UNIVERSITY OF MICHIGAN

JOHN M. OLIN CENTER FOR LAW & ECONOMICS

PARTIAL BAN ON PLEA BARGAINS

Forthcoming in Cardozo Law Review, Vol. 27, 2006

OREN GAZAL

PAPER #05-008

SSRN ABSTRACT AVAILABLE AT HTTP://SSRN.COM/ABSTRACT=794549

THIS PAPER CAN BE DOWNLOADED WITHOUT CHARGE AT:

MICHIGAN JOHN M. OLIN WEBSITE
HTTP://WWW.LAW.UMICH.EDU/CENTERSANDPROGRAMS/OLIN/PAPERS.HTM

PARTIAL BAN ON PLEA BARGAINS

Oren Gazal-Ayal[*]

ABSTRACT

The influence of the plea bargaining system on innocent defendants is fiercely debated. Many scholars call for a ban on plea bargaining, arguing that the practice coerces innocent defendants to plead guilty. Proponents of plea bargaining respond that even an innocent defendant is better off when he chooses to plea bargain in order to assure a lenient result, if he concludes that the risk of wrongful trial conviction is too high. They claim that since plea bargaining is only an option, it cannot harm the defendant whether he is guilty or innocent. This paper argues that both supporters and opponents of plea bargaining overlook its most important effect on innocent defendants: its effect on prosecutorial screening.

When plea bargaining is available, prosecutors can extract a guilty plea in nearly every case, including very weak cases, simply by adjusting the plea concession to the defendant's chances of acquittal at trial. When almost every case results in a plea of guilty, regardless of the strength of the evidence, prosecutors have much less interest in screening away weak cases. Since some cases are weak because the defendant is innocent, however, more innocent defendants are charged and as a result more are convicted.

When the screening process is taken into account, there is no reason to believe that innocent defendants gain from plea bargaining. Yet, a total ban on plea bargaining is not the optimal response to the system's deficiencies–and not only because such a ban would be unsustainable in an overloaded criminal justice system. A better

[*] Humphrey Faculty Fellow, Michigan Law School. Assistant Professor, University of Haifa, Faculty of Law. This paper greatly benefited from comments and criticisms by Oren Bar-Gill, Omri Ben-Shahar, Eve Brensike, Sam Gross, David Hyman, Jerold Israel, Yale Kamisar, Andrew Leipold, J.J. Prescott, Daniel Richman, Daria Roithmayr and Yoram Shachar. I also thank the faculty seminar at the University of Illinois, College of Law for their valuable comments. Marisa Bono and Tim Wise provided excellent research assistance. Finally, I thank the Humphrey Fellowship in Law and Economic Policy at Michigan Law School and the Fulbright Foundation for generous financial support. Certain parts of the analysis elaborate on the basic argument developed in a shorter formal paper coauthored with Oren Bar-Gill, forthcoming in the Journal of Law and Economics.

Electronic copy of this paper is available at: http://ssrn.com/abstract=794549

response would be a ***partial*** ban on plea bargaining, meaning a system that only prohibits plea bargains when the concession offered to the defendant in return for his guilty plea is large. With plea concessions restricted in such a way, defendants with relatively high chances of acquittal at trial would refuse to plea bargain. That way, prosecuting a weak case would usually result in a trial while a strong case would be disposed of through plea bargaining. Since prosecution resources do not allow for a high trial rate, prosecutors will be forced to refrain from bringing weak cases in order to direct scarce resources to stronger cases that can be settled. A partial ban therefore encourages prosecutors to refrain from bringing weak cases and reduces the risk of an innocent person being charged.

CONTENTS

Introduction 103
I. Plea Bargaining and the Innocence Problem 108
A. The Plea Bargaining Debate 108
B. The Emphasis Shift—From Bargaining to Screening 113
1. The Screening Mechanism 113
2. The Effect of the Increased Capacity on the Innocence Problem 115
3. Other Effects on Screening Decision 117
II. Partial Ban 119
A. The Screening Effects of a Partial Ban 119
B. Reevaluating the Parties' Incentives 123
1. Reevaluating the Prosecutor's Incentives 123
2. Reevaluating the Defendant's Incentives 126
III. Challenging the Justification to Screen Weak Cases 128
A. The Probability of Guilt Argument 128
B. The Trial as a Truth Revealing Mechanism 130
1. Trials in Weak Cases 130
2. Trials in Strong Cases 133
C. The Inadmissible Evidence Argument 135
D. Existing Tools to Discourage Unestablished Prosecutions 136
E. Parties with Different Estimations of Probability of Guilt 137
IV. The Feasibility of a Partial Ban 140
A. The Feasibility of Judicial Review of Sentence Bargains 141
B. The Standards for Review 143
C. Charge Bargaining and Cooperation 146
Conclusions 155

Electronic copy of this paper is available at: http://ssrn.com/abstract=794549

INTRODUCTION

Very few issues in the American criminal justice system generate such fierce controversy as plea bargaining[1]—and very few allegations against the practice are as severe as the assertion that it leads to the conviction of innocent defendants.[2] Controversy over the "innocence problem"[3] takes a leading role in today's plea bargaining debate.

Opponents of the plea bargaining system argue that the practice is inherently dangerous to innocent defendants. A defendant might plead guilty, not because he is guilty, but because the prosecutor offers some concession in return. Even an innocent defendant may rationally prefer a specified lenient sentence to the risk of a much harsher sentence resulting from a wrongful conviction at trial. Based on this argument, some opponents conclude that plea bargaining should be prohibited.[4]

[1] For a few of the more noticeable exchanges of articles on the subject, see Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289 (1983) [hereinafter Easterbrook, *Market System*]; Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43 (1988) [hereinafter Schulhofer, *Criminal Justice Discretion*]; Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992) [hereinafter Scott & Stuntz, *Plea Bargaining as Contract*]; Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969 (1992); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979 (1992) [hereinafter Schulhofer, *Plea Bargaining as Disaster*]; Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361 (2003) [hereinafter Bibas, *Harmonizing Values*]; Albert W. Alschuler, *Straining at Gnats and Swallowing Camels: The Selective Morality of Professor Bibas*, 88 CORNELL L. REV. 1412 (2003); Stephanos Bibas, *Bringing Moral Values into a Flawed Plea-Bargaining System* 88 CORNELL L. REV. 1425 (2003).

[2] *See* Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 60 (1968) [hereinafter Alschuler, *Prosecutor's Role*] (arguing that "the greatest pressures to plead guilty are brought to bear on defendants who may be innocent"); C. RONALD HUFF & ARYE RATTNER, CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY 73-74 (1996) (arguing that "many innocent defendants are convicted after entering guilty pleas"); John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 15 (1978) (arguing that plea bargaining is an unreliable process because the resulting guilty pleas are coerced). *See also* Schulhofer, *Plea Bargaining as Disaster*, *supra* note 1, at 1981-87.

[3] For a discussion on the innocence problem in plea bargaining, see Schulhofer, *Plea Bargaining as Disaster*, *supra* note 1, at 1981; Scott & Stuntz, *Plea Bargaining as Contract*, *supra* note 1, at 1949. For an overview of the arguments, see F. Andrew Hessick III & Reshma Saujani, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. PUB. L. 189 (2002).

[4] For arguments for a total ban on plea bargaining, see Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 937-48 (1983) [hereinafter Alschuler, *Alternatives to the Plea Bargaining System*] (arguing that our society should bear the cost needed to assure that every felony defendant receives a jury trial); John H. Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204, 225 (1979) (calling to learn from countries that manage not to rely on plea bargaining); Jeff Palmer, Note: *Abolishing Plea Bargaining: An End to the Same Old Song and Dance*, 26 AM. J. CRIM. L. 505 (1999); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037 (1984) [hereinafter Schulhofer, *Is Plea Bargaining Inevitable?*] (arguing that instead of inducing defendants to waive their right to trial, defendants can be encouraged to waive their right to a jury while still having a bench trial); Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 31 (2002) [hereinafter Wright & Miller,

Electronic copy of this paper is available at: http://ssrn.com/abstract=794549

Others, recognizing the impracticality of such a prohibition, suggest milder remedies.[5]

Supporters of the plea bargaining system claim that the above argument ignores the crux of the practice. Plea agreements are not forced on defendants, supporters note–they are only an option. Innocent defendants are likely to reject this option because they expect an acquittal at trial. Of course, sometimes even an innocent defendant faces a risk of conviction. The prosecutor might gather evidence that could lead to his wrongful conviction in a jury trial. In such a case, the innocent defendant might prefer the more lenient outcome that results from a guilty plea. Even in this case, however, plea bargaining is the least aggravating alternative. Prohibiting plea bargaining for the innocent defendant forces him to face the high risk of a jury trial conviction. But since he would have chosen the plea bargain, one could fairly assume that he thinks that the risk of a guilty verdict at trial is too high. Thus, forcing the innocent defendant to go to trial would be against his best interests.[6]

Both the opponents and supporters of plea bargaining miss the essence of the innocence problem. The danger that plea bargaining poses to innocent defendants is not rooted in the practice of plea bargaining itself. Instead, the innocence problem is the result of the practice's effect on the prosecutor's screening decisions.[7]

When plea bargaining is available, the prosecutor can reach a guilty plea in almost every case, even a very weak one. When the case is weak, meaning when the probability that a trial would result in conviction is relatively small, she can assure a conviction by offering

Screening/Bargaining Tradeoff] (arguing that rigorous prosecutorial screening of cases should serve as an alternative to plea bargains).

5 Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2527-28 (2004) [hereinafter Bibas, *Outside the Shadow of Trial*] (arguing that although the plea bargaining system is flawed, it is impractical to abolish it, and thus one should consider milder revisions); Douglas D. Guidorizzi, Comment*, Should We Really "Ban" Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 EMORY L.J. 753, 781 (1998) ("The concerns of plea bargaining critics–the corruption of institutional values, the decreased effectiveness of criminal sanctions, and the increased chance of improper convictions–can be remedied through regulation of the plea bargaining process.").

6 *See* Thomas W. Church, Jr., *In Defense of "Bargain Justice,"* 13 LAW & SOC'Y REV. 509, 516 (1979); Robert E. Scott & William J. Stuntz, *A Reply: Imperfect Bargains, Imperfect Trials, and Innocent Defendants*, 101 YALE L.J. 2011, 2013 (1992) [hereinafter Scott & Stuntz*, Imperfect Bargains*]. Two proponents of the practice have even suggested that we do not need to encourage innocent defendants to reject plea bargain offers but, on the contrary, we need to assure that innocent defendants get better offers–offers that they are less likely to reject. *Id. See also* Scott & Stuntz, *Plea Barganing as Contract*, *supra* note 1, at 1956-57 (suggesting that judges should not be allowed to increase sentences beyond the prosecutors' recommendation because it might make plea bargain offers less attractive to innocent defendants and would encourage them to opt for a risky trial instead of a plea bargain).

7 By screening decision I mean the process by which prosecutors decide which cases should be dismissed unconditionally and which should be pursued in court.

the defendant a substantial discount–a discount big enough to compensate him for foregoing the possibility of being found not guilty. Knowing that gaining convictions in weak cases is not difficult, the prosecutor cares less about the strength of the cases she brings. As a result, she is more likely to prosecute weak cases where defendants are more likely to be innocent.

Given that the innocent defendant is prosecuted, he might realize that he is better off accepting a plea bargain offer. At that stage, the offer cannot harm him. The point is that the defendant would have been much better off if the prosecutor had not been able to offer him a plea bargain in the first place because then she probably would not have charged him at all.

Therefore, solving the innocence problem requires discouraging the prosecution of weak cases. A total ban on plea bargaining, however, would only be partially effective–at best–in achieving this goal. As many scholars have shown, a total ban on plea bargaining is hardly feasible in the overloaded American criminal justice system.[8] But even if it were possible, there are other reasons to look for alternate solutions to the innocence problem. A total ban would force trials in all cases, making all cases, weak and strong, more expensive to prosecute. As a result, prosecutors would be forced to process fewer cases, but not necessarily the stronger ones.

The best way to cope with the innocence problem is to allow plea bargaining only in strong cases and to ban plea bargaining in weak cases. Such a "partial ban" on plea bargains would allow prosecutors to extract guilty pleas when defendants are almost certainly guilty, while forcing them to conduct jury trials when they bring more questionable charges. As a result, the portion of weak cases pursued by prosecutors would decrease substantially.[9]

Like a total ban, a partial ban would force prosecutors to face the

---

[8] *See* Bibas, *Outside the Shadow of Trial*, *supra* note 5, at 2527 (arguing that abolishing plea bargaining is impractical); Guidorizzi, *supra* note 5, at 776 ("Alaska's experience demonstrates the difficulty in maintaining a complete, long-term ban on plea bargaining."). For additional references, see WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, 5 CRIMINAL PROCEDURE § 21.1(g) (2d ed. 1999 & Supp. 2005). This is also the position of the Supreme Court. *See* Santobello v. New York, 404 U.S. 257, 260 (1971) ("If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities."). Still, some scholars insist that plea bargaining can be abolished. *See* Alschuler, *Alternatives to the Plea Bargain System*, *supra* note 4, at 936 (arguing that "the United States could provide three-day jury trials to all felony defendants who reach the trial stage" by adding the necessary resources); Schulhofer, *Is Plea Bargaining Inevitable?*, *supra* note 4, at 1107 (arguing that instead of encouraging guilty pleas, defendants should be encouraged to choose bench trials that save resources while still assuring fair adversarial hearings).

[9] The partial ban idea is formally studied in a shorter paper coauthered with Oren Bar-Gill. *See* Oren Bar-Gill & Oren Gazal-Ayal, *Plea Bargains Only For the Guilty*, 49 J.L. ECON. (forthcoming 2006) *available at* www.law.harvard.edu/programs/olin_center

high risk of losing each weak case they bring to trial. But unlike a total ban, the alternative to prosecuting the weak case is much more attractive. With their overloaded docket, prosecutors can replace one weak case with a few strong cases, since the latter will usually be disposed of by an inexpensive plea bargain as opposed to a costly jury trial. In addition, unlike a total ban, with a partial ban in place prosecutors would know that strong cases will result in a guilty plea, making convictions almost certain. Because prosecutors dislike losing at trial, this is a supplementary incentive to prefer strong cases to weak ones.

How would this partial ban work? It is, admittedly, difficult for courts to directly evaluate the strength of a case. One might argue that not knowing which cases are weak, courts could not appropriately implement such a partial ban. The purpose of this Article is to show that a partial ban can be implemented without requiring courts to directly review the strength of the cases. Courts only have to reject plea bargains that result in substantial concessions.

Usually, prosecutors cannot obtain guilty pleas in weak cases unless they offer substantial concessions. When a defendant knows he has a good chance for acquittal at trial, he will only plead guilty in return for considerable leniency. Therefore, the disparity between the expected sentence after a trial conviction and the bargained-for sentence signals the strength of the case. When the plea bargain leads to an exceptionally lenient sentence, the guilty plea should be rejected.

With such a rule in place, prosecutors will know they can only obtain guilty pleas in strong cases. This will encourage them to screen away weak cases where defendants are more likely to be innocent. Therefore, a partial ban will mitigate the innocence problem while allowing a fast disposition of the majority of cases through plea bargaining.

Surprisingly, the extensive literature on plea bargaining overlooks the screening effect of the partial ban. A number of scholars notice that weak cases often result in substantial plea bargain concessions.[10] Some have even suggested restricting guilty plea concessions to a limited and fixed sentence discount, in order to encourage innocent defendants to opt for a trial.[11] These suggestions have some similarities to this

10 *See infra* notes 25-32 and accompanying text.

11 *See* Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining*, Part 1, 76 COLUM. L. REV. 1059, 1065, 1127 (1976) [hereinafter Alschuler, *Trial Judge's Role*] (supporting a fixed discount system for guilty pleas in order to ensure that weak cases would result in a trial); Guidorizzi, *supra* note 5, at 782 (suggesting that the plea bargaining process be replaced by a system that relies on fixed written sentencing discounts); Schulhofer, *Plea Bargaining as Disaster*, *supra* note 1, at 2004-05; James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1560-61 (1981) (suggesting "a relatively modest, prescribed sentencing concession of ten or twenty percent of the sentence received for a guilty plea" to encourage

Article's proposal for a partial ban. Yet, they usually overlook the most important feature of the limitation on sentence concessions–its effect on prosecutorial screening decisions.

The advocates of a fixed sentence discount propose the limitation in order to assure that weak cases result in a jury trial. This Article's argument is different. I believe that forcing innocent defendants to face a jury trial cannot protect them. Nevertheless, limiting plea bargains is justified in order to reduce the risk that innocent defendants will face prosecution in the first place.[12]

The remainder of the Article is organized as follows: Part I presents the current state of the plea bargaining debate, focusing on the controversy over the effects of plea bargaining on the risk of wrongful convictions. Later in this Part, the focus is redirected from the bargaining process to prosecutors' choice of cases. Part II compares the effects of three alternative systems: the existing plea bargaining system, a system with a total ban on plea bargaining and the partial ban system. This Part demonstrates a partial ban's superiority to the two alternative systems in discouraging the prosecution of weak cases and in protecting innocent defendants. Part III reviews the justifications for encouraging prosecutors to screen away weak cases. It examines whether it is socially desirable to discourage plea bargains in weak cases, especially since the difficulties in proving some of these cases result from the existing rules of procedure and evidence and not because the defendants' guilt is in doubt. This part also analyzes the effects of potential differences in the parties' evaluation of the evidence on the partial ban. Finally, Part IV discusses the implementation of the partial ban, with reference to different types of plea bargaining including sentence bargaining, charge bargaining, judicial plea bargaining and cooperation agreements. This Part also sets the criterion for the level of concessions that should be allowed in plea bargaining.

defendants with a good defense to exercise their right to trial); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 111 (2005) (arguing for "practices that offer only modest plea discounts to defendants" in order to increase the confidence in criminal convictions).

[12] Because my goal is different than the goals of the fixed discount advocates, there are also differences in the content of my proposal. For example, supporters of the fixed sentence discount rarely explain why they chose a specific percentage of sentence discount. What I am suggesting here is to tailor the allowed sentence reduction in order to discourage the prosecution of cases in which reasonable doubt exists. *See infra* notes 141-145 and accompanying text. Furthermore, the partial ban does not require a fixed sentence discount. The sentence discount can vary from case to case as long as the sentence concession is not bigger than allowed.

I. PLEA BARGAINING AND THE INNOCENCE PROBLEM

Much of the plea bargaining controversy revolves around the innocence problem. This Part will review the current stage of the debate, which focuses on the dilemma of the innocent defendant after being charged. Then, it will address the effects of plea bargaining on prosecutors' screening decisions.

A. *The Plea Bargaining Debate*

Plea bargaining is rationalized just like any other legal settlement.[13] Whether guilty or innocent, a defendant knows he might be convicted at trial. Taking into account the post-trial sentence and the probability of conviction, he determines his "highest acceptable sentence." A defendant will only be willing to plead guilty in return for a sentence lower than or equal to his highest acceptable sentence.[14] His consent assures that accepting a plea bargain is preferable to him than going to trial.

Relying on the consensual nature of the practice, the Supreme Court and various scholars have praised plea bargaining as a process that benefits all participants in the criminal justice system as well as the public.[15] Defendants can opt for a lower sentence than the one they risk at trial, prosecutors assure convictions and are able to prosecute more defendants, and the public benefits from an effective criminal justice system at a reasonable cost.

To be sure, defendants might make mistakes while plea

---

[13] *See* Scott & Stuntz, *Plea Bargaining as Contract*, *supra* note 1, at 1913 (proposing to regard plea bargaining as an exchange for entitlement to chances in trial); Easterbrook, *Market System*, *supra* note 1, at 309 ("If defendants and prosecutors (representing society) both gain, the process is desirable.").

[14] *See* DEBRA S. EMMELMAN, JUSTICE FOR THE POOR–A STUDY OF CRIMINAL DEFENSE WORK 41 (2003) (describing how defense lawyers value a case in deciding whether to accept a plea bargain based on the likely outcome at trial).

[15] *See id*. *See also* Church, *supra* note 6, at 513-519; Santobello v. New York, 404 U.S. 257, 261 (1971).

> Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pretrial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.

Id.

bargaining.[16] They might accept offers they are better off rejecting or vice versa. This risk is especially high when they do not receive adequate representation,[17] and there are good reasons to believe that many defendants receive intolerably poor representation.[18]

One should not overlook, however, that mistakes and bad lawyering can also damage defendants at trial. While plea bargaining is a simple "give-and-take" process, a trial is much more complicated.[19] Forcing a trial cannot solve the problems of a defendant represented by an incompetent lawyer.[20] Similarly, lazy or overburdened defense attorneys who can misrepresent a defendant in plea bargaining would probably also cause similar damage by not investigating the case or not preparing properly for trial.[21] In fact, studies have shown that bad lawyering is one of the more significant reasons for wrongful convictions in jury trials.[22] Thus, it is very likely that abolishing plea bargaining would worsen the consequences of substandard

16 *See* Bibas, *Outside the Shadow of Trial*, *supra* note 5, at 2498-519 (describing different psychological biases that are likely to influence defendants' perception of their options); Geoffrey R. McKee, *Competency to Stand Trial in Preadjudicatory Juveniles and Adults*, 26 J. AM. ACAD. PSYCHIATRY & L. 89, 96-7 (1998) (noting that teenage defendants may lack the capacity to understand plea bargaining).

17 For the most comprehensive presentation of the effects of bad lawyering in plea bargaining, see Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1212 (1975). *See also* Schulhofer, *Plea Bargaining as Disaster*, *supra* note 1, at 1988-91 (describing the defense attorneys' personal interests in plea bargaining); Bibas, *Outside the Shadow of Trial*, *supra* note 5, at 2476-78 (describing why defenders might misrepresent defendants in plea bargaining).

18 *See* Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 221 ("Year after year, in study after study, observers find remarkably poor defense lawyering that remains unchanged by [the constitutional doctrine of effective assistance of counsel], and they point to lack of funding as the major obstacle to quality defense lawyering."); Richard Klein, *The Emperor* Gideon *Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625 (1986).

19 *See* Scott & Stuntz, *Plea Barganing as Contract*, *supra* note 1, at 1933-34 ("[L]awyers' skill surely matters more in a trial than in a plea bargaining session.").

20 *See id*. *See also* Easterbrook, *Market System*, *supra* note 1, at 309 ("Conflicts of interest (agency costs) are as pressing throughout the criminal process as at the time of plea.").

21 *See* Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2123 (1998) ("The poor and ill-represented may also fare badly at trial, where the lack of preparation or empathy of their lawyers, the prejudices of jurors, and the great resources of the state may equally secure an unjust conviction.").

22 *See* JIM DWYER, PETER NEUFELD & BARRY SCHECK, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 183-97 (2000). The authors reviewed cases of bad defense lawyering at trial and stated that "[s]tudies by the Innocence Project found that 27 percent of the wrongfully convicted had subpar or outright incompetent legal help." *Id.* at 187. *See also* SCOTT CHRISTIANSON, INNOCENT: INSIDE WRONGFUL CONVICTION CASES 94 (2004) ("[I]neffective assistance of counsel greatly contributes to many wrongful convictions, especially because negligent representation by defense counsel allows many other kinds of errors, such as mistaken identification and eyewitness perjury, to occur unchallenged.").

representation.[23]

However, this does not mean that policymakers should not try to minimize the risks of low quality representation and mistakes. A variety of measures to mitigate the problem are discussed in academic literature,[24] and no doubt many of them should be seriously considered. But there is no reason to assume that an innocent defendant will be worse off if, in addition to trial, he is offered a plea bargain.

Yet, it is argued that even if defendants make rational decisions, the plea bargaining system increases the risk of wrongful convictions. With plea bargaining, prosecutors can extract a guilty plea in almost any case, regardless of the real culpability of the defendant. They merely have to offer each defendant a settlement he prefers to trial.[25] Only very rarely is the highest acceptable sentence of a defendant zero; in fact many innocent defendants are willing to accept minor punishment in return for avoiding the risk of a much harsher trial result.[26] Therefore,

---

[23] *See* Bibas, *Outside the Shadow of Trial*, *supra* note 5, at 2527 n.295 (admitting that the abolition of plea bargaining could worsen the problems created by defendants' biases and poor representation); *see also* Scott & Stuntz, *Plea Bargaining as Contract*, *supra* note 1, at 1933. Professor Schulhofer argues that if plea bargaining is abolished, more money will be diverted to public defenders and thus reduce the incentives to act negligently. *See* Schulhofer, *Plea Bargaining as Disaster*, *supra* note 1, at 2001-02. However, this argument is unconvincing. More money could certainly improve the quality of the defenders' services. However, if a ban on bargaining accompanies the increase in resources, the new money will first have to be devoted to the new task of trying many more cases before any of it will allow defenders to increase the needed efforts to prepare cases. Schulhofer seems to contend that a ban on bargaining will create the necessary political pressure to supply defendants with the appropriate means to defend themselves. *Id.* at 2002. However, when such political motives are considered, the ban is impractical anyway. No legislator will ban plea bargaining only in order to pressure himself to devote more resources to the public defender's office.

[24] Scott & Stuntz, *Plea Bargaining as Contract*, *supra* note 1, at 1959-60 (arguing that defendants would be better protected from mistakes if judges used their power to impose lower sentences than the parties bargained for); Bibas, *Outside the Shadow of Trial*, *supra* note 5, at 2531-45 (listing several adjustments that could reduce the risk of defendants' mistakes); Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants*, 31 AM. CRIM. L. REV. 73, 122 (1993) (arguing that "present institutions for providing criminal defense ought to be replaced with a voucher system").

[25] Wright, *supra* note 11, at 113 (arguing that the discount offered in return for a guilty plea is often quite large, and thus induces guilty pleas in weak cases); Welsh S. White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439, 450-51 (1971) ("When a New York or Philadelphia assistant prosecutor has a case which he believes is weak, he will frequently offer large concessions to induce a guilty plea.").

[26] *See* Langbein, *supra* note 2, at 12-13. For example, when the prosecutor has a weak case against a defendant charged with rape, she can offer the defendant a guilty plea to simple battery. The defendant is very likely to accept the offer even if he is innocent. Professor Alschuler, in one of the most cited examples of the innocence problem, reported of a defendant in such a case. When his attorney told him that a conviction at trial seems highly improbable, the defendant simply said, "I can't take the chance." Alschuler, *Prosecutor's Role*, *supra* note 2, at 61. For some of the articles revisiting that example, see Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 46; Church, *supra* note 6, at 515; Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652, 685 (1981) [hereinafter Alschuler, *Changing Plea Bargaining Debate*]; Langbein, *supra*

prosecutors can extract guilty pleas even from defendants who are likely to be found not guilty at trial. Some scholars have shown that prosecutors often offer defendants plea bargains that seem to be extremely favorable when defendants' culpability is highly questionable.[27]

A significant number of the recently discovered police misconduct scandals demonstrate that defendants might plead guilty when the trial sentence they face is much higher then the plea bargain sentence, even if they had nothing to do with the alleged offense.[28] In other instances,

note 2, at 13 n.24; Kenneth Kipnis, *Criminal Justice and the Negotiated Plea,* 86 ETHICS 93, 98 (1976). *See also* John G. Douglass, *Fatal Attraction? The Uneasy Courtship of* Brady *and Plea Bargaining*, 50 EMORY L.J. 437, 449 (2001) ("[The prosecutor] will offer greater sentencing concessions in those cases where conviction is less likely, and fewer concessions where she is more confident of conviction."). JOHN BALDWIN & MICHAEL MCCONVILLE, NEGOTIATED JUSTICE: PRESSURES TO PLEAD GUILTY, 59-81 (1977) (citing empirical research showing that many defendants plead guilty while claiming innocence).

[27] Alschuler, *Prosecutor's Role*, *supra* note 2, at 62 (citing an assistant district attorney in Pittsburg who described a practice in which charges in rape cases are reduced to fornication "when it seems likely that the complaining witness consented to the defendant's advances"); Vorenberg, *supra* note 11, at 1534-35 (explaining why prosecutors are likely to offer the greatest incentives for those defendants with the greatest chance of acquittal at trial); White, *supra* note 25, 451 ("According to Martin Erdman, New York prosecutors often reduce their sentence recommendations by at least fifty percent if they believe that there is a fifty percent chance of a hung jury, and by a great deal more if they believe that there is a fifty percent chance of acquittal.").

[28] In the Rampart scandal, officers in the Los Angeles Police Department had routinely lied in arrest reports, leading to the convictions of scores of innocence defendants, many of whom pleaded guilty. *See* Erwin Chemerinsky, *An Independent Analysis of the Los Angeles Police Department's Board of Inquiry Report on the Rampart Scandal*, 34 LOY. L.A. L. REV. 545, 630 (2001) (arguing that the "Rampart [scandal] shows that there is enormous pressure on innocent individuals to plead guilty" and calling for a more serious excursive of the judicial responsibility to examine the factual basis for a guilty plea); Lou Cannon, *One Bad Cop*, N.Y. TIMES, Oct. 1, 2000, § 6 (Magazine), at 32 (describing the Rampart scandal and the case of Rafael Zambrano, an innocent defendant who pleaded guilty to gun possession to avoid a longer sentence). *See also* Samuel R. Gross, Kristen Jacoby, Daniel J. Matheson, Nicholas Montgomery & Sujata Patil, *Exonerations in the United States 1989 Through 2003,* 95 J. CRIM. L. & CRIMINOLOGY 523, 534 (2005) ("In the aftermath of this scandal, at least 100 criminal defendants who had been framed by Rampart CRASH officers–and possibly as many as 150–had their convictions vacated and dismissed by Los Angeles County judges in late 1999 and 2000. The great majority were young Hispanic men who had pled guilty to false felony gun or drug charges."). In the Tulia scandal, 38 people in Tulia, Texas were convicted of drug offenses based on the information of one dishonest deputy. While eight defendants were convicted at trial and were sentenced to long imprisonment terms, the others pleaded guilty. *See* Leonard Post, *Trouble in Tulia Still Resounds; As Trial Looms, Role of Solos Emerges*, NAT'L L.J., Apr. 5, 2004, at 1 (describing attorney Holloway's decision to advise his clients to enter a guilty plea, even though he knew that at least one of them was innocent, in order to reduce their exposure; the defendants pleaded guilty.); Karin Brulliard, *Texas Governor Pardons 35 Convicted in Drug Sting*, WASH. POST, August 23, 2003, at A2 ("The harsh sentences in the first several trials persuaded most of the other defendants to plead guilty."). *See also* Dale Lezon, *Judge Declines to Drop Robertson County, Lawmen from Rights Suit*, HOUS. CHRON., Apr. 14, 2005, at B4 (reporting on 28 defendants who were arrested based on information from an informant who was later found to be tampering with the evidence in this case. Five of the defendants pleaded guilty and received probation and later the cases against all the others were dismissed).

innocent defendants pleaded guilty in order to avoid the risk of capital punishment.[29] While these cases have captured most of the public's attention, they probably do not represent the whole phenomenon.

Less noticeable are cases where the prosecutor's favorable offer is aimed at assuring conviction when specific defenses, like insanity or self defense, might be established in court,[30] or where a favorable plea bargain can lead to a guilty plea even though the defendant has a reasonably good chance of showing that one of the elements of the offense, like lack of consent in a rape case, is absent. In all these cases, an innocent defendant might accept the offer in order to avoid the risk of a much harsher result if he is convicted at trial,[31] and thereby plea bargaining could very well lead to the conviction of factually innocent defendants.[32]

Proponents of the plea bargaining system do not question the fact that sometimes innocent defendants plead guilty. Their common reply is that forbidding plea bargaining would only make defendants' situations worse. Trials are not perfect and defendants can be wrongly

---

[29] *See* Gross et al., *supra* note 28, at 536 (reviewing 340 exonerations since 1989. In twenty cases the conviction resulted from a guilty plea, usually entered to avoid a death sentence or life imprisonment); Hugo A. Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 63 (1987) (reviewing five cases in which innocent defendants pleaded guilty in order to avoid the risk of a death sentence); Daina Borteck, Note, *Pleas for DNA Testing: Why Lawmakers Should Amend State Post-Conviction DNA Testing Statutes to Apply to Prisoners Who Pled Guilty*, 25 CARDOZO L. REV. 1429, 1442-45 (2004) (describing cases of defendants who pleaded guilty to capital offenses they did not commit). *See also* HUFF & RATTNER, *supra* note 2, at 73-74. On the constitutionality of plea bargaining in capital cases, see Joseph L. Hoffmann, Marcy L. Kahn & Steven W. Fisher, *Plea Bargaining in the Shadow of Death*, 69 FORDHAM L. REV. 2313 (2001).

[30] *See* Arnold Enker, *Perspectives on Plea Bargaining*, THE PRESIDENT'S COMM'N ON L. ENFORCEMENT AND ADMIN. OF JUST., TASK FORCE REP.: THE COURTS 108 (1967) (arguing that the intermediate sanction that results from plea bargaining is often fairer than the jury trial result because "the line between responsibility and irresponsibility due to insanity is not as sharp as the alternatives posed to a jury would suggest"). For other views, see John Griffiths, *Ideology in Criminal Procedure; or, A Third "Model" of the Criminal Process*, 79 YALE L.J. 359, 398-99 (1970) (arguing that if the defendant is not responsible, he should not be regarded as responsible through the use of guilty plea); Alschuler, *Prosecutor's Role*, *supra* note 2, at 71 (arguing that instead of plea bargaining, the criminal law can be altered to allow courts to fit the result to the level of the defendant's culpability). *See also infra* Part III A.

[31] *See* White, *supra* note 25, at 451-52. If the defendant in a weak case, innocent or guilty, does not plead guilty, he might still be convicted and face a much harsher sentence. *See supra* note 29; Alschuler, *Prosecutor's Role*, *supra* note 2, at 62 (describing a few such cases, including one in which a defendant who rejected a five-year sentence in a weak murder case was convicted and sentenced to thirty-five years, and another in which a defendant was sentenced to death and executed after rejecting an offer to plead guilty to voluntary manslaughter).

[32] Throughout most of the Article, in discussing innocence, I refer to factual innocence. An innocent defendant is a defendant whose action did not constitute an offense, or constituted a different and less severe offense than the one for which he was charged or convicted. Later, in Part III C, I refer to what is sometimes loosely called "legal innocence," meaning cases where the weakness of the case results from procedural rules and not from real doubts about the nature of the defendant's behavior.

convicted in trials as well.[33] When a defendant takes into account the probability of being falsely convicted and the severity of the post-trial sentence, he may decide he is better off pleading guilty to an offense he did not commit. Plea agreements thus serve as a type of insurance.[34] One should not prevent innocent defendants from buying this type of insurance against a wrongful conviction at trial.[35] In other words, because the defendant can always opt for a trial, the innocent defendant can always choose the lesser evil between pleading guilty and gambling on a jury trial. Eliminating one of these admittedly grave options can only harm him.[36]

B. *The Emphasis Shift—From Bargaining to Screening*

The innocence problem cannot be attributed to the bargaining process itself. Usually the offer to settle can only alleviate the awfulness of the innocent's condition. His real problem is that he was prosecuted in the first place. In many cases, he was charged because of the availability of plea bargaining. The problem with the system is the effect of plea bargaining on the prosecutors' choice of cases. Because of the current, unlimited availability of plea bargaining, the strength of evidence of any given case becomes less important to the prosecution. Suspects in weak cases are more likely to be charged–and therefore more likely to be convicted. With the strength of evidence playing a relatively small role in the result of the case, more innocent defendants are likely to be among those convicted.

1. The Screening Mechanism

To fully understand the effects of plea bargaining on screening decisions one must first focus on the factors affecting the screening policy when plea bargaining is not available. The majority of cases that reach most prosecutors' offices never result in charges;[37] each

---

33 *See generally* BENNETT L. GERSHMAN, TRIAL ERROR AND MISCONDUCT (1997). *See also* DWYER, NEUFELD & SCHECK, *supra* note 22 (surveying dozens of wrongful conviction cases, almost all of which resulted from a jury trial); Bedau & Radelet, *supra* note 29, at 63 (reporting 350 cases of wrongful convictions in potential capital cases, most of which resulted from a jury trial).

34 Gene M. Grossman & Michael L. Katz, *Plea Bargaining and Social Welfare*, 73 AM. ECON. REV. 749, 752 (1983); Scott & Stuntz, *Plea Bargaining as Contract*, *supra* note 1, at 1947.

35 Scott & Stuntz, *Imperfect Bargains*, *supra* note 6, at 2013.

36 *See* Church, *supra* note 6, at 516; Scott & Stuntz, *Plea Bargaining as Contract*, *supra* note 1, at 1960-61; Enker, *supra note* 30, at 113.

37 Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 251 (1980) ("[L]ess than one-fourth of the

prosecutor must choose which cases she desires to pursue. Some cases are dismissed because she believes that they do not merit a criminal trial; these cases would be dismissed regardless of any resource constraints. She may feel that the defendant is innocent or, at least, that his guilt is too questionable to merit putting him at risk for conviction. Alternatively, she can conclude that the violation, though provable, is not severe enough to justify the criminal stigma. Other factors regarding the defendant, victim, offense, public interest, political repercussion of the case, or the prosecutor's personal interest might also lead to the dismissal of particular cases. The cases remaining after this screening process are those that the prosecutor believes she should pursue. But often the complexity of the criminal process and her limited resources allow for prosecution of only a subgroup of these cases.[38]

How does the prosecutor decide among these remaining cases? Analyzing the effects of all possible factors is quite complicated. The prosecutor's policies regarding plea bargains and screening, and the defendants' decisions are all strongly interrelated. To explore this issue, this Article will first use a few simplified assumptions about the ways prosecutors make decisions. Later, in following sections, those assumptions will be relaxed.

The three major factors that are likely to affect prosecutors are the conviction's value, the probability of conviction and the cost of trying the case. The conviction's value is the value the prosecutor attaches to convicting the defendant and is influenced primarily by the severity of the offense.[39] For example, a conviction in a minor embezzlement case is probably much less valuable to the prosecutor than a conviction in a rape or murder case. Value attached to a conviction might also be influenced by such factors as the prosecutor's interest in alleviating the suffering of a crime victim, her personal feelings toward each defendant, or political considerations.[40]

---

complaints received by the ninety-four U.S. Attorneys appear to result in the filing of formal charges."); Vorenberg, *supra* note 11, at 1524 n.10 ("Studies indicate that only a minority of matters received by prosecutors result in charges."); WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, 4 CRIMINAL PROCEDURE § 13.2(a) (2d ed. 1999 & Supp. 2005) (stating that even though the police conducts much of the screening at the state level, "the number of cases which reach the prosecutor but do not result in prosecution can be substantial"). Obviously this extensive screening exists when plea bargaining is allowed; without it, even fewer cases will be prosecuted.

38 *See* JOAN E. JACOBY, THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY 65 (1980) ("Regardless of other considerations–policy, quality, or external constraints–screening is an effective start on the road to caseload reduction.").

39 The term severity refers here to all the factors that make an action more blameworthy, including the defendant's criminal history, the consequences of the offense and other relevant factors.

40 *See* Schulhofer, *Criminal Justice Discretion*, *supra* note 1, at 50; Vorenberg, *supra* note 11, at 1526-27.

I will first assume that the prosecutor's decision is not substantially restricted by grand jury review or preliminary hearings and that her objective is to maximize the number of convictions weighted by their respective values, leaving a more complex analysis of her motives and powers for a later stage.[41] Therefore, the prosecutor will prefer cases that yield a higher expected value per unit of resources, where the expected value is the conviction's value discounted by the probability of conviction.

One can imagine the prosecutor grading each case according to its expected value per resources, listing the cases according to their grades and then taking as many cases as possible from the top of the list.[42] This analysis can explain why prosecutors occasionally bring weak cases, even though they cannot afford to try all of the available strong cases. When the conviction value of a weak case is high enough the prosecutor might prefer it to a stronger one because the potential gain more than offsets the increased risk.

2. The Effect of the Increased Capacity on the Innocence Problem

Introducing plea bargaining influences the prosecutor's choice of cases in various ways. Most importantly, it substantially reduces the resources needed for each case.[43] Plea bargains are not only cheaper

---

[41] See *infra* Part II B for a more complete analysis of the prosecutor's considerations in screening and *infra* Part III D for the discussion of the effects of grand juries and preliminary hearings. It is sometimes assumed that the prosecutor tries to maximize the number of convictions weighted by their respective post-conviction sentences. *See* William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61, 63 (1971); Scott and Stuntz, *Plea Bargaining as Contract*, *supra* note 1, at 1936. The prosecutor would probably be influenced by the severity of the sentence in determining the conviction's value in each case. Yet, I use a more general assumption that recognizes other factors' influences on prosecutorial preference. Several scholars assume that prosecutors want to maximize deterrence or in some other way maximize social welfare. *See* Church, *supra* note 6, at 518-19; Easterbrook, *Market System*, *supra* note 1, at 295-96; Grossman & Katz, *supra* note 34, at 750. This can also be accommodated in the framework discussed in the text by assuming that the prosecutor assigns values to each conviction according to the effect of the conviction on deterrence or another social interest.

[42] The grading formula can be presented as follows: $G_t = [V_t \cdot P] / R_t$, where G_t is the grade of the case at trial, V_t is the value of a trial conviction, P is the probability of conviction and R_t represents the resources needed for a trial. The indicator t refers to trial as opposed to settlement.

[43] In the examples here, I assume that absent plea bargaining all defendants would elect a trial. This is empirically untrue. *See* Michael L. Rubinstein & Teresa J. White, *Alaska's Ban on Plea Bargaining*, 13 LAW & SOC'Y REV. 367, 374 (1979) (showing that Alaska's ban on plea bargaining increased the number of trials, but a substantial minority of defendants still pleaded guilty). Many cases are so strong that the probability of acquittal is approaching zero. In these cases, defendants might prefer to avoid the ordeal of a trial even if they receive no sentence concession for doing so. *Id*. at 371. Yet, that does not change the analysis in any substantial way. We can put aside these very strong cases, deduct the resources needed for them, and refer only to the remaining resources and the remaining cases in the following analysis.

than trials, they are much cheaper.[44] In the absence of plea bargaining, the prosecutor can pursue a certain group of defendants (Group A); with plea bargaining, she can prosecute a much larger group of defendants (Group B). Naturally, as the number of total prosecutions rises, so will the number of prosecuted innocents.[45] However, it is not the *number*, but the *proportion* of innocent defendants that matters. Reducing the number of wrongful prosecutions just by reducing the number of total prosecutions makes no more sense than arbitrarily exonerating a random number of inmates, since some of them are likely to be innocent. The fact that Group B is bigger cannot justify a preference for Group A.[46]

Thus, the important question is whether the proportion of innocent defendants in Group B is higher than in Group A. Contrary to the arguments of some,[47] there is a good reason to answer that question in the affirmative. Group A contains the cases with the highest expected values per resources. When plea bargains increase the prosecutor's capacity, she has to choose additional cases to which she attaches a lower grade. On average, these Group B cases will be more expensive, create lower post-conviction value and, most importantly, will be weaker than the cases in Group A.[48] This does not mean, however, that each case in Group B is weaker than every case in Group A. A prosecutor can sometimes give a weaker case a higher grade than a stronger one, because the conviction in the former is more important to her, or because prosecuting it is less expensive. But since the probability of conviction is one of the factors that influence the choice of cases, the cases in Group B will be, on average, weaker than those in Group A.

Because the cases are on average weaker, the proportion of innocent defendants in Group B is higher than in Group A. If trials have anything to do with revealing guilt, the strength of a case is necessarily correlated with the probability that the defendant is guilty.[49]

---

44 *See* Schulhofer, *Criminal Justice Discretion*, *supra* note 1, at 72 n.79 (estimating that a plea bargain saves the prosecutor between 80 and 90 percent of a proceeding's cost); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 536-37 (2001) [hereinafter Stuntz, *Pathological Politics of Criminal Law*] ("Guilty pleas are not simply cheaper than trials; they are enormously cheaper.").

45 *See* Scott & Stuntz, *Plea Bargaining as Contract*, *supra* note 1, at 1934.

46 The quality of a criminal justice system is a factor of, among other things, the number of correct convictions and the number of wrongful ones. However, the positive social value of a conviction of a guilty person is much smaller than the negative value of a similar conviction of an innocent person. This fact is reflected by the reasonable doubt standard. For a more elaborate analysis of the issue see *infra* Part IV B.

47 *See* Scott & Stuntz, *Plea Bargaining as Contract*, *supra* note 1, at 1934.

48 *See*, *e.g.,* Wright, *supra* note 11, at 115 ("[N]ewly added cases are likely to involve less serious crimes or less persuasive evidence….").

49 Otherwise, a trial is no better than a coin toss. In very strong cases the probability that the defendant is guilty goes much beyond reasonable doubt. For example, when the defendant denies sexual intercourse with the victim, while DNA evidence together with other types of evidence

Therefore, allowing plea bargaining increases the proportion of wrongful prosecutions.

While the argument that plea bargaining should be barred in order to reduce the number of wrongful convictions has some merit, it is a weak one. The prosecutor takes weaker cases when plea bargaining is available because she can process more cases in such a regime. Even without plea bargaining, the prosecutor would have brought the weaker cases if she had received additional resources. Unless one believes that prosecutors should have fewer resources, the mere fact that plea bargaining increases prosecutors' case capacity cannot be considered a disadvantage. It is more likely that society is better off when cases in Group B are not dismissed, even though they are less valuable than cases from Group A.[50] In any event, if society desires to reduce prosecutors' capacity, it can do so by reducing prosecutorial resources instead of prohibiting plea bargaining. That would achieve the same goal while saving total societal resources. Hence, a ban on plea bargaining can hardly be justified on this ground alone.[51]

3. Other Effects on Screening Decision

Plea bargaining does not only affect the cost of handling a case; it also affects the probability of conviction. In fact, if plea bargain offers are good enough, almost all defendants will accept them. This is probably the current situation in America, where guilty pleas account for more than 95% of convictions. Prosecutors can now assure a conviction in both weak and strong cases. This seems to diminish the importance of the strength of the case, thus reducing the relative advantage of strong cases. If this is correct, permitting plea bargaining

proves he was the rapist, the probability that he is innocent is minute. On the other hand, if the strongest evidence against the defendant is an interested informant's testimony or an eyewitness identification, a trial is less likely to result in a conviction (the case is weaker), and if a conviction is acquired, it is more likely to be wrongful. *See* Gross et al., *supra* note 28, at 542 ("The most common cause of wrongful convictions is eyewitness misidentification."); DWYER, NEUFELD & SCHECK, *supra* note 22, at 263 (noting that misidentification was found to be the number one cause of wrongful convictions by a large margin in the Innocence Project). In fact, if the correlation between the probability of conviction at trial and the probability that a defendant is actually guilty is weak, then the situation of the criminal justice system is grim regardless of plea bargaining.

[50] For a different view, see Wright & Miller, *Screening/Bargaining Tradeoff*, *supra* note 4, at 93 (arguing that rigorous prosecutorial screening that would result in fewer prosecutions is superior to allowing plea bargaining because, among other things, it reduces the conviction risk for innocent defendants).

[51] Moreover, there are reasons to believe that courts will look for other ways to dispose of the increasing caseload resulting from the ban and thus apply a cheaper and less accurate proceeding. In such a case, mistakes are likely to increase. *See* Scott & Stuntz, *Plea Bargaining as Contract*, *supra* note 1, at 1932-33.

encourages prosecutors not only to increase the overall number of cases but also to divert resources from strong cases to weaker ones.

Yet, this effect is not as substantial as it might first seem. Though plea bargaining increases the probability of conviction in weak cases, it usually decreases the value of those convictions. The plea bargain sentence in a weak case must be substantially lower than in a similar strong case in order to induce the defendant to accept the offer in the face of a good chance of acquittal at trial. Since prosecutors likely prefer, in most cases, that defendants be sentenced severely,[52] the lower sentence reduces the value of the conviction.

For example, the value of several years of imprisonment for a rape defendant in a strong case is likely to be much higher than the value of a plea bargain for a probation sentence in a similar weak case.[53] In other words, while plea bargaining eliminates the gap between the probability of conviction in weak and strong cases, it creates a new gap in the value of conviction.[54]

The aggregated effect of these two conflicting phenomena is hard to measure and varies from one case to the next. On the one hand, settlements in weak cases require very substantial concessions. As demonstrated in Part IV B., defendants' loss aversion and their high discount rate of future suffering are likely to result in very lenient plea bargaining.[55] This tends to make weak cases relatively less attractive in a plea bargaining system.

On the other hand, in many cases prosecutors believe that the post-trial sentence is too harsh.[56] In these cases, only a portion of the large sentence discount offered to weak case defendants would be considered by prosecutors as a discount. In such a situation, the conviction's value in weak cases is not much lower than in strong ones. If the latter effect is very substantial, there is reason to believe that plea bargaining encourages prosecutors to substitute strong cases with weaker cases, thus aggravating the innocence problem.

All of the above leads to the conclusion that plea bargaining increases the *number* of prosecutions in weak cases and probably also increases the *proportion* of weak cases among cases prosecuted. This is

52 For prosecutors who prefer lighter sentences see *infra* note 173 and accompanying text.

53 *See* Alschuler's example, *supra* note 26.

54 If the grade of a tried case is $G_t = [V_t \cdot P] / R_t$, see *supra* note 42, the grade of this case in settlement is $G_s = [V_s \cdot P] / R_s$. The variable V_s (the value of a plea bargain conviction) might be smaller or bigger than $V_t \cdot P$ (the expected conviction value at trial); but since R_s (the cost of a plea bargain) is much smaller than R_t (the cost of a trial), G_s (the grade of the case if it is settled) is almost always much higher than G_t (the grade of the case if it is tried).

55 *See infra* note 141 and accompanying text.

56 *See* William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004) [hereinafter Stuntz, *Criminal Law's Disappearing Shadow*] (arguing that in many cases prosecutors have the power to threaten defendants with a much harsher sentence than they really want to impose).

not the whole picture. This Article will later demonstrate that since prosecutors dislike losing cases in trial, plea bargaining is even more likely to increase the risk of conviction for innocent defendants. But before that, the next section will turn to an alternative which addresses the innocence problem better then either a total ban or the existing plea bargaining system: a partial ban.

II. PARTIAL BAN

Until now, I had been following the well-worn path of existing plea bargaining literature, examining justifications for allowing or banning plea bargains. Such an approach compared only two alternatives: a system where the prosecutor can freely offer any plea bargain and another in which plea bargaining is completely prohibited. But there is a third alternative, one that bans some bargains but allows others. Such a "partial ban" might restrict sentence concessions to a certain percentage of the post-trial sentence.

A partial ban can be enforced by the courts; they will reject plea bargains if the resulted sentence is lower than allowed. This approach addresses the innocence problem better than the two alternatives that have been extensively considered in the existing literature.

A. *The Screening Effects of a Partial Ban*

This section compares the advantages of the partial ban with the "no ban" and "total ban" approaches. To simplify the analysis, throughout most of this section I will assume that only sentence bargaining is available, leaving the issue of charge bargaining for later. In this simplified system, the prosecutor offers the defendant a sentence and the defendant can accept the offer or reject it and go to trial. If he accepts the offer, the judge will impose the recommended sentence. If a partial ban is imposed, courts will reject the plea bargain whenever the suggested sentence is significantly lower than the post-trial sentence. For convenience, I will call such plea bargains "exceedingly lenient bargains."

Exceedingly lenient bargains are unique because they signal weak cases. A defendant who knows that the probability of acquittal at trial is substantial will only agree to plead guilty in return for an exceedingly lenient bargain.[57] In stronger cases, the prosecutor will not offer exceedingly lenient bargains, knowing that the defendant will settle for

[57] *See supra* note 27 and accompanying text.

much less. Therefore, by comparing the post-trial sentence to the bargained-for sentence the court can discern information about the strength of the case.

It may be argued–in the spirit of the arguments against a total ban–that a partial ban would force potentially innocent defendants to face a trial instead of allowing them to plea bargain.[58] But unlike the total ban, the most substantial effect of the partial ban is not an increase in the rate of trials–it is a change in the prosecutor's choice of cases. With a partial ban in place, the prosecutor would not be able to reach a plea agreement in most weak cases. At the same time, unlike a total ban, almost all strong cases would be settled. As a result, prosecutions of weak cases would cost much more than those of strong cases. The prosecutor would have to dismiss multiple strong cases in order to bring charges in one weak case.[59] This would serve as a substantial incentive against bringing charges in weak cases.[60]

For example, assume that the prosecutor can handle either ten settlements or one jury trial within a specific timeframe. Assume further that the prosecutor must decide how to proceed with a few strong cases of driving under the influence of alcohol (DUI), and, using Alschuler's example,[61] one very weak rape case. The prosecutor can reasonably assume that the rape defendant will plead guilty to a reduced charge that would result in a very lenient sentence, but would refuse a more severe sentence because he knows he is very likely to be acquitted at trial.

If there is no ban on plea bargaining, the prosecutor might very well settle the rape case, knowing she can still settle nine additional DUI cases. In such a system, the cost of the weak rape case is similar to the cost of an alternative strong case for a more minor offense. If a total ban is imposed the prosecutor has to try each case she chooses to take.

---

[58] *See supra* note 36 and accompanying text. *See also*, Scott & Stuntz, *Imperfect Bargains*, *supra* note 6, at 2013; Church, *supra* note 6, at 516 (arguing that the defendant is better off if he is allowed to plea bargain). *But see* Schulhofer, *Plea Bargaining as Disaster*, *supra* note 1, at 1985-86 (arguing that there are externalities to wrongful convictions and thus society should prevent a potentially innocent defendant from pleading guilty).

[59] *See* Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61 L. & CONTEMP. PROBS. 125, 143 (1998) ("Trials are time consuming and expensive; they are a scarce resource. . . . If possible, a likely loss at trial will be avoided through generous plea bargaining; if not, the case may be dismissed….").

[60] In some jurisdictions, prosecutors might currently have sufficient resources to bring additional cases without dropping others. But even these relatively unoccupied prosecution offices rely heavily on guilty pleas. Currently, pleas of guilt account for more than 95% of convictions. If the partial ban is imposed, the unburdened prosecutors might still be able to bring charges in a few weak cases by slightly increasing the rate of trials. But substantial increase in the rate of trials is impossible without additional resources. Thus, a prosecutor who would try to bring too many weak cases would quickly find herself overburdened.

[61] *See supra* note 26. For another example of the prosecutorial practice of reducing weak rape cases to misdemeanor charges see *supra* note 27.

Thus she can choose one case, which can be either one of the misdemeanor cases or the rape case. Though the chance of winning the rape case is lower, the prosecutor is still likely to prefer this case because a rape conviction is much more significant. Therefore, a total ban might not be sufficiently effective in encouraging prosecutors to dismiss weak cases.

However, with a partial ban, taking the rape case to trial would result in giving up ten DUI guilty pleas. And though the prosecutor might pursue the weak rape case at the cost of *one* strong DUI case, she is much less likely to risk a trial in that weak rape case at the cost of *ten* DUI guilty pleas. Therefore, a partial ban would result in fewer weak cases and thus in a lower proportion of wrongful convictions than the two alternative systems.

In fact, if a trial is on average ten times more expensive than a guilty plea, then a weak case is preferable over a strong one only if the expected conviction's value in the weak case is ten times higher than in the strong case. Weak cases would suddenly become ten times less attractive than they are without the partial ban, making strong cases much more attractive, relatively.[62] And if trials in weak cases are on average more expensive than other trials, weak cases might become even less attractive.

Of course, a partial ban cannot assure that the prosecutor would never bring a weak case. In some cases, the conviction's value of the weak case is high enough to compensate the prosecutor for both the low probability of conviction and the high cost of trial. Nevertheless, if the cost of weak cases becomes approximately ten times higher than it was pre-ban, while the cost of strong cases remains unchanged, the proportion of prosecuted weak cases must decrease significantly.

It is important to emphasize that the partial ban not only protects innocent defendants better then the regular plea bargaining system; it also protects them better than a total ban on plea bargaining. As discussed above, a total ban increases the cost of all cases, both weak and strong. Thus, prosecutors might still prefer many weak cases where innocence is more likely. A partial ban only increases the cost of weak cases, and thus makes these cases relatively more expensive. With

62 For simplicity, I assumed that the cost of a case is influenced only by the way it is disposed of, by trial or plea bargain, and not by its severity. Though this is probably not true, the analysis does not change substantially if we do take into account that more severe cases also cost more. For example, if a plea bargain in a DUI case costs one day of work, a plea bargain in a rape case costs two days of work, a trial in the DUI case costs ten days and a trial in the rape case costs twenty days, then the prosecutor faces a similar dilemma. Only now, she knows that in order to try a rape case she must give up twenty DUI guilty pleas (instead of ten), or two DUI trials (instead of one). Still, the partial ban would make the weak case ten times more expensive by forcing the prosecutor to dismiss twenty DUI cases for every weak rape case she decides to prosecute.

fewer weak cases brought, fewer innocent defendants face the risk of conviction.

The partial ban can have a positive side effect in very costly cases. Currently, when prosecution is very expensive, the defendant's bargaining power increases.[63] Sometimes this results in exceedingly lenient bargains even though the case is strong. The partial ban ties the prosecutor's hands and prevents her from offering such lenient bargains. Knowing that he cannot exploit the unique trial aversion of the prosecutor, the defendant would thus agree to a milder discount. The partial ban, therefore, restricts the defendant's ability to gain an excessive concession.

Note the difference between weak cases and costly cases. When a case is weak, the defendant would reject any bargain which is not exceedingly lenient, even if he knows that the prosecutor would proceed with the case to trial. On the other hand, when the case is costly but strong, the defendant would accept a milder plea concession if he knows that the alternative is not an improved bargain but a trial. That is why restricting the prosecutor's ability to offer excessive concessions can result in harsher plea bargains in costly cases but not in weak cases.

I do not mean to say that the partial ban is a panacea. The recent exonerations of hundreds of murder and rape defendants have shown that police and prosecutorial misconduct coupled with eyewitness misidentification can sometimes result in a strong case against an innocent defendant.[64] Yet, as I will show in the next Part,[65] the correlation between the strength of a case and the probability that the defendant is guilty justifies the different attitude towards strong and weak cases, even though it cannot totally prevent wrongful convictions.

Another caveat is required. The partial ban, in itself, cannot remedy the risk that detained defendants would plead guilty in return for "time served,"[66] or would prefer a plea bargain when they reach the conclusion that the post plea imprisonment sentence is likely to be

63 The defendant acquires this bargaining power only when taking the case to trial is uniquely expensive. In a typical case, the prosecutor has a monopoly power she might lose if she gives in to the defendant's pressure to improve her offer. She knows that any unique discount she gives in one case would encourage defense attorneys to demand similar discounts in future similar cases. If she needs to increase the rate of guilty pleadings she can adjust her plea bargain offers down to all defendants, but after she determines her "tariff," she is better off adhering to it. On the other hand, the defendant is much more of a "one time player," and thus would not reject a favorable plea bargain just to maintain a reputation as a tough negotiator. Only in uniquely costly cases is a dual monopoly situation created. This can be the case when the defendant's agreement can save the prosecutor a very costly trial and the uniqueness of the case reduces the risk that the discount would serve as a precedent for future defendants.

64 *See* Gross et al., *supra* note 28 (analyzing hundreds of exoneration cases, mostly in murder and rape cases).

65 *See infra* Part III.

66 *See* HANS ZEISEL, THE LIMITS OF LAW ENFORCEMENT 47-48 (1982) (describing the pressure on defendants in pretrial detention to plead guilty and gain their immediate release).

shorter than the expected length of pre-trial detention.[67] Here, a complementary measure should be adopted to reduce the risk for this group of defendants. For example, one might consider a rule requiring courts to release defendants on their own recognizance if they can show that the detention duration is approaching the imprisonment term they should expect if they plead guilty.[68] I will not try to develop an argument for such a rule here. Instead, I will concede that, absent additional adjustments, the partial ban is less effective in such cases.[69] Still, in most cases, defendants are either released on bail or expected to serve a term much longer then their time in detention and the "time served" plea bargains are not at issue.

B. *Reevaluating the Parties' Incentives*

The case in favor of the partial ban set out above assumes that prosecutors only want to maximize aggregated convictions' value. It also does not fully take into account the effects of plea bargaining on defendants or the effects of differences between defendants. Yet, a more complicated accounting of the parties' incentives does not undermine the argument and might even strengthen the case for the partial ban.

1. Reevaluating the Prosecutor's Incentives

Until now it has been assumed that the prosecutor only seeks to maximize the number of convictions weighted by their respective values. This assumes that the prosecutor only cares about the result of

---

[67] *See* Bibas, *Outside the Shadow of Trial*, *supra* note 5, at 2493 ("pretrial detention places a high premium on quick plea bargains in small cases, even if the defendant would probably win acquittal at an eventual trial"). *See also* Brian A. Reaves & Jacob Perez, *Pretrial Release of Felony Defendants, 1992*, *in* DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN 1, 14 (Nov. 1994) (showing that about 21 percent of detained defendants are not convicted at the end, and among those who are convicted, only 50% are sent to prison, while the rest are either sent to jail terms (38%) or not incarcerated at all (13%). Many of these defendants can spend a shorter term behind bars if they plead guilty, regardless of their chances at trial); MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT 236 (1979) (showing that in a sample of cases from the court of common pleas in New Haven, "[r]oughly four times as many people were incarcerated before disposition than *after* disposition").

[68] For another possible remedy see Jeffrey Manns, *Liberty Takings: A Framework for Compensating Pretrial Detainees*, 26 CARDOZO L. REV. 1947 (2005) (suggesting a compensation scheme for unjustified detention).

[69] It might still be somewhat effective because reducing the trial penalty might encourage some of the defendants to confront unestablished charges in order to vindicate their innocence or avoid a criminal record, even though it would not shorten their term in custody.

the cases, but does not care how these results come about. Most importantly, it means that the value of an unprosecuted case and the value of an acquittal in a jury trial are identical–both have a value of zero. In reality, however, this is untrue. Prosecutors have a strong aversion to losing trials.[70] First, a jury trial resulting in acquittal can harm the prosecutor's reputation or be perceived as a personal failure.[71] Second, if the loss is made public, it might have political ramifications for prosecutors, who are often elected officials.[72] Third, decisions not to prosecute are usually less publicized then acquittals and therefore their negative impact on deterrence is less severe. Fourth, there is a common human inclination to sacrifice some expected benefits in order to avoid loss.[73] Prosecutors might want to avoid the feeling of regret after time and money were devoted in vain to a case.

This aversion to acquittals can help justify a ban on plea bargaining. When plea bargaining is not restricted, almost all cases, weak and strong, are settled and thus the strength of the case does not influence the chances of receiving a conviction. On the other hand, without plea bargaining most cases go to trial.[74] At trial, weak cases are much more likely to result in acquittals, which the prosecutor wants to avoid. Thus, compared to a no-ban system, a total ban better protects the innocent. Nevertheless, both systems are inferior to the partial ban. With a partial ban, a trial loss is probable in weak cases, while strong cases are settled and become virtually risk free. The relative advantage of strong cases in a partial ban system is therefore much higher than in a total ban system.

To illustrate, consider a situation in which the prosecutor has to choose one of the following two cases. The first is a weak case, where the probability of acquittal at trial is 60%. The second is a strong one, where the chances of losing at trial are only 30%. When plea

70 *See* Lynch, *supra* note 21, at 2125.

71 *See* Bibas, *Outside the Shadow of Trial*, *supra* note 5, at 2472; ("[Prosecutors] may further their careers by racking up good win-loss records, in which every plea bargain counts as a win but trials risk being losses."); Alschuler, *Prosecutor's Role*, *supra* note 2, at 106-107 (noting that prosecutors are often measured by the rate of convictions and thus care much more about conviction than sentencing).

72 Stuntz, *Pathological Politics of Criminal Law*, *supra* note 44, at 534 (referring to the practice of many elected prosecutors to cite their conviction rate in their campaign as evidence to the prosecutor's interest in winning cases).

73 *See generally* Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 (1979) (stating that people are risk averse in choices involving sure gain but risk preferring with regard to losses). For a discussion of loss aversion implication in law, see Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1484 (1998).

74 Where the probability of acquittal is minute, some defendants might plead guilty even if they gain no plea concession, just in order to avoid the cost of the trial. These very strong cases will result in guilty pleas whether plea bargaining is allowed or not, and therefore they can be disregarded in this analysis.

bargaining is unrestricted, both cases can be settled and acquittal is unlikely no matter which case the prosecutor takes.

If the same choice appears when plea bargains are totally banned, however, the aversion to acquittals would play a role. The probability of losing the strong case is only 30%, while the chance of losing the weak case is 60%. The prosecutor who wants to reduce the risk of losing at trial would be more inclined to choose the strong case.

If a partial ban were in place, the strong case would be settled, and thus the risk of losing it would be 0%. On the other hand, the prosecutor would have to try the weak case. Hence, choosing the weak case would increase the risk of failure by 60% (from 0% to 60%), much more than the risk increase caused in the total ban system (from 30% to 60%). In such a situation, the weak case's conviction value would have to be much higher in order to justify such a higher risk.[75]

Put differently, the prosecutor's aversion to acquittals would encourage her to screen away weak cases, even when all plea bargains are banned–but this effect would be stronger if the ban was only partial.[76] Note that this effect operates even if trials are as inexpensive as plea bargains. It adds to the already substantial incentives the prosecutor has to dismiss weak cases because of their costs.[77]

Other factors affecting the prosecutor's decision to plea bargain must also be considered. First, some prosecutors might want to experience a jury trial from time to time in order to gain trial experience

---

[75] Adapting the formula from *supra* notes 42 and 54 to the aversion to acquittals would require adding the factor L, which represents the prosecutor's disutility from a loss, to the grade of weak cases. Thus, the grade of a weak case is: $G_t = [V_t P - (1-P)L] / R_t$. The grade of a strong one is unaffected by L and remains $G_s = V_s / R_s$, where G_s is the grade of a settled case, V_s is the value of conviction through settlement and R_s represents the resources required for a settlement. Since the expected disutility from acquittals $(1-P)L$ is positive, the relative advantage of a settlement increases.

[76] Professor William Stuntz argues that prosecutors are more averse to losses because losses are so rare. Thus, he claims, if trials would be more common, prosecutors would be less bothered by losses. *See* Stuntz, *Pathological Politics of Criminal Law, supra* note 44, at 534. If that is true, the advantage of the partial ban over the total ban is even bigger. A total ban would result in many more trials and thus dilute the effect of loss aversion. When prosecutors are less averse to losses, they are less mindful to the strength of the case. A partial ban, on the other hand, still allows the prosecutor to secure guilty pleas in the vast majority of the cases, thus preserving loss aversion and discouraging prosecution of weak cases.

[77] In fact, the advantage of the partial ban over the total ban might be even more substantial because of the phenomenon called the "certainty effect." Loss aversion is substantially more influential when people have the option to choose between a "gamble" and a certain event. People overweigh outcomes they consider certain, relative to outcomes which are merely probable. *See* Kahneman & Tversky, *supra* note 73 at 265-67. When a total ban is in place, prosecutors are required to choose between two "gambles," a trial in a weak case and a trial in a strong case. Even in such a case, loss aversion plays a role in favor of the stronger case. Yet, this role is much more substantial when the partial ban assures that the stronger case would result in a certain victory. In such a case, the prosecutor has to choose between a certain conviction in the strong case and a risky trial in the weak one. Because of the certainty effect, she is much more likely to opt for the former alternative.

or for the excitement of a trial.[78] Yet, these have only relatively small effects on weak cases, since prosecutors would probably prefer to try winnable cases and not cases they are likely to lose.

Second, and more significantly, trials are more likely in some high profile cases where substantial compromises are politically unfeasible. For example, prosecutors might be able to resolve many homicide cases by offering charge reductions in return for guilty pleas.[79] Yet, dropping or reducing homicide charges is often politically costly. Therefore, prosecutors are bound to dedicate resources to trying these cases, even when they are weak.[80] That might explain the relatively high acquittal rate in state murder cases.[81] In these cases, where prosecutors are limited by such political restrictions, the partial ban would have virtually no effect. Yet, in the majority of cases which do not capture the public's eye, political restrictions play a much milder role. The partial ban is needed to affect prosecutors' decision in these cases.[82]

2. Reevaluating the Defendant's Incentives

The partial ban aims to influence prosecutorial discretion. Hence, the effectiveness of the partial ban depends first and foremost on prosecutors' incentives in choosing cases. But this does not mean that defendants' decisions are irrelevant. When the prosecutor decides who to charge, she takes into account the potential reaction of the defendant. The prosecutor needs to know if the defendant would agree to plead guilty in return for the limited concession allowed by the partial ban when she decides whether to prosecute him. She cannot simply prosecute him and then dismiss the charges if he rejects the offer. This would undermine the credibility of her threat to try defendants that refuse to plea bargain, leading future defendants to reject offers that

78 *See* Richard T. Boylan & Cheryl X. Long, *Salaries, Plea Rates, and the Career Objectives of Federal Prosecutors*, 48 J.L. ECON. 627 (2005) (showing that federal prosecutors are more likely to take cases to trial in districts where the salaries in the private sectors are higher, and arguing that prosecutors in these district are more influenced by the incentives to gain trial experience).

79 This type of plea bargain, called charge bargain, is discussed in details later. *See infra* Part IV C.

80 *See* Daniel C Richman & William J Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 600-605 (2005) (arguing that unlike in the federal system, state prosecutors are more often politically obliged to prosecute a defendant for the offense he is suspected of committing, and thus cannot drop the case or offer a charge bargain).

81 *See id.* at 608 ("These data suggest that, at least in high-crime cities and counties, 'truth in charging' is a fairly strong norm and that district attorneys in those high-crime jurisdictions prefer to charge serious crimes and lose than to charge unrelated lesser crimes and win.").

82 For example, in drug cases, prosecutors can often alter the charges or amount of drugs in order to secure virtually any plea bargain they want. *See id.* at 608.

they would otherwise accept.

Prosecutors can estimate with reasonable accuracy how strong a case should be in order to extract a plea bargain from an average defendant. But not all defendants are average–different defendants might behave differently in similar cases. Defendants might have different attitudes toward risk. Some might misestimate the probability of guilt or the trial sentence. Bad representation and irrational behavior can lead some defendants to reject bargains they are better off accepting and cause others to accept bargains they should reject.[83] Thus, the prosecutor might know the probability that a case would result in a plea bargain, but not the actual result in a specific case.

These idiosyncrasies are likely to drive prosecutors to establish a safety margin and prosecute stronger cases than they would have taken had all defendants been average. Since a plea bargain is substantially cheaper than a trial, the expected cost of a potential mistake is usually much higher then the expected benefit of choosing a borderline case instead of a stronger one.[84] The size of this margin will be larger when her resources are more limited, when her aversion to acquittals is greater, and when the alternative cases she can bring are more attractive.[85] The diminutive trial rate today is consistent with the preposition that prosecutors' preference for plea bargains is strong, and thus they are likely to establish sizeable safety margins.

All of this has little qualitative effect on the analysis of a partial ban system. The prosecutors' safety margins should be taken into account when courts decide how restrictive the partial ban should be. Courts might need to allow more settlements then they would have allowed had all defendants been average.[86] Yet, the bargained sentence still signals the strength of the case, and when it is sufficiently lower than the post-trial sentence, it signals that the case is weak.

---

[83] Bibas, *Outside the Shadow of Trial*, *supra* note 5, at 2476-87; 2496-2504.

[84] *Compare with* STEVEN SHAVEL, ECONOMIC ANALYSIS OF ACCIDENT LAW 80 (1987) (showing that for similar reasons a potential tortfeasor would take an excessive level of care when the standard that exempts him from liability is unclear).

[85] The idiosyncrasies of defendants would also influence the plea bargain offers in clearly strong cases. In these cases, the prosecutor would not necessarily offer the defendants the lowest allowed offer, because the defendant would be willing to accept a harsher sentence as well. Since the prosecutor cannot know the highest acceptable sentence of each defendant, she must offer settlements that are attractive enough to assure that most of the defendants–including many sub-average defendants–will accept them. Here again, the level of concession in these cases depends on the prosecutor's willingness to risk a jury trial. The prosecutor might try to reveal the defendant's limit sentence by first offering a high sentence, then lowering it if the defendant rejects it outright. Any defense attorney, however, would begin to anticipate this practice and automatically refuse initial offers in anticipation of better ones, regardless of whether these offers are below or above his client's limit sentence. Ultimately the prosecutor will have to signal which offer is her final one and the defendant will only treat that offer seriously. Hence this technique will fail in revealing the limit sentence of each defendant.

[86] For an estimation of the level of concessions that should be allowed, see *infra* Part IV C.

One important implication of the above analysis is that the specific attitude of each defendant is usually insignificant. Since the prosecutor has to decide whether a case is strong enough during the screening stage and not during plea bargaining, she cannot usually know the preference of the specific defendant. She would thus dismiss weak cases even against defendants who, for different reasons, are willing to accept small plea concessions even though they have a good chance at trial.

III. CHALLENGING THE JUSTIFICATION TO SCREEN WEAK CASES

Part II showed that the partial ban can achieve its goal and discourage prosecutors from pursuing weak cases. This Part will address a more basic challenge to the partial ban–a critique on its aim. It might be argued that the prosecution of weak cases should not be discouraged for different, and sometimes conflicting, reasons. First, one can argue that plea bargains properly mitigate the "all or nothing" approach of trials by allowing settlements that reflect the strength of the case. Therefore, according to the argument, weak cases should not be dismissed; they should be settled. Second, it is sometimes argued that weak cases may become strong after a trial takes place, because trials can reveal new incriminating information. Thus, weak cases should not be dismissed; they should be tried. Third, a settlement can help the prosecutor to convict a clearly guilty defendant when technical legal rules, like the exclusionary rule, weaken the case. In such cases, the argument proceeds, weak cases should be settled, not dismissed. Fourth, some argue that existing institutions, like grand jury review and preliminary hearings, already prevent prosecutors from bringing weak cases, thus making the partial ban unnecessary. None of these critiques should undermine arguments in favor of the partial ban.

A. *The Probability of Guilt Argument*

Some scholars assert that settlements in borderline cases are morally superior to trial results.[87] Judge Easterbrook presented this argument as follows. The probability that the defendant is factually guilty can be somewhere between 50% and 99.9%. The burden of proof at trial, which reflects the standard of beyond reasonable doubt, is, say,

[87] Easterbrook, *Market System*, *supra* note 1, at 317; Enker, *supra* note 30, 114 (arguing that the intermediate sanction that results from plea bargaining is often more fair than the sentence after a jury trial); Gerard E. Lynch, *Screening versus Plea Bargaining: Exactly What Are We Trading Off?*, 55 STAN. L. REV. 1399, 1406 (2002) ("'Bargained' dispositions of cases in which conviction is uncertain may well do a better job [] than all-or-nothing jury trials.").

90%.[88] In a trial, the jury tries to analyze the evidence and estimate the probability that the defendant is guilty. If the probability of guilt is higher than 90%, it is rounded up to 100%; if it is lower than 90%, it is rounded to 0. Plea bargains, on the other hand, result in a sentence that reflects the probability much more accurately. "It is h ard to see how a process of mandatory rounding is necessary for a morally healthy society."[89]

According to Easterbrook, a sentence should be correlated not only to the severity of the offense, but also to the probability that the defendant is guilty. In order to see how plea bargains in weak cases achieve that goal, take the following example. Consider a defendant who faces charges that, if proven at trial, will lead to a sentence of ten years of imprisonment. Assume that the probability that the defendant is guilty, as reflected by the evidence available to the prosecutor, is 80%. That means a reasonable doubt exists assuming, like Easterbrook, that a probability of 90% reflects the "beyond reasonable doubt" standard. The defendant is thus likely to be acquitted. In other words, this case is weak.

However, both parties know that the results of jury trials are not certain. While most juries will acquit the defendant, some could find him guilty, even though the case is weak. Thus, the defendant might be willing to plead guilty if he is offered a greatly discounted sentence. For example, he could plead guilty in exchange for a two year imprisonment term instead of ten. In this way, plea bargains allow the sentence to reflect the weakness of the case. Easterbrook appears to assume that this is a better result than a dismissal of that case.

But why is it better? The "beyond reasonable doubt" standard stems from the core belief of our criminal justice system: convicting an innocent defendant has an extremely high social cost.[90] Clearly, a wrongful conviction is much costlier than setting a guilty person free.[91]

---

[88] The probability of guilt reflected by the reasonable doubt standard is debatable. *See* Alexander Volokh, *n Guilty Men*, 146 U. PA. L. REV. 173 (1997) (describing different attitudes towards the relative costs of wrongful convictions and wrongful acquittals). I have used the 90% standard following Easterbrook, as an example, though I believe the standard should be higher and is, in fact, higher.

[89] Easterbrook, *Market System*, *supra* note 1, at 317.

[90] *See In Re* Winship 397 U.S. 358, 363-64 (1970) (detailing why wrongful convictions are so damaging as to justify the beyond a reasonable doubt standard). *See also* HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 250 (1968) ("The criminal sanction is the law's ultimate threat. Being punished for a crime is different from being regulated in the public interest or being forced to compensate another . . . or being treated for a disease. The sanction is at once uniquely coercive and, in the broadest sense, uniquely expensive."); Alschuler, *Changing Plea Bargaining Debate*, *supra* note 26, at 714 (arguing that it is worse to convict ten innocent defendants and sentence them to one year of imprisonment each than to convict one innocent defendant and sentence him to ten years).

[91] *See* Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973) (showing that even from a pure economic

The expected cost of imprisoning a person for ten years when there is a reasonable doubt that he is innocent exceeds the expected benefits. Easterbrook does not question this assertion, but in his objection to rounding the sentence to zero when reasonable doubt exists he seems to suggest that even in such a case, the benefits of conviction exceed the costs if the sentence is prorated by the probability of conviction. But there is no reason to accept this contention. It is true that the expected costs of a shorter sentence are smaller; but so are the expected benefits. And a proportional reduction in both benefits and costs cannot transform a negative result to a positive one.

Moreover, convicting the innocent is wrong, regardless of the sentence. Society bears a "moral cost" whenever an innocent person is convicted.[92] Increasing the risk of wrongful convictions makes even less sense in an overburdened criminal justice system, where every weak case can be easily replaced by a strong case that can be settled without raising the same concerns. Thus, rounding down the punishment to zero when the case is weak is the moral and efficient thing to do. Weak cases should be dismissed, not settled. The partial ban achieves this goal.

B. *The Trial as a Truth Revealing Mechanism*

1. Trials in Weak Cases

The partial ban relies on the prosecutor's evaluation of the case. If the prosecutor estimates that the defendant is guilty beyond a reasonable doubt, she will usually reach a plea bargain and a conviction; otherwise, the case is likely to be dismissed. In a trial, the jury makes the decision whether reasonable doubt exists.

Some commentators argue that juries are better positioned to correctly evaluate the case.[93] Opponents to a partial ban might argue that aspects unique to trial, such as live testimony and cross examination, may assure a more accurate evaluation of the case than the initial assessment of the evidence by the prosecutor.

Most would probably admit that trials are also problematic and deficient in ways that limit the jury's ability to correctly weigh the

approach, the cost of convicting the innocent is higher than the cost of not convicting the guilty).

[92] R. M. Dworkin, *Principles, Policy, Procedure*, *in* A MATTER OF PRINCIPLE 72 (1985); Schulhofer, *Plea Bargaining as Disaster*, *supra* note 1, at 1986 (arguing that wrongful conviction creates a moral externality and thus it is socially preferable that innocent defendants would stand trial even if they are better off pleading guilty).

[93] Schulhofer, *Criminal Justice Discretion*, *supra* note 1, at 74-75.

available information.[94] One could argue, however, that trial deficiencies are irrelevant because they also influence the plea bargaining process.[95] For example, prosecutors take into account rules that exclude reliable evidence during plea bargaining, because the bargaining takes place in the shadow of the trial. When the prosecutor has inadmissible evidence, she will disregard it in her estimation of whether the case is strong. Thus, some claim that prosecutorial evaluation of a case suffers from all the deficiencies of a trial without enjoying its advantages.[96] As a consequence, when a defendant is convicted by a jury, one should conclude that there is no reasonable doubt, even if the prosecutor estimated that the case was weak. If that is true, weak cases should be tried, not dismissed.

But this argument assumes all trial deficiencies are systematic and known in advance. This is true with regard to clearly inadmissible evidence. But many truth-revealing deficiencies at trial are unsystematic and unpredictable. Different developments at trial can be overestimated by juries and lead both to wrongful acquittals and wrongful convictions.

For example, the appearance of the witness, his likeability, the way he organizes his answer and even the squeaky noise that might come out of his shoes as he walks, can influence the way the jurors evaluate his testimony.[97] A simple mistake or slip of the tongue of a witness could severely undermine his credibility.[98] Heuristics and biases can result in wrong conclusions.[99] Jury group dynamics, the way the judge presides over the trial and other trial idiosyncrasies might result in an overestimation or underestimation of the probability that the defendant is guilty.[100]

These deficiencies and others can incorrectly influence the result

---

94 *See* DONALD E. VINSON, JURY PERSUASION: PSYCHOLOGICAL STRATEGIES & TRIAL TECHNIQUES (1993) (surveying psychological phenomena that affect juries' decision irrespective of the actual facts of the case). *See also* DWYER, NEUFELD & SCHECK, *supra* note 22 (reporting numerous cases of wrong conviction, the vast majority of which resulted from jury trial). The term "correct result" here refers to a result that correctly reflects the evidence and the required standard of proof, not necessarily a conviction of a guilty person or acquittal of an innocent.

95 Schulhofer, *Criminal Justice Discretion*, *supra* note 1, at 74.

96 *Id*.

97 *See* VINSON, *supra* note 94, at 35-58.

98 *Id*. at 37-38.

99 *Id.* at 59-81.

100 For example, see Phoebe C. Ellsworth, *Are Twelve Heads Better Than One?*, 52 LAW & CONTEMP. PROBS. 205, 223-24 (1989) (showing that juries are substantially affected by misperception of the law and that jury deliberation usually fails to correct such mistakes); Judith L. Ritter, *Your Lips are Moving . . . But the Words Aren't Clear: Dissecting the Presumption that Jurors Understand Instructions,* 69 MO. L. REV. 163, 197-201 (2004) (surveying empirical evidence that show juries failure to understand legal instructions). *See also* Rochelle L. Shoretz, *Let the Record Show: Modifying Appellate Review Procedures for Errors of Prejudicial Nonverbal Communication by Trial Judges*, 95 COLUM. L. REV. 1273, 1275-81 (1995) (showing how nonverbal communication by judges can influence juries' decisions).

either way.[101] There is no reason to assume that the prosecutor's estimation of the trial result, which relies on her estimation of how an average jury would evaluate the evidence in such a case, will be less accurate than the actual jury's evaluation.[102]

For example, take a case where the prosecutor estimates that the probability that the defendant is actually guilty is 85%. That means a reasonable doubt exists, assuming conviction is justified only when the probability of guilt is higher than 90%. This is a weak case. Suppose that the prosecutor knows that in 30% of such cases, the jury believes that the probability of guilt is higher than 90% and will reach a conviction. It is possible that the jury is more accurate than the prosecutor because the trial supplied them with new truth-revealing information. But it's also possible that in these cases the jury trial result is an outlier. With different judges, juries, or witness' behavior on the stand, other trials of the same defendant would have resulted in acquittal. In these cases, the prosecutor correctly estimated that the probability of guilt is lower than 90%–it is the jury that made the mistake. Without knowing which phenomenon is more likely, there is no reason to believe that the prosecutor's estimation of the evidence is less accurate than the trial result.

Moreover, the partial ban does not prevent trials in weak cases, it only prices them correctly. Weak cases require trials in order to establish guilt with the necessary certainty. Even if a trial can prove guilt beyond reasonable doubt in a few weak cases, one must conduct a trial to assure that result. In strong cases, on the other hand, guilt can be established without a trial. In this sense, it is socially desirable to encourage prosecutors to prefer strong cases. In the rare instances where a case should be pursued despite its weakness, a prosecutor can still bring charges and bear the cost of a trial.

For example, a prosecutor might decide that the ability of a trial to reveal the truth justifies bringing charges in a weak murder case, although the evidence seems to indicate that a reasonable doubt exists. In such cases, the trial will either confirm the estimation that a reasonable doubt exists or remove that doubt. And if the possibility of removing the doubt is worth the cost of abandoning several strong cases, then the prosecutor can opt for a trial. However, as the prosecutor determines which cases to pursue, it is still worthwhile to encourage her to consider the higher costs of proving guilt in weak

---

[101] For an excellent review of several biases and heuristics that impedes juries' ability to reach an accurate and rational decision see J.J. Prescott & Sonja Starr, *Improving Criminal Jury Decision Making after the* Blakely *Revolution*, 2006 U. ILL. L. REV.(forthcoming 2006).

[102] *See* Gross, *supra* note 59, at 145-146 (arguing that juries are less experienced than the prosecutor and thus cannot systematically correct prosecutors' charging errors).

cases.[103] Therefore, even if trials more accurately evaluate guilt than the prosecutor, the partial ban would encourage a more socially desirable use of resources.

2. Trials in Strong Cases

While there is no reason to condemn the partial ban for discouraging prosecutions of weak cases, this proposal might also face criticism from the other side of the spectrum. Some argue that it is wrong to allow settlements in strong cases. If trials are better at estimating the probability of guilt than prosecutors, strong cases should not be settled. According to this reasoning, the only remedy is a total ban which assures that all cases, weak and strong, are tried.

Here again, trial idiosyncrasies can prove prosecutorial estimation of the case to be the more accurate measure of the probability of guilt. But even if juries are, on average, better than prosecutors at evaluating evidence, there is no reason to prohibit settlements in strong cases. To reach a settlement when the partial ban is in place, it is not enough that the prosecutor believes that the case is strong–the defendant must also share this belief. If the defendant believes the case is weak, he will reject the offer and go to trial. Thus, a plea bargain is reached only when both parties conclude that the case is likely to result in conviction. In such a case, it is unlikely that a jury will acquit the defendant.

Furthermore, defendants can take into account the extent that trials can reveal weaknesses which prosecutors cannot observe at the time of the decision to file charges. Knowing that trials can reveal innocence, an innocent defendant would estimate that his chances at trial are better than the prosecutor's case suggests.[104] For example, an innocent defendant will likely know if a key state witness is lying. If so, the defendant may realize that there is a good chance that at trial the lie will be revealed, perhaps in conjunction with other testimony and physical evidence. Therefore, when trials are better than the prosecutor in revealing the truth, the innocent defendant is much more likely to

---

[103] One might argue that the difference in costs between strong and weak cases is not significant because most of the costs are not trial costs, but jail costs. The prosecutor is the only party that bears the trial costs and thus makes wrong judgments. However, there are additional costs in weak cases that the prosecutor does not internalize, such as costs to the court (increased docket), juries, and the defense attorney. The prosecutor might disregard some of the costs of strong cases but also some of the costs of weak cases. Thus, her decision might still be a good reflection of the balance of the different costs in these cases.

[104] *See* Grossman & Katz, *supra* note 34, at 753-55; Scott & Stuntz, *Plea Bargaining as Contract*, *supra* note 1, at 1940-1946. *See also* Luke Froeb, *The Adverse Selection of Cases to Trial*, 13 INT'L REV. L. & ECON. 317 (showing that defendants who accept plea bargains have smaller chances of winning at trial and concluding that defendants are in possession of private information about their chances at trial during the plea negotiation).

believe the case is weak and reject the plea bargain offer.

Additionally, innocent defendants might reject an offer, even if a cold calculation would support it, because they are unwilling to falsely condemn themselves.[105] Therefore, innocent defendants are more likely to reject plea bargains. If plea bargaining is unrestricted, prosecutors might overcome innocent defendants' reluctance to plead guilty by offering them substantial concessions. For example, an overloaded prosecutor might offer all defendants very favorable plea bargains, driving both guilty and innocent defendants to plead guilty. But if she is limited by a partial ban, she can only offer smaller concessions. These concessions are likely to be sufficient to induce a guilty plea from most guilty defendants, but less likely to extract a plea from innocent defendants.

Of course, this does not mean that an innocent defendant will never accept a plea bargain offer when concessions are limited. Some cases may be sufficiently strong to persuade even an innocent defendant that a trial is unlikely to reveal the truth, and that he should overcome his reluctance to plead guilty to an offense he did not commit, even for a limited concession. Still, when the case against the innocent is so strong, a trial will likely result in a conviction as well. Hence, a total ban cannot protect the innocent defendant facing a very strong case.

One might still be unconvinced, and believe that innocent defendants are more likely to miscalculate their chances at trial because they will underestimate the extent to which trials reveal innocence. The unconvinced may further believe that over-optimism and the other behavioral effects that lead innocent defendants to refuse to plead guilty are not substantial enough to overcome this underestimation. I believe that there is no reason to expect such a systematic underestimation. In fact, experiments show that innocent defendants tend to reject plea bargains that guilty defendants accept even if the two groups face exactly the same prosecutorial case.[106] But even if such concerns were

---

105 *See* Matthew Rabin, *Incorporating Fairness into Game Theory and Economics*, 83 AM. ECON. REV. 1281 (1993) (showing that people are willing to sacrifice their self interest and refrain from accepting offers they believe are unfair). Where *nolo contendere* pleas and *Alford* pleas are available, innocent defendants do not have to lie in order to assure a conviction. *See* Bibas, *Harmonizing Values*, *supra* note 1, 1382-86 (criticizing the systems that allow pleas of *nolo contendere* or *Alford* pleas, because it encourages innocent defendant to plead guilty).

106 *See* Avishalom Tor, Oren Gazal-Ayal & Stephen M. Garcia, *Substantive Fairness and Comparative Evaluation in Plea Bargain Decision Making* (January 15, 2006). http://ssrn.com/abstract=880506 (showing that innocent defendants facing similar offers are much less likely than guilty defendants to accept plea bargains, even when the known probability of conviction at trial is similar for both groups of defendants); Kenneth S. Bordens *The Effects of Likelihood of Conviction, Threatened punishment, and Assumed Role on Mock Plea Bargaining Decisions*, 5 BASIC AND APPLIED SOCIAL PSYCHOLOGY 59, (1984) (showing in an experimental setting that other things being equal, innocent defendants are much less likely to accept a plea bargain and are more optimistic of their chances of acquittal at trial); W. Larry Gregory, John C. Mowen & Darwyn E. Linder, *Social Psychology and Plea Bargaining: Applications,*

well-based, the only way to address it would be to impose a total ban. As has already been demonstrated, compared with a partial ban, a total ban will lead to a higher rate of weak cases being prosecuted and thus a higher rate of innocent defendants risking conviction at trial. That risk to the innocent is much more substantial than any unfounded concern of a systematic underestimation of defendants' chances at trial.

C. *The Inadmissible Evidence Argument*

Prosecutors might believe that a defendant should be convicted even when the case assembled against him is weak. The most obvious example is when the prosecutor has inadmissible evidence that suggests or proves guilt; she might base her estimation that the defendant is guilty on his criminal history, illegally obtained evidence, hearsay or other information that cannot be conveyed to the jury. None of these categories of information can be used at trial–but in today's system all can be used by prosecutors in deciding which weak cases should be settled instead of dismissed. A partial ban would substantially restrict such a use of inadmissible information.

Yet, this restriction on the use of inadmissible evidence is socially desirable. True, such evidence might have probative value, but it is inadmissible for a reason. Usually, evidence is inadmissible because it might be prejudicial, otherwise misevaluated, or due to policy considerations.[107] For example, hearsay rules are allocated to the first group;[108] the exclusionary rule to the second.[109]

If such restrictions are justified, they should not be circumvented through plea bargaining. If hearsay testimony is too unreliable to justify a conviction at trial, it is also unreliable to justify a plea bargain offer that the defendant cannot refuse. If illegally obtained evidence should be precluded from trial in order to deter the police, it should not be allowed in through a plea bargain back door. To the extent that these restrictions are unjustified, they should be altered, not circumvented.

More importantly, while in some cases a prosecutor might

Methodology, and Theory, 36 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY 1521, 1926-29 (1978) (showing that students that had been manipulated into cheating in an experiment were much more willing to accept settlements than students that were not, even though the only evidence against both groups of students was their alleged unexplainable success in a multiple choice questionnaire).

[107] *See* BARBARA E. BERGMAN & NANCY HOLLANDER, 1 WHARTON'S CRIMINAL EVIDENCE § 1:2 (15th ed. 2003).

[108] *See* Moore v. U.S., 429 U.S. 20, 21-22 (1976) (holding that hearsay testimony is inadmissible because, absent cross examination, it is unreliable and cannot be evaluated).

[109] The main purpose of the exclusionary rule is to discourage lawless police conduct. *See* Terry v. Ohio, 392 U.S. 1, 12 (1968) ("[The exclusionary rule] is the only effective deterrent to police misconduct in the criminal context.").

accurately use inadmissible evidence in her decision to offer an exceedingly lenient bargain in a weak case; in other cases she might abuse her power for the wrong reasons. She might pursue a weak case for political reasons. She might believe that the stringent reasonable doubt standard is too high and try to undermine it. She might want to impose "justice" on a defendant she believes has unjustifiably escaped a previous conviction. She might be pressured by the victim or the public to seek a conviction, despite the lack of evidence. She might simply disregard the possibility that some defendants are innocent when the case against them is weak.[110]

For these reasons and others, our society is unwilling to rely on a prosecutor's beliefs as sufficient reasons to convict in weak cases. She does hold the power to dismiss cases–a power that can also be abused or mishandled–but since conviction of the innocent is much more troubling then letting a guilty defendant escape trial, this misuse of power is a lesser evil.

D. *Existing Tools to Discourage Unestablished Prosecutions*

Accepting that weak cases should be weeded out instead of settled, one can still argue that other legal tools, especially grand jury review and preliminary hearings, already prevent prosecutors from bringing weak cases and thus make a partial ban redundant.

There are numerous reasons to believe that weak cases slip through existing screening mechanisms with disturbing frequency. First, existing screening tools are commonly limited to felony cases, while exceedingly lenient bargains can also be offered in misdemeanors. Second, their effectiveness varies from one jurisdiction to another; in many places prosecutors can proceed with weak cases rather easily.[111]

---

110 *See* Alschuler, *Prosecutor's Role*, *supra* note 2, at 62-64 (showing that prosecutors disregard the possibility of wrong conviction and explaining that, in any event, prosecutors' personal opinions are inadequate safeguards against conviction of the innocent). For some anecdotal examples of how prosecutors can be inattentive to clear exculpatory evidence, see DWYER, NEUFELD & SCHECK, *supra* note 22, at 78-105 (describing a case in which a prosecutor refused to believe that a defendant on death row was innocent even when a DNA evidence clearly proved the defendant's innocence, and the only evidence against him was a statement that could hardly be considered as admission); *id.* at 126-57 (describing prosecutors' overconfidence in snitches). For different structural reasons that might bias prosecutors to be overconfident in the culpability of the defendant, see John D. Jackson, *The Effect of Legal Culture and Proof in Decisions to Prosecute*, 3 LAW, PROBABILITY AND RISK 109 (2004).

111 In most jurisdictions, prosecutors can choose between the use of information and indictment or, at least, bypass the preliminary hearing by issuing an indictment before the hearing. *See* LAFAVE, ISRAEL & KING, *supra* note 8, § 14.2 (showing that all the jurisdictions that require a grand jury indictment in felony cases and most of the jurisdictions that do not, allow prosecutors to bypass the preliminary hearing by issuing an indictment prior to the hearing). Some states allow prosecutors to file felony charges directly, with no preliminary hearing or

In a substantial majority of jurisdictions, the bindover standard for preliminary hearing is very lenient because prosecutors are not expected to show, at such an early stage, that the prosecution is likely to succeed.[112] As for the grand jury review, it is almost unanimously accepted today that grand juries are ineffective in controlling prosecutorial discretion and rarely bar the prosecution of weak cases.[113] This is especially significant since prosecutors in most jurisdictions can bypass the preliminary hearing by issuing an indictment before the hearing takes place.

Any attempts to improve grand jury review or preliminary hearings would require complicating the preliminary process and introducing expensive and complex adversarial features to the pre-trial process. Doing so would only add to the existing pressure to extract waivers from defendants. Hence, these screening procedures are bound to be either very elaborate and expensive or ineffective. In contrast, a partial ban requires no such features because it relies on the person that knows better than anyone whether the case is weak–the prosecutor.

Moreover, the right to preliminary hearing or grand jury review can usually be waived; and, in fact, it is waived very often in the context of plea bargaining. Prosecutors can, and often do, condition exceedingly lenient bargains on a waiver of preliminary hearing or grand jury indictment.[114] The partial ban can thus complement or even replace the existing mechanisms that are aimed at preventing the prosecution of weak cases.

E. *Parties with Different Estimations of Probability of Guilt*

By discouraging defendants from accepting plea bargain offers in weak cases, the partial ban dissuades prosecutors from bringing cases they know to be weak. However, when a defendant wrongly believes

indictment. *See id.* § 14.2(d). Even when a preliminary hearing takes place, its effectiveness in screening weak cases is highly questionable in some jurisdictions. *See id.* § 14.1(a) (explaining the reasons for the difference in the effectiveness of the preliminary hearing screening function in different jurisdictions).

112 *See id.* § 14.3(a) ("A substantial majority of jurisdictions reject both the prima facie standard and the mini-trial type of preliminary hearing . . . The timing requirements are stringent and do not suggest affording the prosecution adequate time to bring together its full case in the form of admissible evidence.").

113 *Id.* § 15.3(a) ("Academic commentators have almost uniformly been critical of relying upon grand jury screening in its current form to eliminate prosecutions that are weak and arbitrary."). *See also* Andrew D. Liepold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260 (1995) (arguing that the federal grand jury cannot operate as a shield for the accused).

114 *See id.* § 14.2(e) (arguing that the high rate of waivers of preliminary hearing is the result of, among other things, "a prosecution practice of offering significant concessions to defendants who waive their preliminary hearings").

that the case against him is strong he might still be manipulated to accept the offer even if the prosecutor's case is weak. When defendants (and their attorneys) overestimate the strength of the cases against them, the partial ban is less effective.

This problem is less disturbing then it might seem at first. There are two main reasons that can cause a substantial difference between the parties' estimation of the probability of conviction. First, the defendant and the prosecutor might simply evaluate the evidence differently.[115] Evaluating a case is not an exact science and different rational people might reach different conclusions. In some cases defendants might underestimate the risks; in others they may overestimate them. However, even if a defendant is wrong, the prosecutor cannot use such mistakes to bring charges in weak cases because she cannot know which defendants overestimate the strength of the case when she chooses which cases to pursue. She probably knows that some defendants would still be willing to plead guilty even though the case against them is weak, but she cannot identify them, and thus cannot treat them differently.[116]

Second, the defendant might have a different estimation of the case because he does not know that the prosecutor lacks strong evidence. If the prosecutor knows of the defendant's information deficiency, she could exploit that shortfall to convince him to accept a relatively harsh plea bargain. This is clearly true in some cases.[117] In many jurisdictions, defendants' disclosure rights in plea bargaining are very limited[118] and even these rules are sometimes violated.[119] Hence, in some cases, the prosecutor might be able to mislead defendants into

115 *See* Bibas, *Outside the Shadow of Trial*, *supra* note 5, at 2497 (arguing that defendants' decisions are subject to psychological pitfalls and thus some defendants are more willing to accept plea bargains than the rational choice model suggests; others are less willing).

116 The effects of defendants' unsystematic misevaluations of cases are similar to the effects of defendants' diversity discussed above. *See supra* note 85 and accompanying text. The point here is that the prosecutor will not be able to discriminate defendants that overestimate the risk of conviction when she cannot know which defendants suffer from such overestimation.

117 *See* Eleanor J. Ostrow, *The Case for Preplea Disclosure*, 90 YALE L.J. 1581, 1584-87 (1981) (showing how prosecutors can bluff defendants into believing their case is strong); Alschuler, *Prosecutor's Role*, *supra* note 2, at 65-67 (describing instances where prosecutors tried to give defendants the impression that their chances at trial were low); Douglass, *supra* note 26, at 452-561 (illuminating defendants' information deficits in plea bargaining).

118 *See id.* at 452-57; Bibas, *Outside the Shadow of Trial*, *supra* note 5, at 2494-95 (discussing the limited discovery rules in plea bargaining). It is unclear whether there is a constitutional inalienable right for disclosure of some information during plea bargaining. In United States v. Ruiz, 536 U.S. 622 (2002), the Supreme Court held that defendants can effectively waive their constitutional right for disclosure of exculpatory evidence, a right that was recognized in Brady v. Maryland, 373 U.S. 83 (1963). Yet the Court did not rule out that other types of information must also be disclosed in order for a guilty plea to be deemed voluntary.

119 Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 697-703 (1987).

believing that their cases are strong.[120] The need to improve the effectiveness of the partial ban is just another reason to amend these restrictive disclosure rules.[121]

Nevertheless, this shortfall should not be overstated. Prosecutors often have good reasons to share information, such as personal and professional ethics and the need to preserve a good reputation with defense lawyers.[122] Moreover, defendants and defense attorneys expect to hear the evidentiary basis for the prosecutor's assertion that the case is strong, before they accept it as a fact.[123] As a result, it is often hard to mislead a defendant into believing that a weak case is strong. If it were always so simple to do so, exceedingly lenient bargains would not be as common as they are today.

Moreover, innocent defendants are less likely to accept the prosecutor's unestablished proclamation that the cases against them are strong. The behavior of the innocent defendants in the Tulia and Rampart scandals indicates that usually innocent defendants would not plead guilty unless they are offered exceedingly lenient bargains.[125] Experiments also show that innocent defendants are only likely to plead

120 *See supra* note 117.

121 For other reasons, see Bibas, *Outside the Shadow of Trial*, *supra* note 5, at 2531-32 (advocating more discovery in plea bargaining). *See also* Ostrow, *supra* note 117.

122 Douglass, *supra* note 26, at 457-60 ("Most discovery occurs outside of the rules, in informal exchanges between prosecutors and defense counsel."); Bibas, *Outside the Shadow of Trial*, *supra* note 5, at 2531 (stating that some prosecutors routinely provide information in plea bargaining even though they are not obliged to).

123 Douglass, *supra* note 26, at 458 (explaining that the prosecutor discloses material because the defense attorney requires the information in order to convince his client to plead guilty).

125 In the Tulia case, eight defendants insisted on a trial, were convicted by juries with virtually no black members and were sentenced to up to 90 years of imprisonment. These trials convinced the remaining defendants to accept plea bargains for probation or short imprisonment terms. *See* Brulliard, *supra* note 28. Similarly, in the Rampart case, innocent defendants accepted exceedingly lenient bargains. For example Ruben Rojas pled no contest and received a six year sentence after being threatened with a sentence of 25 years to life at trial. *See* Samuel H. Pillsbury, *Even the Innocent Can Be Coerced into Pleading Guilty*, L.A. TIMES, Nov. 28, 1999, at M5 (reporting of some of the Rampart defendants' incentives to plead guilty). On the other hand, Javier Francisco, the defendant whose conviction later led to the revelation of the scandal, rejected the plea bargain offer to serve 13 years, because his lawyer thought the offer was too severe. He was later sentenced to 23 years of imprisonment. *See* Cannon, *supra* note 28.

guilty if it saves them from incarceration.[126] True, the partial ban cannot solve all cases in which lack of disclosure leads to wrongful conviction. Yet, given any level of disclosure, the partial ban reduces the risk that an innocent defendant will be charged and will plead guilty.

The same is true when prosecutors try to plea bargain before compiling enough evidence. In such cases, prosecutors bargain in order to save resources needed for investigation and preparation. Without the partial ban, the prosecutor can offer exceedingly lenient bargains to all defendants at this initial stage. This might induce both guilty and innocent defendants to accept the plea. With a partial ban, many guilty defendants might still be willing to accept the limited sentence concession allowed, believing that the prosecutor is likely to find sufficient evidence with further investigation. But innocent defendants, unable to receive exceedingly lenient bargains, are much more likely to reject these offers, forcing the prosecutor and police to try to collect additional evidence. Such further investigation is likely to fail in strengthening the case and will thus lead the prosecutor to dismiss the case.

IV. THE FEASIBILITY OF A PARTIAL BAN

The partial ban system can address the innocence problem, but is it feasible? The answer will vary from jurisdiction to jurisdiction. In some places, the partial ban could be incorporated rather well, with relatively minor modifications to existing rules and practices. In others, it would be difficult to prevent circumvention of the ban without major rearrangement to much of the existing system. Since the criminal justice system differs significantly from one state to another (and sometimes from one county to another) there is no one simple prescription that can assure an effective partial ban everywhere. Implementing the partial ban requires different measures in different jurisdictions.

For example, in some jurisdictions, it is the judge, not the prosecutor, who conducts the plea bargaining directly with the defendants.[127] In these systems, the limits should be imposed on the judge's offer. For instance, one might structure a rule in which before

126 *See* Bordens, *supra* note 106, at 69 (showing that the willingness of innocent defendants to plead guilty is substantial when the guilty plea results in probation while a trial conviction is expected to result in incarceration).

127 *See* Michael McConville & Chester Mirsky, *Guilty Plea Courts: A Social Disciplinary Model of Criminal Justice*, 42 SOC. PROB. 216 (1995) (describing coercive judicial plea bargaining in New York City's state court); Alschuler, *Trial Judge's Role*, *supra* note 11, at 1087-91 (describing judicial plea bargaining in Chicago).

offering a plea bargain the judge has to state on the record the expected post-trial sentence. Only then can the judge offer the guilty plea sentence, which must be restricted according to the partial ban.[128] In such a case, if the defendant rejects the offer, he is not exposed to more than the sentence previously stated by the judge.[129]

I will not attempt to take on the impossible task of suggesting how to implement the partial ban in every jurisdictional environment. Instead, I will address two of the possible obstacles to the feasibility of such a policy which are substantial in almost all jurisdictions.

First, it is hard to determine whether a certain sentence is exceedingly lenient. Apart from the definition of "exceedingly lenient bargain" being far from clear, the expected sentence after trial conviction is not always known with sufficient accuracy, especially since sentencing is often a discretionary prerogative of the judge. Even when post-trial sentences are more accurately predictable, it is difficult to determine which settlements are lenient enough to induce guilty pleas when the cases are weak.

Second, any judicial limits imposed on sentence bargaining can be easily circumvented by the use of charge bargaining. It might be argued that curtailing charge bargaining is difficult, or undesirable to the extent that it is possible, because the practice is often necessary to encourage defendants' cooperation. The following Part addresses these issues.

A. *The Feasibility of Judicial Review of Sentence Bargains*

The partial ban system relies on courts to review the bargained-for sentences, requiring them to reject exceedingly lenient bargains. This task does not require novel legal tools. Courts have the power to review sentence bargains. Currently, courts review sentence bargains in one of two distinct ways. In some jurisdictions, sentence bargains take the form of agreed sentence recommendations. In such cases, the parties ask the court to impose the stipulated sentences, but the court can reject the requests and impose harsher ones.[130] In other jurisdictions, the parties can agree on a binding sentence. In this case, when the court rejects the plea agreement the defendant can withdraw his guilty plea.[131]

---

[128] Such a scheme requires, of course, measures which assure that the judge gets reasonable information at this stage, but that is an inherent problem in any judicial plea bargaining. For a suggestion of such a structure see Note*, Restructuring the Plea Bargain*, 82 YALE L.J. 286 (1972)

[129] For an elaborated suggestion in this line see *id* (suggesting that judges would declare the post trial sentence and the discounted guilty plea sentence before the defendant pleads guilty to eliminate the uncertainty).

[130] *See* Carwile v. Smith, 874 F.2d 382 (6th Cir. 1989).

[131] *See* LAFAVE, ISRAEL & KING, *supra* note 8, § 21.2(d).

In the federal system, both types of sentence bargains are allowed.[132]

For the purposes of this Article, however, the difference between these two types of agreements is of little importance. With sentence recommendation, the defendant will prefer a trial when the case is weak, since he knows the court is likely to reject a recommendation for an exceedingly lenient sentence.[133] With a binding sentence agreement, a court's rejection will result in a trial or a dismissal of the charges. Therefore, in both cases, prosecutors would not be able to settle weak cases and thus would refrain from prosecuting them.

True, parties cannot always foresee the court's decisions. Yet, the prosecutor and defense attorney are usually experienced enough to make out whether a certain plea bargain is likely to be acceptable. Sentencing guidelines, when applicable, can assist in reducing uncertainty. By reducing the parties' information gap, the guidelines increase the efficacy of the partial ban.[134] But even absent guidelines, the parties can usually predict whether or not a particular agreement will be acceptable to a judge in their jurisdiction.

With or without guidelines, some borderline settlements will always exist. Court decisions can never be predicted with certainty. The prosecutor cannot know if these borderline cases will result in inexpensive settlements or costly trials.[135] The expected cost of these

---

132 *See* FED. R. CRIM. P. 11(c)(1). The first type of sentence bargains, which rely on sentence recommendations, has been justifiably criticized for increasing uncertainty, escalating the problem of sentence disparity and resulting in severe mistakes. *See* Shayna M. Sigman, *An Analysis of Rule 11 Plea Bargain Options,* 66 U. CHI. L. REV. 1317, 1331 (1999) (stating that when judges are allowed to reject sentence recommendations without offering the defendant to withdraw his plea, sentence disparity between similar offenders increases); Scott & Stuntz, *Plea Bargaining as Contract*, *supra* note 1, at 1955-56 (criticizing judicial use of power to increase the sentence as a source of mistakes, uncertainty, and unnecessary procedural costs); Alschuler, *Trial Judge's Role*, *supra* note 11, at 1070 (asserting that defendants feel cheated when judges reject the sentence recommendation).

133 *See* Sigman, *supra* note 132, at 1333-35.

134 The Federal Sentencing Guidelines create a relatively unambiguous background sentence by suggesting a limited sentence range for each offense, after taking into account the defendant's criminal record and other relevant factors. Then, they allow sentence reduction of two to three levels for acceptance of responsibility. *See* U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2005). Although acceptance of responsibility does not necessarily correlate with a guilty plea, in practice, almost all the defendants who plead guilty enjoy the sentence discount. *See* Wright, *supra* note 11, at 132 ("[A]bout 94 percent of the defendants who pled guilty received the discount while only 8 percent of the defendants who went to trial were given credit at sentencing for accepting responsibility."). In U.S. v. Booker, 543 U.S. 220 (2005), the Supreme Court rendered the Guidelines advisory instead of mandatory. If, after *Booker*, courts depart from the Guidelines in unexpected ways, the ability to foresee the expected trial sentence will be reduced.

135 If the parties reach a binding sentence agreement, the prosecutor can theoretically dismiss the charges after the plea bargain is rejected. In this case, there are no borderline cases; the parties always know whether the court regards the bargain as exceedingly lenient before they make any irreversible move. Yet, in practice, it might be politically impossible to dismiss charges whenever a court rejects a plea agreement. Therefore, the prosecutor might still be required to evaluate the probability that an acceptable plea bargain would be achieved, before deciding whether to prosecute.

cases will fall somewhere between the cost of a weak case and the cost of a strong case. Whether the prosecutor brings these cases depends on her budget and willingness to risk going to trial. If she has many strong alternative cases, or if she is particularly averse to acquittals, she will prefer to dismiss most of the borderline cases, and choose only clearly strong ones. In the alternative, she may prosecute several borderline cases, knowing that some will result in trial.

In any event, however, the partial ban creates a relative advantage to strong cases over borderline cases and to borderline cases over weak ones. Thus, it still encourages prosecutors to divert resources to stronger cases. Whatever the case may be, the uncertainty lurking in the margins does not undermine the prosecutor's basic incentives to dismiss weak cases, at least when they are clearly weak.

B. *The Standards for Review*

How big can a sentence discount be without breaching the partial ban? Different defendants will be convicted if prosecutors are allowed to offer discounts of up to 20%, 50% or 80%. Resolving this issue requires an answer to a normative question–which cases should be considered "weak"?–and an empirical one–how large can the sentence concession be without enabling plea bargains in these weak cases? A satisfying answer to these two questions is beyond the scope of this Article; however this section will sketch a possible direction, leaving the more comprehensive response for another article.

I believe that the partial ban should be tailored to discourage prosecution when an acquittal at trial is more likely than a conviction. In other words, if the probability of conviction is lower than 50%, the case should be considered weak. Such criterion means that weak cases are those that would result in acquittal if brought before an average jury;[136] strong cases are those where an average jury trial would result in conviction.

Relying on the expected decision of an average jury assures that the partial ban would imitate the standard for conviction applied in trials. An average jury would convict the defendant only when his guilt is proven beyond a reasonable doubt. Therefore, this criterion assures that only when the evidence shows that the defendant is guilty beyond a reasonable doubt will the parties regard the case as strong and reach a plea bargain. Similarly, when a jury trial is more likely to result in acquittal than in conviction–that is, when a reasonable doubt exists–the

[136] More accurately, the 50% standard imitates the decision of a median jury, not necessarily an average one. Yet, since we know nothing about the distribution of possible juries' evaluations, the median jury is probably a good proxy of an average jury.

case would be considered weak and a plea bargain would be discouraged.

True, the reasonable doubt standard currently applies only to trials, not to the decision to prosecute. But in a more basic sense, this standard reflects our society's greater concern for wrongful convictions than wrongful acquittals. In a system that relies on trials, it is enough to implement this standard at trial. Yet where almost every prosecuted case results in a guilty plea conviction, this standard must have a role in the screening phase as well. Therefore, plea bargains should be prevented when the prosecutor believes a reasonable doubt exists.

Implementing this criterion requires evaluating the highest acceptable sentence of defendants with up to a 50% chance of acquittal at trial. This highest acceptable sentence is likely to be lower than half of the post-trial sentence. Like prosecutors, defendants are averse to losses.[137] A trial provides defendants with an opportunity to be acquitted and thus avoid any loss. This makes a trial relatively more attractive and hence drives the highest acceptable sentence down. In addition, conviction incurs non-legal sanctions. The stigma and social effects along with the legal ramifications of conviction are harmful regardless of the length of the sentence.[138]

Therefore, as the empirical research suggests, most defendants prefer trials that leave them with some chance of acquittal over plea bargains to the expected post-trial sentence.[139] On top of that, any increase in imprisonment term would only affect defendants in the relatively remote future, and this future suffering is heavily discounted by defendants.[140] Consequently, the highest acceptable sentence is likely to be lower than the expected trial sentence.

Empirical research may be of use to better tailor the partial ban, by indicating the highest sentence which defendants would settle for when

---

137 *See* Richard Birke, *Reconciling Loss Aversion and Guilty Pleas*, 1999 UTAH L. REV. 205.

138 *See* David A. Dana, *Rethinking the Puzzle of Escalating Penalties for Repeat Offenders*, 110 YALE L.J. 733, 772-73 (2001) (describing the effects of social sanctions resulting from conviction); Eric Rasmusen, *Stigma and Self-Fulfilling Expectations of Criminality*, 39 J.L. & ECON. 519 (1996) (analyzing the effects of the stigma). Furthermore, the first year in prison is likely to cost much more than any additional year. The trauma of the encounter with prison in the first few days and weeks is unique and carries disproportionate weight compared to any additional time served. *See* Birke, *supra* note 137, at 218 (explaining why defendants are more affected by the first years in prison than by consecutive equally long terms).

139 *See also* William Spelman, *The Severity of Intermediate Sanctions,* 32 J. RES. CRIME & DELINQ. 107, 113 (1995) (summarizing empirical studies that found that recent arrestees regard a five-year imprisonment sentence as only twice as severe as a one-year sentence, and a ten-year sentence as about four to five times more severe than a sentence of one year).

140 *See* JAMES Q. WILSON & RICHARD J. HERRNSTEIN, CRIME AND HUMAN NATURE 50-51 (1985) (analyzing the effect of time on the disutility from punishment); Jolls, Sunstein & Thaler, *supra* note 73, 1538-1540 (arguing that defendants do not only have a high discount rate but they employ an hyperbolic discount rate, which means that the aversion to near suffering is very strong but that aversion substantially decreases as the suffering is more remote).

they have a 50% chance at trial.[141] For example, one empirical study indicates that a term of three to four months in a county jail is about half as severe as a twelve-month term.[142] This can mean that a plea bargain for less than three or four months should not be allowed if a twelve-month sentence is expected upon conviction at trial.

Additional empirical studies better tailored to our goal are needed. To start, a simple survey that compares defendants' preferences when they face a 50% chance of conviction at trial could supply some information. Yet, even absent such data, the 50% standard is clear enough in the majority of cases. For instance, a deferred sentence or probation is almost always much less severe than any substantial imprisonment term.[143] Similarly, any bargained-for imprisonment term should be deemed exceedingly lenient if it is made in the shadow of the death penalty.[144] And a bargain for a five-year sentence is clearly exceedingly lenient if it is made in the shadow of a sentence of life without parole.[145] All of these settlements, which are permitted today, could reasonably be accepted by defendants who are likely to be acquitted at trial.

On the other hand, a 30% or even 50% shorter imprisonment term usually would not meet the exceedingly lenient standard. Currently, the Federal Sentencing Guidelines offer approximately a 35% discount for defendants who plead guilty.[146] This discount is more appropriate and

---

141 *See* Spelman, *supra* note 139 (reviewing different surveys that graded the severity of different sanctions).

142 Spelman's research showed that offenders ranked a sentence of three months in a county jail as slightly less then half as severe as a 1-year term (the mean for the three month sentence was 48 points when a 1-year term was normalized to 100 points). *Id.* at 120. Two other studies reviewed in Spelman's article reached similar conclusions. *Id.* at 113.

143 On the other hand, a severe intermediate sanction, like two years of intensive supervision, is perceived by most offenders as a more severe sentence than three months of imprisonment in a county jail. *See id.* at 121. Therefore, sometimes it should be permissible to offer a probation sentence instead of a short imprisonment sentence in return for a guilty plea. *See also* Peter B. Wood & Harold G. Grasmick, *Toward the Development of Punishment Equivalencies: Male and Female Inmates Rate the Severity of Alternative Sanctions Compared to Prison*, 16 JUST. Q. 19 (1999) (comparing the severity of different sanctions as perceived by inmates).

144 And, in fact, anecdotal proof shows that innocent defendant pleaded guilty to avoid the death penalty. *See supra* note 29.

145 *See* Bordenkircher v. Hayes, 434 U.S. 357 (1978) (concerning a defendant who was sentenced to life imprisonment after rejecting an offer to recommend a five-year sentence in return for a guilty plea).

146 Defendants who plead guilty usually receive a two or three level reduction for "acceptance of responsibility." *See* U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2005) (giving the defendant a two-level reduction for demonstrating acceptance of responsibility and an additional level at the request of the government and under certain additional conditions). *See also* Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 506 (1992) (estimating that the two-level reduction is equal to approximately 25%). Plea bargains can also assure the defendant a sentence in the lower end of the Guidelines' range, which can be considered as additional discount, and, in some cases, an additional one level of reduction. *See* Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*,

might even be too small. Most defendants would prefer a trial to such a settlement where they are likely to prevail in court. On the other hand, the Guidelines can be circumvented through the use of charge bargains. This issue will be addressed in the next section.

C. *Charge Bargaining and Cooperation*

While sentence bargains are easy to control, charge bargains present a different challenge. A charge bargain is an agreement in which the prosecutor settles for a guilty plea to a lesser offense or drops some of the charges in return for a guilty plea to other charges. Most examples of the troubling large sentence differentiations result from charge bargains.[147] Charge bargains present a significant concern for the partial ban system because they can often escape court review.[148] If agreements are not subject to judicial review, prosecutors can effectively promise defendants exceedingly lenient bargains in return for their guilty pleas. As long as charge bargaining goes on unrestricted, the efficacy of a partial ban is undermined.[149]

110 YALE L.J. 1097, 1155 (2001) (estimating that defendants receive a sentence reduction of 35% or more for guilty pleas). The effects of the decision in U.S. v. Booker, 543 U.S. 220 (2005), on the sentence discount for guilty pleas has not been researched yet. For a formal economic analysis of the Guidelines rule see Oren Bar-Gill & Oren Gazal-Ayal, *Plea Bargains Only For the Guilty,* 49 J.L. ECON. (forthcoming 2006).

147 Alschuler, *Prosecutor's Role in Plea Bargaining*, *supra* note 2, at 85-105 (describing the pervasive effects of overcharging and plea bargaining in different cases); Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409, 1411 (2003) [hereinafter Wright & Miller, *Honesty and Opacity*] (arguing that the sentence disparity caused by charge bargaining is excessive and unduly burdens trial rights).

148 Sentence bargains are equally problematic when the prosecutor has an unreviewable influence over the sentence; for example, when a prosecutor has discretionary power to force a minimum sentence if the defendant elects a trial. In such cases, she can assure that defendants who reject her plea bargain offers face extremely harsher sentences than defendants who plead guilty. Examples of such power can be found when the prosecutor has the power to invoke a habitual offender law on trial defendants only or when the prosecutor's consent is required for a downward departure from sentencing guidelines. *See* Bordenkircher v. Hayes, 434 U.S. 357 (1978) (holding that due process was not violated when the prosecutor threatened to seek an indictment under the Habitual Criminal Act that resulted in a mandatory sentence of life imprisonment after defendant refused to plead guilty for an agreed sentence of five years). For a discussion of the prosecutors' control over sentencing in the federal system, see Stephanos Bibas, *The Feeney Amendment and the Continuing Rise of Prosecutorial Power to Plea Bargain*, 94 J. CRIM. L. & CRIMINOLOGY 295 (2004) (showing how Congress reinforces prosecutorial power over sentencing and weakens the power of the judiciary); Wright, *supra* note 11 (analyzing federal sentencing data and concluding that prosecutors often use their influence on sentencing to extract guilty pleas from defendants that would have been acquitted at trial). The Supreme Court reinstated judicial power, to a certain extent, by rendering the Federal Sentencing Guidelines advisory in U.S. v. Booker, 543 U.S. 220 (2005).

149 Anecdotal evidence of the effect of a ban on charge bargaining on the screening decisions can be found in the following example. Professor Alschuler reported a practice of policemen in Illinois that charged every suspect of reckless driving with driving while intoxicated, knowing

Fortunately, legal tools, already in place in some jurisdictions, enable courts to review exceedingly lenient charge bargains. For example, the federal system requires parties to present charge bargains to the court for acceptance.[150] The court is instructed not to accept the plea agreement unless it "determines, for reasons stated on the record, that the remaining charges adequately reflect the seriousness of the actual offense behavior and that accepting the agreement will not undermine the statutory purpose of sentencing or the sentencing guidelines."[151]

In addition, in determining the sentence, the court takes into account the conduct underlying the charges that were dismissed or reduced.[152] Thus, if the court has the needed information it can assure that charge bargaining does not result in excessive plea concession. A pre-sentence report can provide the court with much of the needed information.

Internal guidelines of the Justice Department further augment courts' ability to review plea agreements by restricting charge bargaining and prohibiting "fact bargains" and other "plea agreement[s] that result[] in the sentencing court having less than a full understanding of all readily provable facts relevant to sentencing."[153] Prosecutors are also instructed to put in writing any plea agreement in felony cases and submit the agreement to the court.[154]

These measures, especially when taken together, allow courts to review plea agreements and reject exceedingly lenient bargains. This does not mean that federal judges currently prevent exceedingly lenient bargains.[155] But it does mean that with the existing structure, federal

that even the soberest drivers would be willing to plead guilty to reckless driving in order to avoid the original charges, and thus save the policemen the ordeal of testifying in court. The prosecution solved the problem, simply by prohibiting charge reduction in driving while intoxicated offenses. *See* Alschuler, *Prosecutor's Role*, *supra* note 2, at 94.

150 *See* FED. R. CRIM. P. 11(c).

151 U.S. SENTENCING GUIDELINES MANUAL § 6B1.2(a) (2005). Since *Booker* the Guidelines are not binding on the court, but still have an advisory force.

152 *See supra* note 151. Because the judge is required to take into account the sentencing factors regardless of the charges, charge bargaining can affect the sentence only if the statutory maximum sentence for the bargained-for offense is less than the Guidelines sentence for the same course of conduct. *See also* Frank O. Bowman III & Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level*, 87 IOWA L. REV. 478, 522 (2002) ("Because of the high statutory maximum sentences for drug crimes, charge bargaining often will have little effect in drug cases.").

153 *See* John Ashcroft, Memorandum from Attorney General to All Federal Prosecutors, Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing (Sept. 22, 2003), http://news.findlaw.com/hdocs/docs/doj/ashcroft92203chrgmem.pdf.

154 *Id*. *See also* FED. R. CRIM. P. 11(c)(2).

155 Empirical research of the practices in the early 1990's showed that in a substantial minority of cases, charge bargaining resulted in Guidelines circumvention. *See* Nagel & Schulhofer, *supra* note 146, at 534. Judges often allowed these plea bargains, though they are empowered to reject them. *See* Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal*

judges could prevent exceedingly lenient bargains if instructed to do so.[156]

A more ambitious response to the problem posed by charge bargaining is to abolish the practice altogether. There are many reasons to do away with charge bargaining. The practice motivates prosecutors to overcharge defendants in order to improve their negotiating positions.[157] Convictions after charge bargains are often mislabeled because of tactical charge reduction.[158] Charge bargains, at least when they are not presented in open court, are not subject to public scrutiny.[159] The practice also results in more significant sentence disparities than sentence bargaining, a problematic phenomenon even if all defendants are guilty.[160]

For these reasons and others, many commentators have called for the abolition of charge bargaining.[161] A comprehensive defense of such a ban exceeds the scope of this Article. For my purpose, it is sufficient to say that improving the efficacy of the partial ban is another reason to revisit the use of the practice.

The concern that prosecutors would find ways to continue to charge bargain on the sly always exists whether the practice is totally prohibited or only restricted and subjected to courts' review. But these concerns should not be overstated. Most prosecutors would not be willing to violate a clear cut rule that prohibits charge bargaining or prohibits concealing it from courts, even when they believe the rule restricts them too much. Prosecutors are bound by many rules that cannot be easily enforced, from disclosure rules to the prohibition on

Sentencing Guidelines: Guideline Circumvention and its Dynamics in the Post-Mistretta *Period*, 91 NW. U. L. REV. 1284, 1300 (1997).

156 In some other jurisdictions, prosecutors need judicial permission to drop counts after the proceeding reached a certain stage (usually after the issuance of indictment or information). *See* LAFAVE, ISRAEL & KING, *supra* note 8, § 13.3(c). In these jurisdictions, judges have some power to restrain unwarranted charge bargains.

157 *See* Wright & Miller, *Screening/Bargaining Tradeoff*, *supra* note 4, at 33 ("A particularly noxious form of dishonesty is overcharging by prosecutors–the filing of charges with the expectation that defendants will trade excess charges for a guilty plea."); Alschuler, *Prosecutor's Role*, *supra* note 2, at 85-105 (describing how prosecutors use overcharging in the plea bargaining process); Note, *supra* note 128, 293-94 (arguing that prosecutors' use of overcharging increases sentence disparity); Gifford, *supra* note 26, at 47-48 (describing how prosecutors might charge the defendant with more serious offenses than those warranted by her case evaluation).

158 *See* Langbein, *supra* note 2, at 16 ("In the plea bargaining that takes the form of charge bargaining (as opposed to sentence bargaining), the culprit is convicted not for what he did, but for something less opprobrious."). *See also* Alschuler, *Trial Judge's Role*, *supra* note 11, at 1141-42.

159 *See* Wright & Miller, *Honesty and Opacity*, *supra* note 147, at 1410-13 (arguing that, "the public cannot tell the difference between reasonable and unreasonable charge bargains" because the practice is not transparent).

160 *See* Alschuler, *Changing Plea Bargaining Debate*, *supra* note 26, at 658 (arguing that because of sentence disparity, plea negotiation is inherently unfair).

161 *See* Wright & Miller, *Honesty and Opacity*, *supra* note 147, Langbein, *supra* note 2, at 16; Guidorizzi, *supra* note 5, at 782; Alschuler, *Trial Judges' Role*, *supra* note 11, at 1141-42.

bribery, yet few are willing to act in clear violation of these rules.[162] The main problem facing weak case defendants today is that prosecutors can induce them to plead guilty while also totally conforming to the existing legal rules. Even if some prosecutors might circumvent the ban on charge bargaining from time to time, only an incurable cynic could argue that a ban would have no impact whatsoever.

In fact, when plea bargaining was banned in different jurisdictions, prosecutors usually complied with the ban, as far as it went. For example, when Alaska introduced a total ban on plea bargaining, claims bargaining as an institution was substantially curtailed as long as policy makers remained committed to the ban.[163] Similarly, a study of the plea bargaining ban for felony cases in El Paso, Texas also concluded that charge bargaining was practically abolished, with few authorized exceptions.[164]

Moreover, the availability of sentence bargaining would ease most of the pressure to circumvent a ban on charge bargaining. While the experiences of Alaska and El Paso show that a total ban on plea bargaining can be enforced, commentators agree that a more selective ban is even more likely to succeed.[165] In a partial ban system, most of the pressure to bargain could be shifted to the permitted sentence bargaining.

To the extent that the risk of illegal charge bargaining is still substantial, one can consider additional measures to reduce it. A sentencing policy that relies more on the real offense rather than the charged one can discourage charge bargaining by limiting its effect on the sentence.[166] Internal prosecutorial guidelines and ethical rules can

---

[162] *See* Alschuler, *Alternatives to the Plea Bargaining System*, *supra* note 4, at 962 (arguing that it is easier to curtail plea bargaining than to curtail bribery, because the prosecutor's personal incentives to accept bribery are stronger and because courts can detect plea bargains more easily than bribery).

[163] When the Attorney General of Alaska declared a ban on plea bargaining in 1975, most prosecutors resisted the move. *See* Teresa White Carns & John Kruse, *A Re-evaluation of Alaska's Plea Bargaining Ban*, 8 ALASKA L. REV. 27, 28 (1991). Yet, at least in the early year of the ban, when it was more strictly enforced, plea bargaining was substantially curtailed. *Id.* at 33.

[164] *See* Robert A. Weninger, *The Abolition of Plea Bargaining: A Case Study of El Paso County, Texas*, 35 UCLA L. Rev. 265, 296 (1987).

[165] *See* Guidorizzi, *supra* note 5, at 772-82 (arguing that a total ban on plea bargaining is unsustainable in the long run, but with sentence incentives to plead guilty a ban can survive). Other studies also showed that when the defendant can enjoy some benefits from waiving their right to jury trial, a ban on charge bargaining is sustainable. *See* Schulhofer, *Is Plea Bargaining Inevitable?*, *supra* note 4, at 1093-94 (arguing, based on the experience of Philadelphia courts, that plea bargaining can be eliminated if defendants get sentence discounts by electing a bench trial instead of a jury trial); Wright & Miller, *Screening/Bargaining Tradeoff*, *supra* note 4, at 79 (showing that an aggressive screening policy together with sentence concessions for guilty pleas substantially curtails the use of charge bargaining in New Orleans).

[166] Under a real offense sentencing system, the court imposes a sentence according to the real conduct of the offender rather than the charges for which he was convicted. When sentencing

assist in preventing charge bargains too.[167] Courts can be instructed to ask the parties whether they reached any understanding about the charges, either after every guilty plea or whenever there are signals that a charge bargain might have been reached, like a guilty plea that followed charge reduction. Prosecutors and defense attorneys are unlikely to engage in an illegal practice knowing that they later would have to lie to the court about it.[168]

Other, more comprehensive amendments to the plea bargaining process can reduce the risk even further.[169] For example, Professor Schulhofer proposed allowing prosecutors to drop charges only until the defendant pleads.[170] Under this proposal, if the prosecutor dismissed some of the charges, the court would verify that the dismissal is not contingent on a guilty plea and then enter a cooling period of at least seven days before the defendant is allowed to plead guilty to the remaining charges. That way the defendant can retract from any illegal charge bargain without risking reinstatement of charges.

The court might need to tell each defendant that the prosecutor cannot reinstate the charges if he does not plead guilty, in order to reduce the risk that the defense attorney will push the defendant to plead guilty against his interest. If the prosecutor tries to reinstate dropped charges or file new related charges, the court must question the parties to make sure that the prosecutor did not carry out an illegal threat to a defendant that retracted from a charge bargain. As a result, the prosecutor would not be able to sanction a defendant who breaches his promise to plead guilty and thus would not offer a charge bargain.

---

relies on "real offense" factors, the prosecutor's charging decision has little importance. The Federal Sentencing Guidelines adopted a modified real offense scheme, that rely on charge related constrains while requiring the consideration of many factors that are not elements courts use in determining the sentence. *See* U.S. SENTENCING GUIDELINES MANUAL § 1A, intro. cmt. n.4(a) (2005); Julie R. O'Sullivan, *In Defense of the U.S. Sentencing Guidelines' Modified Real-Offense System*, 91 NW. U. L. REV. 1342, 1352-61 (1997) (explaining the modified real offense system).

167 *See* Wright & Miller, *Screening/Bargaining Tradeoff*, *supra* note 4, at 54 (suggesting reliance on prosecutorial guidelines and internal enforcement of these guidelines as a tool to curtail charge bargains).

168 *See* Alschuler, *Alternatives to the Plea Bargaining System*, *supra* note 4, at 963-64 (arguing that lawyers would not be willing to engage in illegal plea bargaining and later lie about it to the court).

169 For a few suggestions to assure that plea bargains would be fully supervised by courts, see Note, *supra* note 128, (suggesting a process where the judge explicitly tells the defendant the sentence he should expect after trial and the pleading guilty discount); Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutor Self-Regulation,* 105 COLUM. L. REV. (forthcoming 2005), *available at* SSRN, http://ssrn.com/abstract=658501 (suggesting that sentencing commissions insist that prosecutors draft for themselves some guidelines about their charging and disposition choices and then rely on judges to monitor prosecutors' use of the guidelines).

170 *See* Stephen J. Schulhofer, *Due Process in Sentencing*, 128 U. PA. L. REV. 733, 788-89, 823-24 (1980).

Schulhofer's suggestion aims to assure that charge bargains would not only be illegal, but also unenforceable. According to his proposal, if the prosecutor wants to reduce charges, she can only do so unconditionally.

Note that, unlike charge bargaining, a unilateral charge reduction does not create an innocence problem–even when the defendant pleads guilty because of it. For example, if the prosecutor has an aggravated assault case in which the aggravating factors are hard to prove, she might unconditionally reduce the charge to simple assault. The resulting strong simple assault case can now be resolved through sentence bargaining. Yet, since the simple assault case is strong, this result is desirable.

If, on the other hand, the simple assault case is also weak (for example, when the defendant has a potentially valid claim of self defense or mistaken identity) the defendant would refuse to plea bargain even after the charge was reduced. In such a case the defendant faces a simple assault charge, regardless of his plea. The limited difference between the post-trial sentence for simple assault and the post-plea sentence for the same offense cannot induce him to plead guilty when the case against him is weak. Consequently, a unilateral charge reduction cannot induce guilty pleas to weak charges. As a byproduct, a ban on charge bargaining discourages prosecutors from overcharging because piling up weak charges can only encourage defendants to elect a trial; it cannot induce them to plead guilty.

One might be concerned that an effective ban on charge bargaining might lead to general sentence increases. In capital punishment cases this is an especially serious concern for those who believe that too many defendants are sentenced to death.[171] Yet, when prosecutors cannot bargain in the shadow of death they might refrain from issuing the death notice unilaterally in order to be able to reach a sentence bargain. When defendants only face a sentence of life imprisonment, prosecutors can offer a sentence reduction in return for a guilty plea. When this is done often, fewer defendants face death sentences. Thus, it is unclear whether a ban on charge bargaining would increase or decrease sentences.

Even in non-capital cases, legislation frequently allows prosecutors to secure extremely harsh sentences on defendants convicted at trial, through minimum or mandatory sentences or strict sentencing guidelines. Currently, prosecutors often reduce charges or, in other ways, reduce the sentence to which the defendant is exposed, when they

[171] For another view, see Cass Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? The Relevance of Life-Life Tradeoffs*, *available at* SSRN, http://papers.ssrn.com/abstract=691447 (arguing that capital punishment is morally required because it prevents many more deaths than it causes).

believe that the prescribed sentence is much too severe.[172] However, in the existing system, they usually use such charge reductions to extract guilty pleas.[173] Because they believe that the sentences defendants face are too harsh, they have no interest in imposing them even in strong cases. Hence, they offer similar plea bargains to lower charges in both weak and strong cases. But in order to dissuade defendants from going to trial, they do not offer any charge reduction to defendants that refuse to plead guilty. Since the sentence prescribed by law is so harsh and the plea bargain sentence is so much lighter, the prosecutor's offer is often an offer the defendant cannot refuse even if the case against him is weak. Consequently, almost all cases, weak and strong, are disposed of through similar plea bargains.

With a ban on charge bargains and a partial ban on sentence bargains, prosecutors would not be able to use these excessive sentences to coerce defendants into guilty pleas. If they believe charge reduction is needed to mitigate harsh sentences, they will have to offer this reduction to all defendants whether they plead guilty or not.[174] This would allow defendants to stand trial without risking a sentence that even the prosecutor believes is much too harsh. In such cases, the partial ban would not push post-plea sentences up, but would rather push post-trial sentences down.

In any event, legislators can always bypass any effect a partial ban would have on the severity of sentences by adopting new sentencing laws. The political question of the appropriate sentence severity is not at issue here; the partial ban can be equally incorporated into a more or less severe sentencing regime.

An important point of these examples is that the partial ban is effective even if prosecutors have the power to substantially reduce

---

172 *See* David Bjerk, *Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion Under Mandatory Minimum Sentencing*, 48 J.L. & ECON., 591 (2005) (showing that prosecutors reduce felony charges to avoid three strikes law).

173 *See* Stuntz, *Criminal Law's Disappearing Shadow*, *supra* note 56, at 2553-54 (arguing that prosecutors are often interested in milder sentences than the law prescribes, but they use the harsh post-trial sentence as a threat to extract guilty pleas); Wright, *supra* note 11, at 114 (arguing that the federal law allows harsh sentences and thus the discounted sentence offered to defendant in weak cases is not very costly to the government); Frank O. Bowman III & Michael Heise, *Quiet Rebellion–Explaining Nearly a Decade of Declining Federal Drug Sentences,* 86 IOWA L. REV. 1043, 1132-1133 (2001) (arguing that prosecutors often offer substantial concessions because they deem the prescribed guidelines sentence as very severe).

174 Professor Wright is concerned that a cap on sentence discounts would result in harsher sentences, and "this might be too high a price to pay for a more accurate system that values innocence." Wright, *supra* note 11, 154. Yet, if the prosecutor is not interested in the harsh sentences she currently threatens to impose on defendants who reject plea bargain offers, then this risk is not substantial. Unable to selectively impose the severe sentences only on defendants who plead not guilty, the prosecutor is likely to charge all defendants with the reduced charges. Therefore, when the partial ban restricts the difference between post-plea and post-trial sentence, it is more likely to drive the post-trial sentence down and not post-plea sentences up when the prosecutors deem the higher sentences too severe.

defendants' sentences, as long as most of this sentence reduction is unconditional. A large sentence reduction does not undermine the partial ban–only a large difference between post-trial and post-plea sentences does.

A more substantial challenge to the partial ban is posed by the need to induce defendants to cooperate. Prosecutors' power to offer leniency is sometimes used to elicit defendants' assistance in investigations and prosecutions of other defendants. If charge bargaining and other legal tools that allow exceedingly lenient sentences are prohibited, prosecutors' ability to elicit cooperation would be undermined. Any attempt to accommodate a partial ban and cooperation agreements would probably require a compromise. There are at least three alternative ways to address this issue, each representing a different balance between the conflicting interests of the partial ban and cooperation agreements.

The first approach, which gives full weight to the need to encourage cooperation, restricts the partial ban to non-cooperation cases. In order to assure that prosecutors do not abuse this power to circumvent the partial ban in other cases, the parties to a cooperation agreement should be required to persuade the court that the defendant supplied assistance significant enough to justify the large sentence discount.

The Federal Sentencing Guidelines adopted a version of this approach in the "substantial assistance" rule.[175] Yet, the Guidelines' application notes instruct the court to give substantial weight to the government evaluation of the defendant's assistance.[176] In order to assure that the cooperation term would not be used to circumvent the partial ban when the defendant did not supply substantial assistance, the court must be instructed to question the parties for their motives. That way the risk of circumventing the partial ban would be restricted to cooperation cases.

A second approach, which gives slightly more weight to the need to protect the innocent, would require prosecutors to separate the cooperation discount from the guilty plea discount. In such a system, the defendant's cooperation agreement would include one section detailing the discount for cooperation, and another one detailing the sentence concession for the guilty plea. After the defendant fully cooperated, the cooperation discount would be granted to him, either by an irreversible charge reduction or by a court's ruling that a certain sentence discount will be granted. Only then, when the cooperation

175 *See* U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2005) (authorizing courts to depart from the Guidelines when the defendant has provided substantial assistance in the investigation or prosecution of another person).

176 *See* U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 cmt. n.3 (2005).

discount is secured, would he be required to enter a plea; or, if he already pleaded guilty, he would then be allowed to reconsider his plea. If he pleads guilty at this stage, his sentence would be further reduced by the guilty plea discount.

Even though the partial ban limits this additional sentence concession, most defendants would still plead guilty because, after cooperating, the case against them is likely to be sufficiently strong. In fact, even some innocent defendants would probably believe that their chance at trial is too low after they have cooperated and admitted guilt. Yet, in a few cases, an innocent defendant might be able to show the jury that he lied under prosecutorial pressure. In these rare cases, the innocent defendant might be willing to risk going to trial when, in doing so, he only risks a part of the sentence discount he received. Knowing this, prosecutors would have additional incentives to make sure that the information the defendant supplied is well corroborated or that its credibility can be otherwise shown, before they rely on it.

While this approach might better protect innocent defendants, it might also raise concerns that prosecutors would too often be unable to prove that the cooperator's version is reliable, and thus defendants would too often be acquitted at trial after cooperating. That would not only allow them to escape conviction, but could also benefit the other defendants they helped convict. On the other hand, if one is more concerned that cooperation agreements too often produce unreliable evidence, this approach might be preferred.[177]

A third and more sweeping reform would give full weight to the need to protect the innocent. Under such an approach, cooperation agreements should be restricted like other plea agreements and not result in exceedingly lenient bargains. Since the partial ban still allows many plea concessions, prosecutors would still be able to induce defendants to cooperate when the available concessions are limited. For example, the average sentence discount for cooperation in the federal system is about 50%.[178] This and even a slightly higher discount are

[177] Currently, the Federal Sentencing Guidelines leave the final decision regarding the size of the reward for cooperation in the hands of the judge. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2005). In practice, the prosecutor has a substantial influence on the reward. Yet, by vesting the power to grant the reward in the hands of the judge, prosecutors gain two important advantages. First, the reward is only determined after the cooperator fulfilled his part, and thus can be adjusted to the level and quality of cooperation. Second, when the cooperator testifies against another defendant he can truthfully claim that the prosecutor did not promise him a certain sentence discount, and that his sentence rests in the hands of the judge. That makes his testimony seem more reliable. *See* Daniel C. Richman, *Cooperating Clients,* 56 OHIO ST. L.J. 69, 94-97 (1995). Yet, these advantages to the prosecutor might be considered as disadvantages by those who believe that cooperating defendants are too often lying in return for substantial leniency. If this concern is justified, it might be wrong to leave the jury with the impression that the reward is uncertain and therefore the testimony is more likely to be true.

[178] *See* Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 VAND. L. REV. 1, 21 (2003).

still permissible according to the standard of review suggested in this Article.[179]

Only in a minority of cases, where the prosecutor is required to offer more in return for cooperation, will the partial ban restrict her. Even then, she can still elicit cooperation by offering to drop all charges against the cooperator. Unlike exceedingly lenient bargains, a dismissal of a case cannot result in wrongful conviction of the defendant. Such an approach would probably be preferred if policymakers fear that cooperation agreements are too often used to circumvent the partial ban and elicit a guilty plea from innocent defendants.

I will not try to compare the costs and benefits of each approach here, although I believe that the first approach, which does not burden prosecutors' ability to extract cooperation, is the only one that is politically feasible. Even with this approach, the partial ban can play an important role in alleviating the innocence problem.

CONCLUSIONS

For years lawyers have struggled with the need to restrict prosecutors' charging decisions. When nineteen out of twenty convictions result from guilty pleas and only few defendants acquitted at trial, prosecutors' charging decisions become the single most important factor in allocating convictions. Currently, grand juries and preliminary hearings are supposed to prevent unfounded prosecutions. Yet, grand juries are easily controlled by prosecutors and judges in preliminary hearings cannot effectively review the strength of the case without conducting a costly mini-trial before the actual trial. Thus, not surprisingly, few students of criminal justice regard these processes as effective barriers against unestablished charges.

The cheapest and most effective way to discourage the prosecution of weak cases is to rely on the prosecutors' estimation of the case. Of course, if the aim is to control prosecutorial discretion, one cannot simply rely on their asserted evaluations of the evidence. But by using the links between plea bargains and charging policies, the prosecutor's real evaluation of the case can be revealed. Since a substantial plea bargain concession signals weakness in the case, the partial ban can discourage prosecutors from bringing unsupported charges in a cheaper and more effective way than preliminary hearings or grand juries. Instead of ignoring the interrelation between plea bargaining and prosecuting policies, we should use it to effectively control prosecutorial discretion.

---

179 *See supra* Part IV B.