictional Pleas*, 94 IND. L.J. 855, 897 (2019). As scholars have noted, “[t]hey serve as ‘an enabler,’ allowing the ‘application of the law to novel legal questions and circumstances.’” *Id.* (quoting Nancy J. Knauer, *Legal Fictions and Juristic Truth*, 23 ST. THOMAS L. REV. 1, 9 (2010)).

45. *Id.*

46. MARVIN E. FRANKEL, *PARTISAN JUSTICE* 73 (1980).

truth.⁴⁷ I exclude the defendant as one of the parties from this list because the defendant is generally the only person who has full knowledge of the facts of his conduct, but that truth is not always ascertainable by, or even clear to, others.

Furthermore, lying at plea bargaining involves a party (or parties) understanding some version of the case's truth but then presenting a different version in court. The lying I describe here is not necessarily perjury.⁴⁸ Nor does it require that some party tell a lie under oath. That said, lies in plea bargaining are formalized. Even when a plea is not taken under oath, there is an understanding that a plea, unlike a civil settlement, represents a truthful and accurate record.⁴⁹ This is what Federal Rule of Criminal Procedure 11 calls for,⁵⁰ as do most states'

47. On the other side of the coin, if one genuinely believes something is incorrect, that is not a lie. As the scholar Marvin Frankel put it when defining truth in the courtroom setting, "[y]ou may be wrong when you 'genuinely believe' you saw your neighbor's cat yesterday. But if you do believe it and you say so, you're telling the 'truth' . . ." *Id.*

48. 18 U.S.C. § 1621 defines the crime of perjury as:

Whoever—

(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or

(2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under [§] 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true;

is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both.

Id.

49. Although under Federal Rule of Evidence 410 plea negotiations are prohibited from being used against a defendant, the plea itself can be admitted against a defendant at a future trial under Federal Rule of Evidence 609, and statements made during plea negotiations that result in a final plea of guilty are also admissible. FED. R. EVID. 410; FED. R. EVID. 609; *United States v. Paden*, 908 F.2d 1229, 1235 (5th Cir. 1990). Although as Brandon Garrett notes, one of the reasons pleas are *not* confessions is because they are not administered under a formal oath. Brandon L. Garrett, *Why Plea Bargains Are Not Confessions*, 57 WM. & MARY L. REV. 1415, 1417 (2016).

50. Federal Rule of Criminal Procedure 11 requires the court to "determine that there is a factual basis for [a] plea." FED. R. CRIM. P. 11(b)(3). Per the advisory notes for Federal Rule of Criminal Procedure 11, "[w]here inquiry is made of the defendant himself it may be desirable practice to place the defendant under oath." FED. R. CRIM. P. 11(f) advisory committee's note to 1974 amendment. Although formal swearing in is not required, Rule 11 still does require the judge to determine that there is an accurate—in other words, truthful—basis for the plea. FED. R. CRIM. P. 11(b)(3).

local rules.⁵¹ Plea bargains based on lies are thus entered into the record as the truth, as any other guilty plea would be.

Finally, the lies described below are all made possible by two fundamental features of the broader plea system—a lack of transparency and an abundance of flexibility. These lies represent how these features allow for the parties to stretch and bend the truth in often extreme ways.

With these characteristics in mind, I present below a brief taxonomy of plea bargaining’s lies. This taxonomy is descriptive—a means to help us understand what lying at plea bargaining looks like. I do not mean to identify any of the lies here as either “bad” or “good,” but rather to showcase the ways in which plea bargains regularly result in lies,⁵² and that such lies conflict with our understanding of the outcomes produced by plea bargaining.

A. *Lies About Facts*

I begin the taxonomy with lies about facts. In these pleas, the parties manipulate the facts to achieve a desired result. For example, a case starts with a charging document detailing the facts. That charging document itself may be flawed, but the collection of facts through investigation allows the parties to come to some understanding of the truth of what occurred. In pleas that involve lies about the facts, however, the parties ultimately bend or discard facts to reach a resolution.

51. See, e.g., ME. R. UNIFIED CRIM. P. 11; MASS. R. CRIM. P. 12; N.H. R. CRIM. P. 11.

52. I use the word “regularly” here because, as the taxonomy demonstrates, the sorts of pleas that are based on lies are typical and common in practice; however, because these pleas are often done in the shadows, see *supra* Part I, it is difficult to calculate the number of pleas that are based on lies. On the issue of how to normatively characterize these sorts of pleas, scholars have made compelling arguments that—as to the use of them by prosecutors—at least some of these practices should be prohibited. Jeffrey Bellin argues that prosecutors should not use fictional pleas to resolve cases, while Darryl Brown makes the argument that fashioning factually baseless pleas is within the scope of appropriate prosecutorial discretion but that pleas to non-existent crimes are less justified by traditional conceptions of prosecutorial discretion. Compare Jeffrey Bellin, *Theories of Prosecution*, 108 CALIF. L. REV. 1203, 1231 (2020) (noting prosecutors, based on the law, cannot bargain for fictional pleas), with Darryl K. Brown, *Factually Baseless Enforcement of Criminal Law Is Okay. Full Enforcement Is Not.*, 104 MARQ. L. REV. 511, 515 (2020) (arguing that charging defendants with baseless offenses is a tactic to “moderat[e] the harshness or inadequacies of criminal law” and that little justification exists for prosecuting nonexistent crimes).

1. *Fictional Pleas*

In a previous article, *Fictional Pleas*, I explored how plea bargaining provides an avenue for guilty defendants to plead guilty but to crimes they did not commit.⁵³ Such guilty pleas involve:

[A] guilty plea, a factual admission of the elements of a crime [or a plea of *nolo contendere*,] an “admission of guilt for the purposes of the case,” entered by a defendant for an offense that the defendant did not commit, and that all the parties in the case know the defendant did not commit.⁵⁴

There are many examples of these pleas. For instance, *Fictional Pleas* begins with an example of a defendant who transformed a single felony sex offense into three separate misdemeanor sex offenses that each corresponded to a separate “act.”⁵⁵ Even though all parties (including the judge) agreed there was only one criminal act, the three misdemeanor pleas proceeded.⁵⁶ In this way, the defendant avoided sex offender registration and other onerous burdens accompanying a felony sex offense.⁵⁷ Plus, the prosecutor still achieved a long sentence by running three misdemeanor sentences consecutive to one another, while avoiding the time and expense of a trial.⁵⁸ In another jurisdiction, a defendant was charged with multiple counts of downloading child pornography, along with possession of criminal tools for his use of the computer to commit the crime.⁵⁹ The defendant ended up pleading guilty to felonious assault, despite no factual record to support that charge.⁶⁰ In many drug cases, defense attorneys work to transform drug charges into non-drug charges to help defendants avoid

53. See generally Johnson, *supra* note 44. Others have described these pleas as “baseless pleas.” See Mari Byrne, Note, *Baseless Pleas: A Mockery of Justice*, 78 *FORDHAM L. REV.* 2961, 2966–67 (2010).

54. Johnson, *supra* note 44, at 860 (quoting Byrne, *supra* note 53, at 2966).

55. *Id.* at 857.

56. *Id.*

57. *Id.*

58. See *id.*

59. Donnelly, *supra* note 32, at 431.

60. *Id.*

immigration consequences, often through the use of fictional pleas.⁶¹ One extreme example out of Washington involved a defendant accused of a violent robbery, who then pleaded guilty to “creating no less than one thousand illegal music recordings without consent.”⁶² As the public defender admitted during a later interview: “There were no allegations of sound recordings or videos. We were just being creative to get to the point we need to get in sentencing.”⁶³

Fictional pleas abound in less serious cases as well. Many drivers use fictional pleas to escape traffic offenses that would add points to their license. For instance, a 2007 case in Iowa revealed that in one county, defendants were regularly pleading down from a variety of misdemeanor traffic offenses to a nonmoving violation charge of a “cowl-lamp” violation.⁶⁴ A “cowl-lamp” is an antique fender lamp no longer used on modern vehicles, and Iowa law prohibited motor vehicles from being equipped with more than two side cowl-lamps.⁶⁵ It is safe to say that hundreds of drivers in Iowa were not equipping their vehicles with three or more side cowl-lamps.⁶⁶

Fictional pleas like this allow a defendant to escape some penalty associated with the crime that he *did* commit, including immigration consequences, sex offender registration, a higher charge or sentence, or points on one’s driver’s license. Prosecutors consent to these pleas because they benefit from the plea—namely, the certainty of a criminal conviction⁶⁷—and they may not have a strong interest in seeing the defendant suffer the non-criminal penalty. In some instances, the plea may even politically benefit prosecutors in certain districts where local voters consider showing mercy through plea bargaining as an asset.⁶⁸

61. See Johnson, *supra* note 44, at 858.

62. Jolly & Prescott, *supra* note 37, at 1086.

63. *Id.* (quoting Thomas Clouse, *Man Pleads Guilty to Bogus Crime*, SPOKESMAN-REV. (May 1, 2006), <https://www.spokesman.com/stories/2006/may/01/man-pleads-guilty-to-bogus-crime/> [https://perma.cc/Z5TA-S3A7] (quotation attributed to assistant public defender Tom Krzyminski)).

64. Iowa Sup. Ct. Att’y Disciplinary Bd. v. Borth, 728 N.W.2d 205, 207, 209 (Iowa 2007).

65. *Id.* at 209.

66. *Id.* (“Everyone involved, including [the County Attorney], knew the cowl-lamp charges were not supported by probable cause. In fact, there was no factual basis for the charges at all because vehicles no longer have cowl or fender lamps.”).

67. See Johnson, *supra* note 44, at 858.

68. *Id.* at 875.

No matter the motivation, the result is a plea that does not reflect, and sometimes does not even relate to, the underlying factual allegations that the parties believe to be the truth. And although some states seemingly prohibit the use of such pleas,⁶⁹ for the reasons described in Part I, plea bargaining is loosely regulated on the ground, making it unlikely that statutes and court opinions can fully restrict their use by stakeholders.⁷⁰

Indeed, lawyers seem increasingly comfortable being open about their use of fictional pleas, even while rejecting the term. The Michigan Supreme Court proposed a rule change that would restrict the procedures around plea bargaining to require that defendants provide a factual record only to the charges of conviction.⁷¹ As the

69. Brown, *supra* note 52, at 527–28, 528 nn.57–62 (reviewing the states that “have expressly condoned factually baseless convictions”).

70. *See supra* Part I.

71. The current plea procedure rules under Rule 6.302 and Rule 6.610 of the Michigan Court Rules, reads, in part:

Rule 6.302 Pleas of Guilty and Nolo Contendere

....

(D) An Accurate Plea.

(1) If the defendant pleads guilty, the court, by questioning the defendant, must establish support for a finding that the defendant is guilty of *the offense charged* or the offense to which the defendant is pleading.

....

Rule 6.610 Criminal Procedure Generally

....

(F) Pleas of Guilty and Nolo Contendere. Before accepting a plea of guilty of nolo contendere, the court shall in all cases comply with this rule.

(1) The court shall determine that the plea is . . . accurate. In determining the accuracy of the plea,

(a) if the defendant pleads guilty, the court, by questioning the defendant, shall establish support for a finding that the defendant is guilty of *the offense charged* or the offense to which the defendant is pleading

MICH. CT. R. 6.302(D)(1) (emphasis added); MICH. CT. R. 6.610(F)(1)(a) (emphasis added). The proposed rule would have eliminated the italicized language (“the offense charged”) and would have only allowed a defendant to present a factual record only to the crime for which she was pleading guilty. Proposed Amendments of Rule 6.302 & Rule 6.610 of the Mich. Ct. Rules, ADM File No. 2018-29, at *2 (Mich.

court noted, the proposed change was meant to address the use of “fictional pleas.”⁷² Both prosecutors and defense attorneys objected to the proposal, arguing that such a requirement would prevent defendants from pleading guilty to crimes they did not commit—a tool that both sides identified as critical to producing just results for defendants and, interestingly, victims.⁷³ The following are among the fictional pleas that lawyers said they relied on: pleading a driving while under the influence case down to a failure to report an accident;⁷⁴ allowing a defendant to plead to an aggravated assault, even where there was no factual basis of an injury as required by the statute; using disorderly conduct—which requires proof of intoxication in a public place—to resolve a malicious destruction of property charge.⁷⁵

2. Fact Bargaining

Fact bargaining and its close cousin, charge bargaining,⁷⁶ are perhaps the original forms of lying at plea bargaining. In fact

Mar. 25, 2021) [hereinafter *Proposed Michigan Court Rule Amendments*], https://www.michbar.org/file/generalinfo/pdfs/6-11-21_PPC_agenda.pdf [https://perma.cc/JAF5-V7WT].

72. *Proposed Michigan Court Rule Amendments*, ADM File No. 2018-29, at *1.

73. Crim. Juris. & Prac. Comm., State Bar of Mich., Public Policy Position on ADM File No. 2018-29 Proposed Amendments of MCR 6.302 & 6.610, at *1 (May 7, 2021), https://www.michbar.org/file/generalinfo/pdfs/6-11-21_PPC_agenda.pdf [https://perma.cc/WY8S-KVRZ]. In the letter from the State Bar of Michigan, the Executive Director wrote:

[The State Bar of Michigan] Board [of Commissioners] voted unanimously to oppose the rule amendments. These amendments will take away an important tool in the criminal justice process and reduce the options available when negotiating a plea, which has the potential to harm the government, defendants, and victims. For example, a victim may want a defendant to admit to the facts charged [as opposed to facts that correspond with the conviction], and it not clear why the court rules should deprive them of that option. The amendments are not only unnecessary but detrimental to the criminal justice process.

Letter from Janet K. Welch, Exec. Dir., State Bar of Michigan, to Larry Royster, Clerk of the Ct., Michigan Sup. Ct. (Dec. 12, 2019), https://www.michbar.org/file/generalinfo/pdfs/6-11-21_PPC_agenda.pdf [https://perma.cc/WY8S-KVRZ].

74. E-mail from Stephen Adams, Att’y-at-L., to ADMcomment@courts.mi.gov (Mar. 31, 2021, 10:18:52 EST), https://www.michbar.org/file/generalinfo/pdfs/6-11-21_PPC_agenda.pdf [https://perma.cc/WY8S-KVRZ].

75. Letter from Prosecuting Att’y Ass’n of Michigan, to JJ. of the Michigan Sup. Ct. (Jan. 7, 2020), https://www.michbar.org/file/generalinfo/pdfs/6-11-21_PPC_agenda.pdf [https://perma.cc/WY8S-KVRZ].

76. Crespo, *supra* note 29, at 1311 (“A charge bargain is thus simply an agreement to replace a higher

bargaining, the defendant and prosecutor agree to certain facts, after the arrest but often before the indictment, that define the defendant's charges. This, in turn, can change the charges. Parties engage in fact bargaining to achieve some particular outcome vis-à-vis the charges. For instance, the defendant may have been charged at arrest with possessing drugs and a gun, but through the process of fact bargaining, the facts are modified to indicate that the defendant only possessed drugs; the gun then disappears.⁷⁷ Or in a statutory rape case, the prosecutor may agree to stipulate to the fact that the defendant and victim were a certain number of years apart in age to ensure the defendant falls under a less serious sexual assault statute, even if that "fact" is untrue.⁷⁸ With fact bargaining, the parties reach resolution over the facts to determine the charges, which means the facts are not a fixed dataset but rather may be massaged to fit whatever charge the parties deem fair.

Fact bargaining, like charge bargaining, has been practiced for decades. For instance, in 1996, a study of federal probation officers found that a major concern for probation officers was that "plea agreements commonly fail to reflect the true facts of a case, thus distorting guideline calculations and mak[ing] it difficult for the court to consider properly whether to accept a plea agreement."⁷⁹ Approximately forty percent of probation officers reported that the "guideline calculations set forth in plea agreements in a majority of cases are not 'supported by offense facts that accurately and completely reflect all aspects of the case.'"⁸⁰

And yet, unlike some of the other pleas listed in this taxonomy, fact bargaining may not seem as obviously a "lie." After all, it is a negotiation over the appropriate charges for the defendant, and one

charge with a lower one in exchange for the defendant's promise to plead guilty, which guarantees the prosecutor a conviction without the expense of trial.").

77. See Johnson, *supra* note 44, at 862–63.

78. Indeed, as Justice Michael Donnelly of the Ohio Supreme Court recounts, as a trial judge, he was once asked to accept a stipulation that the defendant and victim were three years apart in age, rather than four years—which was the truth—so the defendant could avoid a felony statutory rape charge. Donnelly, *supra* note 32, at 434.

79. David Yellen, *Probation Officers Look at Plea Bargaining, and Do Not Like What They See*, 8 FED. SENT'G REP. 339, 339 (1996).

80. *Id.*

way to arrive at those appropriate charges is through mutual agreement on relevant facts. But a negotiation over facts is a negotiation over truth—or the degree of truth—and falls somewhere between a full-blown airing of the facts and a complete lie. For instance, to say a defendant possessed a small amount of drugs when he actually possessed a much larger amount of drugs is, to some degree, a lie about what police found when they arrested the defendant. That lie makes a difference in what sentence the defendant receives, and this divergence between punishments makes clear that legislators purposefully distinguished between two different drug amounts within the law for a particular reason.⁸¹ But fact bargaining allows the parties to maneuver around the legislative intent.⁸² Evidence that legislatures contemplate such maneuvering⁸³ does not negate the lie at the base of the plea; rather it only explains the mechanisms that allow for it.

3. *Guilty Pleas of Innocent Defendants*

After hundreds of overturned convictions and decades of DNA-based exonerations, there remains little doubt that people plead guilty to crimes when they are factually innocent of any crime.⁸⁴ The Innocence Project highlights the terrible stories of people imprisoned for years—even decades—for crimes they did not commit but to which they pleaded guilty.⁸⁵ Indeed, despite earlier protestations from the Supreme Court that plea bargaining does not result in the conviction

81. *But see* Mark Osler & Thea Johnson, *Why Not Treat Drug Crimes as White-Collar Crimes?*, 61 WAYNE L. REV. 1, 3–4 (2015) (arguing that pegging the seriousness of drug crimes to the amount of drugs at issue does not make sense from a public safety or retributivist perspective).

82. *See* Johnson, *supra* note 44, at 862 (“[Fact bargaining] functions as a maneuver around the law . . .”).

83. *See infra* Part III.A (discussing theories that legislators create a range of charge and sentencing options to give prosecutors leverage during the plea process).

84. *See, e.g., Exonerate the Innocent*, INNOCENCE PROJECT, <https://innocenceproject.org/exonerate/> [<https://perma.cc/AN9K-K89F>] (noting DNA testing has exonerated “375 people in the United States”).

85. *See Why Do Innocent People Plead Guilty to Crimes They Didn’t Commit?*, #GUILTYPLEAPROBLEM, <https://guiltypleaproblem.org/#stats> [<https://perma.cc/E9UT-XNRN>] (spotlighting the individual stories of innocent people who pleaded guilty). The Innocence Project and the Innocence Network created the website #GuiltyPleaProblem.org. Innocence Staff, *Guilty Plea Problem Website Re-Launch Today!*, INNOCENCE PROJECT (Oct. 22, 2018), <https://innocenceproject.org/guilty-plea-problem-website-re-launch-today/> [<https://perma.cc/DM5U-JEFD>].

of innocent people,⁸⁶ more recent jurisprudence acknowledges that innocent people pleading guilty is a risk of plea bargaining. As Justice Scalia noted in *Lafler v. Cooper*:

In the United States, we have plea bargaining aplenty, but . . . it has been regarded as a necessary evil. It presents grave risks of prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense”⁸⁷

There is no doubt that criminal justice actors know that innocent people plead guilty to crimes they did not commit. There are a few ways that such “innocence pleas” manifest themselves as lies. One is where the defense attorney, who holds the genuine belief that the defendant is innocent, allows, or even encourages, the defendant to proceed with the plea, putting a factually inaccurate plea (and potentially a factually inaccurate statement of facts) on the record.⁸⁸ This sort of plea allows the defendant to avoid what would be the worse outcome after trial, generally a harsher sentence than the one offered with the plea. There is also anecdotal evidence that judges allow defendants to plead guilty even when they have reason to believe

86. *Brady v. United States*, 397 U.S. 742, 758 (1970). The Court explained:

We would have serious doubts about this case if the encouragement of guilty pleas by offers of leniency substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves. But our view is to the contrary and is based on our expectations that courts will satisfy themselves that pleas of guilty are voluntarily and intelligently made by . . . defendants with adequate advice of counsel and that there is nothing to question the accuracy and reliability of the defendants’ admissions that they committed the crimes with which they are charged.

Id.

87. *Lafler v. Cooper*, 566 U.S. 156, 185 (2012) (Scalia, J., dissenting).

88. Indeed, as Abbe Smith has argued, it may be imperative for a defense attorney to facilitate the guilty plea of an innocent person if it saves the person from an unjust sentence. See ABBE SMITH, *CASE OF A LIFETIME: A CRIMINAL DEFENSE LAWYER’S STORY* 40–44 (2008) (describing the defense attorney dilemma of how hard to lean on an innocent client to take a plea). For the purposes of this Article, I put the ethical question aside. Whether it is ethical to facilitate such pleas, they are still lies when they are entered onto the formal record because the defense attorney knows or genuinely believes that the defendant is not guilty.

the defendant is innocent to prevent the defendant from receiving a long sentence after trial.⁸⁹

Prosecutors also participate in innocence pleas, often in the form of *Alford* pleas (which are also discussed as lies of process in Part II.c.2).⁹⁰ In an *Alford* plea, the defendant accepts a conviction on his record while openly proclaiming innocence.⁹¹ Effectively, the defendant says: “I am not guilty, but I agree to take the plea.” There are several examples of prosecutors using *Alford* pleas to convict defendants who the prosecutors may themselves believe are innocent.⁹² Perhaps the most famous example is the case of the “West Memphis Three.”⁹³ In 1993, Damien Echols, Jessie Misskelley, Jr., and Jason Baldwin were charged as teenagers with murdering three eight-year-old boys in Arkansas.⁹⁴ Despite flimsy evidence, the defendants were convicted. Echols was sentenced to death, and Misskelley and Baldwin were sentenced to life in prison.⁹⁵ Exonerating evidence emerged many years after the convictions.⁹⁶ As the courts considered whether the new evidence was grounds for a retrial, the prosecutor offered the three an *Alford* plea.⁹⁷ Despite the new evidence pointing to their innocence, the defendants accepted the *Alford* plea, asserting their innocence, yet acceding that the state had sufficient evidence to convict them.⁹⁸ For its part, the prosecution

89. Donnelly, *supra* note 32, at 431–32 (describing a training session with judges in which half the judges would have accepted a plea of guilty, even where the defense attorney informed the judge that the client swears that he is innocent).

90. *See infra* Part II.C.

91. *See infra* Part II.C.2.

92. This category excludes instances where there is disagreement about the defendant’s guilt among the parties. There are many cases where prosecutors and defense attorneys take opposite views of where the evidence leads. When a prosecutor offers a plea that corresponds with their genuinely held belief about a defendant’s guilt, even if that belief later turns out to be incorrect, that plea is not based on a lie.

93. John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157, 157 (2014).

94. *Id.* at 158.

95. *Id.* at 159.

96. This turn of events was due in large part to the work of Joe Berlinger, a filmmaker who focused his 1996 documentary, *Paradise Lost: The Child Murders at Robin Hood Hills*, and two later follow-up films, *Paradise Lost 2: Revelations* and *Paradise Lost 3: Purgatory*, on the plight of the three defendants. PARADISE LOST: THE CHILD MURDERS AT ROBIN HOOD HILLS (Home Box Office 1996); PARADISE LOST 2: REVELATIONS (Home Box Office 2000); PARADISE LOST: PURGATORY (Home Box Office 2012).

97. Blume & Helm, *supra* note 93, at 160.

98. Shargel, *supra* note 6.

claimed to still believe that these defendants were guilty.⁹⁹ Their willingness to allow the defendants to walk out of prison for the murder of three young boys clearly indicated that the state had no such certainty. Instead, it used a plea bargain, based on a lie, to allow the convictions to stand and the defendants to walk free,¹⁰⁰ likely to avoid a later civil suit. *Alford* pleas have been similarly used in other cases where a defendant's innocence has been established.¹⁰¹

This use of the *Alford* plea in this context is a different sort of lie than the traditional use of such lying during plea bargaining. Instead of the defendant's oral claim of innocence performing the lie, it is the conviction itself which rests on the lie that the factual record supports a finding of guilt. But the result, like in other innocence pleas, is the same: a guilty plea based on a lie as a means of resolving a case involving innocent defendants.

I conclude with a note about the defendant's role in innocence pleas. It goes without saying that in innocence pleas, the defendant is also facilitating the lie. Presumably, the defendant is aware of whether he committed the crime, and when an innocent person pleads guilty to a crime he did not commit, he is lying. From a systemic perspective, these lies tell us much about the pressures that defendants face to plead guilty. But these lies are different in nature than those told by other stakeholders, mostly because the defendant is the only one who can be

99. *Id.*

100. *See id.*

101. *See, e.g.,* Lara Bazelon, *Ending Innocence Denying*, 47 HOFSTRA L. REV. 393, 467–68 (2018); Megan Rose & ProPublica, *The Deal Prosecutors Offer When They Have No Cards Left to Play*, ATLANTIC (Sept. 7, 2017), <https://www.theatlantic.com/politics/archive/2017/09/what-does-an-innocent-man-have-to-do-to-go-free-plead-guilty/539001/> [<https://perma.cc/ZL88-LNEH>] (detailing the DNA exoneration of two men convicted for murder, resulting in one man accepting an *Alford* plea, while the other pursued a retrial); Martha Waggoner, *North Carolina Man Exonerated by Panel in 1979 Dorm Slaying*, AP NEWS (Aug. 22, 2019), <https://apnews.com/93519aca1dfd4b0585e8a0feab93f51c> [<https://perma.cc/9JUB-SHSV>] (highlighting a mentally ill defendant who entered an *Alford* plea in 1988 and was exonerated by a judicial panel in 2019, nearly forty years after the murder for which he was convicted); Sydney Schneider, Comment, *When Innocent Defendants Falsely Confess: Analyzing the Ramifications of Entering Alford Pleas in the Context of the Burgeoning Innocence Movement*, 103 J. CRIM. L. & CRIMINOLOGY 279, 284–86 (2013) (noting studies by the U.S. Department of Justice conducted between 2003 and 2004 found that between 6.5% and 8.5% of inmates entered *Alford* pleas). Yet another example of a surprisingly common “innocence plea” was identified by JESSICA S. HENRY, *SMOKE BUT NO FIRE: CONVICTING THE INNOCENT OF CRIMES THAT NEVER HAPPENED* 4 (2020) (noting that nearly one-third of exonerations since 1989 involved “no-crime” convictions, in which the defendant was convicted of a crime that *never* occurred).

certain of the truth. The other stakeholders are usually acting on genuine belief rather than first-hand certainty. Further, what separates defendants from other stakeholders is that, illogically, defendants tend to have little to do with the plea process itself.¹⁰² They are often excluded from negotiations and only play a role at the time of the colloquy (where, as I note in Section C, the lie formally enters the record).¹⁰³ Part III.B explores in greater detail the way these differences should shape our understanding of lying at plea bargaining, but it is critical to note that systemically authorized lies by defendants during the plea process are of a different nature than those told or approved of by lawyers and judges.¹⁰⁴

B. *Lies About Law*

Although many forms of lying involve manipulations of the law and facts—for instance, fact bargaining allows the parties to influence which charges (or laws) apply to the case through the negotiation of facts—it is generally harder to manipulate the laws. This makes sense; it is easier to massage the facts to fit a law than to massage the law to fit the facts. But, as explored below, there is one form of plea bargaining in which lawyers twist statutes until they no longer actually represent a true law: pleas to crimes that do not exist.

1. *Pleas to Crimes that Do Not Exist*

Courts have allowed defendants to plead guilty to crimes that they could not be convicted of at trial because the crimes do not exist; there would be no statute on which to instruct the jury and therefore no crime to charge. Several courts have upheld guilty pleas to non-existent crimes. For instance, a Kansas court found a defendant could plead to an attempted second-degree unintentional murder, even though Kansas does not recognize attempted second-degree unintentional murder as a crime because “it is logically impossible for a person to have the

102. Thea Johnson, *Public Perceptions of Plea Bargaining*, 46 AM. J. CRIM. L. 133, 139 (2019) (noting that defendants are excluded from the secretive, off-the-record plea process, even in their own cases).

103. See *infra* Part II.C.

104. See *infra* Part III.B.

specific intent to commit an unintentional killing.”¹⁰⁵ The court reasoned:

Although the practice of permitting plea agreements such as this one to stand may seem illogical at first glance, such agreements serve a legitimate purpose. Compromises have long been permitted by our courts. Criminal cases are resolved by plea bargains virtually every day. As long as due process requirements are met and the bargain is beneficial to the defendant that defendant cannot later validly collaterally attack either the plea or bargained-for sentence.¹⁰⁶

An Ohio court came to a similar conclusion: if the defendant knowingly and voluntarily pleaded guilty and received a benefit, then he could plead to the non-existent crime of attempted involuntary manslaughter.¹⁰⁷ Courts have not, however, allowed a defendant’s conviction of a non-existent crime after trial.¹⁰⁸ Rather, it is only through plea bargaining that a defendant can secure a conviction to a non-existent crime. One can find several more examples of pleas to crimes that do not exist in other jurisdictions.¹⁰⁹

105. *McPherson v. State*, 163 P.3d 1257, 1261, 1264 (Kan. Ct. App. 2007).

106. *Id.* at 1264 (relying on the holding in *Spencer v. State*, 942 P.2d 646, 647, 649 (Kan. Ct. App. 1997), *aff’d*, 954 P.2d 1088 (Kan. 1998), which found that a defendant who was charged with a valid crime, aggravated battery, “may, pursuant to a beneficial plea agreement knowingly entered, plead guilty to [the] nonexistent crime” of attempted aggravated assault).

107. *State v. Wickham*, No. CA 76-40, 1977 Ohio App. LEXIS 10210, at *7 (Ohio Ct. App. Sept. 28, 1977).

108. *See, e.g.*, *People v. Martinez*, 611 N.E.2d 277, 278 (N.Y. 1993) (“While we will allow a defendant to plead to a nonexistent crime in satisfaction of an indictment charging a crime with a heavier penalty, . . . [f]or a conviction, a jury must find the defendant guilty of each element of the crime beyond a reasonable doubt, but could not do so here because an element of attempted manslaughter in the first degree as charged is an unintended result that as a matter of law cannot be attempted.” (citations omitted)).

109. *State v. Pollman*, 441 P.3d 511, 517 (Kan. Ct. App. 2019) (holding that a defendant’s prior conviction for a non-existent crime is still a conviction for the purposes of calculating the defendant’s criminal history at sentencing), *appeal dismissed as moot*, No. 118672 (Kan. Mar. 23, 2021), <https://pittsreporting.kscourts.org/Appellate/CaseDetails?caseNumber=118672> [<https://perma.cc/M6FK-MV5L>]; *People v. Myrieckes*, 734 N.E.2d 188, 194 (Ill. App. Ct. 2000) (holding that the defendant may enter plea to a non-existent crime); *People v. Guishard*, 789 N.Y.S.2d 332, 333 (App. Div. 2005) (affirming conviction to legally impossible attempted assault in the first degree); *People v. Genes*, 227 N.W.2d 241, 242–43 (Mich. Ct. App. 1975) (affirming an attempted manslaughter conviction achieved

The critic may decry the description of these pleas as lies. After all, anyone can go to the statute book and discover that there is no such crime as an attempted unintentional murder. Despite this, I characterize pleas to crimes that do not exist as lies for several reasons. First, like the fictional pleas described above, these lies are not an accurate reflection of the defendant's conduct. If it is indeed impossible to attempt an unintentional crime, then a defendant's confession of guilt to such a crime is impossible as well, making it a lie to make such a claim. Second, all actors involved in the plea agree that the plea does not represent the charged criminal conduct, so there is a knowing acceptance of the lie among the stakeholders. Third, it is not always clear to the outside world that the plea represents an impossibility. Although a lawyer may determine that the defendant could not be convicted of the same conduct at trial, such a conclusion may fall outside the purview of any non-criminal justice actors looking at the plea. Nonetheless, the conviction attaches to the defendant's record, becoming a part of the defendant's criminal history.

C. *Lies About Process*

Finally, this taxonomy identifies lies about process. Lies about process are critical to the functioning of the criminal system; they are the grease that keep the wheels turning. Indeed, as I describe below, these lies about process facilitate the formal acceptance of the guilty plea, while shielding from view the realities of how and why defendants decide to plead guilty. They give the process legitimacy while maintaining the lack of transparency that is a key characteristic of the plea process.

1. *The Plea Colloquy*

Once a defendant is ready to plead guilty, they must enter a plea on the record and engage in a plea colloquy with the judge.¹¹⁰ That

through a guilty plea, even though under Michigan law "there can be no such thing as attempted involuntary manslaughter" because the "factual basis may support a finding that the defendant is guilty of either the crime charged or the crime pled to").

110. *E.g.*, FED. R. CRIM. P. 11(b)(1).

colloquy is necessary because the judge has the duty to establish that the defendant is waiving their rights knowingly and voluntarily.¹¹¹ The judge does this by asking a series of questions about the defendant's decision to plead guilty and their knowledge of their rights.¹¹²

But to meet the constitutional standard, defendants often lie during these colloquies. These lies are done with the knowledge and approval of the other actors in the courtroom, including the judge, prosecutor, and defense attorney. In fact, such lies are encouraged so that pleas can be recorded quickly and in accordance with statutory and constitutional mandates. But defendants, despite what they say on the record, often do not enter plea bargains knowingly or voluntarily.

For instance, to plead guilty “knowingly,” the Supreme Court has held that defendants should be advised by competent counsel and made aware of the nature of the charges against them.¹¹³ But defendants frequently plead guilty early in the case, often at their first appearance, before they have had a chance to review discovery or consult with counsel.¹¹⁴ Further, millions of misdemeanor defendants across the country plead guilty without any counsel at all.¹¹⁵ To get the benefit of the plea, those defendants are required to affirm that they understand a panoply of rights that they are giving up¹¹⁶ without having a single conversation with a lawyer. Even defendants with a lawyer often do not understand the collateral consequences of pleading guilty or sometimes even the direct consequences. Yet the guilty plea hinges on the lie—told every day in courts across the country—that the defendant understands the nature and consequences of the charges.

The same issues come up with establishing the voluntariness of the plea. A voluntary plea is one in which the defendant's plea is not

111. *See supra* Part I.

112. *E.g.*, FED. R. CRIM. P. 11(b)(1).

113. *Brady v. United States*, 397 U.S. 742, 756 (1970).

114. *See generally* Colin Miller, *The Right to Evidence of Innocence Before Pleading Guilty*, 53 U.C. DAVIS L. REV. 271 (2019) (arguing for an explicit right to *Brady* material pre-plea).

115. *See generally* SIXTH AMENDMENT CTR., THE RIGHT TO COUNSEL IN MAINE: EVALUATION OF SERVICES PROVIDED BY THE MAINE COMMISSION ON INDIGENT LEGAL SERVICES (2019), https://sixthamendment.org/6AC/6AC_me_report_2019.pdf [<https://perma.cc/3AY2-7728>] (discussing the lack of assigned counsel in misdemeanor cases across the state).

116. *E.g.*, FED. R. CRIM. P. 11(b)(1).

“induced by threats” and improper promises.¹¹⁷ The plea colloquy in every jurisdiction requires the court to ask the defendant on the record if they were promised anything in exchange for pleading guilty to assess whether such threats or improper promises are the heart of the agreement.¹¹⁸ The “right” answer to that question is “no” because such promises might undermine the “voluntariness” of the plea. Instead, courts maintain the fiction that defendants only plead guilty in exchange for the promised sentence and charge laid out on the record.¹¹⁹ But, of course, defendants are promised all sorts of things, formally and informally, to induce their guilty pleas. These promises cannot, however, be acknowledged on the record if the plea is to stand constitutional muster.

For instance, the Ninth Circuit held that a defendant’s guilty plea was not involuntary when the government promised to drop charges against his son in exchange for his guilty plea.¹²⁰ But had the defendant claimed that he was pleading guilty only to protect his son as he later did on appeal,¹²¹ the trial court would have likely rejected his plea, even though the government held out his son’s prosecution as its main inducement for him to take the plea. Acknowledging that he was pleading to save his son would not have been the “correct” answer, even though it was the truthful answer. In the same vein, a defendant generally cannot admit that they are pleading guilty to sidestep immigration consequences, reduce their sentence, or for any of the other reasons defendants regularly plead guilty. Although some courts may allow the defendant to give their true reasons for accepting a

117. *Brady*, 397 U.S. at 755 (quoting *Shelton v. United States*, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc), *rev’d on other grounds per curiam*, 356 U.S. 26 (1958)).

118. FED. R. CRIM. P. 11(b)(2).

119. *Id.*; *United States v. Wright*, 43 F.3d 491, 495 (10th Cir. 1994) (finding that if the plea is the “product of prosecutorial ‘threats, misrepresentations, or improper promises,’” then the defendant can challenge it as not knowing and voluntary under *Brady* (first quoting *Bradbury v. Wainwright*, 658 F.2d 1083, 1086 (5th Cir. Unit B Oct. 1981); and then citing *Crow v. United States*, 397 F.2d 284, 285 (10th Cir. 1968)).

120. *See, e.g.*, *United States v. Seng Chen Yong*, 926 F.3d 582, 585–86 (9th Cir. 2019) (holding that, as long as there was probable cause to prosecute a defendant’s child, a defendant’s guilty plea was not involuntary if it was induced by his desire to avoid prosecution for his child).

121. *Id.* at 585.

plea,¹²² many others require the defendant to stick to a circumscribed script at the colloquy.

The following is how one judge described the process:

[I]f the judge makes a sentencing commitment in chambers, it is an unspoken rule in some courtrooms that such a commitment is not to be communicated publicly, especially at the plea hearing. Therefore, defense counsel must often privately instruct [the] client to unequivocally answer “no” when asked at the hearing if any promises have been made to induce the plea[.]

Occasionally in the courtrooms where this occurs, a defendant will forget this important instruction from the attorney and state at the plea hearing something to the effect . . . : “Yes, my attorney told me I would receive a minimum sentence.” There are scores of transcripts where something like this has occurred. The embarrassed defense attorney will then [ask to speak to their client off the record] [a]nd then miraculously the client will resume back on the record, “No[,] your honor, no promises have been made to me.”¹²³

The excerpt above makes explicit the common understanding among stakeholders that a defendant’s “correct” answers to the plea colloquy’s queries are not necessarily accurate answers.

The colloquy may seem like a classic legal fiction—a bit of oil to keep to the wheels of justice churning. But true legal fictions are acknowledged as such; future courts understand that when we say a corporation is a person, the corporation does not, in fact, breathe air. Pleas of guilty, on the other hand, receive the imprimatur of truth. When the defendant says they are pleading guilty because they are

122. See *infra* Part II.C.2 (discussing the *Alford* case).

123. Donnelly, *supra* note 32, at 428.

guilty and not through any promises or inducements, future courts hold that against them.¹²⁴ In fact, the high-profile case of Michael Flynn, the once National Security Advisor to former President Donald Trump, makes this clear. Flynn pleaded guilty on the record and then claimed, after his plea, that the government induced his plea by a series of inappropriate threats, including that they would charge his son with a crime if he did not plead guilty.¹²⁵ Flynn pleaded guilty and then later attempted to withdraw his plea.¹²⁶ Former U.S. Attorney General William Barr supported Flynn and told CBS News of the case, that “people sometimes plead to things that turn out not to be crimes.”¹²⁷ A retired judge, appointed by the district court to review the case, recommended a perjury charge for Flynn’s attempts to withdraw his plea.¹²⁸ Yet the threat of the perjury charge by the district court makes clear that courts view the act of taking the plea as the truth. This means that the plea colloquy has the force of truth, even though it is quite often, at the moment of its inception, a lie.

2. *Alford Pleas*

As described above, in an *Alford* plea, a defendant declares his innocence at the time of the plea while also accepting a conviction and any associated punishment.¹²⁹ A court accepts the defendant’s claims

124. For instance, rules that allow for impeachment by prior conviction do not differentiate between convictions that were the result of plea bargains based on lies and those that were not. FED. R. EVID. 613.

125. Quinta Jurecic & Benjamin Wittes, *Flynn Redux: What Those FBI Documents Really Show*, LAWFARE (May 1, 2020, 3:32 PM), <https://www.lawfareblog.com/flynn-redux-what-those-fbi-documents-really-show> [<https://perma.cc/8YUN-WCNX>] (detailing documentary evidence that Flynn claims proved the government inappropriately threatened to prosecute his son for activities related to Flynn’s consulting work for the Turkish government). *But see* Spencer S. Hsu & Ann E. Marimow, *Flynn Committed Perjury, and DOJ Request to Toss His Conviction Was ‘Corrupt,’ ‘Politically Motivated,’ Court-Appointed Adviser Argues*, WASH. POST (June 10, 2020), https://www.washingtonpost.com/local/legal-issues/michael-flynn-committed-perjury-but-should-not-face-contempt-hearing-court-appointed-counsel-finds/2020/06/10/09dada24-aa81-11ea-9063-e69bd6520940_story.html [<https://perma.cc/T9B7-4M8J>] (highlighting Flynn’s many shifting reasons for withdrawing his guilty plea).

126. *Attorney General Barr Says What Michael Flynn Did “Was Not a Crime,”* CBS NEWS, <https://www.cbsnews.com/news/michael-flynn-case-dismissal-william-barr-attorney-general/> [<https://perma.cc/S455-KRBW>] (May 8, 2020, 3:48 PM).

127. *Id.* (quoting former U.S. Attorney General William Barr).

128. Hsu & Marimow, *supra* note 125.

129. *See supra* Part II.A.3.

of innocence only if the court is satisfied that the defendant is *actually* guilty, despite holding no trial or meaningfully testing the evidence. And this is the lie about process—namely, the court makes a finding of guilt, even though, in most cases, they only heard a mere recitation of facts from the prosecutor.

To understand how an *Alford* plea functions, we must briefly review the *Alford* case itself. In *Alford*, the defendant was charged with the capital offense of first-degree murder.¹³⁰ Before accepting a plea, the trial court heard sworn testimony from both sides.¹³¹ The prosecution presented an officer, who gave a summary of the evidence.¹³² The defense put on Alford himself, who testified under oath that he had not committed the murder, but to avoid the death penalty, he would plead guilty to the reduced charge of second-degree murder.¹³³ Relying on its prior jurisprudence involving *nolo contendere* pleas,¹³⁴ the Court upheld Alford's plea of guilty:

Thus, while most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty. An individual accused of [a] crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.¹³⁵

And so, the *Alford* plea was born. In a footnote, Justice White affirmed that *Alford* pleas were only acceptable in cases where guilt was established:

Because of the importance of protecting the innocent and of

130. North Carolina v. Alford, 400 U.S. 25, 26–27 (1970).

131. *Id.* at 28.

132. *Id.*

133. *Id.* at 28 & n.2.

134. The Court in *Alford* described *nolo contendere* pleas in the following way: “[A] plea by which a defendant does not expressly admit his guilt, but nonetheless waives his right to a trial and authorizes the court for purposes of the case to treat him as if he were guilty.” *Id.* at 35.

135. *Id.* at 37.

[e]nsuring that guilty pleas are a product of free and intelligent choice, various state and federal court decisions properly caution that pleas coupled with claims of innocence should not be accepted unless there is [some] factual basis for the plea, and until the judge taking the plea has inquired into and sought to resolve the conflict between the waiver of trial and the claim of innocence.¹³⁶

But the standard for a factual basis fails to rise to the level of proof beyond a reasonable doubt; indeed, there is no clear standard, except that the judge be convinced the defendant is guilty, even when the defendant swears under oath—as in *Alford*—that he is not.¹³⁷ Furthermore, the Supreme Court provides no guidance to trial courts on how developed a factual record must be to accept an *Alford* plea.

One might imagine that, given that a factual record is not required, *Alford* pleas would be used only for low-level crimes when, presumably, the stakes are low, and the factual record is simple. But interestingly, *Alford* pleas are frequently used to resolve cases involving violent crimes. One study estimated that, from 2003 to 2004, 76,000 individuals entered *Alford* pleas and that 50% of defendants who took an *Alford* plea were incarcerated for violent crimes such as murder, assault, and sexual assault.¹³⁸ Twenty-five percent were incarcerated for property crimes, 20% for drug crimes, and only about

136. *Alford*, 400 U.S. at 38 n.10 (citations omitted).

137. Of course, another lie embedded in the *Alford* case is that if indeed the court is truly convinced of the defendant's guilt, it still allows the defendant to then lie in open court that he did not commit the crime. As such, the defendant does not have to confront the harm he has caused. Eugene R. Milhizer, *Rethinking Police Interrogation: Encouraging Reliable Confessions While Respecting Suspects' Dignity*, 41 VAL. U. L. REV. 1, 4–5 (2006) (“A sincere confession . . . can be indicative of a wrongdoer's rehabilitative potential and can serve as an important first step toward his restoration and reintegration into society.”); Gad Czudner & Ruth Mueller, *The Role of Guilt and Its Implication in the Treatment of Criminals*, 31 INT'L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 71, 73–74 (1987). In addition, as Stephanos Bibas has noted, these sorts of pleas send confusing messages about the criminal system's commitment to truth: “Guilty-but-not-guilty pleas muddy the moral message by implying that the law does not care enough to insist on clear, honest resolutions and vindications.” Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1402–03 (2003).

138. Allison D. Redlich & Asil Ali Özdoğru, *Alford Pleas in the Age of Innocence*, 27 BEHAV. SCIS. & L. 467, 484 (2009).

4% for public-order crimes.¹³⁹ These numbers indicate that *Alford* pleas are not reserved for minor or non-serious crimes. Instead, courts regularly resolve serious, violent cases with pleas in which the defendant swears innocence and no meaningful adjudicatory process was undertaken to get to the truth of what happened.

III. THE PARADOX OF PLEA BARGAINING

The taxonomy above lays the groundwork for exploring the paradox of plea bargaining. Each form of lying at plea bargaining described in this Article has a beneficial purpose. These lies allow criminal justice stakeholders to maneuver around the cascade of conflicting and cumulative criminal laws, sentences, and collateral consequences that legislatures have imposed over decades. In many instances, the lack of transparency in the plea process, along with the flexibility to bend the truth, benefit stakeholders who want to negotiate just resolutions in individual cases.

These same virtues, however, also obscure the system from public view, which has negative consequences more broadly for the criminal legal system. An examination of lying at plea bargaining quickly reveals how completely unknowable the system is to an outsider. Even legislators cannot understand whether the laws they pass function as designed because, in application, the laws are manipulated—sometimes beyond recognition—as in the case of pleas to crimes that do not exist. This means the public at large and those interested in criminal justice reform do not—indeed, cannot—have a real grasp on the pressure points in the system because such pressure is relieved via plea bargaining.

The natural solution to the systemic problem—to make the system more transparent or less flexible—would likely harm individual defendants. If lying at plea bargaining disappeared tomorrow, thousands of defendants would suffer dire consequences, such as deportation for minor charges or a forced trial rather than a mandatory minimum sentence. These defendants would lose their ability to avoid

139. Schneider, *supra* note 101, at 285 (citing Redlich & Özdoğru, *supra* note 138).

the injustices of the system. Yet lying at plea bargaining is the result of a series of interlocking mandatory laws and rules that many stakeholders believe are deeply unfair and should be reformed. Thus, lying at plea bargaining is both a means of avoiding injustice *and* a force prohibiting meaningful reformation of the laws and rules that produce such injustice.

As the final Section of this Part explores, examining the push and pull between transparency and flexibility, and between the individual and the system, reveals a reformer's dilemma—one that is playing out in real time in jurisdictions across the country. Should a reformer fight for more transparency and less flexibility to prevent the many perversions currently seen in the plea process, or would any changes to the plea process just make it harder to achieve actual justice?

A. *The Benefits of Lying in Individual Cases*

Plea bargaining produces several benefits, including significant efficiency gains in an often overwhelmed system. Lying at plea bargaining achieves these same gains but adds an additional benefit: the ability to avoid the many mandatory consequences of the current laws. Lying allows the parties to achieve outcomes that would be unachievable by the operation of law because lying expands the range of options (or outputs) beyond what the inputs determine. For example, if the parties lie at plea bargaining, the defendant may plead to an assault rather than a sex offense, thereby changing the output. Thus, the defendant avoids mandatory sex offender registration by circumventing the statute on point for his actual conduct.

Similar benefits are found in pleas to statutes that do not exist. At arrest, the defendant is charged with conduct covered by a statute with a fixed sentencing scheme and potential collateral consequences; however, if the defendant pleads to a non-existent statute, the parties themselves determine the sentence and collateral consequences, with no logical or foreseeable correlation to the legal inputs.

Also, pleas of process allow parties to achieve outcomes they could not achieve without lies. For instance, the colloquy is necessary because of the constitutional requirement that a plea be knowing and

voluntary.¹⁴⁰ To avoid acknowledging the reality that nearly all pleas are induced by threats and promises, the law asks the parties at the colloquy to lie about the nature of the bargain. In this way, the benefit accrued to the parties is the avoidance of a constitutional requirement.

And that is the point: lying in plea bargaining is, at its heart, avoidance. The lies described in the taxonomy allow stakeholders to work around the increasing size and scope of the criminal system. Over the last fifty years, the American system of criminal law has become much more complex and complicated.¹⁴¹ As Bill Stuntz noted in his work, *The Pathological Politics of Criminal Law*, the breadth and depth of U.S. criminal justice has expanded dramatically.¹⁴² For instance, in the early twentieth century, the number of federal laws was in the dozens.¹⁴³ Today, there are over four thousand federal criminal laws.¹⁴⁴ On a drug case, sentences range from no jail time to lifetime incarceration, and those sentences may be enhanced for several reasons, including if the defendant has a prior conviction from within the last ten years.¹⁴⁵ In addition to these sentencing ranges, the federal government and local state governments now impose hundreds of collateral consequences on nearly all drug offenses.¹⁴⁶ Navigating such

140. See *Boykin v. Alabama*, 395 U.S. 238, 242 (1969) (finding reversible error where trial judge accepted defendant's guilty plea "without an affirmative showing that [the plea] was intelligent and voluntary").

141. Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL'Y 715, 729 (2013) ("According to the ABA, more than forty percent of the federal criminal laws enacted since the Civil War have gone on the books since 1970. The number of federal criminal statutes was one-third larger in 2004 than it was in 1980." (footnote omitted)).

142. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 513–15 (2001).

143. Mila Sohoni, *The Idea of "Too Much Law,"* 80 FORDHAM L. REV. 1585, 1606 (2012).

144. Gary Fields & John R. Emshwiller, *Many Failed Efforts to Count Nation's Federal Criminal Laws*, WALL ST. J. (July 23, 2011), <https://www.wsj.com/articles/SB10001424052702304319804576389601079728920> [<https://perma.cc/UT8N-NEV5>] (describing the difficulty in accurately counting the number of federal crimes and estimating the total at over three thousand based on an estimate made by the Justice Department in the 1980s); John S. Baker, Jr., *Jurisdictional and Separation of Powers Strategies to Limit the Expansion of Federal Crimes*, 54 AM. U. L. REV. 545, 548 (2005).

145. 21 U.S.C. § 841(b)(1)(A)-(B).

146. Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 254 (2002) (connecting the increase of collateral consequences with the get tough on crime approach of the 1980s and 1990s); Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 154 (1999).

an expansive and complex system of outputs requires flexibility and responsiveness in the input, which lying provides.

The increase in crimes, criminal punishments, and civil consequences means that the criminal system has a massive number of inputs, which grow with each passing year. Even recent criminal justice reforms—such as the various federal and state clemency initiatives,¹⁴⁷ the Federal First Step Act,¹⁴⁸ and the reforms of recent local progressive prosecutors¹⁴⁹—tend to focus on how to restrict the enforcement or effect of the current laws rather than how to decrease the number of laws. These efforts attempt to chip away at the breadth and depth of the system in discrete ways but do little to truly reduce the size of the system.

So, the parties in the criminal system are left with many mandatory outcomes they wish to avoid for a variety of reasons, including that

147. Jamie Fellner, *Presidential Clemency Highlights Need to Fix Bad Laws*, HILL (Jan. 7, 2016, 6:00 AM), <https://thehill.com/blogs/congress-blog/judicial/264942-presidential-clemency-highlights-need-to-fix-bad-laws> [https://perma.cc/3ML9-L5FE].

148. See, e.g., John Wagner, *Trump Signs Bipartisan Criminal Justice Bill amid Partisan Rancor over Stopgap Spending Measure*, WASH. POST (Dec. 21, 2018), https://www.washingtonpost.com/politics/trump-to-sign-bipartisan-criminal-justice-bill-amid-partisan-rancor-over-stopgap-spending-measure/2018/12/21/234f9ffc-0510-11e9-b5df-5d3874f1ac36_story.html [https://perma.cc/M2HE-2UCD]; German Lopez, *The First Step Act, Explained*, VOX, <https://www.vox.com/future-perfect/2018/12/18/18140973/state-of-the-union-trump-first-step-act-criminal-justice-reform> [https://perma.cc/6QFT-JXCT] (Feb. 5, 2019, 9:42 PM); Nicholas Fandos, *Senate Passes Bipartisan Criminal Justice Bill*, N.Y. TIMES (Dec. 18, 2018), <https://www.nytimes.com/2018/12/18/us/politics/senate-criminal-justice-bill.html> [https://perma.cc/497B-E5DW].

149. Josie Duffy Rice, Opinion, *Cyrus Vance and the Myth of the Progressive Prosecutor*, N.Y. TIMES (Oct. 16, 2017), <https://www.nytimes.com/2017/10/16/opinion/cy-vance-progressive-prosecutor.html> [https://perma.cc/RX9L-G4FH]; see also Note, *The Paradox of “Progressive Prosecution,”* 132 HARV. L. REV. 748, 750 (2018). For instance, in Boston, the progressive prosecutor, Rachael Rollins, committed to not prosecuting the following crimes: trespassing, shoplifting, larceny under \$250, disorderly conduct, disturbing the peace, receiving stolen property, minor driving offenses, breaking and entering, wanton or malicious destruction of property, threats (excluding domestic violence), minor in possession of alcohol, drug possession, drug possession with intent to distribute, a stand-alone resisting arrest charge, or a resisting arrest charge combined only with another charge on the list of charges the office will decline to prosecute. *Charges to Be Declined*, RACHAEL ROLLINS, <https://rollins4da.com/policy/charges-to-be-declined/> [https://perma.cc/3KFD-ZWHS]. But according to reports from watchdog groups, these offenses were charged, albeit punished in different ways. Eoin Higgins, *Progressive DA Rachael Rollins Hasn’t Stopped Prosecuting Petty Crimes, Despite Pledge. Police Are Still Furious.*, INTERCEPT (Mar. 24, 2019, 6:00 AM), <https://theintercept.com/2019/03/24/rachael-rollins-da-petty-crime/> [https://perma.cc/VN4V-XFGW]. Yet a pledge to decline to prosecute certain offenses is a different sort of promise than working to get those statutes taken off the books. Leaving the vast web of criminal laws and collateral consequences formally intact in legislation means that prosecution of these charges can be resumed at any time at the discretion of the DA.

they believe those outcomes to be unfair or inefficient. As Julia Simon-Kerr notes about systemic lying in the legal system,¹⁵⁰ lying is a way for legal actors to “recalibrate the system when formal change is not forthcoming[, t]hus . . . alert[ing] us to the existence of a strong and collective dissonance between moral beliefs and legal prescriptions.”¹⁵¹ In other words, lying makes it possible to change the outcome of the system without changing the fundamentals of the system.

Similarly, lying helps maintain a symbiotic relationship between prosecutors and local legislatures. Prosecutors are accustomed to tremendous discretion in how they carry out their duties. Legislatures intend to give prosecutors discretion in the administration of the criminal law.¹⁵² Prosecutors have a huge range of options to draw from when deciding how to charge a defendant, and they usually have several statutes that could apply to any particular case, as well as sentencing enhancements and other tools to ratchet a sentence up or down. Lying at plea bargaining, however, indicates that the many sources of law and procedure that govern the criminal system both empower and constrain prosecutors, and the use of lies demonstrates this unusual juxtaposition. On the one hand, prosecutors turn to lying because something in the law constrains them from achieving a particular outcome. On the other hand, they feel confident about their ability to lie because they are so accustomed to using their discretion to get the outcomes they want.

Thus, lying benefits prosecutors by allowing them to avoid mandatory outcomes, either in the interests of justice or not, while also

150. Early in her article, *Systemic Lying*, Julia Simon-Kerr gives many examples of such lying:

An English jury finds that the theft of a pair of pants constitutes manslaughter. A wife accuses her husband of adultery to obtain a divorce, and he goes along with it, even though they both know this is a lie. A southern jury acquits a [W]hite man of violence against a [B]lack man, despite clear evidence that the man is guilty. A police officer says he saw a man holding drugs in plain view, even though the drugs were concealed and were found in a search without probable cause. What do all these cases have in common? They are all examples of “systemic lies”: lies that participants in the legal system tell repeatedly, knowing they are lies and with the complicity of all participants, for what they see as a higher purpose.

Simon-Kerr, *supra* note 5, at 2178.

151. *Id.* at 2179.

152. Stuntz, *supra* note 142, at 528, 547.

not pushing back on legislatures—the grantors of their power. Rather than fight the mandatory nature of registration or simply apply the law as is, prosecutors use lying in plea bargaining on a case-by-case basis to avoid certain consequences for individual defendants. In this sense, lying at plea bargaining helps avoid friction between legislatures and prosecutors, both of which continue to benefit from a broad criminal system without having to acknowledge the realities that the system should produce.

B. The Drawbacks of Lying to the System

The benefits to individual defendants (and to prosecutors in individual cases) described above comes at a cost to the broader criminal legal system. The lack of transparency in the criminal system means there is a mismatch between the system's inputs (the criminal laws and procedures applicable to a defendant's criminal conduct) and its outputs (the convictions and attendant punishments a defendant receives). A combination of inputs *should* produce certain outputs. After all, in any given jurisdiction, it is clear which criminal statutes and associated sentencing schemes are available, even if, as I note in Part I,¹⁵³ the criminal procedure may vary significantly between jurisdictions. It is also clear which state and federal collateral consequences and other non-criminal penalties, such as immigration consequences, mandatorily attach to a particular criminal conviction.¹⁵⁴ Thus, although these are just some of the inputs that go into a plea bargain,¹⁵⁵ one would expect these inputs, when combined

153. *See supra* Part I.

154. *See* Padilla v. Kentucky, 559 U.S. 356, 374 n.15 (2010) (listing state criminal procedure rules that require trial courts to advise defendants of possible immigration consequences).

155. Of course, there are many non-legal factors that go into plea bargaining outcomes, including the race and gender of the defendant. *See generally* Carlos Berdejó, *Gender Disparities in Plea Bargaining*, 94 IND. L.J. 1247 (2019) (discussing how female defendants are more likely than male defendants to have their charges dropped or reduced); Josefina Figueira-McDonough, *Gender Differences in Informal Processing: A Look at Charge Bargaining and Sentence Reduction in Washington, D.C.*, 22 J. RSCH. CRIME & DELINQ. 101 (1985) (discussing how prosecutors may change their criteria in charge bargaining and sentence reduction based on defendants' gender); Donna M. Bishop & Charles E. Frazier, *The Effects of Gender on Charge Reduction*, 25 SOCIO. Q. 385 (1984) (analyzing data and finding no correlation between gender and charge-reduction measures); Alexander Testa & Brian D. Johnson, *Paying the Trial*

in a particular way, to produce a specific output. But they simply do not.

For instance, an adult defendant charged with a felony sex crime should face only a certain set of possible outcomes. The sentence will be defined by the law. There will almost certainly be sex offender registration attached. The defendant will have to pay the fines and fees associated with the charge. Although there may be room for negotiation around the edges, the law—*in theory*—demands a set of outcomes; however, lying allows the stakeholders to manipulate these inputs in ways hidden from public view, warping them until one cannot even predict the output of a felony sex crime. And by hiding these realities from view, lying inhibits the feedback loop that would allow those outside the criminal system to understand what occurs within the system. It does this by, on the macro-level, making it impossible to collect meaningful data for systemic review and on the micro-level, obscuring the stories of individual defendants that might shape the narrative around reform. In the end, lying at plea bargaining distorts our view of how and why the criminal system punishes individuals because lying alters the fundamental input mechanics of the system while also concealing the alterations themselves.

To illustrate, let us continue examining the felony sex crime example. In the last few decades, every state and the federal system has adopted a sex offender registry.¹⁵⁶ In most places, sex offender registration is now mandatory for felony sex offenses and many misdemeanor sex offenses.¹⁵⁷ Efforts to overturn these mandatory and

Tax: Race, Guilty Pleas, and Disparity in Prosecution, 31 CRIM. JUST. POL'Y REV. 500 (2019) (finding Black and Latino defendants are less likely to plead guilty than White defendants); BESIKI KUTATELADZE, VANESSA LYNN & EDWARD LIANG, VERA INST. OF JUST., DO RACE AND ETHNICITY MATTER IN PROSECUTION?: A REVIEW OF EMPIRICAL STUDIES (2012), https://www.vera.org/downloads/Publications/do-race-and-ethnicity-matter-in-prosecution-a-review-of-empirical-studies/legacy_downloads/race-and-ethnicity-in-prosecution-first-edition.pdf [<https://perma.cc/6VBM-RRWQ>] (analyzing studies on how prosecutorial discretion affects racial disparities).

156. See generally NIC/WCL PROJECT ON ADDRESSING PRISON RAPE, FIFTY STATE SURVEY OF ADULT SEX OFFENDER REGISTRATION REQUIREMENTS, <https://www.prearesourcecenter.org/sites/default/files/library/fiftystatesurveyofadultsexoffenderregistrationstatutesnovember2010update.pdf> [<https://perma.cc/YCC8-S8QT>] (Nov. 2010) (providing a state-by-state list of requirements for sex offender registration).

157. *Id.*

harsh consequences have been largely unsuccessful.¹⁵⁸ As a result, when prosecutors choose to charge sex offenses, they also put the defendant at risk for the onerous burden of registration¹⁵⁹ and often of some potential mandatory sentence.

But what happens when prosecutors, defense attorneys, or even judges do not believe these penalties are appropriate, despite the defendant having been correctly charged—given the factual allegations—with a sex offense? As we saw in Part II.A, in these instances, stakeholders use fictional pleas to resolve non-registrable felony convictions, or they rely on fact bargaining to avoid sex offender registration or mandatory minimums.¹⁶⁰ The stakeholders themselves decide the just resolution in the case, and this resolution only comes about through lying because law otherwise formally prohibits it. As such, by resolving individual cases with such pleas, legislatures and the public are denied an opportunity to examine how the sex offender laws are working because they lack reliable data about what conduct criminal law covers and miss the stories of those escaping mandatory punishments through the use of lying at plea bargaining.

These lies should alter how we think about the use of convictions as markers of guilt. After all, these lies distort efforts to study the criminal justice system through data. The federal government, states, and cities rely on data to drive criminal justice policy, legislation, and reform.¹⁶¹

158. Sarah Lustbader, *What Is the Purpose of Sex Offense Registries?*, APPEAL (Dec. 10, 2019), <https://theappeal.org/what-is-the-purpose-of-sex-offense-registries/> [https://perma.cc/5PC9-QN7P] (noting that Wisconsin Governor Tony Evers vetoed a bipartisan bill that would have loosened restrictions on convicted sex offenders).

159. Johnson, *supra* note 44, at 888–89 (listing the requirements and negative consequences for defendants of sex offender registration).

160. *See supra* Parts II.A.1, II.A.2.

161. *See generally, e.g.*, Brandon L. Garrett, *Evidence-Informed Criminal Justice*, 86 GEO. WASH. L. REV. 1490 (2018); Cecelia Klingele, *The Promises and Perils of Evidence-Based Corrections*, 91 NOTRE DAME L. REV. 537, 551 (2015); Ronald L. Davis, Roy L. Austin, Jr. & DJ Patil, *Growing Number of Communities Are Using Data to Improve Policing and Criminal Justice*, U.S. DEP'T JUST. ARCHIVES: OFF. PUB. AFFS., <https://www.justice.gov/archives/opa/blog/growing-number-communities-are-using-data-improve-policing-and-criminal-justice> [https://perma.cc/7YT5-LEDQ] (Mar. 3, 2017). For specific examples of how data has driven reform processes in states and localities, see Angie Jackson, *18 Ways Michigan Could Change Its Criminal Justice Process*, DET. FREE PRESS, <https://www.freep.com/story/news/local/michigan/2020/>

Most conviction data is the result of plea bargains because most convictions are the result of plea bargains. Lying at plea bargaining calls into question the endeavor to study the criminal justice system more systemically because so many of the measurables may be inaccurate. Again, if plea bargaining transforms sex offenses into non-sex offenses that do not represent the truth of what the defendant did or did not do, then attempts to use those convictions to measure either crime or criminal justice outcomes are deeply problematic.

Furthermore, although some stories about defendants shine a light on the troubles with sex offender registration,¹⁶² lying at plea bargaining indicates that many more defendants are diverted from registration through pleas based on lies. Without knowing the intricacies of these lies, the public cannot understand how or why those defendants benefited from a fictional plea rather than a plea that requires registration. If there are sympathetic stories (or unsympathetic stories as in the recent Jeffrey Epstein case)¹⁶³ that make sex offender registration not optimal for an individual defendant, the public and policymakers should hear those stories to better understand whether sex offender registration is working as intended. Otherwise, by using lies to avoid sex offender registration, stakeholders deny policymakers

01/14/michigan-jail-reform-criminal-justice/4434827002/ [https://perma.cc/4GPX-996P] (Jan. 14, 2020, 6:04 PM), in Michigan; Andy Sher, *Lee's Criminal Justice Investment Task Force Releases Policy Recommendations for Public Safety, Inmate Treatment and More*, Chattanooga Times Free Press (Dec. 19, 2019), <https://www.timesfreepress.com/news/local/story/2019/dec/19/lee-criminal-justice-investment-task-force-policy-recommendations/511024/> [https://perma.cc/8PWT-J5PT], in Tennessee; Grace Toohey, *Louisiana Sees Rise in Savings, Further Drop in Prison Population from 2nd Year of Justice Reforms*, ADVOCATE (July 19, 2019, 5:20 PM), https://www.theadvocate.com/baton_rouge/newscime_police/article_7759e8a6-aa73-11e9-ad85-470066e75115.html [https://perma.cc/R7K7-LU8L], in Louisiana; and Josh Salman, *Criminal Justice Bill 'a Game-Changer'*, HERALD-TRIB., <https://www.heraldtribune.com/news/20180222/a-game-changer-florida-house-passes-criminal-justice-reform-bill> [https://perma.cc/RED7-W23E] (Feb. 22, 2018, 7:25 PM), in Florida.

162. See, e.g., Stillman, *supra* note 4 (detailing the stories of individuals on sex offender registries for sexual conduct they engaged in while teens or pre-teens); Mona Charen, *Remove Children from Sex-Offender Registries*, NAT'L REV. (May 31, 2019, 6:30 AM), <https://www.nationalreview.com/2019/05/sex-offender-registries-children-1994-crime-bill/> [https://perma.cc/W7ZM-ALFF] (“Sex-offender registries in many states make no distinction between crimes committed by adults against children and offenses children commit against one another. Children as young as eight years old have been required to register as sex offenders and remain on the registry for life.”).

163. See *Who Was Jeffrey Epstein? The Financier Charged with Sex Trafficking*, *supra* note 4.

the recorded data points needed to determine the effectiveness of their policies.

C. The Paradox of Reform

This Article presupposes that the criminal justice system needs reform. The fact that attorneys, and sometimes judges, allow lying in plea bargaining provides proof for this contention. For decades, there have been difficult, robust conversations about how best to tackle this reform. Like many law reform debates, there are questions of scope and depth.¹⁶⁴

In the following Section, I lay out a reformer's dilemma that focuses on two voices in the reform space today: one that calls for more transparency and accountability at plea bargaining and one that resists such changes until there can be meaningful transformation of the broader system. These are the sorts of reform debates among legal stakeholders about how to improve plea bargaining and, by extension, the criminal legal system. In Ohio, for instance, defense attorneys fought a move to require that a factual record be developed and put on the record at plea bargaining.¹⁶⁵ The call for such a rule was to curb lying and other forms of manipulation at plea bargaining.¹⁶⁶ But as the Ohio State Public Defender argued in his response to the proposal, lawyers need flexibility to mitigate the draconian laws under which they operate.¹⁶⁷ Being forced to develop an accurate factual record would inhibit that flexibility and hurt real defendants.¹⁶⁸ The argument goes that until some more transformative reform is in place, transparency serves as a harm as much as a benefit. This argument was echoed in the response to the proposed rule change in Michigan

164. Alan D. Freeman, *Race and Class: The Dilemma of Liberal Reform*, 90 YALE L.J. 1880, 1887–88 (1981) (reviewing DERRICK A. BELL, JR., *RACE, RACISM AND AMERICAN LAW* (2d ed. 1980)).

165. See Donnelly, *supra* note 32, at 432–33.

166. *Id.* at 433.

167. *Id.*

168. Interestingly, prosecutors remained silent on the issue, not taking the opportunity to embrace a rule requiring more transparency. *Id.*

discussed in Part II.A.¹⁶⁹ Scholars have documented this push and pull in other areas of the law as well.¹⁷⁰

Because lying at plea bargaining is the ultimate illustration of the push and pull between transparency and flexibility, it provides a case study for this reformer's dilemma. As the prior two Sections of this Part lay out, lying produces both profound benefits and harms.¹⁷¹ If you want a more just process and better outcomes—what should a reformer do?

Before getting into the dilemma, it is critical to note that it presents just two visions of reform. There are, of course, other ways to envision the future of the criminal legal system. For instance, even before the world-wide protests over police brutality in the wake of George Floyd's murder, the Movement for Black Lives was highlighting the weaknesses of typical police reforms and calling instead for a much more profound reimagining of public safety.¹⁷² As I explore in this Part's Section C.2, this sort of reimagining is happening regarding criminal courts as well.¹⁷³

But I focus on these two voices because the unresolved debate about the benefits of transparency versus flexibility is an essential part of what allows lying, in particular, and plea bargaining, more generally, to continue. Further, the debate pushes us to imagine more profound revolutions in criminal justice reform. Though this Article does not lay out a specific vision of transformation, it contributes to our understanding of such transformation as the only path towards a just system. Although, as this Part outlines, much could be done to improve the system right now, current suggestions for repairing the plea system

169. *See supra* notes 71–75 and accompanying text.

170. For instance, Andrew Keane Woods argues that transparency comes with certain costs to the legal system, including narrowing the range of interpretations for what the law means, which, in turn, limits the law's expressive power. Andrew Keane Woods, *The Transparency Tax*, 71 VAND. L. REV. 1, 16–22, 25–38 (2018); *see also* Brigham Daniels, Mark Buntaine & Tanner Bangerter, *Testing Transparency*, 114 NW. U. L. REV. 1263, 1274, 1325 (2020) (arguing that empirical testing indicates that the benefits of administrative transparency to a healthy democracy may be overstated).

171. *See supra* Parts III.A, III.B.

172. *The Demilitarization of Law Enforcement*, M4BL, <https://m4bl.org/policy-platforms/the-demilitarization-of-law-enforcement/> [<https://perma.cc/MA28-V26Y>]; Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 416–18, 421–26 (2018).

173. *See infra* Part III.C.2.

will only go so far because of the deadlock described here. But in understanding this deadlock, we see the limits of the current voices for reform.

1. *The Reformer's Dilemma*

What then does the paradox look like as a reformer's dilemma? To illustrate the point, let us assume that both the reformer demanding more transparency (the "pro-transparency reformer") and the reformer who sees danger in that transparency (the "pro-flexibility reformer") are seeking the same thing: more just resolutions and an overall fairer system.

So, what do pro-transparency reformers say in favor of this reform? They focus on the arguments made in Part III.B.¹⁷⁴ Lying means that at the macro-level, criminal justice data is flawed, and at the micro-level, some of the more sympathetic and compelling cases, which would make for real fodder for reform, are being diverted from the system in ways that do not reflect the true facts of the case. From a data perspective, the lack of transparency means that convictions are not markers of guilt because it is impossible to know the truth behind how and why defendants are being convicted. To put it differently, it is impossible to know which defendants benefit from lying. Lawyers have created workarounds to the system for many defendants, but presumably some defendants suffer the collateral consequences or mandatory minimums imposed by legislatures. Yet how can we know which defendants benefit from lying and which do not?

This data is further altered because, like many benefits that defendants receive, the benefits from lying in plea bargaining are influenced by one's lawyer's skills, the geographic region in which the plea takes place, the prosecutor negotiating the plea, the judge who will preside over the plea colloquy, and other hard-to-measure factors. In addition, the defendant's race plays a role because we know that Black defendants fare worse across the criminal system, including in

174. *See supra* Part III.B.

the negotiation of favorable pleas.¹⁷⁵ But the lack of transparency means we have no way of measuring who is and is not receiving the benefits of lying, and why or why not some lawyers engage in these practices whereas others do not.

Furthermore, we have no way of tapping into the stories of those defendants who are being diverted from the actual consequences of their charges through lying. The lack of these stories should worry us because of the power of narrative to shape the law.¹⁷⁶ The narratives we tell about the law are critical in swaying juries and judges alike, but they also resonate with the public, who use individual stories about crime and justice to inform their view of the criminal justice system. Usually, this phenomenon works in one direction, with the public pushing for harsher laws and longer sentences based on compelling individual stories.¹⁷⁷ But there is reason to believe that given recent movements in criminal justice reform, compelling stories about individual defendants would work in the other direction as well.

By concentrating the public's attention on individual stories of suffering and harm, the Black Lives Matter movement has focused the world's attention on the racist roots of the criminal justice system and the resulting daily violence and indignities the criminal system inflicts on Black Americans.¹⁷⁸ The media has increasingly been open to the stories of those impacted by the criminal legal system. The rapper Meek Mill, for instance, received a tremendous amount of media attention about his torturous experience with the Pennsylvania parole system, which sparked reform efforts in his home city of Philadelphia and elsewhere.¹⁷⁹

175. Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187, 1213–15 (2018).

176. Johnson, *supra* note 102, at 136–37.

177. Jennifer K. Wood, *In Whose Name? Crime Victim Policy and the Punishing Power of Protection*, NWSA J., Fall 2005, at 1, 4.

178. *About*, BLACK LIVES MATTER, <https://blacklivesmatter.com/about/> [<https://perma.cc/PU5V-AH3J>].

179. Bobby Allyn, *Meek Mill Pleads Guilty to Misdemeanor Gun Charge, Ends 12-Year Legal Case*, NPR (Aug. 27, 2019, 3:58 PM), <https://www.npr.org/2019/08/27/754769378/meek-mill-pleads-guilty-to-misdemeanor-gun-charge-ends-12-year-legal-case> [<https://perma.cc/974Z-ELUR>]. For more information regarding Meek Mill's non-profit focusing on criminal justice reform, see, for example, *About Us*, REFORM ALL., <https://reformalliance.com/about/> [<https://perma.cc/8P33-QWDD>].

Further, even in the world of sex offender laws, sympathetic stories about children and young adults placed on the sex offender registry for consensual sexting or other activities sparked a somewhat successful push to reform registration laws.¹⁸⁰ Quite simply, public interest in these stories means there is hope for changing the system.

Scholars have argued that these feedback loops between the public and policymakers may indeed have an impact on law reform.¹⁸¹ The “punitive turn” in American criminal justice was, at least partly, the result of actual changes in the level and severity of crime.¹⁸² But even very popular laws that were meant to combat this rise in crime have seen public backlash that led to changes in the laws, or at least in their enforcement. For instance, New York repealed the draconian Rockefeller Drug Laws, at least partially in response to public disgust with them.¹⁸³ Now, local elections of progressive prosecutors across the country indicate that the public may be open to reducing the power and scope of the criminal system in other ways. Also, legislatures may be taking seriously a new public consciousness about the criminal system, as indicated by the First Step Act at the federal level and several criminal justice reform efforts at the state level.¹⁸⁴ Most recently, Black Lives Matter protests led to legislative action on police

180. Lustbader, *supra* note 158; Dara Lind, *Why the Sex Offender Registry Isn't the Right Way to Punish Rapists*, VOX (July 5, 2016, 10:50 AM), [<https://www.vox.com/2016/7/5/11883784/sex-offender-registry>] [<https://perma.cc/RQ4J-TKH4>] (noting offenses such as consensual sex as teenagers and pulling down siblings' pants as children can put someone on a sex offender registry).

181. *See, e.g.*, Daniel Epps, *Adversarial Asymmetry in the Criminal Process*, 91 N.Y.U. L. REV. 762, 828–31 (2016).

182. Donald A. Dripps, *Why Gideon Failed: Politics and Feedback Loops in the Reform of Criminal Justice*, 70 WASH. & LEE L. REV. 883, 885 (2013).

183. Allegra M. McLeod, *Beyond the Carceral State*, 95 TEX. L. REV. 651, 678 (2017) (book review).

184. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (codified as amended in scattered sections of 18 U.S.C., 21 U.S.C., 34 U.S.C., and 42 U.S.C.); *see generally* Nicole D. Porter, *Top Trends in State Criminal Justice Reform, 2020*, SENT'G PROJECT (Jan. 15, 2021), [<https://www.sentencingproject.org/wp-content/uploads/2021/01/Top-Trends-in-State-Criminal-Justice-Reform-2020.pdf>] [<https://perma.cc/YUK7-ZCNT>] (discussing the focus in various states of reducing incarceration and mitigating collateral consequences); Daniel Nichanian, *Criminal Justice Reform in the States: Spotlight on Legislatures*, APPEAL, [<https://theappeal.org/political-report/legislative-round-up/>] [<https://perma.cc/F9RK-VYT6>] (providing an interactive map of the United States, which highlights a range of criminal justice reforms from changes to the felony murder rule to limits on qualified immunity for state actors).

reform.¹⁸⁵ It is important to remember that plea bargaining, although a regular feature of the criminal system, was largely in the shadows from the 1920s to the 1970s.¹⁸⁶ Although stakeholders understand how and why plea bargaining is used, the public's appreciation of plea bargaining is still developing¹⁸⁷ and may be open to change.

Lying also harms the defendants who do not get the benefits of lying in their own cases. There is a small but growing body of research on defendant perspectives on plea bargaining indicating that defendants often see the process of plea bargaining as unfair, even when they believe they got a positive outcome.¹⁸⁸ This scholarship is in line with research indicating that defendants' perceptions of the legitimacy of the criminal system are linked to the fairness of the *process*.¹⁸⁹ The benefits of plea bargaining are unevenly distributed among defendants, including the benefits bestowed by lying.¹⁹⁰ Defendants are often excluded, as much as the public, from the behind-the-scenes workings of the plea process.¹⁹¹ They may not have any sense of how the lawyers negotiated the final charges, which taints their view of the fairness of the process. Further, when a defendant sees that he has not received some advantageous plea that some other defendant has achieved through lying, that harms that defendant both materially—because he did not receive the better deal—and psychologically—because he now sees the system as illegitimate. Furthermore, defendants must,

185. See Vanessa Romo, *Minneapolis Council Moves to Defund Police, Establish 'Holistic' Public Safety Force*, NPR (June 26, 2020, 8:14 PM), <https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/06/26/884149659/minneapolis-council-moves-to-defund-police-establish-holistic-public-safety-forc> [<https://perma.cc/B457-5GYB>].

186. Dripps, *supra* note 182, at 886 (“Guilty pleas, which accounted for about four out of five convictions through the 1970s, accounted for more than nine of ten by the end of the twentieth century.”); William Ortman, *When Plea Bargaining Became Normal*, 100 B.U. L. REV. 1435, 1430–40 (2020).

187. Johnson, *supra* note 102, at 136–37 (noting that there are relatively few studies that assess what the public understands about how plea bargaining works and whether it approves of the practice).

188. Jeanette Hussemann & Jonah Siegel, *Pleading Guilty: Indigent Defendant Perceptions of the Plea Process*, 13 TENN. J.L. & POL’Y 459, 495–96 (2019).

189. *Id.* at 471–72 (surveying the literature on perceptions of legitimacy and procedural justice).

190. Because of the transparency issues described in this Section, it is not clear which defendants do or do not receive the benefits of certain forms of lying at plea bargaining. But the literature makes clear that Black and Latino defendants fare worse than White defendants during plea bargaining generally. Berdejó, *supra* note 175, at 1215; Testa & Johnson, *supra* note 155, at 519. There is no reason to suspect that this trend would not also be true for plea bargains based on lies.

191. See Johnson, *supra* note 102.

themselves, participate in lies of process, namely the plea colloquy, which sends a damaging message that truth is not important in the process or the outcome.

But what does the pro-flexibility reformer say in response to these arguments? She argues that it is not so much that she supports plea bargaining, but rather she is a realist who understands how the system functions. She notes that transparency and a lack of flexibility threaten real people. Like the Ohio State Public Defender who pushed back on a requirement of a full factual record at the time of a plea, she will note that the lies in the taxonomy are workarounds to injustice. She understands the racist underpinnings of the American criminal system,¹⁹² and she is skeptical that meaningful change will be forthcoming until the country reckons with these roots.

In this sense, lying—and plea bargaining in general—may be described as a “lesser evil.” Lying, although it may inflict the harms described by the pro-transparency reformer, is still often better than the alternative (not lying). If the defendant will be deported for a low-level drug offense, which would leave his children orphaned, the lesser evil is to fabricate a false plea that allows him and his family to escape this fate. In this scenario, the liars—defendant, defense attorney, prosecutor, and judge—may be committing the bad act of lying, but they are doing it for a higher purpose. For instance, if one encountered a murderer on his way to kill a victim, the moral choice would be to lie to the murderer about the victim’s whereabouts rather than tell the absolute truth if it would divert him from his wicked

192. See Matthew Clair & Amanda Woog, *Courts and the Abolition Movement*, 110 CALIF. L. REV. 1, 16–20 (2022) (outlining the ways in which “White supremacy is foundational to the criminal courts’ violence and social control function”). See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (10th Anniversary ed. 2020) (arguing that mass incarceration of Black men serves as a form of control in the same way that Jim Crow laws used to); DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (2008) (describing how indentured servitude of the Black community after the Civil War was an extension of slavery); JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007) (describing how crime and fear of it led to policies that have put millions of Americans in prison); Dorothy E. Roberts, *Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775 (1999) (outlining the harm caused to Black communities through the enforcement of even “minor” crimes, like loitering and disorderly conduct).

end.¹⁹³ Indeed, mere omission or equivocation would not be sufficient in this circumstance. Rather, there is a moral imperative to lie.¹⁹⁴ And here, the metaphorical murderer is the criminal system itself.

Legal scholars have also made this argument. In their piece, *A Welfarist Perspective on Lies*, Ariel Porat and Omri Yadlin reason that certain lies are valuable and therefore should be permitted because they promote social goals.¹⁹⁵ For instance, where a prospective employee lies to a company about his religion because the company intends to discriminate against him if it knows his true (as in accurate) religion, a welfarist perspective would allow the employee to lie.¹⁹⁶ This is a version of the lesser-evil argument; to lie is bad, unless the lie achieves the social value of avoiding what is both illegal and immoral discrimination. Julia Simon-Kerr points out that this consequentialist justification is why many legal actors lie.¹⁹⁷ For instance, if the stakeholders believe the system will not produce just results, they may feel permitted to lie.¹⁹⁸

The pro-flexibility reformer will also argue that transparency is unlikely to even achieve the aims that the pro-transparency reformer is after and may, in fact, make the system harsher. It is the policies and practices of prosecutors and police that shape criminal law, not legislatures. For decades, legislatures have only been responsive to increasing the scope of criminal law, which furthers the discretion that prosecutors and police have to define the actual contours of the law in practice.¹⁹⁹ Normative arguments by scholars about the scope of the criminal system have had no impact on law-making.²⁰⁰ For these reasons, the pro-flexibility reformer will argue transparency and a tightening of the restrictions on lawyers will not achieve reform and will only serve to hurt the real people processed through the system.

193. This example came from BOK, *supra* note 40, at 40.

194. *See id.*

195. Porat & Yadlin, *supra* note 39, at 621.

196. *Id.* at 617, 618–20.

197. *See generally* Simon-Kerr, *supra* note 5.

198. *Id.* at 2209.

199. Stuntz, *supra* note 142, at 507, 509; *see also* Eric S. Fish, *Against Adversary Prosecution*, 103 IOWA L. REV. 1419, 1460 n.191 (2018) (noting with skepticism that more prosecution may cause legislatures to pass fewer criminal laws).

200. Stuntz, *supra* note 142, at 507–08.

Indeed, the pro-flexibility reformer will argue that transparency on this issue will actually ramp up the harshness of the law. If legislatures are alerted to the fact that prosecutors sometimes skirt sex offender registration laws through the plea process, one—politically appetizing—solution might be to legislatively ban such plea bargaining, forcing nearly everyone arrested for a felony sex offense to be registered as a sex offender. Or judges, if forced to be transparent about all the horse-trading that occurs in their courtroom, may become totally inflexible on plea bargaining in general, leading to poor outcomes for defendants across the board.

The pro-flexibility advocate might also note that although more transparency and less flexibility may lead to more trials, trials are not necessarily a good thing for defendants or even prosecutors. Trials subject both sides to the whims of jurors, who may be influenced by bias²⁰¹ or unable to understand complicated legal matters. And trials also expose defendants to mandatory minimums and mandatory collateral consequences—the very reasons that they resort to lying in the first place.

In short, lying is meant to mitigate the effects of a cruel system; transparency would only make that cruelty less escapable. For this reason, the pro-flexibility reformer argues that the solution to the problem is to view plea bargaining as something akin to civil settlement, where the parties decide what is best for the two sides and negotiate accordingly, even if such negotiations result in agreements that are not entirely accurate. In this way, a different sort of transparency is achieved; one in which the reality of the current system is recognized, but the parties are given free rein to work around the system where needed. This still leaves the possibility of reform around the edges—for instance, through discovery reform—but keeps intact the fundamental vehicle for achieving rough justice, the unfettered plea bargain.

201. Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 835–47 (2012) (explaining the scope of implicit and explicit bias in juries).

2. *Future Visions for Reform*

Of course, both reformers are correct: hence, the dilemma. So, what then is the path forward for those who care about a fair and just criminal system? There have been plenty of recent attempts to reform the system, but each of those attempts tends to fall within one reformer's box or another, leaving us with the same dilemma.

For instance, as noted earlier in this Part, there have been efforts to move toward a progressive prosecutor model. Although what constitutes a "progressive" prosecutor is a matter of some debate,²⁰² in general, those who claim the title of progressive prosecutor are interested in using their wide discretion to help defendants get out from under the power of unfair laws.²⁰³ And though many progressive prosecutors are more transparent about their practices, they cannot change the laws. Rather, these prosecutors figure out ways to avoid the worst of the law, largely putting themselves in the pro-flexibility camp and using the power of the office to construct fair pleas.²⁰⁴

On the other side of the coin are legislative efforts to fix the system. But while legislatures may attempt to make the legal system less flexible and more transparent, those efforts tend to be limited and often

202. For instance, Natasha Irving, who was elected as a prosecutor in Maine in 2018 and has been called a progressive prosecutor by others, calls herself a criminal justice reform prosecutor. *S4, Episode 4: Gender Justice*, HI-PHI NATION, at 6:47 (May 23, 2020), <https://hiphination.org/season-4-episodes/s4-episode-4/> [<https://perma.cc/2YTN-NEVZ>]. She focuses her attention on restorative justice and increasing the prosecution of rape and domestic violence crimes, even where the victim may not want to participate. *Id.* at 7:35–11:31. Other prosecutors, like San Francisco District Attorney Chesa Boudin, embrace the title of progressive prosecutor and prioritize decarceration. Chesa Boudin, *The Opportunity in Crisis: How 2020's Challenges Present New Opportunities for Prosecutors*, 110 J. CRIM. L. & CRIMINOLOGY ONLINE 23, 37–53 (2020). For more on competing visions of what it means to be a progressive prosecutor, see generally Bellin, *supra* note 52, which highlights the lack of a clear normative theory of the prosecutor's proper role; Jeffrey Bellin, *Defending Progressive Prosecution: A Review of Charged by Emily Bazelon*, 39 YALE L. & POL'Y REV. 218 (2020) (book review), for a discussion of alternative ways to view prosecutorial discretion; and Steven Zeidman, *Some Modest Proposals for a Progressive Prosecutor*, 5 UCLA CRIM. JUST. L. REV. 23 (2021), for criticism of the limits of some efforts by progressive prosecutors to reform the criminal system.

203. See Chad Flanders & Stephen Galoob, *Progressive Prosecutors in a Pandemic*, 110 J. CRIM. L. & CRIMINOLOGY 685, 690–94 (2020) (reviewing the policies of several self-proclaimed progressive prosecutors).

204. Johnson, *supra* note 44, at 875–76 (discussing the political power of prosecutors). It is worth noting that recent progressive prosecutors have claimed that their political power is limited compared to their predecessors because they are often openly at odds with the local legislature. See Rollins, *supra* note 35, at 15:35.

make the problems within the system worse, just as the pro-flexibility reformer predicts. For instance, Congress's past attempts to make sentencing more uniform resulted in higher and often unfair sentences.²⁰⁵ For just this reason, such sentences are often reworked using fact bargaining.

More recent legislative efforts at reform tend to focus on repealing or reforming specific laws. For instance, there has been tremendous congressional focus on *mens rea* reform, which would make it harder to secure convictions where the defendant did not act with a culpable mental state.²⁰⁶ But reforms like this do not reevaluate the way that the substantive criminal laws and, more importantly, sentencing and collateral consequences schemes work together.²⁰⁷ And the things that most likely lead to lying at plea bargaining—like mandatory minimum sentencing and mandatory collateral consequences—have been largely untouched by reform efforts. Indeed, despite wide calls to abandon mandatory minimums,²⁰⁸ they exist in every jurisdiction. And although

205. Joshua B. Fischman & Max M. Schanzenbach, *Racial Disparities Under the Federal Sentencing Guidelines: The Role of Judicial Discretion and Mandatory Minimums*, 9 J. EMPIRICAL LEGAL STUD. 729, 729 (2012) (noting that the U.S. Sentencing Guidelines were created “to reduce unwarranted racial disparities” in sentences, but that many stakeholders found that the guidelines lead to overly harsh sentencing).

206. See generally RICHARD M. THOMPSON II, CONG. RSCH. SERV., R44464, *MENS REA REFORM: A BRIEF OVERVIEW* (Apr. 14, 2016), <https://sgp.fas.org/crs/misc/R44464.pdf> [<https://perma.cc/AZK3-FQ6Q>] (discussing several congressional *mens rea* reforms).

207. Although to be fair, there have been more recent broader efforts. For instance, in 2020, Oregon residents voted to decriminalize personal possession of all drugs. E.g., German Lopez, *America's War on Drugs Has Failed. Oregon Is Showing a Way Out.*, VOX (Nov. 11, 2020, 08:00 AM), <https://www.vox.com/future-perfect/21552710/oregon-drug-decriminalization-marijuana-legalization> [<https://perma.cc/NLA4-AJWE>]; Noelle Crombie, *Oregon Decriminalizes Possession of Street Drugs, Becoming First in Nation*, OREGONIAN/OREGONLIVE, <https://www.oregonlive.com/politics/2020/11/oregon-decriminalizes-possession-of-street-drugs-becoming-first-in-nation.html> [<https://perma.cc/4PSV-5SPF>] (Nov. 4, 2020, 10:27 AM). And in 2019, the State of Oregon also passed a bill that allows undocumented people to get Oregon driver's licenses legally, which will likely cut down on minor driving offenses for undocumented immigrants. *Oregon DMV Opens 200,000 Appointment Slots as 'Driver Licenses for All' Takes Effect*, KTVZ.COM (Nov. 13, 2020, 3:57 PM), <https://ktvz.com/community/community-billboard/2020/11/13/oregon-dmv-opens-200000-appointment-slots-as-driver-licenses-for-all-takes-effect/> [<https://perma.cc/988J-JXNS>]; see Lizzy Acker, *Oregon Will Start Issuing Driver's Licenses to Undocumented Immigrants in January*, OREGONIAN/OREGONLIVE, <https://www.oregonlive.com/commuting/2020/12/oregon-will-start-issuing-drivers-licenses-to-undocumented-immigrants-in-january.html> [<https://perma.cc/N8JQ-AZ8G>] (Dec. 29, 2020, 1:37 PM).

208. E.g., *A Federal Judge Says Mandatory Minimum Sentences Often Don't Fit the Crime*, NPR (June

mandatory collateral consequences have been widely condemned by various stakeholders,²⁰⁹ there are still over 40,000 mandatory collateral consequences listed on the National Inventory of Collateral Consequences of Conviction.²¹⁰

Reform efforts that fail to address the interlocking nature of substantive criminal law, procedural law, sentencing law, and collateral consequences are unlikely to create a more just criminal legal system. If reformers focus just on transparency or flexibility, they will miss the legitimate reasons that lawyers hide plea bargaining in the shadows. But a failure to think big and focus only on discreet reform is unlikely to have a meaningful impact because lying is the product of these knitted inputs.

Even with this mind, there are many reforms that could be implemented that would make plea bargaining fairer for individuals and more transparent to the outside world while also cutting down on the need for lying at plea bargaining. These reforms, although useful, can only go so far. It is still worth briefly mentioning them here.

First, legislatures should get rid of mandatory minimum sentencing laws and mandatory collateral consequences that lead to much of the lying at plea bargaining. Defendants are often trying to lie their way around these punishments. As this Article makes clear, judges and prosecutors are often willing to help defendants lie at plea bargaining. This alone should justify the undoing of these much-criticized mandatory minimum sentencing laws and mandatory collateral consequences laws.

1, 2017, 5:04 AM), <https://www.npr.org/2017/06/01/531004316/a-federal-judge-says-mandatory-minimum-sentences-often-dont-fit-the-crime> [<https://perma.cc/GDZ6-TCZW>]; Nancy Gertner & Chiraag Bains, *Mandatory Minimum Sentences Are Cruel and Ineffective. Sessions Wants Them Back.*, WASH. POST (May 15, 2017), <https://www.washingtonpost.com/posteverything/wp/2017/05/15/mandatory-minimum-sentences-are-cruel-and-ineffective-sessions-wants-them-back/> [<https://perma.cc/4ZZP-HNVW>].

209. E.g., Leon Neyfakh, *In a Remarkable Decision, Federal Judge Lays Out All the Ways Our Justice System Hurts Ex-Cons*, SLATE (May 25, 2016, 3:35 PM), <https://slate.com/news-and-politics/2016/05/frederic-block-federal-judge-speaks-out-against-collateral-consequences-for-felons.html> [<https://perma.cc/68TH-X4BM>].

210. *Collateral Consequences Inventory*, NAT'L INVENTORY COLLATERAL CONSEQUENCES CONVICTION, <https://niccc.nationalreentryresourcecenter.org/consequences> [<https://perma.cc/6LZY-8FPX>] (click "search").

Second, plea bargaining should be—and could be—more transparent. Even accounting for the type of secrecy that is sometimes needed to protect individual defendants, there are still many ways to take the plea process out of the shadows. In many cases, judges could require the parties to disclose the plea history of the case. In a system that has nearly eliminated public trials, there is no justification for the absolutely shrouded nature of plea bargaining. Exceptions can be made where necessary, but the rule should be that plea bargains are recorded in writing and placed on the record for review, including any offers made by the prosecutor and why such offers were made.²¹¹

Third, despite the many potential flaws with the data, stakeholders and policymakers should still collect and study the data. Both parties should have some understanding of what crimes defendants are being arrested for and how those crimes are resolved after plea bargaining. The parties should also care about who is getting the benefit of particular plea bargains and who is being excluded. Black defendants fare more poorly than similarly situated White defendants across the board in the criminal system.²¹² The few studies on plea bargaining echo this trend, but there should be more work in this area to understand the disparate impact of plea bargaining and whether such pleas are based on lies.

Fourth, there are many other reforms that would make the entire plea system fairer and, by extension, more transparent and less prone towards lying. As many commentators have noted, there should be robust pre-plea discovery reform, of the kind recently implemented in New York.²¹³ Defendants should not plead guilty without an opportunity to understand the nature of the evidence against them and

211. This suggestion was made by Jenia I. Turner in her paper, *Transparency in Plea Bargaining*. Turner, *supra* note 23, at 1006. Her paper lays out a series of useful measures that every courtroom should adopt to create a more transparent plea process, including creating a searchable database of pleas and strengthening the role of judicial review at the plea phase. *Id.* at 1000–21.

212. Berdejó, *supra* note 175, at 1213, 1215.

213. Rebecca C. Lewis, *What to Know About New York's New Discovery Laws*, CITY & ST. N.Y. (Feb. 11, 2020), <https://www.cityandstateny.com/policy/2020/02/what-to-know-about-new-yorks-new-discovery-laws/176409/> [<https://perma.cc/794P-NQHN>]; see also Jenia I. Turner & Allison D. Redlich, *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, 73 WASH. & LEE L. REV. 285, 380 (2016) (finding that pre-plea open-file discovery policies lead to more informed guilty pleas); Miller, *supra* note 114, at 273 (arguing for an explicit right to *Brady* material pre-plea).

any exculpatory evidence that the prosecutor possesses. Defendants should not be held on bail pre-trial, except in extraordinary cases, nor should they be forced to waive their constitutional rights, including sometimes the right to appeal even in the face of new evidence of innocence,²¹⁴ just to get the benefit of the plea. These practices are coercive and drive even innocent defendants to accept guilty pleas.²¹⁵

Implementing these reforms would fundamentally alter the current system in important ways, and they should be pursued. Indeed, any reform that faces the realities of the plea system head on, even if it fails to disentangle all the pieces, may have the benefit of creating broader visions for further reform.²¹⁶ But we should understand that broader visions of reform and transformation are not just useful but necessary. Even if all the reforms listed above were realized, they would not eliminate the need to lie.

And to fix these problems, the entire system likely needs to be reworked and reimagined. As Matthew Clair and Amanda Woog noted in their work on abolition and the criminal courts, there have been a long list of reforms to the criminal court system that have only had a modest impact on making the system more equitable.²¹⁷ Because of this, they reimagine the criminal court system—and all that goes along with it, including plea bargaining—from an abolitionist perspective that focuses on three central principles: power shifting, defunding and reinvesting, and transformation.²¹⁸ Their vision “necessitates imagining concrete alternatives rather than offering only modest

214. Colin Miller, *Why States Must Consider Innocence Claims After Guilty Pleas*, 10 U.C. IRVINE L. REV. 671, 709–27 (2020) (arguing for a right to prove innocence via appeal after pleading guilty).

215. Vanessa A. Edkins & Lucian E. Dervan, *Freedom Now or a Future Later: Pitting the Lasting Implications of Collateral Consequences Against Pretrial Detention in Decisions to Plead Guilty*, 24 PSYCH. PUB. POL’Y & L. 204, 213–14 (2018) (explaining the results of the authors’ study, which found that pretrial detention increases the likelihood that even innocent people will plead guilty); Miller, *supra* note 114, at 273 (demonstrating the dangers of pleading guilty without an understanding of the exculpatory evidence against them); Samuel R. Wiseman, *Waiving Innocence*, 96 MINN. L. REV. 952, 960–65 (2012) (outlining the use of plea waivers to bar defendants from requesting future DNA testing).

216. As Allegra McLeod writes, in response to concerns that decarceration reform may be a lost cause, “[i]n the end, after all, there is generally no way out but through. There is no way of confronting present injustice other than by making do—making the most of the opportunities and circumstances at hand.” McLeod, *supra* note 183, at 689 (responding to the bleak outlook on reform presented in MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS (2015)).

217. Clair & Woog, *supra* note 192, at 25.

218. *Id.* at 7, 25.

tweaks to existing arrangements.”²¹⁹ This reimagining is what is missing from the reformer’s dilemma, largely because criminal justice reform has often been cabined by a lack of imagination about what the criminal system *could* look like. As Amna A. Akbar has written about in the context of police reform, the “reform and repair” models for improving policing persist, at least in part, because of “the difficulty [in] seeing alternatives.”²²⁰

The purpose of this Article is not to lay out a particular alternative vision for transformation but rather to make clear why some vision—separate and apart from discrete legal reforms—is necessary. Lying is a symptom not of some hidden disease within the body of system; rather the disease *is* the system and an exploration of lying at plea bargaining shows just how all-encompassing the illness is. Measures like discovery reform, the collection of more data, and other reforms described above will have a salutary effect on the disease, but they will not heal the body.²²¹ For that, we need something closer to a total reimagining rather than reform around the edges. There are many compelling proposals for transformation, including from the Movement for Black Lives and affiliated groups, who are amplifying a long-standing advocacy that asks us to recognize the foundations of American criminal law, to tear down existing structures, and to rebuild a truly equitable legal process.²²² More transparency or more flexibility to lie at plea bargaining will not get us to a fairer legal system.

219. *Id.* at 26.

220. Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1814 (2020).

221. See *supra* text accompanying note 212 and note 213 and accompanying text.

222. For instance, some of the proposals in the Vision for Black Lives Platform include “End to All Jails, Prisons and Immigration Detention,” “End the Death Penalty,” “End the War on Drugs,” and “End to Pretrial Detention and Money Bail,” among others. *Vision for Black Lives*, M4BL, <https://m4bl.org/policy-platforms/> [https://perma.cc/M8D3-FWP2]. The Movement for Black Lives comprises fifty organizations. *Partners*, BLACK LIVES MATTER, <https://blacklivesmatter.com/partners/> [https://perma.cc/3LTQ-U4M5]. The Black Lives Matter Global Network Foundation is a separate organization with several affiliated partners, including The Black Alliance for Just Immigration and the NAACP Legal Defense and Educational Fund, among others. *Id.*

CONCLUSION

It is deeply troubling that judges and lawyers on both of sides of the aisle often believe that the only path to justice in the modern criminal legal system is paved with lies. To merely call for more transparency and less flexibility that would eliminate such lies misses the critical point—lying provides many legitimate benefits to stakeholders in a system that has grown bloated with thousands of substantive criminal laws, mandatory minimum sentences, and collateral consequences. But to say that lying is to be tolerated or even encouraged is to give up on the idea that the criminal justice system can deliver both truth and justice. This state of affairs poses a reformer’s dilemma: should one seek truth through transparency or rough justice through unlimited plea bargaining? As this Article makes clear, the dilemma fails to account for a third option—a reimagining of what the criminal legal system could and should look like.