

Plea Bargaining

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Plea bargaining dominates the criminal process in the United States today, yet it remains highly controversial. Supporters defend it on the grounds that it expedites cases, reduces processing costs, and helps authorities obtain cooperation from defendants. But critics contend that it can generate arbitrary sentencing disparities, obscure the true facts, and even lead innocent defendants to plead guilty. Lack of transparency and limited judicial involvement frustrate attempts to correct flaws in the process. As policymakers and legislators prepare to tackle reform of sentencing laws and prosecutorial discretion, they should also consider reforms to plea bargaining that would make the practice fairer, more transparent, and more honest.

INTRODUCTION

As the Supreme Court recently acknowledged, in the U.S., “criminal justice today is for the most part a system of pleas, not a system of trials.”¹ More than 95% of convictions in the federal and state systems are the product of negotiated guilty pleas.² Roughly every two seconds during typical work hours, a person pleads guilty.³ In some jurisdictions, individual prosecutors may practice for months without trying a case.⁴ Courts, policymakers and scholars for the most part view plea bargaining as an inevitable feature of our criminal process. The general assumption is that without guilty pleas, the criminal justice system

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1. Lafler v. Cooper, 566 U.S. 156, 170 (2012).

2. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, FEDERAL JUSTICE STATISTICS 2012—STATISTICAL TABLES tbl.4.2 (2015) (97% of federal convictions disposed of via guilty plea). For state statistics, see BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, STATE COURT SENTENCING OF CONVICTED FELONS, 2004—STATISTICAL TABLES tbl.4.1 (2004) (95% of state convictions obtained through a guilty plea); *Court Statistics Project DataViewer*, NAT’L CTR FOR STATE COURTS, http://www.ncsc.org/Sitecore/Content/Microsites/PopUp/Home/CSP/CSP_Criminal (showing that for most states, jury trials amounted to only about 1-2% of criminal dispositions).

3. Joseph A. Colquitt, *Ad Hoc Plea Bargaining*, 75 TUL. L. REV. 695, 696 (2001).

4. Don Stemen et al., *Plea Bargaining in Wisconsin: Prosecutor Effects on Charge Reductions Outcomes 9* (2015) (unpublished manuscript) (on file with author) (noting that “there are many prosecutors with no trials over the study period,” 2009-2013).

would grind to a “screaming halt.”⁵ Even if the system could afford to provide more contested trials than it currently does, many believe that plea bargaining helps allocate resources more sensibly—away from trials of clear-cut cases and toward more valuable programs, such as probation, parole, and reentry.⁶

Another stated advantage of plea bargaining is that it helps the prosecution to obtain cooperation in complex cases. Informants are often indispensable to uncovering the operation of organized crime, for example, and plea discounts can be critical to obtaining their cooperation.⁷ Plea bargaining has also been defended for sparing reluctant and vulnerable witnesses the ordeal of testifying and for providing victims with closure more quickly than trials do.⁸ Some courts and commentators have also stated that guilty pleas can facilitate the rehabilitation of defendants by encouraging them to accept responsibility and by leading to the swifter imposition of punishment.⁹

5. Eileen Nimm, *Plea Bargains Crucial to Efficient Court System*, APG MEDIA WISCONSIN (July 6, 2016), http://www.apg-wi.com/plea-bargains-crucial-to-efficient-court-system/article_c73f2715-fbb7-5c89-953f-b135b0aa257d.html (citing Wisconsin prosecutor); see also Santobello v. New York, 404 U.S. 257, 260-61 (1971); J. Harvie Wilkinson III, *In Defense of American Criminal Justice*, 67 VAND. L. REV. 1099, 1138-44 (2014) (discussing various benefits of plea bargaining, including its efficiency). *But see* DARRYL K. BROWN, FREE MARKET CRIMINAL JUSTICE 104-05, 154-55 (2016); Albert W. Alschuler, Lafler and Frye: *Two Small Band-Aids for a Festering Wound*, 51 DUQ. L. REV. 673, 705 (2013); Mary E. Vogel, *The Negotiated Guilty Plea: Vacancies as an Alternative to the Caseload Pressure Explanation*, 21 J. MATH. SOCIOLOGY 241, 241 (1996) (noting that “the claim that crowded courts induce plea bargaining as part of an effort by prosecutors, judges and attorneys to move cases more rapidly has been called increasingly into question”).

6. See, e.g., Welsh S. White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439, 440-41 (1971) (quoting Arnold Enker, *Perspectives on Plea Bargaining*, in PRESIDENT’S COMM’N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, TASK FORCE REPORT: THE COURTS 108, 112 (1967)); see also Susan Turner, “Reentry,” in Volume 4 of the present Report.

7. See, e.g., Daniel Richman, “Informants and Cooperators,” in Volume 2 of the present Report; ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE 31 (2009); Daniel C. Richman, *Cooperating Defendants: The Costs and Benefits of Purchasing Information from Scoundrels*, 8 FED. SENT’G REP. 292, 293 (1996).

8. Wilkinson, *supra* note 5, at 1142. For a discussion of crime victims in the criminal process, see Paul G. Cassell, “Crime Victims’ Rights,” in the present Volume.

9. E.g., Brady v. United States, 397 U.S. 742, 753 (1970); Wilkinson, *supra* note 5, at 1142. For a discussion of rehabilitation, see Francis T. Cullen, “Correctional Rehabilitation,” in Volume 4 of the present Report.

These perceived advantages of plea bargaining have made it an increasingly popular feature of criminal justice reform around the world. Countries as diverse as France, Germany, India, Japan, Nigeria, Russia, and South Africa have adopted some form of negotiated justice.¹⁰ Even international criminal courts, dealing with the gravest crimes against humanity, have relied on plea bargaining to dispose of cases.¹¹

But while plea bargaining continues to spread globally, its use remains highly controversial. Perhaps the greatest concern is that, at least as currently practiced in the United States, plea bargaining can be so coercive as to lead some innocent people to plead guilty.¹² Broad prosecutorial discretion to set high plea discounts, combined with harsh baseline sentences, places significant pressure on defendants to take a plea. Data from the National Registry of Exonerations (NRE) support these concerns: As of January 2017, roughly 18% of recorded exonerations (343 out of 1,956) in the NRE were the product of guilty pleas.¹³ As discussed below, many more false guilty pleas likely remain unreported.

Apart from its potential to coerce innocent defendants to plead guilty, the current practice of plea bargaining in the U.S. is criticized for conflicting with the search for truth. Even if defendants are guilty of *some* offense, incomplete investigations, inadequate disclosure, limited adversarial testing, perfunctory judicial oversight, and sizeable plea discounts can lead defendants to plead guilty to crimes different from the ones they committed. Some of the same factors can also produce sentences that are disproportionately lenient or

10. See, e.g., JENIA IONTCHEVA TURNER, PLEA BARGAINING ACROSS BORDERS 1 (2009); *Critics Hit Japan's New Plea-Bargaining System, Say It Opens Door to False Testimony*, JAPAN TIMES (May 29, 2016), <http://www.japantimes.co.jp/news/2016/05/29/national/crime-legal/critics-hit-japans-new-plea-bargaining-system-say-opens-door-false-testimony/#.WHL38FMrKM8>.

11. TURNER, *supra* note 10, at 213; *Malian Jihadi To Plead Guilty in ICC Cultural Destruction Trial*, THE GUARDIAN (May 24, 2016), <http://www.theguardian.com/law/2016/may/24/malian-jihadi-to-plead-guilty-forgiveness-icc-cultural-destruction-trial>.

12. See, e.g., Lucian E. Dervan, *The Injustice of the Plea-Bargain System*, WALL ST. J. (Dec. 3, 2015), <https://www.wsj.com/articles/the-injustice-of-the-plea-bargain-system-1449188034>; Tim Lynch, *Americans Are Bargaining Away Their Innocence*, WASH. POST (Jan. 20, 2016), https://www.washingtonpost.com/news/in-theory/wp/2016/01/20/americans-are-bargaining-away-their-innocence/?utm_term=.e5b3744dffdb. For a discussion of wrongful convictions, see Brandon L. Garrett, "Actual Innocence and Wrongful Convictions," in the present Volume.

13. *Exoneration Detail List*, NATIONAL REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/detailist.aspx> (last visited Jan. 4, 2017).

disproportionately harsh. They also allow the negotiation of plea bargains that vary based on arbitrary factors such as race, “wealth, sex, age, education, intelligence, and confidence.”¹⁴

Plea bargaining is further criticized for reducing the fairness and legitimacy of the criminal justice system. When defendants plead guilty, they waive most procedural protections associated with a trial and opt for a non-transparent process with limited judicial review and little to no adversarial testing. The lack of transparency in plea bargaining impairs the legitimacy of the process in the eyes of not only defendants, but also victims and the general public.¹⁵ Public attitudes toward plea bargaining are overwhelmingly negative, in large part because of the lack of transparency and the perception that it is allowing guilty defendants to get away with unduly lenient punishment.¹⁶

So far, courts and legislatures have taken a largely hands-off approach to plea bargaining, imposing few constraints on its operation.¹⁷ To address the serious concerns about the fairness and accuracy of the process, judges and policymakers ought to consider more comprehensive regulation. As subsequent sections discuss, regulation may range from small fixes, such as requiring that plea agreements be reduced to writing and placed on the record, to more significant reform, such as mandating broader pre-plea disclosure, more thorough judicial scrutiny of guilty pleas, and limits on plea discounts. Even more ambitiously, broader criminal justice reform—aimed at narrowing the scope of criminal codes, increasing judicial sentencing discretion, and providing better funding for prosecutors and defense attorneys alike—is also important for ensuring that plea bargaining functions in a fair manner.

14. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2468 (2004); see also Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining* (pt. 1), 76 COLUM. L. REV. 1059, 1125-26 (1976) (noting that plea bargaining is influenced by “a defense attorney’s charm, by past favors that he had rendered, by the extent of his friendship with prosecutors or trial judges, by the race, wealth or bail status of the defendant, by the unusual weight that a particular judge might choose to give to a defendant’s choice of plea, by a prosecutor’s mood or his desire to finish work early on an especially busy day, by the publicity that a case had generated, or by any of a number of other factors, irrelevant to the goals of the criminal process”). For discussions of the impact of race in adjudication and sentencing, see Paul Butler, “Race and Adjudication,” in the present Volume; and Cassia Spohn, “Race and Sentencing Disparity,” in Volume 4 of the present Report.

15. See, e.g., Gregory M. Gilchrist, *Plea Bargains, Convictions and Legitimacy*, 48 AM. CRIM. L. REV. 143 (2011).

16. Sergio Herzog, *Plea Bargaining Practices: Less Covert, More Public Support?*, 50 CRIME & DELINQ. 590, 590-92 (2004).

17. See, e.g., BROWN, *supra* note 5, at 91.

I. PLEA-BARGAINING LAW AND POLICY

Despite its central place in criminal law practice, plea bargaining remains remarkably lightly regulated. The Supreme Court has imposed limited constraints grounded in the Due Process Clause, the privilege against self-incrimination, and the Sixth Amendment right to counsel.¹⁸ Statutes and rules provide only minimal additional regulation.

In *Brady v. United States*, the Supreme Court held that because a guilty plea is a waiver of the right to trial, the Due Process Clause requires that the plea be voluntary and knowing.¹⁹ But in both *Brady* and subsequent decisions, the Court interpreted these requirements narrowly.

The Court held that the threat of a significantly more severe penalty (even the death penalty) upon conviction is not so coercive as to invalidate a guilty plea.²⁰ Indeed, few governmental actions short of physical coercion would render a guilty plea involuntary.²¹ For example, neither threats to bring more serious charges against the defendant nor threats to charge family members have been held to constitute impermissible coercion, as long as the prosecutor has probable cause to support the charges.²²

The requirement that a guilty plea be informed is also not particularly demanding. Judges must confirm that the defendant understands the essential elements of the crime to which he is pleading guilty.²³ In most jurisdictions, rules of procedure and statutes further require judges to inform defendants of the direct consequences of a guilty plea²⁴ and of rights waived by pleading

18. For arguments that the Supreme Court should impose more stringent constitutional limits, see Russell D. Covey, *Plea Bargaining After Lafler and Frye*, 51 DUQ. L. REV. 595, 597, 599-600 (2013); Richard L. Lippke, *Plea Bargaining in the Shadow of the Constitution*, 51 DUQ. L. REV. 709, 722-23 (2013).

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

20. *Id.* at 755.

21. *E.g.*, *Corbitt v. New Jersey*, 439 U.S. 212, 218-26 (1978); *United States v. Carpenter*, 25 F. App'x. 337, 343-44 (6th Cir. 2001) (guilty plea was not involuntary even though it was part of a "package deal" under which the prosecution would refrain from seeking the death penalty only if both the defendant and his codefendant brother agreed to plead guilty); *Miles v. Dorsey*, 61 F.3d 1459, 1468 (10th Cir. 1995). Certain rules and case law, however, presume that judicial participation in plea negotiations renders a subsequent guilty plea involuntary. *E.g.*, *State v. Bouie*, 817 So. 2d 48, 53-54 (La. 2002); FED. R. CRIM. P. 11(e)(1).

22. *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978); *United States v. Pollard*, 959 F.2d 1011, 1021-22 (D.C. Cir. 1992).

23. *Henderson v. Morgan*, 426 U.S. 637, 652-53 (1976).

24. *E.g.*, *United States v. Rivera-Maldonado*, 560 F.3d 16, 22 (1st Cir. 2009); *Jamison v. Klem*, 544 F.3d 266, 276-277 (3d Cir. 2008); 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 21.4(d) n.116 (4th ed. 2016).

guilty.²⁵ However, a guilty plea may be informed even when the prosecution fails to disclose evidence favorable to the defense.²⁶ Likewise, judges need only give minimal notice of the meaning of the right to counsel before defendants waive that right at a plea hearing.²⁷

And while federal and state criminal procedure rules generally require guilty pleas to be based on facts, the factual-basis standard remains quite vague.²⁸ As a result, judges rarely go beyond reviewing the indictment and then confirming that the facts alleged comport with the defendant's brief statement at the plea colloquy.²⁹ Given this rather perfunctory factual inquiry, parties remain free to engage in fact bargaining and frequently do so.³⁰ The Court has also allowed

25. LAFAVE ET AL., *supra* note 24, § 21.4(e) n.190. Some courts have held that a warning of the rights waived is required in order for the plea to be informed. *See id.* n.194; *cf.* Boykin v. Alabama, 395 U.S. 238, 242 (1969) (requiring a record of a knowing and voluntary waiver of rights inherent in guilty plea).

26. Ruiz v. United States, 536 U.S. 622, 623 (2002) (holding that a guilty plea may be informed even when the prosecution has failed to disclose evidence that serves to impeach the credibility of prosecution witnesses). Ruiz concluded that the government is not constitutionally required to disclose impeachment evidence before a guilty plea, but it did not squarely resolve whether the government must disclose factually exculpatory evidence. *Id.* at 628. Circuit courts have split on this question. *Compare, e.g.,* Orman v. Cain, 228 F.3d 616, 617 (5th Cir. 2000) (holding that a prosecutor need not disclose exculpatory evidence when a defendant waives a trial and pleads guilty), *with, e.g.,* McCann v. Mangialardi, 337 F.3d 782, 787–88 (7th Cir. 2003) (suggesting that, if a prosecutor fails to disclose factually exculpatory evidence before a defendant enters a guilty plea, this would likely violate the Due Process Clause); *see also* Buffey v. Ballard, 2015 WL 7103326, at *11 (W. Va. Nov. 10, 2015) (reviewing federal and state decisions on this question and concluding “that a defendant is constitutionally entitled to exculpatory evidence during the plea negotiation stage”).

27. Iowa v. Tovar, 541 U.S. 77, 80 (2004) (holding that the court must inform the defendant “of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea” but does not need to “(1) advise the defendant that ‘waiving the assistance of counsel in deciding whether to plead guilty [entails] the risk that a viable defense will be overlooked’; and (2) ‘admonis[h]’ the defendant ‘that by waiving his right to an attorney he will lose the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty’”).

28. LAFAVE ET AL., *supra* note 24, § 21.4(f).

29. Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 212–23 (2006); MOLLY TREADWAY JOHNSON & SCOTT A. GILBERT, FED. JUDICIAL CTR., THE U.S. SENTENCING GUIDELINES: RESULTS OF THE FEDERAL JUDICIAL CENTER'S 1996 SURVEY 10 (1997), <https://www.fjc.gov/sites/default/files/materials/2017/gssurvey.pdf> (reporting that 25% of judges stated that they have never “‘go[ne] behind’ a plea agreement and rule[d] against a prosecutor’s recommendation that tends to lower a sentence by either stipulating facts or recommending the application, or nonapplication, of specific offense characteristics” and that of the 75% who do “go behind plea agreements,” only about 8% do so “somewhat or very frequently”).

30. Turner, *supra* note 29, at 212–23.

judges to accept guilty pleas even when defendants profess their innocence, as long as sufficient factual basis independently supports the conviction.³¹

Courts have also failed to regulate the practice of charge bargaining in any meaningful way. They have interpreted separation-of-powers principles to prevent judges from interfering with prosecutors' decisions to reduce or dismiss charges.³² Because decisions about charges have profound effects on sentencing (particularly in systems with mandatory minimums, recidivist enhancements, or sentencing guidelines),³³ prosecutors can typically induce guilty pleas by offering favorable charging concessions to defendants.

The Supreme Court has also done little to ensure the transparency and reviewability of negotiated judgments. It has allowed the parties to waive the right to appeal—a practice that is now routine—and it has not required agreements to be reduced to writing or otherwise placed on the record.³⁴ Victims have no right to take part in the negotiations and in some jurisdictions are not even consulted about the possibility of resolving the case through a plea bargain.³⁵ Plea negotiations thus remain opaque and largely immune from review in most U.S. jurisdictions.³⁶

31. *North Carolina v. Alford*, 400 U.S. 25, 38 (1970) (equivocal guilty pleas are acceptable when there is strong factual evidence supporting guilt). *But cf.* U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-16.015, <https://www.justice.gov/usam/usam-9-16000-pleas-federal-rule-criminal-procedure-11#9-16.015> (last updated Oct. 2016) (instructing federal prosecutors not to consent to *Alford* pleas “except in the most unusual of circumstances” and only after supervisory approval).

32. *See, e.g.*, *Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375, 379-81 (2d Cir. 1973); *United States v. Giannattasio*, 979 F.2d 98, 100 (7th Cir. 1992); *cf.* Darryl K. Brown, *Judicial Power to Regulate Plea Bargaining*, 57 WM. & MARY L. REV. 1225, 1231 (2016) (critiquing this jurisprudence as “inconsistent with the history of criminal justice administration in many states”).

33. *See, e.g.*, Ronald F. Wright & Rodney L. Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, 84 N.C. L. REV. 1935, 1977 (2006) (finding that “charge bargaining over the offense seriousness is one of the central ways that cases are resolved” and that “these charge reductions have substantial effects on the severity of sentences imposed”).

34. *See, e.g.*, *United States v. Toth*, 668 F.3d 374, 378 (2012); *Keller v. United States*, 657 F.3d 675, 681 (7th Cir. 2011); *see also* Nancy King & Michael O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 212 (2005) (“In nearly two-thirds of the cases settled by plea agreement in our sample, the defendant waived his right to review.”).

35. LAFAVE ET AL., *supra* note 24, at § 21.3(f) (“Provisions on prosecutor/victim consultation ... exist in about two-thirds of the states as well as on the federal level” and “a substantial minority of the states appear to authorize a victim to appear at [plea hearings] and to be heard on the matter.”); *see also* Cassell, *supra* note 8.

36. A few states have begun enacting rules requiring that plea offers be placed on the record. *See Missouri v. Frye*, 566 U.S. 133, 146-47 (2012) (discussing Arizona and New Jersey rules requiring that plea offers be placed on the record).

While otherwise taking a laissez-faire approach to plea bargaining, the Court has been more active in regulating defendants' rights to effective assistance of counsel at the guilty-plea stage.³⁷ The Court has held that defense counsel must advise defendants of certain significant consequences of pleading guilty, such as the possibility of deportation.³⁸ It has also affirmed that counsel must relay to clients any plea offers made by prosecutors and must competently advise clients of the legal advantages and disadvantages of accepting an offer.³⁹ But the court has yet to clarify the duties of defense counsel in preparation for and during plea negotiations, and it has not attempted to directly regulate prosecutorial conduct in the process.

II. PLEA-BARGAINING CRITIQUES

While a few commentators have defended plea bargaining on the grounds of its efficiency and ostensible benefits to the parties involved,⁴⁰ most have been critical of the practice. In the 1980s, some called for outright abolition of plea bargaining.⁴¹ At this point, perhaps in recognition of the entrenched position of plea bargaining in the United States, scholarship has shifted focus toward correcting the worst excesses of the practice.⁴² Empirical research has also attempted to identify more systematically areas in need of reform. Scholars' concerns fall into three principal categories: (1) the risk of coercion; (2) the risk of inaccuracy; and (3) insufficient procedural protections.

37. *Padilla v. Kentucky*, 559 U.S. 356 (2010); *Lafler v. Cooper*, 566 U.S. 156, 170-72 (2012); *Frye*, 566 U.S. at 145-46.

38. *Padilla*, 559 U.S. 356.

39. *Lafler*, 566 U.S. 156; *Frye*, 566 U.S. at 145 ("As a general rule, defense counsel has the duty to communicate formal prosecution offers to accept a plea on terms and conditions that may be favorable to the accused.").

40. See, e.g., Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969 (1992); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1914-15, 1968 (1992); Wilkinson, *supra* note 5; Jacqueline E. Ross, *The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 AM. J. COMP. L. 717, 730 (2006) (offering a qualified defense of plea bargaining based on its "value in inducing defendants to cooperate in investigations of other suspects").

41. See, e.g., Albert W. Alschuler, *Implementing the Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 1048 (1983); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 2003-08 (1992).

42. Alschuler, *supra* note 5, at 706-07 ("[T]he time for a crusade to prohibit plea bargaining has passed. Instead, the time may have come for criminal justice scholars to abandon the search for ways to make the criminal justice system fair and principled. Their principal mission today should be to make it less awful. Improving the plea bargaining process should be one of their goals.").

A. COERCION

Much has been written about the concern that excessive plea discounts may coerce defendants to plead guilty and unduly penalize those who choose to go to trial.⁴³ This risk is particularly serious when steep discounts are combined with harsh baseline sentences.⁴⁴ Together, these two features may induce even defendants with good odds of prevailing at trial to accept a plea bargain.

Since the 1980s, mandatory sentencing laws, sentencing guidelines, and the abolition of parole have led to a sharp rise in sentence length in most states and the federal system.⁴⁵ Just as sentences have grown longer, rewards for pleading guilty have also increased.⁴⁶ Some of these rewards are expressly granted by rules or statutes, such as reductions for accepting responsibility or cooperating with the prosecution. Others are offered indirectly, by giving prosecutors broad discretion to reduce charges for defendants who agree to plead guilty.⁴⁷

43. See, e.g., *id.* at 678-81; Russell Covey, *Fixed Justice: Reforming Plea Bargaining With Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1245 (2008); Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 CARDOZO L. REV. 2295, 2346 (2006); John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 12 (1978); Maximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 224-28 (2006); Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 49 CRIM. L.Q. 67, 87-90 (2005); Ronald Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 109 (2005).

44. See, e.g., Ross, *supra* note 40, at 718.

45. Turner, *supra* note 29, at 205; see also Cullen, *supra* note 9; Douglas A. Berman, "Sentencing Guidelines," in Volume 4 of the present Report; Erik Luna, "Mandatory Minimums," in Volume 4 of the present Report. Even after the Federal Sentencing Guidelines became merely advisory, judges continue to follow the Guidelines in a large majority of cases. Paul J. Hofer, *Has Booker Restored Balance? A Look at Data on Plea Bargaining and Sentencing*, 23 FED. SENT'G. REP. 326, 328-29 (2011). This leaves prosecutors with significant power to set the plea discount through charging decisions and motions for substantial assistance departures.

46. Andrew Chongseh Kim, *Underestimating the Trial Penalty: An Empirical Analysis of the Federal Trial Penalty and Critique of the Abrams Study*, 84 MISS. L.J. 1195, 1202 (2015) (finding that "federal defendants convicted at trial receive sentences that are sixty-four percent longer than similar defendants who plead guilty, excluding the effects of charge and fact bargaining"); Nancy J. King et al., *When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial In Five Guidelines States*, 105 COLUM. L. REV. 959, 973-75, 992 (2005) (studying sentencing practices in five states and finding trial penalties ranging from 13 to 461%); McCoy, *supra* note 43, at 90 (finding an average trial penalty of 44.5 months in state felony cases); HUMAN RIGHTS WATCH, AN OFFER YOU CAN'T REFUSE: HOW U.S. FEDERAL PROSECUTORS FORCE DRUG DEFENDANTS TO PLEAD GUILTY 102 (2013) (finding that average federal drug sentences in cases that went to trial were three times harsher than average sentences in cases that were resolved by a plea).

47. See, e.g., Wright & Engen, *supra* note 33, at 1948-50.

Empirical studies suggest that innocent defendants are at the greatest risk of pleading guilty in four situations: (1) when there is a significant differential between the negotiated sentence and the sentence expected upon conviction after trial;⁴⁸ (2) when the plea offer is to probation, while the expected sentence post-trial entails imprisonment;⁴⁹ (3) when the plea offer is to imprisonment, while capital punishment is a possibility after trial; and (4) when the defendant is detained, and a guilty plea results in release for time served.⁵⁰

48. E.g., Wright, *supra* note 43, at 84-86, 116-17, 147-48 (reviewing the increase of guilty plea rates and the decrease of acquittals in the federal system since the rise of mandatory sentencing and concluding that deep discounts for “acceptance of responsibility” and “substantial assistance” may have led defendants in the federal system to abandon meritorious trial defenses and plead guilty); Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant’s Dilemma: An Innovative Empirical Study of Plea Bargaining’s Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1, 36 (2013) (in an experiment involving college students accused of cheating, finding that “well over half of the innocent study participants ... were willing to falsely admit guilt in return for a reduced punishment”). Studies relying on self-reports by convicted offenders also offer qualified support for the proposition that the threat of harsher punishment after trial might induce some innocent defendants to plead guilty. Kenneth S. Bordens & John Basset, *The Plea Bargaining Process from the Defendant’s Perspective: A Field Investigation*, 6 BASIC & APPLIED SOC. PSYCH. 93, 109 (1985) (finding that convicted defendants had accepted plea bargains primarily in order to minimize punishment); Allison D. Redlich et al., *Self-Reported False Confessions and False Guilty Pleas Among Offenders with Mental Illness*, 34 LAW & HUM. BEHAV. 79, 88 (2010) (finding that 37% of offenders with mental illness reported having tendered a false guilty plea at some point in their life, and nearly two-thirds of them stated that they did so to secure release from jail or a shorter sentence).

49. For example, a 1984 mock bargaining experiment involving college students found that in certain circumstances, particularly when conviction was seen as highly likely and probation was offered upon a guilty plea, “innocent” study subjects would accept a plea bargain “in order to cut their losses.” Kenneth S. Bordens, *The Effects of Likelihood of Conviction, Threatened Punishment, and Assumed Role on Mock Plea Bargaining Decisions*, 5 BASIC & APPLIED SOC. PSYCH. 59, 71 (1984).

50. After reviewing real cases of exonerees who had pleaded guilty, John Blume and Rebecca Helm identified a similar set of factors contributing to false guilty pleas. See John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157 (2014).

For example, the most recent data reported by the National Registry of Exonerations show that roughly 18% of recorded exonerations (343 out of 1,956) were the product of guilty pleas.⁵¹ The NRE identified large plea discounts as a key factor driving false guilty pleas.⁵² Other analyses of plea-based exonerations have similarly found that innocent defendants plead guilty to avoid the risk of harsher punishment after trial.⁵³

Certain types of plea discounts appear to be especially coercive. The plea discount that Brady claimed had induced him to plead guilty—the threat of receiving the death penalty if convicted after trial—is an important example. A recent study of capital charging and sentencing decisions in Georgia in the period between 1993 and 2000 found “strong evidence that the threat of the death penalty ha[d] a robust causal effect on the likelihood of a plea agreement.”⁵⁴ The threat of the death penalty was found to increase the probability of a guilty plea by roughly 20% to 25%.⁵⁵ While the study did not reach any conclusions about the effects of the death-penalty threat on *innocent* defendants, other studies have documented cases in which innocents have pleaded guilty to avoid the death penalty.⁵⁶ As the NRE noted, “[e]xcluding drug cases, most guilty-plea exonerations are for homicide or sexual assault, two categories that account for 70% of all known exonerations.”⁵⁷ Among the homicide exonerees, almost three-

51. *Exoneration Detail List*, NATIONAL REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/detailist.aspx> (last visited Jan. 4, 2017). Of these exonerations based on guilty pleas, 50.1% (172/343) were for drug offenses, and most of these came from one county—Harris County, Texas—where they were uncovered as a result of the work of the Harris County D.A.’s Office Conviction Integrity Unit. *Id.*; *Innocents Who Plead Guilty*, NAT’L REGISTRY OF EXONERATIONS, (Nov. 24, 2015), <http://www.law.umich.edu/special/exoneration/Documents/NRE.Guilty.Plea.Article1.pdf> [hereinafter *Innocents Who Plead Guilty*]. For a discussion of some of the reasons why exoneration data might underrepresent the prevalence of false guilty pleas, see Dervan & Edkins, *supra* note 48, at 21–22. See generally Garrett, *supra* note 12.

52. *Innocents Who Plead Guilty*, *supra* note 51; see also Blume & Helm, *supra* note 50, at 180.

53. Russell Covey, *Police Misconduct as a Cause of Wrongful Convictions*, 90 WASH. U.L. REV. 1133, 1173 (2013) (examining the mass exonerations in the Rampart case in California and the Tulia case in Texas and finding that, in those two cases involving police misconduct, innocent defendants pleaded guilty at a rate of 77%).

54. Sherod Thaxton, *Leveraging Death*, 103 J. CRIM. L. & CRIMINOLOGY 475, 475 (2013). For a discussion of the death penalty, see Carol S. Steiker & Jordan M. Steiker, “Capital Punishment,” in Volume 4 of the present Report.

55. Thaxton, *supra* note 54, at 475.

56. Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 544–46 (2005); *Innocents Who Plead Guilty*, *supra* note 51.

57. *Innocents Who Plead Guilty*, *supra* note 51, at 2.

fourths were convicted of homicide, and “[i]t appears that the great majority [pleaded guilty] to avoid the risk of execution. All but 2 were prosecuted in death penalty states, and 70% had falsely confessed (31/44).”⁵⁸

On the other side of the punishment spectrum, a plea offer of time served for detained defendants has also been found to lead innocent defendants to plead guilty. Misdemeanor defendants are frequently detained for the simple reason that they cannot afford to post bail, and they are commonly offered plea deals to “time served.”⁵⁹ They are then subject to significant economic and familial pressures to plead guilty in order to be released from jail. A recent empirical study found that misdemeanor detainees “plead guilty at a 25% higher rate than similarly situated releasees.”⁶⁰ The authors concluded that “[m]isdemeanor pretrial detention ... seems especially likely to induce guilty pleas, including wrongful ones.”⁶¹

B. INACCURACY

Apart from coercive plea discounts, several other plea-bargaining features heighten the risk of inaccurate and unjust outcomes: (1) limited time and resources for investigations, especially by the defense; (2) principal-agent problems on both the defense and prosecution sides; and (3) insufficient judicial review. These flaws increase the risk that defendants may plead guilty to inaccurate charges or receive punishment that is undeservedly lenient or undeservedly harsh.

In theory, if the prosecution attempts to pressure a defendant into a guilty plea despite weak evidence of guilt, the defense attorney could advise the client to reject the plea offer. In practice, counsel is frequently unable to do so because of overwhelming caseloads, cuts in indigent-defense funding, and rules that limit defense investigations.⁶² Defense attorneys lack search and subpoena

58. *Id.* at 3; *see also* Blume & Helm, *supra* note 50, at 180 (identifying the threat of the death penalty as a factor in pushing innocent defendants to plead guilty).

59. Paul S. Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 *STAN. L. REV.* 711, 715 (2017); Alexandra Natapoff, *Misdemeanors*, 85 *S. CAL. L. REV.* 1313, 1322 (2012) [hereinafter Natapoff Article]; *see also* Megan Stevenson & Sandra G. Mayson, “Pretrial Detention and Bail,” in the present Volume; Alexandra Natapoff, “Misdemeanors,” in Volume 1 of the present Report.

60. Heaton et al., *supra* note 59, at 747.

61. *Id.* at 716; Natapoff Article, *supra* note 59, at 1347.

62. Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 *CAL. L. REV.* 1585, 1590 (2005); *see also* Eve Brensike Primus, “Defense Counsel and Public Defense,” in the present Volume.

powers and the authority to depose witnesses.⁶³ Pre-plea discovery is also limited; for example, prosecutors are not constitutionally required to disclose impeachment evidence, which could greatly help the defense uncover flaws in the government's case.⁶⁴ Some courts have even held that prosecutors need not disclose factually exculpatory evidence before a guilty plea.⁶⁵ While state rules may mandate more robust disclosure, such mandates often apply before trial, but not before a plea.

Various incentives for the defendant to plead guilty as early as possible further discourage thorough defense investigation.⁶⁶ Charging and sentencing concessions are frequently predicated on timely "acceptance of responsibility."⁶⁷ When defendants are presented with "exploding offers," defense attorneys are left with scant opportunity to investigate the case.⁶⁸

Agency problems also affect prosecutors' and defense attorneys' actions in plea negotiations. When defense attorneys carry heavy caseloads or are paid flat fees, they have an incentive to settle cases quickly even when their clients might prefer to test the case at trial or when a more thorough investigation might uncover viable defenses or mitigating factors.⁶⁹ On the flip side, prosecutors dealing with high caseloads may negotiate overly generous plea bargains to dispose of a case more swiftly.⁷⁰ This risk is heightened because victims have little to no input into prosecutorial decisions during plea bargaining.

63. See Brown, *supra* note 62, at 1601. *But see* FLA. R. CRIM. P. 3.220(a)(1)(ii) (providing for pretrial depositions by the defense).

64. United States v. Ruiz, 536 U.S. 622, 623 (2002).

65. Orman v. Cain, 228 F.3d 616, 617 (5th Cir. 2000); Walton v. State, 165 So. 3d 516, 525 (Miss. Ct. App. 2015).

66. U.S. ATTORNEYS' MANUAL § 9-27.420, <https://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution#9-27.420> (last updated Jan. 2017) (prosecutors "should make clear to defense counsel at an early stage in the proceedings that, if there are to be any plea discussions, they must be concluded prior to a certain date, and *well in advance* of the trial date") (emphasis added). For a discussion of evidentiary disclosure, see Darryl K. Brown, "Discovery," in the present Volume.

67. E.g., U.S. SENTENCING GUIDELINES MANUAL § 3E.1.1 cmt., app. 1 (2016); *id.* § 6B1.2 cmt.

68. Tina M. Zottoli et al., *Plea Discounts, Time Pressures, and False-Guilty Pleas in Youth and Adults Who Pleaded Guilty to Felonies in New York City*, 22 PSYCHOL. PUB. POL'Y & L. 250, 251 (2016) ("Anecdotal data abound to suggest that prosecutors (and sometime judges) attach very stringent time constraints on defendants, such that defense attorneys have little to no time to vet evidence or investigate cases.").

69. Alschuler, *supra* note 5, at 682; Bibas, *supra* note 14, at 2477.

70. Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 51 (1968); Bibas, *supra* note 14, at 2474.

In theory, judges could provide a neutral check on the parties and ensure that bargaining decisions are consistent with the facts of the case. But in reality, the law provides judges few tools to do so, and judges rarely make use of the powers they do have to check plea bargains. As discussed earlier, the factual-basis inquiry remains rather perfunctory, and fact bargaining is common.⁷¹ Furthermore, in many jurisdictions, judges are prohibited from participating in or commenting on the plea negotiations.⁷² Yet it is precisely during the negotiations that judges are likely to have the greatest impact on the fairness and accuracy of the outcome. Once the parties have arrived at a deal, they have little incentive to reveal anything that might disturb the agreement. The judge's inquiry into the facts at the plea hearing is therefore unlikely to unearth discrepancies that place the deal in jeopardy.

As a result, plea bargains often fail to fully reflect the facts of the case. Negotiated charges may allege a crime that is more serious, less serious, or simply quite different from the actual conduct of the defendant. Similarly, because of the lack of publicity and adequate judicial checks on plea bargaining, a defendant who pleads guilty may get a sentence that does not accurately reflect his guilt. For example, a defendant may receive a harsher sentence than deserved, based on arbitrary factors such as race, gender, age, wealth, or the relationship between defense counsel and the prosecutor.⁷³ Conversely, a defendant may get a sentence that is undeservedly mild if a prosecutor is too overworked or if the factors mentioned above bias prosecutors in favor of leniency.⁷⁴ In the rush to dispose of the case, without adequate judicial scrutiny or publicity, the parties can settle for bargains that depart from the "shadow of trial" and from the truth.⁷⁵

C. INADEQUATE PROCEDURAL SAFEGUARDS

Another failing of plea bargaining is its opaqueness. The parties negotiate the disposition in private, typically without the participation of a neutral third party or direct input from victims. Plea bargains are rarely written or recorded in any fashion. The lack of record and transparency hinders accountability

71. See *supra* note 30 and accompanying text.

72. E.g., *State v. Bouie*, 817 So. 2d 48, 53-54 (La. 2002); FED. R. CRIM. P. 11(e)(1); Turner, *supra* note 29, at 202 & n.6 (listing jurisdictions).

73. See *supra* note 14 and accompanying text; Besiki Luka Kutateladze et al., *Opening Pandora's Box: How Does Defendant Race Influence Plea Bargaining?*, 33 JUSTICE Q. 398, 420 (2016); Cassia Spohn & Robert Fornango, *U.S. Attorneys and Substantial Assistance Departures: Testing for Interprosecutor Disparity*, 47 CRIMINOLOGY 813, 835-36 (2009).

74. E.g., Nancy J. King, *Judicial Oversight of Negotiated Sentences in a World of Bargained Punishment*, 58 STAN. L. REV. 293, 297 (2005); Turner, *supra* note 29, at 259.

75. See, e.g., RICHARD LIPPKE, *ETHICS OF PLEA BARGAINING* ch. 9 (2011).

for flaws in the process or the outcome. It also taints the process in the eyes of the public and victims.⁷⁶ Public rates of disapproval of plea bargaining are strikingly high, at least in part because of the covert nature of the practice.⁷⁷ The lack of a clear record also makes empirical research into plea bargaining difficult and frustrates scholars who aim to offer data-based analysis.⁷⁸

In addition to lacking transparency, plea bargains increasingly require defendants to waive important procedural rights that are designed to ensure fair and accurate outcomes. Inherent in a guilty plea are waivers of the right to remain silent, the right to confront witnesses, the right to a public trial, and the right to a jury trial. Increasingly, however, as part of plea negotiations, prosecutors regularly demand waivers of critical additional rights. These include the following rights: to appeal the validity of the plea and associated sentence;⁷⁹ to discovery (including discovery of exculpatory evidence);⁸⁰ to post-conviction DNA testing;⁸¹ to have a pre-sentence investigation and report prepared;⁸² and to challenge ineffective counsel.⁸³ These types of waivers insulate plea bargains from judicial review, thus allowing prosecutorial overreaching

76. Bibas, *supra* note 14, at 2547; Michael M. O’Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 444-46 (2008).

77. Herzog, *supra* note 16, at 591.

78. Brian D. Johnson et al., *Sociolegal Approaches to the Study of Guilty Pleas and Prosecution*, 12 ANN. REV. L. & SOC. SCI. 481-82 (2016). For a notable example of a state statute requiring a record, for purposes of maintaining statistics, of the sentencing and charging concessions made in exchange for a guilty plea, see KY. REV. STAT. § 27A.420.

79. Paul J. Hofer, *Has Booker Restored Balance? A Look at Data on Plea Bargaining and Sentencing*, 23 FED. SENT’G. REP. 326, 327-28 (2011); Nancy King & Michael O’Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L. J. 209, 212 (2005) (finding that “in nearly two-thirds of the cases settled by plea agreement [in the federal system], the defendants waived their rights to review”). See generally Nancy J. King, “Criminal Appeals,” in the present Volume.

80. Hofer, *supra* note 45, at 327-28; Susan R. Klein et al., *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73, 77 (2015); see also Brown, *supra* note 6.

81. Klein et al., *supra* note 80, at 83; see also Garrett, *supra* note 12.

82. Hofer, *supra* note 45, at 327-28 (in districts with “fast-track programs ... defendants, in order to avoid excessive punishments, are required to waive their rights to indictment, to discovery of the evidence against them, to have a pre-sentence investigation and report prepared, to argue for a reduced sentence before the judge, and to appeal a mistaken sentence”).

83. Klein et al., *supra* note 80, at 88.

and other procedural failures and factual inaccuracies to remain unchecked.⁸⁴ They are also arguably uninformed, as most defendants cannot adequately understand some of the claims they are waiving.⁸⁵ While some people defend such waivers on the grounds that defendants should have the freedom to exchange their rights for shorter sentences, these arguments underestimate the long-term damage to the integrity of the system that widespread waivers of critical rights can inflict.

III. REFORM PROPOSALS

The increasing number of exonerations of people who pleaded guilty has revived interest in proposals to reform plea bargaining. These range from complete abolition to discrete doctrinal fixes.⁸⁶

A. REDUCING COERCION

One set of proposals aims to reduce the coerciveness of plea bargaining by limiting the size of plea discounts. Proposals include setting a fixed plea discount (e.g., one-third of the anticipated post-trial sentence), enacting caps on plea

84. As one court explained about negotiated waivers of the right to appeal the sentence: The condition sought to be imposed by the government is inherently unfair; ... it will undermine the error correcting function of the courts of appeals in sentencing; it will create a sentencing regime where courts of appeals will never have the opportunity to review an illegal or unconstitutional sentence, or a sentence that has no basis in fact, unless those sentencing errors work to the disadvantage of the government.... A defendant cannot knowingly, intelligently and voluntarily give up the right to appeal a sentence that has not yet been imposed and about which the defendant has no knowledge as to what will occur at the time of sentencing.

United States v. Raynor, 989 F. Supp. 43, 49 (D.D.C. 1997); see also Klein et al., *supra* note 80, at 114 (“[Waivers of ineffective assistance claims] remove the ‘only remaining ‘checks’ in our system of plea-agreement justice. If the defendant is allowed to give up this right at the plea stage, there is little cushion left to protect her against unwise tactical decisions, prosecutorial misconduct or overzealousness, or waiver of important other rights.”).

85. Klein et al., *supra* note 80, at 107-08; Ellen S. Podgor, *Pleading Blindly*, 80 MISS. L.J. 1633, 1641 (2011) (noting ethical and legal concerns with discovery waivers).

86. For a sampling of recent reform proposals by policy organizations, judges and legislators, see FAIR TRIALS, COMMUNIQUE—A FAIR DEAL: NEGOTIATING JUSTICE (2015), <https://www.fairtrials.org/wp-content/uploads/Final-Washington-Plea-Bargain-roundtable-communique.pdf>; Ted Cruz, *Reduce Federal Crimes and Give Judges Flexibility*, BRENNAN CTR. FOR JUST. (Apr. 27, 2015), <https://www.brennancenter.org/analysis/reduce-federal-crimes-and-give-judges-flexibility>; Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), <http://www.nybooks.com/articles/archives/2014/nov/20/why-innocent-people-plead-guilty/>; *American Prosecutors Have Too Much Power: Hand Some of It to Judges*, ECONOMIST (Oct. 4, 2014), <http://www.economist.com/news/leaders/21621784-american-prosecutors-have-too-much-power-hand-some-it-judges-plea-change>.

discounts (e.g., no more than one-third of the anticipated post-trial sentence), setting a limit on the “trial penalty” that courts might impose, or giving courts the power to review whether plea discounts are proportionate to the expected post-trial sentence.⁸⁷ Such limits exist—and appear to work fairly successfully—in foreign jurisdictions that have adopted forms of plea bargaining.⁸⁸ But they are typically embedded in legal regimes that give judges broader sentencing discretion and greater authority to amend charges.⁸⁹ By contrast, U.S. jurisdictions that have to impose limits on plea discounts have been less successful because prosecutors have been able to circumvent such limits through their charging decisions.⁹⁰ To ensure that plea-discount limits are effective, therefore, legislators must adopt

87. Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 CARDOZO L. REV. 2295, 2313-17 (2006); McCoy, *supra* note 43, at 103; *see also* Covey, *supra* note 18, at 622 (proposing limits on the trial penalty rather than on the plea proposed by the prosecutor).

88. *See* SENTENCING GUIDELINES COUNCIL, REDUCTION IN SENTENCE FOR A GUILTY PLEA: DEFINITIVE GUIDELINE (rev. 2007), https://www.sentencingcouncil.org.uk/wp-content/uploads/Reduction_in_Sentence_for_a_Guilty_Plea_-Revised_20071.pdf (setting a recommended sentence reduction of one-third when a guilty plea is entered at the earliest reasonable opportunity and less if entered later); Julian V. Roberts & Ben Bradford, *Sentence Reductions for a Guilty Plea in England and Wales: Exploring New Empirical Trends*, 12 J. EMPIRICAL LEGAL STUD. 187, 196 (2015) (finding that “almost all cases where a plea was entered attracted reductions of one-third or less”); Turner, *supra* note 29, at 235 (discussing how German courts are required to ensure that post-plea as well as post-trial sentences remain proportionate to the offense committed and how plea discounts tend not to exceed one-third of the anticipated post-trial sentence); C.P.P. art. 444 (Italy), *cited in* William T. Pizzi & Mariangela Montagna, *The Battle to Establish an Adversarial Trial System in Italy*, 25 MICH. J. INT’L L. 429, 466 (2004) (setting the plea discount to one-third of the maximum sentence to be imposed post-trial in Italian criminal cases).

89. *See, e.g.*, BROWN, *supra* note 5, at 108 (observing that English constraints on prosecutorial discretion “are less rigorous, but still somewhat greater than in the United States”); Giulio Illuminati, *The Accusatorial Process from the Italian Point of View*, 35 N.C. J. INT’L L. & COM. REG. 297, 318 (2010) (arguing that although Italy has introduced a form of plea bargaining, “the principle of compulsory prosecution prevents a real out-of-court settlement between the defendant and the prosecution. Compulsory prosecution requires, in all cases, an evaluation on the merits by a judge and a monitoring on the content of the agreement, in accordance with the legality principle.”); Turner, *supra* note 29, at 219-20, 225-32 (describing the extensive involvement in plea negotiations by German judges for the purpose of controlling prosecutorial discretion and ensuring a proportionate sentence and an accurate outcome).

90. *See, e.g.*, Josh Bowers, *The Unusual Man in the Usual Place*, 157 U. PA. L. REV. PENNUMBRA 260, 274 (2009) (noting that although a New York statute, N.Y. CRIM. PROC. LAW § 220.10, imposed caps on the size of post-indictment charge bargains, the parties would evade the limits by entering into pre-indictment plea agreements); Markus Dirk Dubber, *American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure*, 49 STAN. L. REV. 547, 601 (1997) (“As the experience with the federal sentencing guidelines makes clear, merely introducing a moderate and standard plea discount, without simultaneously controlling the prosecutorial charging decision, does little to constrain prosecutorial bargaining power or to prevent rampant charge and fact bargaining.”).

them alongside more comprehensive reform of the criminal justice system, which would include restoring judicial discretion over sentencing and limiting prosecutorial discretion in charging decisions.⁹¹

Some have also argued that to reduce coerciveness in plea bargaining, courts and legislators should reject the Supreme Court's hands-off approach to prosecutorial threats to overcharge defendants who refuse a plea offer. Instead, rules could require prosecutors to provide justification for adding charges later in the process and perhaps require new evidence for such additions.⁹² In a number of states, courts acting "in the interests of justice" may be able to dismiss charges that were added by prosecutors solely to induce a plea bargain.⁹³ As an alternative, some scholars have called on prosecutors' offices to develop protocols that require line prosecutors to "refrain from pressure tactics like exploding offers and charging threats."⁹⁴

B. IMPROVING ACCURACY

Other reform proposals have focused on enhancing the accuracy of plea bargains. One critical step toward ensuring well-informed plea bargains would be a requirement of broad pre-plea discovery.⁹⁵ A number of states have already adopted liberal discovery rules, and more are likely to follow suit in the near future.⁹⁶ If enacted with due care to protect witness safety, discovery reform would come at little cost, while making an important contribution to the accuracy of plea bargains.⁹⁷

91. See, e.g., John F. Pfaff, "Prosecutorial Guidelines," in the present Volume; Luna, *supra* note 45.

92. BROWN, *supra* note 5, at 102 (discussing pre-*Bordenkircher* cases that constrained prosecutorial charging threats).

93. E.g., CAL. PENAL CODE § 1385(a); Valena E. Beety, *Judicial Dismissal in the Interest of Justice*, 80 MO. L. REV. 629, 647 (2015) (discussing state statutes that provide for judicial dismissal of charges in the interest of justice).

94. O'Hear, *supra* note 76, at 431; see also *United States v. Kupa*, 976 F. Supp. 2d 417, 422 (E.D.N.Y. 2013) ("The Attorney General needs to expressly prohibit the use of prior felony information to coerce defendants into pleading guilty or to punish those who refuse to do so.").

95. See, e.g., Jenia I. Turner & Allison D. Redlich, *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, 73 WASH. & LEE L. REV. 285 (2016) (discussing scholarship advocating for broader pre-plea discovery); Brown, *supra* note 66.

96. For a list of key features of state and federal discovery rules, see Turner & Redlich, *supra* note 95, at 400.

97. *Id.* at 352-72 (reporting the views of North Carolina prosecutors and defense attorneys on the advantages and disadvantages of open-file discovery in their state).

At the same time, for broad discovery to provide its intended benefits, it must be accompanied by provisions for well-funded defense.⁹⁸ Defense attorneys must have the time and resources to review, analyze, and further investigate facts disclosed by the prosecution.

Judicial oversight of plea bargains can also increase the truthfulness of the process. This could be accomplished by involving judges in the negotiations⁹⁹ or by demanding a more thorough inquiry into the factual basis of the guilty plea.¹⁰⁰

Most states already require judges to ensure that guilty pleas are factually based.¹⁰¹ At a minimum, reform aimed at ensuring accurate guilty pleas must include this basic rule;¹⁰² preferably, the rule would also delineate how searching the inquiry should be. In the United States, perhaps the most robust factual-basis inquiry occurs in the military justice system; it can serve as a model for states wishing to provide greater judicial oversight over the guilty-plea process.¹⁰³ Military judges must engage the accused in a “dialogue in which the military judge poses questions about the offense and the accused provides answers that describe his personal understanding of the criminality of his or her conduct.”¹⁰⁴ The dialogue is supposed to entail a genuine effort to elicit the

98. See, e.g., Ben Grunwald, *The Fragile Promise of Open File Discovery*, 49 CONN. L. REV. *1, *5 (forthcoming); Primus, *supra* note 62.

99. Alschuler, *supra* note 14, at 1060; Turner, *supra* note 29; Rakoff, *supra* note 86; *American Prosecutors Have Too Much Power*, *supra* note 86.

100. E.g., BROWN, *supra* note 5, at 110; Susan R. Klein, *Monitoring the Plea Process*, 51 DUQ. L. REV. 559 (2013).

101. LAFAVE ET AL., *supra* note 24, § 21.4 nn.205-06.

102. SUPREME COURT OF OHIO, PROPOSED AMENDMENTS TO THE RULES OF PRACTICE AND PROCEDURE IN OHIO COURTS (2016), <http://www.supremecourtsohio.gov/ruleamendments/documents/Public%20Comment--2016%20Rules%20of%20Practice%20and%20Procedure%20proposed%20amendments.pdf> (proposing the adoption of a factual basis requirement for guilty pleas in Ohio).

103. Continental European systems also typically require the court, as part of its duty to investigate the truth, to conduct a searching inquiry into the facts underlying a plea agreement or guilty plea. E.g., Stephen C. Thaman, *A Typology of Consensual Criminal Procedures: An Historical and Comparative Perspective on the Theory and Practice of Avoiding the Full Criminal Trial*, in WORLD PLEA BARGAINING 297, 368 (Stephen C. Thaman ed., 2010).

104. *United States v. Hartman*, 69 M.J. 467, 469 (C.A.A.F. 2011).

true facts, and judges are not supposed to ask leading questions that produce simple “yes” and “no” responses.¹⁰⁵ Judges may also reject the guilty plea if the evidence presented at the hearing is inconsistent.¹⁰⁶

Another way to enhance the accuracy of plea bargains would be to allow judges to participate in the negotiations. Judicial participation provides a neutral assessment of the facts at a point when such assessment can still make a difference; it minimizes the risks of coercion by prosecutors; and it provides the parties with early certainty about the sentencing outcome of a plea-bargained case. Such involvement also entails some risks—undermining the perceived neutrality of the judge or pressuring the parties to settle in order to expedite dispositions.¹⁰⁷ But states can adopt procedural safeguards that address these problems—for example, by requiring, as Connecticut and Maryland do, that a different judge preside over a trial should the plea negotiations falter.¹⁰⁸ Interviews with practitioners in states that permit judicial participation in plea negotiations suggest that, on the whole, judicial involvement tends to produce more-informed and fairer plea bargains.¹⁰⁹ Experimental studies and public surveys further suggest that involving judges in the process is likely to enhance public perceptions of the legitimacy of plea bargaining.¹¹⁰

105. *United States v. Negron*, 60 M.J. 136, 143 (C.A.A.F. 2004), *aff'd*, 64 M.J. 439 (C.A.A.F. Feb. 21, 2007) (“We have repeatedly advised against and cautioned judges regarding the use of conclusions and leading questions that merely extract from an accused ‘yes’ and ‘no’ responses during the providency inquiry.”).

106. *E.g.*, *United States v. Pinerio*, 60 M.J. 31, 34 (C.A.A.F. 2004); MANUAL FOR COURTS-MARTIAL, UNITED STATES, app. 8 (2012) (“The military judge should be alert to discrepancies in the accused’s description or between the accused’s description and any stipulation. If the accused’s discussion or other information discloses a possible defense, the military judge must inquire into the matter, and may not accept the plea if a possible defense exists. The military judge should explain to the accused the elements of a defense when the accused’s description raises the possibility of one.”).

107. Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325, 359–64 (2016) (noting that concern about managing cases more efficiently is a key factor motivating judicial participation in plea negotiations); Turner, *supra* note 29, at 202–04 (discussing concerns about judicial participation in plea negotiations).

108. MD. R. 4–243(c)(5) (“If the defendant withdraws the plea and pleads not guilty, then upon the objection of the defendant or the State made at that time, the judge to whom the agreement was presented may not preside at a subsequent court trial of the defendant on any charges involved in the rejected plea agreement.”); *State v. D’Antonio*, 830 A.2d 1187, 1194 (Conn. App. Ct. 2003).

109. King & Wright, *supra* note 107, at 364–81; Turner, *supra* note 29, at 252–56.

110. *See, e.g.*, Herzog, *supra* note 16, at 593, 606 (discussing surveys of Canadian citizens and experimental study involving Israeli citizens).

Finally, prosecutors' offices can take measures to improve the accuracy of plea bargaining. Specifically, chief prosecutors can adopt internal guidelines that prohibit plea bargaining in so-called "half-baked cases."¹¹¹ Instead of bargaining away cases with weak evidence, prosecutors could be encouraged to either screen out such cases or bring them to trial. It is precisely in cases with weak evidence that defendants are most likely to be innocent and yet prosecutors are most likely to grant enormous plea discounts to induce a plea. To reduce the risk of wrongful convictions, prosecutors could refrain from bargaining in such cases.

C. ENHANCING TRANSPARENCY AND FAIRNESS

Other proposed reforms of plea bargaining focus on increasing transparency and procedural fairness. One such proposal would require that plea agreements be written and placed on the record. The written agreements would contain a clear statement of the key expected sentencing and collateral consequences. A few jurisdictions have already adopted such rules.¹¹² They aim to protect defendants from uninformed guilty pleas and from basing the decision to plead guilty "upon certain promises made by the prosecutor where the judge has in fact not accepted the state's recommendation."¹¹³ While seemingly adding an onerous layer of documentation, such requirements can also "help prevent the possibility of disputes concerning the specific terms of a plea bargain" and prevent spurious claims of ineffective assistance of counsel.¹¹⁴ Furthermore, they provide a measure of transparency that protects the interests of victims and the public in understanding the terms of the bargain.

111. See, e.g., RICHARD LIPPKE, *ETHICS OF PLEA BARGAINING* ch. 8 (2011) (arguing that "officials committed to principled prosecution would be reluctant to engage in half-loaf plea bargaining," i.e., plea bargaining to obtain conviction in cases with weak evidence); Welsh, *supra* note 6, at 442-43 (discussing such policies in the Philadelphia D.A.'s Office, but noting that actual practice differed somewhat from office policy); Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 *STAN. L. REV.* 29, 117 (2002) (holding up as an example the New Orleans D.A.'s Office, which relied on internal prosecutorial guidelines to get prosecutors to screen out, rather than bargain away weak cases).

112. See, e.g., *IND. CODE ANN.* § 35-35-3-3 (providing that plea agreements in felony cases must be in writing to be accepted by the court); *MD. R.* 4-243(d); *N.J. CT. R.* 3:9-1(b) ("Any plea offer to be made by the prosecutor shall be in writing and forwarded to the defendant's attorney").

113. *Davis v. State*, 418 N.E.2d 256, 260 (Ind. App. 1981).

114. *Missouri v. Frye*, 132 S. Ct. 1399, 1408-09 (2012); 16A *IND. PRAC., CRIMINAL PROCEDURE—TRIAL* § 13.3; see also Joel Mallard, Comment, *Putting Plea Bargaining on the Record*, 162 *U. PA. L. REV.* 683, 685 (2014); Stephanie Stern, *Regulating the New Gold Standard of Criminal Justice: Confronting the Lack of Record-Keeping in the American Criminal Justice System*, 52 *HARV. J. LEGIS.* 245, 250-51 (2015). To promote transparency in plea bargaining, the German Constitutional Court has held that trial courts must record the existence, substance, and outcome of any plea negotiations and must not accept negotiated appeals waivers. Thomas Weigend & Jenia I. Turner, *The Constitutionality of Negotiated Criminal Judgments in Germany*, 15 *GERMAN L.J.* 81 (2014).

To strengthen the fairness of plea bargaining, courts and legislatures can also impose limits on permissible waivers. These include limits or outright bans on: waivers of the right to appeal the plea and accompanying sentence; waivers of ineffective assistance of counsel claims; waivers of post-conviction DNA testing; and waivers of discovery rights.¹¹⁵ Such waivers are becoming more widespread in the federal system, but are less common and in some instances expressly prohibited in state systems, as violations of public policy or of professional responsibility rules.¹¹⁶

Finally, commentators have proposed alternatives to current forms of plea bargaining that expedite proceedings, but at a lesser cost to procedural fairness. Some have suggested that bench trials (possibly with simplified rules of procedure) would be a fairer, yet sufficiently expeditious and cost-effective alternative to plea bargaining.¹¹⁷ Others have gone further, proposing that the parties negotiate away certain trial procedures, but still retain the basic form of a trial as a substitute for plea bargaining.¹¹⁸ One commentator has proposed a plea jury, which would examine the validity of a guilty plea to ensure that it is voluntary, knowing, and factually based.¹¹⁹ These alternatives have been criticized by some for not offering the same demanding process that trials do.¹²⁰ But in a system where trials are the rare exception, abbreviated bench trials and jury plea hearings can be defended as superior alternatives to the norm of procedurally deficient plea bargains.

115. *E.g.*, Klein et al., *supra* note 80, at 94, 114; FAIR TRIALS, *supra* note 86.

116. *See, e.g.*, *People v. Stevenson*, 231 N.W.2d 476, 477 (Mich. Ct. App. 1975) (holding that negotiated waivers of the right to appeal are against public policy); Ala. State Bar Office of Gen. Counsel, Op. 02, at 1, 4 (2011), <https://www.alabar.org/assets/uploads/2014/08/2011-02.pdf> (opining that prosecutors and defense attorneys seeking to negotiate waivers of ineffective assistance claims would violate the state's rules of professional responsibility); *see also* Klein, *supra* note 100, at 582-83; Turner & Redlich, *supra* note 95, at 346-52 (finding that waivers of discovery rights are rarely negotiated in Virginia and North Carolina).

117. Alschuler, *supra* note 41, at 1033 (“Since bench trials can be completed in a matter of minutes, they serve substantially the same purpose as guilty pleas.”); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?* 97 HARV. L. REV. 1037, 1037 (1984) (“[B]ench trials can be ... genuine adversary proceedings in which defendants retain many of the constitutional protections that plea bargaining sacrifices.”).

118. Gregory Gilchrist, *Trial Bargaining*, 101 IOWA L. REV. 609, 621 (2016) (“Trials could be streamlined through various waivers, while maintaining the legitimizing effect of jury verdicts.”).

119. Laura I. Appelman, *The Plea Jury*, 85 INDIANA L. J. 731, 733 (2010) (arguing that a plea jury would return the community to its traditional role in deciding guilt and punishment in criminal cases, enhance the procedural rights of defendants, strengthen the inquiry into the factual basis of the plea, add transparency to the process, and reduce prosecutorial power in plea bargaining).

120. *E.g.*, Scott & Stuntz, *supra* note 40, at 1950.

RECOMMENDATIONS

Most of the above proposals address distinct problematic aspects of plea bargaining. They ought to be considered for adoption not in isolation, but as part of a comprehensive package that aims to ensure that plea bargaining produces just and accurate outcomes.

1. **Require written plea agreements.** Perhaps the easiest plea-bargaining reform for legislators to undertake is requiring that plea agreements be placed in writing and entered into the record. As noted earlier, several jurisdictions have already adopted such requirements. They help ensure that defendants receive notice of the terms of the agreement, allow for a more informed judicial review of the plea, and make the process more transparent to the public.

The California Judicial Council has created a plea form that lists a number of direct and collateral consequences that might follow a guilty plea and invites the parties to identify which of these consequences apply to their case. It also outlines rights that the defendant is waiving by pleading guilty and provides space for the parties to list other terms of the agreement. This form can serve as a blueprint for other jurisdictions.¹²¹

With respect to placing plea agreements on the record, the Maryland rule offers a good model: “All proceedings pursuant to this Rule, including the defendant’s pleading, advice by the court, and inquiry into the voluntariness of the plea or a plea agreement shall be on the record. If the parties stipulate to the court that disclosure of the plea agreement or any of its terms would cause a substantial risk to any person of physical harm, intimidation, bribery, economic reprisal, or unnecessary annoyance or embarrassment, the court may order that the record be sealed subject to terms it deems appropriate.”¹²² In cases where cooperating defendants might frequently be subject to retaliation (e.g., organized-crime cases), the recording requirement may be modified or

121. See California Courts, *Plea Form, With Explanations and Waiver of Rights—Felony*, <http://www.courts.ca.gov/documents/cr101.pdf>. For a discussion of collateral consequences, see Gabriel J. Chin, “Collateral Consequences of Criminal Conviction,” in Volume 4 of the present Report.

122. Md. R. 4-243(d); see also *State v. Poole*, 583 A.2d 265 (Md. 1991) (holding that while the rule does not require that bench conferences relating to plea agreement be recorded, judges should make a record of pertinent discussion and decisions reached or at least summarize essential parts of the agreement).

even eliminated. The federal system is currently studying options for balancing these interests in cases where the safety of cooperating witnesses might be compromised.¹²³

2. **Prohibit waivers of critical rights.** Courts or legislatures should prohibit the parties from negotiating waivers of several key rights that help protect the fairness and accuracy of plea bargains—the right to appeal the validity of the guilty plea and the accompanying sentence, the right to discovery, the right to subsequent DNA testing, and the right to effective assistance. Some jurisdictions already restrict or prohibit such waivers, but there is a troubling increase in the waivers negotiated in other systems, especially the federal system. These waivers undermine critical protections against uninformed and unfair plea bargains. To restore a measure of due process in plea bargaining, it is critical to prohibit their use by statute, case law or ethical rules.¹²⁴ At the very least, prosecutor’s offices ought to restrict the negotiation of such waivers except in special circumstances requiring supervisory approval.
3. **Provide broad pre-plea discovery and ensure that defense attorneys have the time and resources to review it.** To ensure that innocent defendants do not plead guilty and to improve the fairness of plea bargains, legislatures should also adopt broad pre-plea discovery.¹²⁵ Specifically, discovery rules should be amended to require prosecutors to disclose to the defense, before a guilty plea, at a minimum, the following types of evidence: (1) impeachment and exculpatory evidence, without regard to its materiality; (2) witness names and statements, redacted as

123. ADVISORY COMM. ON CRIMINAL RULES, COOPERATOR SUBCOMMITTEE REPORT 245, 250-51, 310-12 (2016), http://www.uscourts.gov/sites/default/files/2016-09-criminal-agenda_book_0.pdf (endorsing federal court rules that require, among else, that any discussion of presence or absence of cooperation be included in a sealed supplement to plea agreements). *See generally* Richman, “Informants and Cooperators,” *supra* note 7.

124. *See, e.g.,* *People v. Ventura*, 531 N.Y.S.2d 526, 531 (App. Div. 1988) (holding that “the public policy of this State requires that before the People can condition a plea to the defendant’s waiver of his right to appellate review, it must advance some legitimate State interest”); Klein et al., *supra* note 80, at 95-106 (discussing state ethical rules that have been interpreted to bar negotiated waivers of ineffective assistance of counsel claims); MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 705(c)(1)(B) (2012) (“A term or condition in a pretrial agreement shall not be enforced if it deprives the accused of ... the complete and effective exercise of post-trial and appellate rights.”).

125. *See, e.g.,* Cruz, *supra* note 86 (“Congress should pass legislation that requires the government—whether constitutionally required or not—to disclose material exculpatory evidence before the accused enters into any plea agreement. This reform will reduce the risk of false guilty pleas by helping ensure that the accused is better informed before sealing his or her fate.”); *see also* Brown, *supra* note 66.

necessary to protect witnesses from risk of harm; and (3) police reports, again redacted as needed to protect the safety of witnesses. A number of states have already adopted such rules;¹²⁶ some, like North Carolina and Texas, have gone even further and adopted open-file pre-plea discovery.¹²⁷ The evidence so far suggests that broad discovery can be implemented at a reasonable cost and without undue hardship to witnesses. It is the first step toward ensuring that parties are negotiating fair, well-informed, and factually based plea bargains and that innocent defendants are not coerced into pleading guilty.

For open-file discovery to have its intended positive effects, defense counsel must have the time and resources to review and investigate the facts revealed through discovery.¹²⁸ Open-file discovery therefore must be coupled with reforms that ensure adequate funding of criminal defense.¹²⁹ Legislators, courts, and prosecutors' offices should also strictly limit or entirely prohibit "exploding" offers. Such offers prevent defendants and their counsel from adequately evaluating the evidence disclosed and conducting further investigations if needed, before making a decision whether to plead guilty or proceed to trial. Therefore, states may require (as Louisiana has done) that guilty pleas be accepted only after a certain period has passed since arrest¹³⁰ or (as in Texas) that prosecutors make

126. See, e.g., ARIZ. R. CRIM. P. 15.1 (requiring the prosecutor to make available to the defendant all reports regarding relevant information within the prosecutor's control); COLO. R. CRIM. P. 16 (same); N.J. CT. R. 3:13-3 (requiring the prosecutor to put together a discovery packet or allow defendant to inspect, copy, and photograph relevant information); OHIO R. CRIM. P. 16 (allowing a defendant access to relevant case materials subject to few limitations).

127. N.C. GEN. STAT. ANN. § 15A-903 (allowing a defendant to make a motion entitling her to receive "the complete files of all law enforcement agencies, investigatory agencies, and prosecutor's offices involved in the investigation"); TEX. CODE CRIM. PROC. ANN. art. 39.14 (allowing defendants upon request access to documents and items that are "material to any matter involved in the action and that are in the possession, custody, or control of the state or any person under contract with the state").

128. E.g., Cruz, *supra* note 86 ("Mitigating the coercive effect of the plea-bargaining process will require empowering the defense. And one way to do that is to reduce the informational asymmetry between prosecutors and defense counsel. Plea offers are often foisted upon the accused before the defense has had enough time to investigate the facts, and the longer the investigation takes, the less generous the plea off may become.").

129. See Primus, *supra* note 62.

130. LA. CODE CRIM. PROC. ANN. art. 559 (banning felony guilty pleas within 48 hours of arrest).

discovery available to the defense before a court can accept a guilty plea.¹³¹ Prosecutors' offices could also consider adopting internal protocols that discourage "exploding offers."¹³²

4. **Strengthen judicial oversight of plea bargains and guilty pleas.** Judicial participation in plea negotiations allows a neutral party to assess the terms of the plea bargain and the facts of the case at a point in the proceeding when such oversight can make a real difference. A number of states permit such participation, and recent qualitative studies suggest that it is perceived to provide greater certainty, fairness, and much-needed oversight of the plea-bargaining process. The risk of judicial coercion can be minimized through procedures that allow a different judge to preside over trial when plea bargaining falls apart.¹³³ Legislators should therefore expressly permit judicial participation in plea negotiations, but require judicial recusal if a case proceeds to trial after negotiations fail.

At a minimum, legislators should demand that judges conduct a more searching inquiry into the facts underlying the guilty plea and accompanying agreement. Judges should not rely merely on factual stipulations or summaries of the evidence presented by the prosecution, but should question the defendant and review any available materials to ensure that the conviction and the proposed plea agreement reflect the true facts of the case. Military courts—as well as courts in continental European systems that have adopted plea bargaining—engage in more thorough vetting of the facts before accepting guilty pleas, and they can offer helpful guidance for civilian U.S. jurisdictions.¹³⁴

5. **Adopt limits on plea discounts.** Courts and legislatures should also limit the charging and sentencing concessions that prosecutors can offer in exchange for a guilty plea. Enormous discounts heighten the risk of innocent persons pleading guilty and may produce unjust sentencing disparities. Legislatures can address this problem by limiting plea discounts to no more than a third of the expected post-trial sentence; alternatively or in addition, courts can use any sentencing discretion they have to reduce discounts that are more than 30% to 35%.¹³⁵ In many U.S. jurisdictions today, prosecutors can circumvent plea-discount caps through their charging decisions. But the experience of foreign systems

131. TEX. CODE CRIM. PROC. ANN. art. 39.14.

132. O'Hear, *supra* note 76, at 431.

133. See *supra* note 108 and accompanying text.

134. See *supra* notes 104-106.

135. See *supra* note 88.

like England and Germany suggests that such limits can be effective if coupled with broader judicial discretion to scrutinize charges and impose proportionate sentences. For that reason, policymakers should consider this proposal in tandem with ideas for comprehensive reform of the criminal justice system. Excising overlapping criminal statutes—a stated goal of reformers—would constrain prosecutorial discretion to evade plea-discount limits through charge bargains.¹³⁶ Reducing sentencing severity and restoring judicial discretion over sentencing can also help courts ensure that plea discounts remain reasonable. Finally, chief prosecutors themselves can also take the initiative and adopt internal regulations that limit the size of plea discounts line prosecutors can offer.

The proposals above offer a range of practical solutions that can help make plea bargaining fairer, more transparent, and more honest. Given the central place of plea bargaining in our criminal justice system, any serious reform of the process ought to consider them.

136. For discussions of the overcriminalization phenomenon, see Douglas Husak, “Overcriminalization,” in Volume 1 of the present Report; and Stephen F. Smith, “Overfederalization,” in Volume 1 of the present Report.