

MAKING THE EVIL LESS NECESSARY AND THE NECESSARY LESS EVIL: TOWARDS A MORE HONEST AND ROBUST SYSTEM OF PLEA BARGAINING

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“Criminal justice today is for the most part a system of pleas, not a system of trials.” Justice Anthony Kennedy for the Court in Lafler v. Cooper

“The decision whether to plead guilty or contest a criminal charge is ordinarily the most important single decision in any criminal case.” Anthony G. Amsterdam, in Trial Manual 5 for the Defense of Criminal Cases (1988)

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INTRODUCTION

That the American criminal justice system rewards with reduced sentences those criminal defendants who plead guilty rather than go to trial will come as a surprise to no one. The result of this of course is that invariably those who choose to go to trial and are convicted receive heavier sentences than had they chosen to plead guilty or than their similarly situated co-defendants who do plead guilty receive.¹ As obvious and inevitable as this result is, American courts at every level have engaged in all sorts of verbal and conceptual gymnastics to avoid acknowledging this reality. This may be due to the optics of acknowledging that this difference in the severity of a sentence is due primarily to the defendant's decision to exercise his constitutional right to trial. Unfortunately, courts have been far more sensitive to these optics than to the intellectual dishonesty and the real consequences created by differential sentencing based on the choice of a defendant whether to seek a trial. This response leads not only to absurd and disingenuous opinions attempting to justify differential sentencing, but also has frustrated efforts to improve the ever more ubiquitous practice of plea bargaining in the United States.

Part I of this article will enumerate and examine the various arguments that courts have made to justify a system in which defendants are punished for deciding to exercise their constitutional right to trial.² Those justifications begin with the assertion that while plea bargaining rewards the decision to save the system the time and expense of a trial, it does not punish those defendants who choose not to plead guilty.³ The article will then discuss how this assertion is flawed theoretically and how this flaw is magnified when examined pragmatically.⁴ Another justification offered for differential sentencing is based on the theories of sentencing, specifically on the theory of rehabilitation as a factor in sentencing.⁵ This justification holds that the defendant's guilty plea represents his first step on the road to rehabilitation and therefore allows for a reduced sentence than had he gone to trial and been convicted.⁶ While there is a purely theoretical defense for this justification, the realities of why defendants plead guilty belie its use as a reason for differential sentencing.

The final two justifications for differential sentencing share the quality of not being fundamentally flawed (as are the reasons above), but they are either numerically insignificant or are beside the point of whether differential sentenc-

¹ See *infra* notes 20, 21.

² See *infra* Sections I.A–D.

³ See *infra* Section I.A.

⁴ See *infra* Section I.A.

⁵ See *infra* Section I.B.

⁶ See *infra* Section I.B.

ing amounts to punishment for exercising the right to trial.⁷ Specifically, some courts defend significantly heavier sentences given to defendants after trial than the sentences they were offered to plead guilty based on what the judge supposedly learned about the defendant's greater participation in the crime or the crime's more serious nature during the trial.⁸ While this may be true in a few isolated cases, it unduly minimizes the information most judges have about the crime and the defendant when a guilty plea is taken. Perhaps more significantly, it fails to account for the fact that almost all defendants convicted at trial receive harsher sentences than they would have received had they plead guilty. That same sentence disparity exists with respect to two similarly defendants when one pleads guilty and the other is convicted at trial.⁹ The final argument as to why differential sentencing is not punishment for exercising the right to trial revolves around the concept of plea bargaining as a negotiation.¹⁰ In plea negotiations, the defendant who chooses not to reach a bargain receives the sentence he does as a result of these failed negotiations, not as a form of punishment.¹¹ While there may be some truth to this, it in no way offers a rational justification for differential sentencing that conforms to any of the accepted goals of punishment and how such punishment is traditionally determined.¹²

Recognizing that the differential sentencing that almost always flows from plea bargaining is punishment for exercising the right to trial, does not end the discussion of whether and what type of plea bargaining system the constitution permits. It begins the discussion. There is a way in which courts can escape from the flawed and at times shallow justifications offered for differential sentencing without abandoning the plea bargaining system that many regard as essential to the functioning of our criminal justice system.¹³ Part II of this article will examine the principle that permits the government at times to place a price on the exercise of a constitutional right and just how that principle would apply to plea bargaining.¹⁴ The result of such an application would be a more honest approach to how the criminal justice system operates and provide a vehicle for facilitating positive changes in the system.¹⁵

The final part of this article discusses one way in which abandoning the unpersuasive and unnecessary defenses of differential sentencing and adopting the more honest approach to the nature of plea bargaining would permit greater judicial participation in the bargaining process.¹⁶ Such participation could go

⁷ See *infra* Sections I.C.–I.D.

⁸ See *infra* Section I.C.

⁹ See discussion *infra* Section I.A.

¹⁰ See *infra* Section I.D.

¹¹ See *infra* Section I.D.

¹² See discussion *infra* Section I.D.

¹³ See *infra* Part II.

¹⁴ See *infra* Part II.

¹⁵ See *infra* Part II.

¹⁶ See *infra* Part III.

beyond the role some, but not all jurisdictions currently permit of allowing judges to advise defendants of their sentence should they plead guilty.¹⁷ Specifically, it would permit defendants to get advice from the judge on what range of sentence they could expect if they reject the plea offer, go to trial, and are convicted.¹⁸ Such advice would allow a defendant to make a genuinely informed choice about whether to accept a plea of guilty at the time it is offered.¹⁹

I. DEFENSES OF DIFFERENTIAL SENTENCING

Criminal defendants who are convicted after exercising their constitutional right to a trial invariably receive harsher sentences than they would have had they chosen to plead guilty.²⁰ Viewed another way, between two defendants charged with similar crimes and possessing similar backgrounds, the one who chooses to plead guilty will receive a less harsh sentence than the one who is convicted after a trial.²¹ That this almost inevitable enhancement in sentencing,

¹⁷ See *infra* Part III.

¹⁸ See *infra* Part III.

¹⁹ See *infra* Part III.

²⁰ See, e.g., *Correia v. Hall*, 364 F.3d 385, 387 (1st Cir. 2004) (Defendant was offered a plea deal of five to seven years. Defendant rejected the State's offer and went to trial where he was convicted and sentenced to twelve to seventeen years); *United States v. Thomas*, 114 F.3d 228, 272 (D.C. Cir. 1997) (Defendant was offered a plea deal of five years. Defendant rejected the State's offer and went to trial where he was convicted and sentenced to life); *Cousin v. Blackburn*, 597 F.2d 511, 512 (5th Cir. 1979) (Defendant was offered a plea deal of ten years. Defendant rejected the State's offer and went to trial where he was convicted and sentenced to thirty years); *Walker v. Walker*, 259 F. Supp. 2d 221, 223, 226 (E.D.N.Y. 2003) (Defendant was offered a plea deal of eight years to life. Defendant rejected the State's offer and went to trial where he was convicted and sentenced to twenty-five years to life); *Prado v. State*, 816 So.2d 1155, 1156 (Fla. Dist. Ct. App. 2002) (Defendant was offered a plea deal of four years. Defendant rejected the State's offer and went to trial where he was convicted and sentenced to forty years); *People v. Dennis*, 328 N.E.2d 135, 136 (Ill. App. Ct. 1975) (Defendant was offered a plea deal of two to four years. Defendant rejected the State's offer and went to trial where he was convicted and sentenced to forty to eighty years); see also Comment, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L.J. 204, 207 (1956) ("The estimates of the extent to which the fine or prison term was diminished for a defendant pleading guilty varied from 10 to 95 per cent of the punishment which would ordinarily be given after trial and conviction."); LINDSEY DEVERS, BUREAU OF JUSTICE ASSISTANCE, PLEA AND CHARGE BARGAINING 3 (2011), <https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf> [<https://perma.cc/B3KL-6RLE>].

²¹ See, e.g., *United States v. Rodriguez*, 162 F.3d 135, 152 (1st Cir. 1998); *United States v. Stevenson*, 573 F.2d 1105, 1106 (9th Cir. 1978); *United States v. Wiley*, 278 F.2d. 500, 501, 503 (7th Cir. 1960). In *Wiley*, the court unsurprisingly found that his decision to go to trial was the apparent motivating factor for the three-year sentence meted out to the defendant, a first-time offender described by the court as an "accessory" in the crime. *Id.* at 503. The court compared Wiley's sentence with that of McGhee, the "principal" offender and "most active participant in the crime." *Id.* The court describes McGhee as a man who "had four prior felony convictions, was the ringleader in this matter, and, subsequent to this offense and while out on bond, committed two other similar offenses." *Id.* After pleading guilty, McGhee received a sentence of two years. *Id.* At other times, courts will strain to justify the

occurring for the most part when the only variable in the two situations is the choice of a defendant to go to trial, amounts to punishment for exercising the right to trial should be obvious.²² Obvious though it may be, the judicial system has struggled to come to grips with this reality for reasons related to the already negative aura surrounding plea bargaining in the United States²³, the optics of acknowledging our system punishes for the exercise of a constitutional right and the emotional and intellectual difficulty of confronting the real issues sur-

disparity in sentences among defendants charged with the same crimes without acknowledging that the disparity was based on the decision of one to plead guilty and the other to go to trial. A blatant example of this occurred in *Jung v. State*, 145 N.W.2d 684 (Wis. 1966). Jung and his co-defendants were charged with armed robbery and attempted murder stemming from a supermarket robbery in which a police officer was shot. *Id.* at 685, 686. Jung was the driver of the getaway car, whereas the two who plead guilty entered the supermarket and committed the robbery. *Id.* at 686. Jung, a married father of five children, had no prior criminal record, whereas the two who plead guilty also plead guilty to several other offenses, one of them to “six other unrelated crimes including armed robbery.” *Id.* at 688. The judge sentenced Jung to a total of sixty years in prison and the codefendants who plead guilty to twenty-five years. *Id.* The result of these sentences was that Jung’s conditional release date was fifteen years after that of the other two. *Id.* at 690. In affirming these sentences, the Wisconsin Supreme Court rejected some of the typical arguments used to justify differential sentences, such as that pleading guilty is the first step on the road to rehabilitation or that the codefendants’ agreements to cooperate in the case were mitigating factors in the sentencing. *Id.* at 688–89. It then adopted the arguable position that, for sentencing purposes, the driver of the car can be regarded as equally culpable as those who entered the store and pointed the gun at the victims. *Id.* at 690. Far more troubling was the court’s apparent disregard of the substantially harsher sentence meted out to the only perpetrator with no other known criminal behavior. In rejecting Jung’s assertion that his longer sentence was due to his decision to stand trial, the court described various aspects of the crime that demonstrated its disparity. *Id.* at 688–90. None of these addressed in any way why Jung’s sentence was longer than his two codefendants. Ultimately, the court seemed to base its decision on the fact that the trial judge did not affirmatively indicate he was punishing Jung for exercising his right to trial. *Id.* at 689.

²² *Berthoff v. United States*, 140 F. Supp. 2d. 50, 68–69 (D. Mass. 2001):

As a practical matter this means, as between two similarly situated defendants, that if the one who pleads and cooperates gets a four-year sentence, then the guideline sentence for the one who exercises his right to trial by jury and is convicted will be twenty years.

Not surprisingly, such a disparity imposes an extraordinary burden on the free exercise of the right to an adjudication of guilt by one’s peers. Criminal trial rates . . . are plummeting due to the simple fact that today we punish people—punish them severely—simply for going to trial.

See also State v. Baldwin, 629 P.2d 222, 225 (Mont. 1981), in which the court wrote:

It may be difficult to distinguish between situations where leniency is offered in exchange for a plea and situations where the defendant is punished for exercising his right to trial by jury. In the absence of clear indications in the record to the contrary, a trial judge could justify any disparity between a sentence offered in exchange for a plea of guilty and the sentence actually imposed following a jury trial simply by characterizing the sentence offered in the plea bargaining process as an offer of leniency—regardless of the judge’s true motivations.

²³ JENIA I. TURNER, *PLEA BARGAINING ACROSS BORDERS 1* (Hiram E. Chodosh ed., 2009): Some have even compared the coercive aspects of plea bargaining to the procedures of medieval inquisitions. Plea bargaining has been criticized for its potential to undermine the search for truth in criminal prosecutions, and it is blamed for interfering with victims’ rights. Moreover, the lack of transparency in plea negotiations is said to reduce the public legitimacy of the criminal justice system.

rounding the benefits and problems regarding the manner in which we dispose of 95 percent of the cases in the criminal justice system.²⁴ If we are to move forward in a meaningful way to address such issues that prevent plea bargaining from working better for all involved, we need to abandon the largely facile defenses to the reality that differential sentencing based on the accused's decision whether to plead guilty is punishment for exercising the right to trial.

The courts have generally offered defenses of differential sentencing that fall roughly into four categories.²⁵ They are: 1) the system does not punish those who are convicted after a trial, it merely rewards those who plead guilty;²⁶ 2) there is a difference for sentencing purposes between one who pleads guilty and one who is convicted after trial, in that the former has taken the first step on the road to rehabilitation and therefore deserves a less harsh sentence;²⁷ 3) after a trial, the sentencing judge learns substantially more about the evil of the defendant and the seriousness of his crime that she was not aware of when there would have been a guilty plea;²⁸ and 4) the difference in sentences before and after trial results from the give and take of negotiations rather than punishment, in other words: you gambled, you lost.²⁹ The first two justifications for differential sentencing are seriously flawed both in theory and in practice. The third defense may have some validity in limited cases, however, it does not explain why a sentence after trial is almost always harsher than if the defendant had plead guilty. The final justification is undoubtedly correct, but gambling and losing is inconsistent with the traditional reasons why we sentence those convicted of crimes to greater or lesser sentences.

A. *It Is a Benefit Not a Punishment*

Perhaps the justification offered most often for differential sentencing is the win/win notion that the criminal justice system offers a benefit to those who plead guilty while merely meting out the sentence the accused deserves if he

²⁴ *United States v. Booker*, 543 U.S. 220, 276–77 (2005) (Stevens, J., dissenting); *see also* DEVERS, *supra* note 20 at 3.

²⁵ *See supra* text accompanying notes 2–3, 5, 8, 10.

²⁶ *See, e.g.*, *United States v. Long*, 823 F.2d 1209, 1211 (7th Cir. 1987); *United States v. Stevenson*, 573 F.2d 1105, 1107 (9th Cir. 1978); *Weathington v. Wainwright*, 486 F. Supp. 934, 938 (S.D. Fla. 1979); *Stanley v. State*, 479 N.E.2d 1315, 1318 (Ind. 1985); *In re D.R.R.*, 322 S.W.3d 771, 773 (Tex. Ct. App. 2010).

²⁷ *See, e.g.*, *Brady v. United States*, 397 U.S. 742, 753 (1970); *United States v. Rodriguez*, 64 F.3d 638, 643 (11th Cir. 1995); *United States ex rel. Gardner v. Meyer*, 519 F. Supp. 75, 83 (N.D. Ill. 1981); *United States v. Wiley*, 184 F. Supp. 679, 687–88 (N.D. Ill. 1960).

²⁸ *Alabama v. Smith*, 490 U.S. 794, 801 (1989); *State v. Molinario*, 530 So. 2d 665, 668 (La. Ct. App. 1988); *State v. Mitchell*, 691 N.E.2d 354, 356 (Ohio Ct. App. 1997).

²⁹ *Bordenkircher v. Hayes*, 434 U.S. 357, 363–64 (1978); *Dingle v. Stevenson*, 840 F.3d 171, 175 (4th Cir. 2016); *Scott v. United States*, 419 F.2d 264, 276 (D.C. Cir. 1969); *see also* Richard L. Lippke, *To Waive or Not to Waive: The Right to Trial and Plea Bargaining*, 2 CRIM. L. & PHIL. 181, 184 (2008).

exercises his right to trial and is convicted.³⁰ Who can argue with a system that benefits many and harms none? It is likely the simple nature of this benefit/punishment rationale combined with its optimistic vision of the criminal justice system that accounts for its popularity in judicial responses to challenges by defendants to sentences substantially higher after trial than those offered as part of a plea bargain.³¹ These challenges stem both from cases in which defendants receive significantly harsher penalties after trial than they were offered in a plea bargain³² and from those in which the defendant who was convicted after a trial receives a greater sentence than his co-defendants with similar or worse criminal records who were equal or more primary participants in the crime, but had the good sense to accept the prosecutor's plea offer.³³

The benefit/punishment rationale relies on the assertion that the punishment one deserves for criminal behavior is the sentence he receives after being convicted at trial.³⁴ This would be the "regular" sentence.³⁵ It follows, therefore, that were he to accept a plea bargain with the virtually inevitable reduced sentence awarded in exchange for his plea of guilt, this discount constitutes a benefit, a departure from the sentence he deserved.³⁶ The vast and varied ways in which both prosecutors and judges exercise discretion, however, belies the notion of a "regular" sentence.³⁷ Except when the sentencing options of the judge are limited by crimes that have mandatory minimum sentences, judges rarely have any meaningful limits to the range of sentences they can mete out within the often broad statutory limits of permissible sentences for crimes in

³⁰ *United States v. Mezzanatto*, 513 U.S. 196, 209 (1995); F. Andrew Hessick III & Reshma M. Saujani, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 *BYU J. PUB. L.* 189, 225 (2002) ("The only way a plea is attractive to a defendant is if it offers a large sentence differential. Thus, judges must increase the cost of going to trial by increasing the post-verdict sentence. One way that many courts have avoided this constitutional conundrum is by classifying the judge's actions (the presentation of a large sentencing differential) as a denial of a benefit rather than a penalty").

³¹ *See e.g., Scott*, 419 F.2d at 278 ("The temptation is strong in the area of plea bargaining to assume that defendants convicted after trial receive a 'normal' sentence while those who plead guilty and save the Government the cost of a trial receive special "leniency" in exchange. If this analysis were valid, some defendants would win and none would lose. But in reality there are winners and losers").

³² *See cases cited supra* note 20; *see also* Gregory M. Gilchrist, *Trial Bargaining*, 101 *IOWA L. REV.* 609, 612 (2016).

³³ *See cases cited supra* note 21; *see also* *State v. Donohoe*, 895 P.2d 590, 592 (Idaho Ct. App. 1995).

³⁴ Scott W. Howe, *The Value of Plea Bargaining*, 58 *OKLA. L. REV.* 599, 619 (2005).

³⁵ Steven P. Grossman, *An Honest Approach to Plea Bargaining*, 29 *AM. J. TRIAL ADVOC.* 101, 111 (2005).

³⁶ *Corbett v. New Jersey*, 439 U.S. 212, 219–20 (1978) (quoting *Brady v. United States*, 397 U.S. 742, 751 (1970)); *Lopez v. United States*, 857 F. Supp. 1000, 1009 (D.P.R. 1994).

³⁷ Were there such a thing as a regular sentence, surely it would be the one meted out in the ninety-five percent of cases disposed of through plea bargaining and not the five percent that result from trial convictions. *See supra* note 24.

most jurisdictions.³⁸ This in part accounts for the disparate sentences given to defendants convicted of similar crimes, often with similar backgrounds.³⁹ It was the unfairness of this disparity in sentencing that led in part to the implementation of mandatory sentencing guidelines, such as the ones governing federal courts embodied in the Sentencing Reform Act of 1984.⁴⁰ Such mandatory guidelines were deemed by many to have significant problems⁴¹ and were ultimately determined to be unconstitutional by the Supreme Court.⁴² Although these guidelines still exist and federal judges are instructed to consult them before sentencing, the judge is free to go above or below the guidelines when meting out a sentence.⁴³ Many states do not even have advisory guidelines, and, thus, judges have especially broad discretion in their sentencing practices.⁴⁴

There are also significant opportunities within the process of a criminal case for a prosecutor to exercise broad discretion over the eventual sentence the defendant will receive if convicted at trial.⁴⁵ The initial decision regarding what level of charges to bring, involves often critical determinations concerning the seriousness of the crime or the prosecutor's view about the nature of the accused.⁴⁶ As to the former, consider an assault stemming from a fight in which the accused hits the victim with his fist, then grabs the stick that the victim is holding and slams it against the victim's knee causing a bruised jaw and severe

³⁸ See G. NICHOLAS HERMAN, PLEA BARGAINING 248 (3d ed. 2012).

³⁹ Crystal S. Yang, *Free at Last? Judicial Discretion and Racial Disparities in Federal Sentencing*, 44 J. LEGAL STUD. 75, 75–76 (2015).

⁴⁰ Daniel K. Brough, *Breaking Down the Misprison Walls: Looking Back on the Federal Sentencing Guidelines, After Booker, Through a Bloomian Lens*, 82 N.D. L. REV. 413, 436–37 (2006).

⁴¹ See, e.g., United States v. Harrington, 947 F.2d 956, 967 (D.C. Cir. 1991); Douglas A. Berman, *From Lawlessness to Too Much Law? Exploring the Risk of Disparity from Differences in Defense Counsel Under Guidelines Sentencing*, 87 IOWA L. REV. 435, 444 (2002); Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence That Undermines the Federal Sentencing Guidelines*, 76 NOTRE DAME L. REV. 21, 42 (2000); Marc Miller, *Rehabilitating the Federal Sentencing Guidelines*, 78 JUDICATURE 180, 180 (1995); R. Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 PSYCHOL. PUB. POL'Y & L. 739, 742 (2001); Abbe Smith, *Criminal Responsibility, Social Responsibility, and Angry Young Men: Reflections of a Feminist Criminal Defense Lawyer*, 21 N.Y.U. REV. L. & SOC. CHANGE 433, 454 (1994); Ronald F. Wright, *Counting the Cost of Sentencing in North Carolina, 1980–2000*, 29 CRIME & JUST. 39, 100–01 (2002).

⁴² United States v. Booker, 543 U.S. 220, 267 (2005).

⁴³ *Id.* at 245; Gall v. United States, 552 U.S. 38, 59 (2007).

⁴⁴ See generally, Neal B. Kauder & Brian J. Ostrom, State Sentencing Guidelines, NAT'L CTR. FOR STATE COURTS (2008), https://www.ncsc.org/~media/Microsites/Files/CSI/State_Sentencing_Guidelines.ashx [<https://perma.cc/A58G-8WVG>] (noting that as of 2006, only twenty-one states had sentencing guidelines in place); Donald A. Dripps, *Guilt, Innocence, and Due Process of Plea Bargaining*, 57 WM. & MARY L. REV. 1343, 1352 (2016).

⁴⁵ See James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1525 (1981).

⁴⁶ *Id.* at 1526–27; See e.g., IND. CODE ANN. § 35-34-1-2.5 (West 1984); MICH. COMP. LAWS ANN. § 769.13 (West 2007).

knee pain. In such a scenario, depending on the jurisdiction in question, a prosecutor may charge various degrees of assault. In criminal statutes, the levels of assault are often distinguished by the difference between physical injury and serious physical injury or whether and what kind of a weapon was used in the commission of the crime.⁴⁷ The prosecutor might charge the maximum allowed by law, might believe that the injuries were not that serious and charge a lower felony, or might believe it was really just a fight between two people and charge a simple assault.

Perhaps the accused will be persuaded to offer information leading to the conviction of criminals in other cases, resulting in a prosecutorial decision to charge the defendant with misdemeanor assault or perhaps not charge him at all.⁴⁸ The difference in this prosecutorial charging decision can result in the defendant being charged as a high level felon facing decades in prison after conviction at trial, or a low level felon likely to receive a lesser prison term, or a misdemeanor, often punished with some non-incarceration sentence such as probation.⁴⁹ What then is the regular sentence for one convicted of hitting

⁴⁷ Compare, N.Y. PENAL LAW § 120.00 (McKinney 1965) (“A person is guilty of assault in the third degree when: . . . [w]ith intent to cause physical injury to another person, he causes such injury to such person or to a third person”), with *id.* § 120.05 (“A person is guilty of assault in the second degree when: . . . [w]ith intent to cause serious physical injury to another person, he causes such injury to such person or to a third person”). Compare S.C. CODE ANN. § 16-3-600(C)(1) (2015) (“A person commits the offense of assault and battery in the first degree if the person unlawfully: (a) injures another person, and the act: (i) involves non-consensual touching of the private parts of a person, either under or above clothing, with lewd and lascivious intent; or (ii) occurred during the commission of a robbery, burglary, kidnapping, or theft; or (b) offers or attempts to injure another person with the present ability to do so, and the act: (i) is accomplished by means likely to produce death or great bodily injury; or (ii) occurred during the commission of a robbery, burglary, kidnapping, or theft.”), with *id.* § 16-3-600(D)(1) (“A person commits the offense of assault and battery in the second degree if the person unlawfully injures another person, or offers or attempts to injure another person with the present ability to do so, and: (a) moderate bodily injury to another person results or moderate bodily injury to another person could have resulted; or (b) the act involves the nonconsensual touching of the private parts of a person, either under or above clothing”). Compare MONT. CODE ANN. § 45-5-201 (West 1999) (“A person commits the offense of assault if the person: (a) purposely or knowingly causes bodily injury to another; (b) negligently causes bodily injury to another with a weapon; (c) purposely or knowingly makes physical contact of an insulting or provoking nature with any individual; or (d) purposely or knowingly causes reasonable apprehension of bodily injury in another”), with *id.* § 45-5-202 (A person commits the offense of aggravated assault if the person purposely or knowingly causes serious bodily injury to another or purposely or knowingly, with the use of physical force or contact, causes reasonable apprehension of serious bodily injury or death in another”).

⁴⁸ See *Prosecution Function*, A.B.A. § 3-3.9, http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pfunc_blk.html#3.9 [https://perma.cc/9CUE-MNRK] (last visited Mar. 24, 2017).

⁴⁹ See, e.g., *Ewing v. California*, 538 U.S. 11, 18–20 (2003); *Rummel v. Estelle*, 445 U.S. 263, 265–66 (1980). See also Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 *FORDHAM L. REV.* 1511, 1519–20 (2000); Vorenberg, *supra* note 45, at 1526.

someone with fist and stick and causing injuries similar to those described above?

Additionally, who the defendant is often plays a significant role in what charges are brought.⁵⁰ The presence of a serious criminal history may convince a prosecutor to either charge the defendant as a persistent felon, which would warrant a mandatory enhanced sentence, or to only charge the defendant for the actual crime committed.⁵¹ That was precisely the situation that led to the Supreme Court's decision in *Bordenkircher v. Hayes*.⁵² The state prosecutor charged Hayes with uttering a forged instrument for which Hayes faced two to ten years in prison.⁵³ Apparently, the prosecutor determined that despite Hayes' prior two felony convictions, a decision to charge him under the Kentucky Habitual Criminal Act mandating life imprisonment for this crime involving \$88.30, was not warranted.⁵⁴ That determination changed however, when Hayes turned down the offer of a guilty plea in exchange for the prosecutor recommending a five-year prison term.⁵⁵ The prosecutor then re-charged Hayes under the above act, and after his conviction at trial, Hayes received the mandatory life sentence.⁵⁶ What then is the regular sentence for someone charged with such a forgery in Kentucky, even for a defendant with two prior felony convictions, when the crime charged by the prosecutor can make such a difference? Even where there is no such mandatory distinction in penalties between various charges that could be brought, the prosecutor might use the criminal record of the defendant as a factor in exercising his or her discretion regarding the charges to bring with a similar result regarding the post-trial sentence.⁵⁷

Another use of prosecutorial discretion in a way that destroys the concept of a regular sentence after trial is the sentencing recommendation the prosecutor makes after the defendant is convicted.⁵⁸ While the judge is not bound by the prosecutor's recommendation of a certain sentence, judges regularly take

⁵⁰ See *infra* text accompanying note 51.

⁵¹ See, e.g., *Bordenkircher v. Hayes*, 434 U.S. 357, 358–59 (1978); *Rummel*, 445 U.S. at 266. Rummel was charged with felony theft in Texas for obtaining \$ 120.75 by false pretenses. Texas punished such offenses at the time with a prison sentence from two to ten years. The prosecutor chose to proceed against Rummel under a Texas recidivist statute, and eventually he was sentenced to life imprisonment. See also *Ewing*, 538 U.S. at 17, in which the Court discusses California's statute affording prosecutors the discretion to treat certain crimes as felonies or misdemeanors. Such a decision was critical in determining application of the state's Three Strikes Law then in existence.

⁵² *Bordenkircher*, 434 U.S. at 357.

⁵³ *Id.* at 358.

⁵⁴ *Id.* at 358–59.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Vorenberg, *supra* note 45, at 1525–26; see also *supra* text accompanying note 51 (discussion of *Ewing v. California*, 538 U.S. 11 (2003)).

⁵⁸ See *infra* text accompanying notes 59–63.

such a recommendation into consideration for various reasons.⁵⁹ While the prosecutor's recommendation may be based on many factors, such as the ones referred to above, it may also be based on the plea offer that the defendant turned down before trial.⁶⁰ All prosecutors realize that if the sentence recommendation they make after trial does not exceed the one offered as part of a guilty plea, few defendants would have any incentive to accept the original offer and plead guilty.⁶¹ In most cases the ultimate sentence the judge metes out will not exceed the prosecutor's recommended sentence.⁶² So again, while not necessarily determinative of the sentence, the exercise of prosecutorial discretion can be significant at this stage as well.

In almost all non-capital cases for which there is not a precise mandatory sentence, it is the judge who ultimately decides the defendant's sentence.⁶³ But for the small minority of cases in which the judge is limited by mandatory minimum sentencing requirements (and even in such cases, the judge often has discretion about whether and how far to exceed this minimum), the judge still exercises immense discretion regarding the severity of a sentence.⁶⁴ So many variables may factor into a judge's sentence that it is impossible to enumerate all of them.⁶⁵ Some of these factors are appropriate sentencing factors, others might not be.⁶⁶ In the former category would be many of the factors related to the long accepted theories of why and how severely we sentence people convicted of criminal offenses.⁶⁷ Usually, these theories are categorized as retribution, incapacitation, deterrence, and rehabilitation.⁶⁸ Retribution calls for a sen-

⁵⁹ *Harris v. Superintendent, Va. State Penitentiary*, 518 F.2d 1173, 1174 (4th Cir. 1975); Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550, 567 (1978).

⁶⁰ See Vorenberg, *supra* note 45, at 1535.

⁶¹ See Gilchrist, *supra* note 32, at 612 ("Hefty trial penalties empower prosecutors to secure guilty pleas in almost all cases[.]").

⁶² Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1064–66, 1097 (1976) ("Judges seem to fear that if they were to depart too frequently from prosecutorial sentence recommendations, they would find their names in the newspapers. It is, in fact, almost as rare for judges to impose substantially more lenient sentences than prosecutors have recommended as it is for them to impose sentences that are more severe").

⁶³ Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 953 n.1 (2003) ("In noncapital felony cases, only five states—Arkansas, Missouri, Oklahoma, Texas, and Virginia—permit juries to make the sentencing decision").

⁶⁴ HERMAN, *supra* note 38, at 248; see also *United States v. Tucker*, 404 U.S. 443, 446 (1972).

⁶⁵ See, e.g., 18 U.S.C. § 3553 (2010); John H. King, *Criminal Procedure from the Viewpoint of the Trial Judge*, 25 CONN. B.J. 202, 210–213 (1951); see also *Bartholomey v. State*, 297 A.2d 696, 706 (Md. 1972) (enumerating a list of factors judges should consider in sentencing, which are relevant, and even encouraged in determining the sentence to be imposed).

⁶⁶ See HERMAN, *supra* note 38, at 248–50.

⁶⁷ *Id.* at 245–46, 248–50.

⁶⁸ *Harmelin v. Michigan*, 501 U.S. 957, 959 (1991); Grossman, *supra* note 35, at 117; Mary Sigler, *Contradiction, Coherence, and Guided Discretion in the Supreme Court's Capital Sentencing Jurisprudence*, 40 AM. CRIM. L. REV. 1151, 1154 (2003). See also *United States*

tence whose severity is commensurate with the seriousness of the crime.⁶⁹ It is a morality-based theory that looks to the blameworthiness of the offender and the harm his actions caused.⁷⁰ Retribution focuses more on the crime than the criminal and seeks beyond all else to do justice and achieve fairness.⁷¹

The other sentencing theories are more utilitarian in nature in that their primary goal is to diminish criminal behavior either by the individual criminal or the population as a whole.⁷² Rehabilitation as a theory of sentencing should not be confused with mere advocacy for the use of programs designed to help the defendant overcome any economic, social, medical, financial or psychological problem deemed to have played a role in his criminal behavior.⁷³ Such programs are favored even by many people who are opposed to rehabilitation-based sentencing.⁷⁴ Rehabilitation as a sentencing theory bases the type and severity of the sentence primarily on what and how long it will take for the defendant to overcome whatever problem caused the commission of the crime.⁷⁵ Such a sentence focuses considerably more on the offender than the offense,

v. Bergman, 416 F. Supp. 496, 498–500 (S.D.N.Y. 1976), for discussion of these sentencing theories by a highly regarded expert on the subject, Judge Marvin Frankel.

⁶⁹ C. L. TEN, CRIME, GUILT, AND PUNISHMENT 154 (1987); ANDREW VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS 31 (1985); Judge James S. Gwin, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, 4 HARV. L. & POL'Y REV. 173, 177 (2010).

⁷⁰ Gwin, *supra* note 69, at 177; VON HIRSCH, *supra* note 69, at 64; *see also* Grossman, *supra* note 35, at 117–18.

⁷¹ Gwin, *supra* note 69, at 177; JEFFRIE G. MURPHY, 16 RETRIBUTION, JUSTICE AND THERAPY: ESSAYS IN THE PHILOSOPHY OF LAW 229 (Wilfrid Sellars & Keith Lehrer eds., 1979); *see also* Grossman, *supra* note 35, at 117.

⁷² *See* Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 456 (1997).

⁷³ Chad Flanders, *The Supreme Court and the Rehabilitative Ideal*, 49 GA. L. REV. 383, 389–402 (2015). Rehabilitation as a theory of punishment seeks to impose a sentence based on how long the individual offender needs to be rehabilitated. *Id.* at 393; United States v. Bergman, 416 F. Supp. 496, 498–99 (S.D.N.Y. 1976).

⁷⁴ *See* Flanders, *supra* note 73, at 389–95.

⁷⁵ *Id.* at 399–402; NICHOLAS N. KITTRIE ET. AL., SENTENCING, SANCTIONS, AND CORRECTIONS: FEDERAL AND STATE LAW, POLICY, AND PRACTICE 24–25 (Robert C. Clark et. al. eds., 2d ed. 2002) (citing to J.M BURNS & J.S. MATTINA, SENTENCING (1978)); *See also* Bergman, 416 F. Supp. at 498–99, wherein Judge Marvin Frankel described and criticized the use of rehabilitation as a theory of punishment:

The court agrees that this defendant should not be sent to prison for “rehabilitation.” Apart from the patent inappropriateness of the concept to this individual, this court shares the growing understanding that no one should ever be sent to prison *for rehabilitation*. That is to say, nobody who would not otherwise be locked up should suffer that fate on the incongruous premise that it will be good for him or her. Imprisonment is punishment. Facing the simple reality should help us to be civilized. It is less agreeable to confine someone when we deem it an affliction rather than a benefaction. If someone must be imprisoned—for other, valid reasons—we should seek to make rehabilitative resources available to him or her. But the goal of rehabilitation cannot fairly serve in itself as grounds for the sentence to confinement.

and values “curing” the offender over proportionality between crime and punishment.⁷⁶

Advocates of deterrence-based sentencing seek to use punishment to create a strong disincentive for the particular offender to re-offend (referred to as special or specific deterrence) or to send a similar message to others in the community contemplating committing a crime, such as the one committed by the offender in the instant case (general deterrence).⁷⁷ Such sentences reflect these goals, for example, by conditioning the length of a prison sentence or the amount of a fine to that which the judge believes is likely to deter this offender or other potential offenders from committing a similar crime.⁷⁸

The final theory of punishment, incapacitation, is also utilitarian in that its purpose is to protect the public by separating the most dangerous of offenders from society.⁷⁹ Sometimes viewed as the dark side of rehabilitation, an incapacitation-based sentence imprisons a criminal offender for as long as it takes for him to no longer be a threat to the public.⁸⁰

Some judges use one or more of these theories to the exclusion of others, while other judges use some or all of the theories in combination, but often prioritize one theory over the others.⁸¹ That the decision about which theories to use or prioritize leads to substantially different sentences for the same crime is obvious.⁸² In fact, two judges who use the same theory still often arrive at different sentences for similar crimes and criminals.⁸³ Given the application of different theories of punishment and varied sentences even by judges applying the same theory, it is impossible to determine what the regular sentence is for a particular crime.⁸⁴

The broad and varied discretion afforded to prosecutors and judges in the vast majority of cases makes it absurd to attempt to claim that there is a regular sentence meted out to defendants who are convicted of similar crimes.⁸⁵ Without the ability to make such a determination, one cannot claim the sentence af-

⁷⁶ Judge Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691, 691 (2010); Morris B. Hoffman, *Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes the Most Dangerous*, 29 FORDHAM URB. L.J. 2063, 2077 (2001).

⁷⁷ Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 70–71 (2005).

⁷⁸ See Katelyn Carr, Comment, *An Argument Against Using General Deterrence as a Factor in Criminal Sentencing*, 44 CUMB. L. REV. 249 (2014).

⁷⁹ TEN, *supra* note 69, at 8.

⁸⁰ *Id.*

⁸¹ Steven Grossman & Stephen Shapiro, *Judicial Modification of Sentences in Maryland*, 33 U. BALT. L. REV. 1, 23 (2003).

⁸² *Id.*; see also Charles W. Ostrom et al., *Judges and Discrimination: Assessing the Theory and Practice of Criminal Sentencing*, 13–14 (2003), <https://www.ncjrs.gov/pdffiles1/nij/grants/204024.pdf> [<https://perma.cc/NGP6-HXQ9>].

⁸³ See Grossman & Shapiro, *supra* note 81, at 23.

⁸⁴ See *supra* notes 47–61 and accompanying text.

⁸⁵ See *supra* notes 14–47 and accompanying text.

forded to those convicted after trial is the regular sentence for particular types of crimes or offenders.⁸⁶ It follows that if there is no regular sentence meted out after trial, then there is no merit to the claim that the reduced sentence one receives almost inevitably from pleading guilty is a reward and simultaneously denying that the greater sentence meted out after conviction at trial is punishment.⁸⁷ The sentences meted out after trial are too fluid to be labeled as regular. Therefore, the difference in the sentences must be regarded as both reward and punishment.⁸⁸

Interestingly, the Supreme Court rejected a similarly misguided reward-only rationale when considering the use of the defendant's cooperation as a factor in sentencing.⁸⁹ In *Roberts v. United States*⁹⁰, the government asserted that the defendant deserved a harsh sentence in part due to his refusal to cooperate by naming his criminal associates. In response, Roberts argued that although cooperation is "[a] laudable endeavor" that bears a "rational connection to a defendant's willingness to shape up and change his behavior[.]" and therefore warrants a reduced sentence, he should not be punished for his failure to so cooperate.⁹¹ The Court's response to this argument was,

[w]e doubt that a principled distinction may be drawn between "enhancing" the punishment imposed upon the petitioner and denying him the "leniency" he claims would be appropriate if he had cooperated. The question for decision is simply whether petitioner's failure to cooperate is relevant to the currently understood goals of sentencing.⁹²

Applied to plea bargaining and embodying that same reasoning, that same sentence would read, "[w]e doubt that a principled distinction may be drawn between 'enhancing' the punishment imposed upon the petitioner and denying him the 'leniency' the court claims would be appropriate if he had plead guilty. The question for decision is simply whether petitioner's failure to plead guilty is relevant to the currently understood goals of sentencing." In other words, factoring into sentencing the accused's decision about whether to exercise his right to trial is both benefit and punishment. What matters is whether that decision should affect one's sentence.

⁸⁶ Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652, 658–60 (1981).

⁸⁷ *Id.*; see also *Scott v. United States*, 419 F.2d 264, 278 (D.C. Cir. 1969) ("The 'normal' sentence is the average sentence for all defendants, those who plead guilty and those who plead innocent. If we are 'lenient' toward the former, we are by precisely the same token 'more severe' toward the latter.").

⁸⁸ See generally Lippke, *supra* note 29 (arguing that the sentence a defendant receives following a guilty plea is a "waiver reward" and the sentence a defendant receives post-trial is a "non-waiver penalty" for exercising the right to trial).

⁸⁹ See, e.g., *Roberts v. United States*, 445 U.S. 552 (1980).

⁹⁰ *Id.*

⁹¹ *Id.* at 557 (quoting Brief for Petitioner).

⁹² *Id.* at 556–57 n.4.

The assertion that the reduced sentence accompanying a guilty plea is a reward, but the harsher post-trial conviction sentence is not a punishment seems even more absurd when viewed in conjunction with the actual extent of plea bargaining in the U.S. Roughly 95 percent of criminal cases are disposed of without trial in this country.⁹³ Using this reward only theory would mean that nineteen of twenty criminal defendants receive a “reward” for their guilty plea, whereas the one defendant who is convicted after trial receives the “regular” sentence he deserves and is therefore not being punished for exercising his right to trial.⁹⁴ I do not claim this means that differential sentencing reflects only punishment and not benefit, but that it further belies the claim that such a difference between those who plead and those who are convicted after trial is benefit alone.

Therefore, the benefit/punishment distinction rationale commonly offered as a defense to the claim that such differential sentencing reflects punishment for exercising the constitutional right to trial is unsupportable.

B. *A Guilty Plea Is the First Step On the Road to Rehabilitation*

As stated above, there are four traditional justifications for punishment: retribution, deterrence, incapacitation and rehabilitation.⁹⁵ The first three of these justifications offer no explanation as to why those who choose to go to trial should receive harsher sentences than those who plead guilty. Retributionists argue for sentences whose severity depends on the extent of the moral wrong committed by the offender and the consequences of his offense.⁹⁶ The focus of a retribution-based sentence would be the establishment of a proportional relationship between crime and punishment.⁹⁷ Whether a person chooses to plead guilty is irrelevant to this relationship, and therefore no defense of differential sentencing can be based on retributionist principles.⁹⁸

The intent of a deterrence-based sentence is to create a severe enough disincentive to engage in future criminal behavior by either the defendant before the court (specific deterrence) or others who are contemplating committing a similar crime (general deterrence).⁹⁹ Whether that sentence results from the offender’s guilty plea or conviction after trial has no impact on the degree to

⁹³ See sources cited *supra* note 24.

⁹⁴ Such a situation is rather like stores that have items “ON SALE” for fifty-one weeks a year. If you are unfortunate enough to purchase the item during the other week, are you paying the “regular” store price for it? See also Alschuler, *supra* note 86, at 658–60.

⁹⁵ See *supra* Section I.A.

⁹⁶ Gwin, *supra* note 69, at 177.

⁹⁷ *Id.*

⁹⁸ In fact, many retributionists would argue that plea bargaining is incompatible with the retribution model because most plea bargains impose lighter sentences than what would be “deserved.” Russell L. Christopher, *The Prosecutor’s Dilemma: Bargains and Punishments*, 72 *FORDHAM L. REV.* 93, 118–22 (2003).

⁹⁹ Frase, *supra* note 77, at 70–71.

which the defendant or another potential offender is likely to eschew future criminal behavior.¹⁰⁰ That is unless what the sentencer is hoping to deter is the decision to claim one's right to a trial.¹⁰¹ Deterrence-based sentencing, therefore, offers no explanation for the difference in sentences between those who plead guilty and those who go to trial.¹⁰²

Sentences meted out for incapacitation are designed to separate the most dangerous criminals from the rest of society because of the extreme danger posed by such criminals.¹⁰³ The goal is to sentence the defendant to enough time to ensure he no longer poses such a danger.¹⁰⁴ The decision to plead guilty or go to trial tells us nothing about how long it will take for a serial rapist or child molester to no longer be dangerous. Accordingly, neither retribution, deterrence, nor incapacitation can explain why one who is convicted at trial invariably receives a harsher sentence as opposed to what he was offered to plead guilty. The remaining justification for punishment, rehabilitation, does offer such a justification theory.¹⁰⁵ Rehabilitation as a sentencing theory conditions the severity of a sentence primarily on the means and the length of time that will be best for "curing" the offender of whatever social, economic, psychological, or other factor is believed to have motivated his criminal behavior.¹⁰⁶ If pleading guilty is viewed as the acceptance of responsibility,¹⁰⁷ such acceptance can be regarded as the first step on the road to rehabilitation.¹⁰⁸ Applying this

¹⁰⁰ *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, *supra* note 20, at 211.

¹⁰¹ Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 728 (2005); *Id.* at 728 n.25 (noting examples of the Department of Justice requesting stricter sentencing laws. Increased sentences make prosecutors' jobs easier by "creating an incentive for defendants to cooperate." By increasing potential sentences, prosecutors retain enhanced bargaining power. Enhanced bargaining power and the enhanced risks of trial encourages more defendants to accept pleas and avoid trial).

¹⁰² *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, *supra* note 20, at 211.

¹⁰³ TEN, *supra* note 69, at 8.

¹⁰⁴ *Id.* at 7–8.

¹⁰⁵ *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, *supra* note 20, at 210.

¹⁰⁶ See Gertner, *supra* note 76, at 691. See also B. ANTHONY MOROSCO, THE PROSECUTION AND DEFENSE OF SEX Crimes 13–14 (1993).

¹⁰⁷ See, e.g., U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2016). Entry of a plea of guilty prior to the commencement of trial combined with "truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which [he] is accountable under § 1B1.3 (Relevant Conduct)[,]" will constitute significant evidence of *acceptance of responsibility* for the purposes of subsection (a). *Id.* Application Note 1(A).

¹⁰⁸ *McKune v. Lile*, 536 U.S. 24, 47 (2002) ("Acceptance of responsibility is the beginning of rehabilitation."); *Blackledge v. Allison*, 431 U.S. 63, 71 (1977); *Hooten v. State*, 442 S.E.2d 836, 840 (Ga. Ct. App. 1994) ("[G]uilty pleas are recognized as a significant step toward rehabilitation"); Richard Klein, *Due Process Denied: Judicial Coercion in the Plea Bargaining Process*, 32 HOFSTRA L. REV. 1349, 1408 (2004); Jeff Palmer, Note, *Abolishing Plea Bargaining: An End to the Same Old Song and Dance*, 26 AM. J. CRIM. L. 505, 516–17

theory, an offender who pleads guilty requires less time to be completely rehabilitated than one who goes to trial maintaining his innocence.¹⁰⁹ Because this is the only punishment theory that justifies differential sentencing, it too is a popular response to the assertion that such sentencing amounts to punishment for exercising the right to trial. Unfortunately, the theory breaks down when confronted with the reality of why defendants in criminal cases *actually* plead guilty.¹¹⁰

It will surprise no one who has been a defendant in a criminal case, who has represented a criminal defendant, or who understands human behavior that the vast majority of defendants who plead guilty do so in order to avoid the virtual certainty of the harsher sentence they will receive if convicted at trial.¹¹¹ While it is certainly possible (although undoubtedly rare) that the defendant is pleading guilty because he wishes to begin to mend his evil ways, such a reason is likely to be secondary to the understandable human desire to avoid prison or spend the least amount of time there as possible.¹¹²

Those wishing to disregard this reality must still confront the corollary of the assertion that pleading guilty is the first step on the road to rehabilitation. That is: the decision of those charged with crimes to go to trial manifests a lack of rehabilitative likelihood. In fact, people opt to claim their trial-related rights for a variety of reasons.¹¹³ These reasons generally relate to their belief that they will be acquitted at trial or convicted of a lesser offense.¹¹⁴ Sometimes this belief is based on a perceived legal impediment to their conviction, such as the government's reliance on a search or seizure of dubious Fourth Amendment legality.¹¹⁵ Sometimes defendants believe they are actually innocent of the

(1999); *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, *supra* note 20, at 209–10.

¹⁰⁹ See Douglas D. Guidorizzi, *Should We Really "Ban" Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 EMORY L.J. 753, 761–62 (1998); see, e.g., Brady v. United States, 397 U.S. 742, 753 (1970) (“[W]e cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary.”).

¹¹⁰ Charlie Gerstein, *Plea Bargaining and Prosecutorial Motives*, 15 U.N.H. L. REV. 1, 25 (2016) (arguing that defendants often plead guilty to be released from incarceration, knowing if they plead guilty they will likely spend less time incarcerated); Tung Yin, Note, *Not a Rotten Carrot: Using Charges Dismissed Pursuant to a Plea Agreement in Sentencing Under the Federal Guidelines*, 83 CAL. L. REV. 419, 458 (1995).

¹¹¹ Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992); Tina Wan, Note, *The Unnecessary Evil of Plea Bargaining: An Unconstitutional Conditions Problem and a Not-So-Least Restrictive Alternative*, 17 S. CAL. REV. L. & SOC. JUST. 33, 40 (2007); Yin, *supra* note 110, at 458.

¹¹² See *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, *supra* note 20, at 210–11.

¹¹³ See, e.g., HERMAN, *supra* note 38, at 8–10.

¹¹⁴ *Id.* at 8.

¹¹⁵ See *id.*

crimes for which they have been charged.¹¹⁶ Are such individuals less likely to be rehabilitated because they wish to claim the protections afforded to them by law? For example, if a defendant listens to his attorney's advice that the government will not be successful in obtaining a conviction against him, is he less likely to be rehabilitated than one who ignores such advice and pleads guilty?

The notion that acknowledging one's responsibility for a negative behavior is the first step towards addressing, correcting, and curing that behavior certainly has support in literature and in practice.¹¹⁷ The Twelve Step Program, made famous by Alcoholics Anonymous, has this principle as one of its foundations.¹¹⁸ But that declaration must be sincere and directed—in other words, the desire to correct one's behavior must be the basis, the causative factor that leads to engaging in the action taken by the subject.¹¹⁹ It stretches credulity and belies the experience of those engaged in the criminal justice process to believe that the overwhelming number of defendants who plead guilty do so primarily for any reason other than to obtain a benefit in sentencing.¹²⁰

It is apparent then that neither rehabilitation nor any other traditional justification for punishment can be used to support differential sentencing in the plea bargaining/trial criminal justice process.

¹¹⁶ *Id.*

¹¹⁷ See, e.g., *McKune v. Lile*, 536 U.S. 24, 33–34 (2002); John Coleman, *Take Ownership of Your Actions by Taking Responsibility*, HARV. BUS. REV. (Aug. 30, 2012), <https://hbr.org/2012/08/take-ownership-of-your-actions> [<https://perma.cc/5YDH-YPU9>]; Seth A. Grossman, *A Thin Line Between Concurrence and Dissent: Rehabilitating Sex Offenders in the Wake of McKune v. Lile*, 25 CARDOZO L. REV. 1111, 1116 (2004); Raffaele Rodogno, *Shame and Guilt in Restorative Justice*, 14 PSYCHOL. PUB. POL'Y, & L. 142, 143, 154 (2008); John Sabini & Maury Silver, *In Defense of Shame: Shame in the Context of Guilt and Embarrassment*, 27 J. FOR THEORY SOC. BEHAV. 1, 1–15 (1997).

¹¹⁸ ALCOHOLICS ANONYMOUS WORLD SERVICES, INC., ALCOHOLICS ANONYMOUS: THE STORY OF HOW MANY THOUSANDS OF MEN AND WOMEN HAVE RECOVERED FROM ALCOHOLISM 58–60 (3d. 1976).

¹¹⁹ See *State v. Tiernan*, 645 A.2d 482, 486 (R.I. 1994); *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, *supra* note 20, at 210.

¹²⁰ LLOYD L. WEINREB, DENIAL OF JUSTICE: CRIMINAL PROCESS IN THE UNITED STATES 75 (1977); see also *Defendants' Incentives for Accepting Plea Bargains*, NOLO.COM, <http://www.nolo.com/legal-encyclopedia/plea-bargains-defendants-incentives-29732.html> [<https://perma.cc/L587-YC9X>] (last visited Mar. 24, 2018). The Supreme Court noted that “[f]or a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious—his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated.” *Brady v. United States*, 397 U.S. 742, 752 (1970). Even those believing themselves to have a significant chance of being acquitted at trial are incentivized to plead guilty because they know they are highly likely to receive a lower sentence by doing so than if convicted at trial. Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 205 (2006).

C. *The Sentencing Judge Learns Significantly More About the Defendant and the Crime After Trial Than She Knew During Plea Bargaining*

Some cases have justified harsher sentences for criminal defendants who choose to go to trial because the sentencing judge learns of aggravating factors regarding either the crime or the criminal that she did not know at the time a plea would have been taken.¹²¹ There are several problems with using this as a justification for differential sentencing. As with the first step on the road to rehabilitation justification discussed above, this theory rests on a largely flawed premise that belies what actually happens in most cases.¹²² Additionally, even if this argument has validity in certain instances, appellate courts too often accept the assertion that information learned at trial was the causative factor in the enhanced post-trial sentence. They do so absent a convincing explanation as to what those aggravating factors were or why they played such a substantial role in the enhanced post-trial sentence.¹²³ Finally, even if this justification applies

¹²¹ *Alabama v. Smith*, 490 U.S. 794, 801 (1989); *Morales v. State*, 819 So. 2d 831, 834 (Fla. Dist. Ct. App. 2002) (noting that because the “trial court, at the time of sentencing, received greater information about the defendant’s prior convictions and the extensiveness of this, the third attack on the victim, than was known to the court when the plea was discussed,” the harsher sentence was upheld); see also *The Influence of the Defendant’s Plea on Judicial Determination of Sentence*, *supra* note 20, at 218.

¹²² See, e.g., *People v. Blond*, 96 A.D.3d 1149, 1150, 1153 (N.Y. App. Div. 2012), wherein the defendant claimed that the disparity between final pre-trial plea offer of three-and-a-half years and his ultimate post-trial sentence of twenty-two and two-thirds years plus twenty years of post-release supervision was punishment for exercising his right to trial. In rejecting the defendant’s argument, the court conceded that the disparity was “significant,” but found no evidence “that the sentences were retaliatory or vindictively imposed as a penalty for defendant’s exercise of his right to a jury trial.” *Id.* at 1153–54. In support of this conclusion, the court found that “the crimes are of a serious nature, they were committed against a backdrop of physical violence, they involved a vulnerable teenager who was living in defendant’s household, he received less than the maximum allowable sentence for rape in the first degree and he has refused to take any responsibility for his conduct or exhibit any remorse.” *Id.* at 1154. It is hard to imagine that when the plea was offered, the prosecutor and judge were not aware of most of the factors used by the court above to justify the significantly harsher post-trial sentence. The defendant had been indicted on ten counts, including the forcible rape and sexual abuse of a fifteen-year-old girl. *Id.* at 1150. Additionally, he was charged with “attempted assault with a brick on his wife, who was the victim’s aunt, and property damage he caused to his wife’s vehicle when he repeatedly drove his own vehicle into it. When he was arrested and taken into custody, he also caused property damage to a police vehicle by shattering its window in a violent rage.” *Id.* A pre-trial hearing revealed that the defendant had engaged in previous domestic violence. *Id.* While undoubtedly the trial judge learned more details about the crimes during the trial, it seems unlikely that such information could justify a prison sentence more than six times that which was offered as part of a guilty plea, given what the parties knew of the defendant and the crime at the time the plea was offered.

¹²³ See, e.g., *Hampton v. Wyrick*, 588 F.2d. 632, 633–34 (8th Cir. 1978). In *Hampton*, the court affirmed the federal district court’s denial of a writ of habeas corpus in which the defendant had argued that he was punished for exercising his right to trial. *Id.* at 632. During plea negotiations, the prosecutor had offered Hampton twenty-five years in prison in exchange for a guilty plea, a sentence that the trial judge indicated was acceptable to him. *Id.* at 633. After rejecting the plea and being convicted at trial, the judge sentenced Hampton to fifty years in prison, double the length or twenty-five years more than what had apparently

in certain cases, those cases are likely to be the exception rather than the rule and do not come close to explaining the fact that post-trial sentences of criminal defendants are almost always more substantial than these individuals would have received had they pled guilty.¹²⁴

To understand why this defense of differential sentencing rests on a largely flawed premise, we need to examine the process by which most guilty pleas are entered along with what information about the defendant and the crime are normally available to the prosecutor, defense attorney, and judge before the plea is offered and accepted. Of course each jurisdiction, in fact each particular court and prosecutor's office, may have different amounts of material available to them at various times during plea negotiations.¹²⁵ Regarding some minor criminal charges, prosecutors might have a boilerplate policy for plea offers, and therefore the specific details of the crime may not be known to them.¹²⁶ For all other offenses however, it would be the poor prosecutor that offers a plea bargain to a defendant without adequate knowledge of both the alleged offense and the defendant's criminal record.¹²⁷ While the computer-generated records of the defendant's criminal history can have omissions or errors, they are gen-

seemed appropriate to the judge during the plea negotiations. *Id.* In so holding, the federal circuit court noted that although the sentence was "unusual, there exists only speculation that it was vindictively imposed for petitioner's exercise of his constitutional right to a jury trial." *Id.* The court then accepted the basis offered by the state court for why the post-trial sentence was so much longer. *Id.* at 634. "It was within the statutory limits. Further, the trial judge testified at the 27.26 hearing that he was influenced in the sentencing by the fact revealed at trial as to the vicious nature of the crime and defendant's record of 13 prior convictions." *Id.* at 633 (citations omitted) (quoting *Hampton v. State*, 558 S.W.2d 369, 371 (Mo. Ct. App. 1977)). That the sentence was within statutory limits sheds no light on the issue of whether the sentence was punishment for exercising the right to trial. No mention is made of whether the trial judge knew of the defendant's criminal record at the time of the plea, but it is hard to imagine the judge approved of a twenty-five-year prison sentence at that time without such knowledge. The final justification for the enhanced sentence relies on the dubious notion that the judge apparently was also unaware of the "viciousness" of the crime at the time of the plea in a case which involved armed robbery, the taking of a hostage, and the shooting of the defendant by a police officer. *State v. Hampton*, 509 S.W.2d 139, 140 (Mo. Ct. App. 1974).

¹²⁴ See cases cited *supra* note 20; see also *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, *supra* note 20, at 209–211.

¹²⁵ See Stephen J. Schulhofer, *A Wake-Up Call from the Plea-Bargaining Trenches*, 19 LAW & SOC. INQUIRY 135, 136–37 (1994).

¹²⁶ GARY MULDOON, HANDLING A CRIMINAL CASE IN NEW YORK § 17:68 (2017) (noting that "[i]ndividual prosecutors' offices may have plea policies for various offenses, such as a ban on offering a plea to a lesser offense in a high blood alcohol DWI case, or restrictions post-indictment."); Hadar Aviram, et al., *Check, Pleas: Toward a Jurisprudence of Defense Ethics in Plea Bargaining*, 41 HASTINGS CONST. L.Q. 775, 837–38 (2014) (quoting Telephone Interview by Deanna Dyer with Assistant Public Defender, Orange County, Calif. (Sept. 3, 2013)) (noting that plea offers for some charges, like a first-time DUI, are standard in the prosecutor's office, and are not subject to deviation).

¹²⁷ See Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 44 (1983) (noting that the primary concern for any prosecutor in deciding whether to offer a plea bargain, and what the terms should be, are the "circumstances of the offense" and the "characteristics of the offender").

erally accurate and likely have already been the basis for the determination of the defendant's bail and in some cases possibly even for what charges were brought.¹²⁸ Similarly, when they offer pleas, prosecutors usually know most of the details of the crime charged.¹²⁹ For example, not all rapes are the same. While every rape is a serious crime, some might warrant harsher sentences than others because of the degree of violence involved.¹³⁰ Of course prosecutors likely would have spoken to the rape victim or at least the investigating officer to learn this detail among others about the rape before determining the extent of the plea to offer the defendant.¹³¹

It is equally obvious that no sensible judge would accept a plea of guilty to a lesser charge without knowing the facts of the case.¹³² This is true even if the judge only commits herself to dismissing the higher charge as part of the plea deal.¹³³ Where the judge makes a commitment to a sentencing range or agrees to a specific sentence as part of the deal, the degree to which the judge knows the facts of the case and the background of the accused is likely to be even greater.¹³⁴ No judge wants to have agreed to a plea to a lesser offense and or sentence than was embodied in the original charge if it turns out the offense was far worse than she knew. To support the assertion that the increase in sentences meted out after trial compared to those discussed or agreed to during

¹²⁸ See e.g., *Banks v. State*, 466 A.2d 69, 74 (Md. Ct. Spec. App. 1983); James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 U. SAINT THOMAS L.J. 387, 391, 391 n.24 (2006) (Noting that criminal records are used for a variety of purposes, including deciding what charges to bring and to aid in plea bargaining decisions. The author further notes that twenty-four states require or permit criminal records to be considered in bail decisions).

¹²⁹ See Steven L. Friedman, Comment, *Preplea Discovery: Guilty Pleas and the Likelihood of Conviction at Trial*, 119 U. PA. L. REV. 527, 529–30 (1971).

¹³⁰ This difference in the level of plea offered may stem from just the prosecutor's view of the case or it may be manifested in the law itself. See e.g., MD. CODE ANN., CRIM. LAW § 3-303 (West 2017) (rape in the first degree is defined as "vaginal intercourse with another by force, or the threat of force, without the consent of the other" with the use of a dangerous weapon, an infliction of serious injury on the victim, threatening or placing the victim in fear that the victim will be subject to death, suffocation, strangulation, disfigurement, serious physical injury, or kidnapping, committed while aided and abetted by another, or a rape committed in connection with a burglary); *Id.* § 3-304 (rape in the second degree is defined as vaginal intercourse by force, threat of force, without the consent of the other, vaginal intercourse with a person who is cognitively impaired, or vaginal intercourse with a victim under the age of 14 when the person performing is at least 4 years older than the victim).

¹³¹ See Friedman, *supra* note 129, at 529–30.

¹³² See ABA STANDARDS FOR CRIMINAL JUSTICE 14-1.6(a) (3d ed. 1999).

¹³³ See *id.* at 14-3.3(a), (b)(ii).

¹³⁴ See Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325, 376–77, 379 (2016). Virtually all information that goes into determining the appropriate sentence for a defendant is available at the time that plea negotiations take place. Through interviews with prosecutors, defense attorneys, and judges, the authors describe how judges learn critical information about the defendant at this time. Computer records usually detail the criminal history of the defendant and the defense attorneys customarily provide personal information about their clients that may be used to mitigate a plea offer.

plea bargaining is often due to the additional information judges find out about the crime or the accused during trial, requires a belief that judges customarily act irresponsibly in accepting pleas of guilty without adequate knowledge of the critical elements that go into the sentencing decision—the nature of the crime and the defendant’s background.

While there are undoubtedly certain situations in which what a judge learns about the crime or the criminal during trial leads the judge to think the defendant deserves a harsher sentence than she was willing to accept during plea negotiations, it defies credulity to imagine that the frequency of such situations comes anywhere near explaining why nearly all post-trial sentences are more severe than any proposed plea agreements.

D. Enhanced Sentences for Those Defendants Convicted After Trial Is an Essential and Inevitable Part of the Negotiation Process That Is Plea Bargaining

The final defense of differential sentencing rests on the recognition that plea bargaining is a negotiation and the essence of a negotiation is that each side tries to obtain the best outcome necessary to satisfy its interest.¹³⁵ In most cases, for the prosecutor that means obtaining a plea of guilty and a sentence commensurate with her assessment of the crime and the criminal.¹³⁶ For the defendant, this usually means pleading to the least serious charge and receiving the most lenient sentence possible.¹³⁷ Obviously, this often translates in operation to the prosecutor negotiating for a plea that authorizes more prison time and the defendant seeking less time.¹³⁸ An essential ingredient in this negotiation is the option each side has to take the case to trial should the negotiations fail to reach an agreed to plea of guilt.¹³⁹ For the prosecutor, this risks the possibility of the defendant being acquitted.¹⁴⁰ For the defendant, this risks a trial conviction with the almost inevitable result that he will receive a sentence harsher than was offered during the plea negotiations.

In *Bordenkircher v. Hayes*, mentioned above, the Supreme Court used this reasoning to dispute the notion that the substantially harsher sentence that Hayes received after his re-indictment and conviction, compared to what was

¹³⁵ WEINREB, *supra* note 120, at 78, 82; *see also*, Scott & Stuntz, *supra* note 111, at 1935–40.

¹³⁶ HERMAN, *supra* note 38, at 5.

¹³⁷ *Id.* at 8.

¹³⁸ *See* William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61, 61, 85 (1971).

¹³⁹ Of course, the defendant without the acquiescence of a quid pro quo from the prosecutor or the judge can plead guilty to all of the charges he faces, thus eliminating the possibility of a trial. As there is no tangible benefit for their doing so, very few defendants plead guilty in such a manner.

¹⁴⁰ Jacqueline L. Schreurs, Note, *For the Sake of Public Policy: Plea Bargaining Demands Sixth Amendment Protection Due to Its Prevalence and Necessity in the Judicial System*, 48 CREIGHTON L. REV. 629, 644 (2015).

offered during plea negotiations, was in fact punishment for exercising his right to trial.¹⁴¹ In the Court's words, "in the 'give-and-take' of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer."¹⁴² In other words, the process surrounding the decision to plead guilty or go to trial is a gamble for the accused and if you take the gamble, are convicted at trial, and receive a harsher sentence than if had you plead guilty, you cannot come back and say you were punished for that decision.¹⁴³

Nine years before the decision in *Hayes*, the U.S. Court of Appeals for the D.C. Circuit used similar reasoning in *Scott v. U.S.*¹⁴⁴ After wisely rejecting the benefit/punishment dichotomy discussed in Subsection I.A above as being false, Judge David Bazelon offered the following alternative argument for why differential sentencing is not punishment for exercising a constitutional right:

Superficially it may seem that . . . the defendant who insists upon a trial is found guilty pays a price for the exercise of his right when he receives a longer sentence than his less venturesome counterpart who pleads guilty. In a sense he has. But the critical distinction is that the price he has paid is not one imposed by the state to discourage others from a similar exercise of their rights, but rather one encountered by those who gamble and lose.¹⁴⁵

Similar to the Court in *Hayes*, Judge Bazelon justified differential sentencing as the acceptable price to be paid for taking the risk of going to trial.¹⁴⁶ In so doing, the accused is seeking the reward of an acquittal with the understanding that he will likely receive a heavier sentence should the gamble prove unsuccessful and he loses at trial.¹⁴⁷

The assertion that plea bargaining is a negotiation and that the negotiation inevitably involves a gamble for the accused should he reject the plea deal and go to trial is reasonable.¹⁴⁸ The advantage of this acknowledgment is at least an implicit rejection of the other defenses of differential sentencing in that it recognizes that this difference rests on the defendant's choice to go to trial and not on the unrealistic justifications discussed above.¹⁴⁹ The problem with it lies in its failure to offer a reason based in any traditional justification for punishment—that explains why defendants who choose the trial option receive or deserve heavier sentences than those who plead guilty.¹⁵⁰ Unlike retribution, rehabilitation, deterrence, and incapacitation, gambling and losing has never been

¹⁴¹ *Bordenkircher v. Hayes*, 434 U.S. 357, 362–65 (1978).

¹⁴² *Id.* at 363.

¹⁴³ *Id.* at 363–64.

¹⁴⁴ *Scott v. United States*, 419 F.2d 264, 276 (D.C. Cir. 1969).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ See H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Criminal Justice System*, 61 CATH. U. L. REV. 63, 70 (2011).

¹⁴⁸ *Scott*, 419 F.2d at 276–77.

¹⁴⁹ *Id.* at 270–72; see discussion *supra* Section I.A.

¹⁵⁰ See discussion *supra* Section I.A.

used as an explanation for how long the government should deprive a person of his or her freedom. Clearly the gambling and losing argument does not fall within any of the long accepted sentencing justifications. And, as the Supreme Court said in *Graham v. Florida*, “[a] sentence lacking any legitimate penological justification is by its nature disproportionate to the offense.”¹⁵¹

Therefore, unlike the other defenses offered, the give-and-take of negotiations, gamble and lose rationale is a realistic explanation for differential sentencing. However, this explanation offers no sound sentencing theory for why those who go to trial should be imprisoned longer than those who plead guilty and as with all the other justifications, results in a punishment for the exercise of a constitutional right.

II. THE GOVERNMENT MAY PLACE A PRICE ON THE CONSTITUTIONAL RIGHT TO TRIAL IF THE SOCIETAL NEED IT SERVES IS SIGNIFICANT

After acknowledging that the harsher sentence a defendant receives after a trial conviction as opposed to the lighter sentence offered for a plea of guilty is punishment for exercising his right to trial, we must next determine if a person can be lawfully punished for exercising a constitutional right. Cases have held that with appropriate justification and limits, it is permissible to place a price on the exercise of a constitutional right.¹⁵² Some of these cases have involved broad constitutional protections, such as the right to free speech, the free exercise of religion, and the right to bear arms.¹⁵³ Notably, other such cases have dealt specifically with sanctioning the inevitable chill on the right to trial that stems from the plea bargaining process itself.¹⁵⁴

It has been clear since the Supreme Court’s holding in *Sherbert v. Verner* that even the most fundamental of constitutional rights, such as the free exercise of religion, can be restricted by government actions, where those actions meet the “compelling state interest” test.¹⁵⁵ In *United States v. Lee*, for example, the appellee claimed his Amish religious beliefs regarding providing for one’s own family were violated by the requirement that he pay social security taxes.¹⁵⁶ The Court accepted both the sincerity of his claim and concluded that this did involve an interference with the free exercise of his religion.¹⁵⁷ Significantly, however, the Court said this determination began rather than ended the

¹⁵¹ *Graham v. Florida*, 560 U.S. 48, 71 (2010).

¹⁵² See *infra* notes 157–83 and accompanying text.

¹⁵³ See *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) (right to bear arms); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (free exercise of religion); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 570–72 (1942) (free speech).

¹⁵⁴ See, e.g., *Corbitt v. New Jersey*, 439 U.S. 212, 230 (1978); *United States v. Jackson*, 390 U.S. 570, 582 (1968).

¹⁵⁵ *Sherbert*, 374 U.S. at 403.

¹⁵⁶ *United States v. Lee*, 455 U.S. 252, 255 (1982).

¹⁵⁷ *Id.* at 257.

inquiry into its constitutionality and reiterated that such an interference is justified “[if] it is essential to accomplish an overriding governmental interest.”¹⁵⁸

The government interests pertaining to the nature of the social security system that were enumerated in *Lee* bear a resemblance to the justifications for the plea bargaining system as well. Specifically, the Court alluded to the nationwide breadth of the social security system, its size, and the benefits that flow to individuals through social security.¹⁵⁹ Finally, the Court noted that without the requirement that people contribute to social security, the system could not function, leading to the conclusion that the governmental interest was “very high.”¹⁶⁰ Similarly, plea bargaining, with the almost inevitable price it places on the constitutional right to trial, is nationwide in its breadth. The system by which courts dispose of criminal cases through plea bargaining is not a unitary system as is social security, but it is pervasive in the criminal justice systems of all fifty states and the federal courts. And while the numbers vary to some degree, it is generally accepted that 90 to 95 percent of criminal cases are disposed of through plea bargaining.¹⁶¹ Lastly, it is hard to argue with the assertion that our modern criminal justice system could not function in its current form without disposing of as many cases as it does through trial-avoiding guilty pleas that save the system time and resources.¹⁶²

As with the free exercise of religion, a person can be punished for exercising other fundamental protections embodied in the Bill of Rights.¹⁶³ For example, regarding the freedom of speech, the Supreme Court noted in *Chaplinsky v. N.H.*, “[t]here are certain well-defined and narrowly limited classes of speech, the prevention and *punishment* of which ha[ve] never been thought to raise any Constitutional problem.”¹⁶⁴ To so punish, the government must show a compelling state interest.¹⁶⁵ Similarly, the exercise of other constitutional rights can be punished when a strong government need exists to do so.¹⁶⁶ Even as it held that the second amendment right to bear arms was a right possessed by individuals and invalidated laws that too broadly banned this protection, the Supreme Court in *District of Columbia v. Heller* emphasized that laws prohibiting and punishing the possession of weapons by felons or the mentally ill and those laws that

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 258.

¹⁶⁰ *Id.* at 258–59.

¹⁶¹ See sources cited *supra* note 24.

¹⁶² See *infra* notes 168–76 and accompanying text.

¹⁶³ See *infra* notes 166–71 and accompanying text.

¹⁶⁴ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (emphasis added).

¹⁶⁵ *Brown v. Hartlage*, 456 U.S. 45, 53–54 (1982); *First Nat’l. Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978).

¹⁶⁶ Strict scrutiny is the test used by the court to determine whether the government may constitutionally infringe upon an individual’s fundamental rights. This requires the government to show there is a compelling state interest for the infringement, and that the governmental act is narrowly tailored to achieving said interest. *Roe v. Wade*, 410 U.S. 113, 155 (1973).

bar the carrying of weapons into schools or government buildings were still lawful.¹⁶⁷ In interpreting and applying *Heller* to a recent second amendment challenge to a federal firearms law, the U.S. Court of Appeals for the Third Circuit asserted that *Heller* allows for laws not only deemed to be non-burdensome to the right to bear arms (i.e. for groups of people deemed to have forfeited this protection), but significantly also for those laws that do burden that right.¹⁶⁸ The requirement for upholding such laws is that they be shown to have the appropriate level of government need.¹⁶⁹

In yet another area of constitutional protection, the Court allowed for limitations on the right to privacy.¹⁷⁰ After holding that a New York statute prohibiting the sale of contraceptives to minors was unconstitutional in *Carey v. Population Services International*, the Court observed that not all intrusions into privacy rights were invalid.¹⁷¹ In the Court's words, "even a burdensome regulation may be validated by a sufficiently compelling state interest."¹⁷²

While courts, including the Supreme Court, have taken pains to avoid acknowledging that meting out harsher penalties for trials is indeed punishment for the exercise of a constitutional right (as discussed in Part I), the Supreme Court has on at least one occasion come substantially close to both acknowledging and defending this reality.¹⁷³ In *U.S. v. Jackson*, the Court considered the constitutionality of the part of the Federal Kidnapping Act that provided for the sentence of death only when the defendant was found guilty by a jury.¹⁷⁴ In other words, the accused was not subject to capital punishment under this statute if he plead guilty or was convicted after electing a trial before a judge only.¹⁷⁵

After rejecting the government's various arguments that disputed the above meaning of the Act, the Court focused on why such a sentencing scheme was unconstitutional.¹⁷⁶ In so holding, the Court concluded that the "inevitable effect of any such provision, is of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial."¹⁷⁷ The Court did not, however, rest its decision on the existence of this effect alone and regarded as insignificant

¹⁶⁷ *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008).

¹⁶⁸ *Binderup v. Attorney Gen. United States*, 836 F.3d 336, 344 (3d Cir. 2016).

¹⁶⁹ *Id.* at 346.

¹⁷⁰ *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684–85 (1977).

¹⁷¹ *Id.* at 685–86.

¹⁷² *Id.* at 686; *see also* *Roe v. Wade*, 410 U.S. 113, 155 (1973).

¹⁷³ *See infra* notes 175–181 and accompanying text.

¹⁷⁴ *United States v. Jackson*, 390 U.S. 570, 570–71 (1968).

¹⁷⁵ *Id.* at 571.

¹⁷⁶ *See id.* at 572.

¹⁷⁷ *Id.* at 581 (citations omitted); *see also* *Corbitt v. New Jersey*, 439 U.S. 212, 218 (1978) (wherein the Court made clear, specifically in connection with plea bargaining, "that not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid").

both whether this effect was intentional or collateral and whether the statute coerced or merely encouraged the defendant to forego his right to a jury trial. Instead, the Court emphasized that the government's right to "chill" the exercise of such constitutional rights depended on whether that chilling was "needless[]." ¹⁷⁸ Later in the opinion, after recognizing the government's claim that the goal of the statute was to mitigate the application of the death penalty in kidnapping cases, the Court alluded to other ways such a goal could be achieved without punishing a defendant for exercising his right to a jury trial. ¹⁷⁹ The Court noted that, "[w]hatever the power of Congress to impose a death penalty for violation of the Federal Kidnaping Act, Congress cannot impose such a penalty in a manner that *needlessly* penalizes the assertion of a constitutional right." ¹⁸⁰ The obvious implication to be drawn from the Court's reference on two occasions to the inability of the government to chill or penalize the exercise of a constitutional right needlessly is that such penalizing can occur if the government has a need to do so. Such an approach is consistent with the Court's holdings in the cases discussed above dealing with the right to free speech, to bear arms, privacy, and the free exercise of religion. ¹⁸¹

The task then is to discern whether the penalty meted out by the almost inevitably harsher sentence the defendant will receive because he chose to exercise his constitutional right to a trial is needless. The first logical step in this assessment is to recognize the usual cause-effect relationship in the decision to choose or forego the right to trial. This requires acknowledging that the vast majority of defendants who plead guilty do so because they have been promised or have reason to believe they will receive a charge and or sentencing reduction if they forego their right to a trial. ¹⁸² In other words, they believe, and almost always with good reason, that they will receive a harsher sentence if their conviction comes from a trial and not a guilty plea. ¹⁸³ Aside from exceptional circumstances, it would be the foolish defendant who pleads guilty and the incompetent defense attorney who recommends he do so without this belief. ¹⁸⁴ Why give up the chance for an acquittal, even if slight, if the defendant derives no meaningful benefit for doing so? Once this cause-effect relationship is accepted, the discussion must turn to whether there is a justification, a need, for imposing this penalty on the decision of whether to choose a trial.

¹⁷⁸ *Jackson*, 390 U.S. at 582.

¹⁷⁹ *Id.* at 582–83.

¹⁸⁰ *Id.* at 583 (emphasis added).

¹⁸¹ See discussion *supra* Part II.

¹⁸² Wan, *supra* note 111, at 36–37.

¹⁸³ Daniel S. McConkie, *Judges as Framers of Plea Bargaining*, 26 STAN. L. & POL'Y. REV. 61, 63, 67 (2015).

¹⁸⁴ John G. Douglass, *Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining*, 50 EMORY L.J. 437, 447 (2001); see also Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1205 (1975).

While many have leveled reasonable criticisms of the plea bargaining systems in place almost everywhere in the United States,¹⁸⁵ a strong argument can be made that plea bargaining, in some form, is necessary to the functioning of criminal justice in our courts.¹⁸⁶ The most obvious and most often mentioned need for plea bargaining relates to the limited resources available to handle the thousands of criminal cases that pass through American courts on a daily basis.¹⁸⁷ The vast majority of criminal cases are disposed of without trials and most of these dispositions derive from plea bargaining.¹⁸⁸ Outlawing plea bargaining and the differential sentencing inextricably linked to it would result in many more trials.¹⁸⁹ Using the generally accepted figure that 90 to 95 percent of criminal cases are disposed of through plea bargaining, the system would have to accommodate up to nineteen times the trials it already conducts now.¹⁹⁰ Given the added time it takes to do trials, the additional manpower necessary, space limitations, other trial expenses such as the use of expert witnesses, and the inevitable appeals that follow trials, the allocation of resources needed to try all criminal cases that are now plead out would be monumental.¹⁹¹ Simply put, we could not afford to try these cases.¹⁹²

While the resource issue dominates any discussion of the benefits of plea bargaining, other benefits of the plea bargaining system should not be ignored. Disposing of cases through pleas is more likely to bring about the desired goal of prompt justice than is the often delayed trial process, complete with appeals, possible reversals, and retrials.¹⁹³ Additionally, the reduction in court dockets that results from this quick resolution of cases via guilty pleas allows those cases that should go to trial to be tried more expeditiously.¹⁹⁴ While, as discussed

¹⁸⁵ See, e.g., Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1979 (1992); Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387, 1387–1411 (1970); Guidorizzi, *supra* note 109, at 767–72; Wan, *supra* note 111, at 40–41.

¹⁸⁶ Palmer, *supra* note 108, at 512; see also Chief Justice Warren Burger, *The State of the Judiciary—1970*, 56 A.B.A. J. 929, 931 (1970); Schreurs, *supra* note 140, at 658.

¹⁸⁷ Palmer, *supra* note 108, at 512–13; Schreurs, *supra* note 140, at 645–46.

¹⁸⁸ See Palmer, *supra* note 108, at 512–13.

¹⁸⁹ See *id.*

¹⁹⁰ See sources cited *supra* note 24.

¹⁹¹ *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.”); see also John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157, 164 (2014), in which the authors assert, “[i]t is almost universally accepted by the participants in the system that there is not enough personnel, court time, or funds to try every case, or for that matter even any significant percentage of cases.”

¹⁹² In 1970, then Chief Justice Warren Burger stated that “[a] reduction from 90 per cent to 80 per cent in guilty pleas requires the assignment of twice the judicial manpower and facilities” and “[a] reduction to 70 per cent trebles this demand.” Warren, *supra* note 186, at 931.

¹⁹³ See Guidorizzi, *supra* note 109, at 767.

¹⁹⁴ See Steeve Mongrain & Joanne Roberts, *Plea Bargaining with Budgetary Constraints*, 29 INT’L REV. L. & ECON. 8, 10 (2009) (arguing that plea bargaining allows more resources to be devoted to cases that go to trial).

above, the motivation for the vast majority of defendants who plead guilty is to obtain a milder sentence, such pleas can at least offer a quicker path to rehabilitation programs and approaches for defendants wishing to take advantage of such programs.¹⁹⁵

Many victims understandably wish to avoid having to testify at a criminal trial.¹⁹⁶ To go through what are often painful and, in certain cases, very private details of a crime before a courtroom filled with strangers can be a traumatic experience.¹⁹⁷ Plea bargaining allows witnesses, especially victims, to avoid what for most is an unwanted time commitment and, for many, an indignity.¹⁹⁸ Often the government's decision to offer one defendant a lenient plea assures that this defendant will testify against, or at least provide information about, others involved in criminal activity.¹⁹⁹ Usually this information serves the valuable goal of implicating those higher up in the criminal chain or those who were the primary participants in a given crime.²⁰⁰ Finally, a plea of guilty sometimes allows for a more appropriate disposition of a criminal case than would a verdict of guilty or not guilty on a higher charge.²⁰¹ Take for example, a defendant facing murder charges stemming from a fight who is claiming that he acted in self-defense. The jury's verdict of guilty of murder because they did not accept his defense or a verdict of not guilty of all charges, if they did, may not be as just of an outcome as the manslaughter charge he was permitted to plead guilty to.

In determining whether the burden placed on the exercise of the right to trial by the use of differential sentencing is needed, courts should also pay attention to the negatives that flow from our current system. The goals of the adversary system, complete with its protections—the right to confront and cross examine witnesses, the presumption of innocence, the requirement of proof beyond a reasonable doubt, and the right to a jury trial—are largely negated in practice by the overwhelming use of plea bargaining.²⁰² As discussed above, the differential sentencing connected inextricably to plea bargaining punishes the exercise of the right to trial.²⁰³ Some commentators assert that with the threat of increased prison sentences for defendants who elect a trial, no plea of

¹⁹⁵ See discussion *supra* Section I.B.

¹⁹⁶ Guidorizzi, *supra* note 109, at 767.

¹⁹⁷ Rebecca Hollander-Blumoff, *Getting to "Guilty": Plea Bargaining as Negotiation*, 2 HARV. NEGOT. L. REV. 115, 133 (1997).

¹⁹⁸ See *id.*

¹⁹⁹ Eli Paul Mazur, Note, *Rational Expectations of Leniency: Implicit Plea Agreements and the Prosecutor's Role as a Minister of Justice*, 51 DUKE L.J. 1333, 1333 (2002).

²⁰⁰ See *id.* at 1334.

²⁰¹ Ursula Odiaga, Note, *The Ethics of Judicial Discretion in Plea Bargaining*, 2 GEO. J. LEGAL ETHICS 695, 697 (1989) (arguing that plea bargaining allows for personalized sentences which reflect the circumstances of each offender's individual case).

²⁰² See Richard L. Lippke, *Plea Bargaining in the Shadow of the Constitution*, 51 DUQ. L. REV. 709, 710 (2013).

²⁰³ See discussion *supra* Part I.

guilty is truly voluntary and all involve an unacceptable level of coercion.²⁰⁴ In a recent article, for example, Professor Donald Dripps compared the pressure on a criminal defendant to plead guilty when facing a long sentence of imprisonment with that of someone threatened with the whole spectrum of “enhanced interrogation” techniques for seventy-two hours in order to obtain information.²⁰⁵ These techniques would include “[s]leep deprivation,” “[s]imulated drowning,” and “[n]onmedical rectal dehydration.”²⁰⁶ Dripps’s conclusion was that “[t]he threat of forty-years imprisonment has more power to induce cooperation than seventy-two hours of torment.”²⁰⁷

Disposing of so many cases so quickly invites a reduction in the time spent by attorneys in researching and preparing a case and, therefore, often results in a similar reduction in the quality of legal representation afforded to criminal defendants.²⁰⁸ In many cases where a plea of guilty is negotiated, a search in violation of the Fourth Amendment, a statement taken in violation of the Fifth or Sixth Amendments, or an identification procedure done in violation of due process is never litigated or even uncovered.²⁰⁹ The result of this is a reduction in the deterrent impact of the exclusionary rule for such violations.²¹⁰ Finally, although there are benefits to avoiding the testimony of victims in many trials, there are genuine concerns about avoiding the transparency of public trials in so many cases.²¹¹

Of course, considering and weighing the benefits derived from the system of plea bargaining against its disadvantages involves difficult, sometimes painful acknowledgments and decisions. These discussions can largely be avoided with bromides such as the one claiming that everyone wins from a plea/trial system that offers benefits to many and punishments to none. It is hardly surprising, therefore, that judges are reluctant to admit that they are punishing a defendant for his exercise of a constitutional right. To acknowledge this reality, however, contributes not just to the intellectual honesty of decisions concerning plea bargaining, but also opens the door to more tangible benefits.

²⁰⁴ See, e.g., Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 50 CRIM. L.Q. 67, 71–72 (2005).

²⁰⁵ Dripps, *supra* note 44, at 1343.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 1345.

²⁰⁸ Molly J. Walker Wilson, *Defense Attorney Bias and the Rush to the Plea*, 65 U. KAN. L. REV. 271, 293–95 (2016); Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLINICAL L. REV. 73, 78–81 (1995).

²⁰⁹ See Note, *Plea Bargaining and the Transformation of the Criminal Process*, 90 HARV. L. REV. 564, 573 (1977); see also Palmer, *supra* note 108, at 524.

²¹⁰ See Palmer, *supra* note 108, at 524.

²¹¹ Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121, 1178–81 (1998).

III. AN EXPANDED FORM OF JUDICIAL PARTICIPATION IN THE BARGAINING PROCESS

The issue of whether and to what degree judges should become involved in the plea bargaining process has garnered much debate.²¹² Proponents of judicial involvement argue among other things that as judges are the ultimate sentencers, they should let both the prosecution and the defense know their views regarding the appropriate disposition of a case before a plea bargain is accepted.²¹³ Additionally, judicial involvement is seen as a means of curtailing the abuse by prosecutors of the substantial discretion that they have in both the charging and the plea negotiation processes.²¹⁴ Opponents fear that judicial participation in the bargaining process can take the form of judicial pressure upon a defendant to accept a bargain, and therefore make the process unduly coercive.²¹⁵ They note that should the defendant reject a plea that seems to have the judge's imprimatur, it will be more difficult or at the very least appear more difficult for the defendant to then get a fair trial.²¹⁶ Additionally, a subsequent claim that the plea was involuntary or improper in some way is likely to appear initially before the very same judge who helped negotiate and ultimately accepted the plea.²¹⁷ Again, this makes for at least the perception that such a challenge will not be adjudicated completely without bias.²¹⁸ Whether a jurisdiction permits judicial participation in plea bargaining or not, the judge in almost all instances must accept a plea of guilty before it can be entered.²¹⁹

Given this debate, it is hardly surprising that American jurisdictions are divided over the role of judges in the plea bargaining process.²²⁰ These divisions

²¹² King & Wright, *supra* note 134, at 325–26.

²¹³ See Thomas D. Lambros, *Plea Bargaining and the Sentencing Process*, 53 F.R.D. 509, 515–16 (1972).

²¹⁴ Rishi Raj Batra, *Judicial Participation in Plea Bargaining: A Dispute Resolution Perspective*, 76 OHIO ST. L.J. 565, 585–86 (2015).

²¹⁵ *Id.* at 581. As one court stated,

The unequal positions of the judge and the accused, one with the power to commit to prison and the other deeply concerned to avoid prison, at once raise a question of fundamental fairness. When a judge becomes a participant in plea bargaining he brings to bear the full force and majesty of his office. His awesome power to impose a substantially longer or even maximum sentence in excess of that proposed is present whether referred to or not. A defendant needs no reminder that if he rejects the proposal, stands upon his right to trial and is convicted, he faces a significantly longer sentence. One facing a prison term, whether of longer or shorter duration, is easily influenced to accept what appears the more preferable choice.

United States v. Werker, 535 F.2d 198, 201–02 (2d Cir. 1976) (citing United States ex rel. Elksnis v. Gilligan, 256 F. Supp. 244, 254 (S.D.N.Y. 1966)).

²¹⁶ Turner, *supra* note 120, at 199.

²¹⁷ See Batra, *supra* note 214, at 581.

²¹⁸ *Id.* at 583.

²¹⁹ See, e.g., Fed. R. Crim. P. 11; Pa. R. Crim. P. § 590 (2016); NEV. REV. STAT. § 174.035 (2017); TENN. R. CRIM. P. § 11 (2015).

²²⁰ See Rachel Broder, Comment, *Fair and Effective Administration of Justice: Amending Rule 11(c)(1) to Allow for Judicial Participation in Plea Negotiations*, 88 TEMP. L. REV. 357,

are reflected in the questions of whether judges should be involved at all in the process and if so, to what degree.²²¹ The Federal Rules of Criminal Procedure and the rules of many states prohibit judicial involvement in the negotiations of the plea, but still require the judge's acceptance of the plea before it takes effect in almost all circumstances.²²² Other states permit, with certain limitations and various protections against judicial coercion, judges to participate in some ways.²²³ For example, Michigan, Florida, and Connecticut all allow judges to make commitments in some form as to what their sentence or at least the maximum sentence will be if the plea is accepted by the parties.²²⁴

One thing is clear however. If a judge states directly or even hints too overtly that the sentence she metes out to the accused is likely to be greater should the defendant forego a plea offer and be convicted at trial, that will lead to an almost certain reversal of the ultimate sentence should it be challenged.²²⁵ The almost universal reason why appellate courts invalidate such a sentence is because the judge is said to have punished the defendant for exercising his constitutional right to trial.²²⁶ As discussed in Part I, virtually all the differential sentencing that is a vital component of plea bargaining can be characterized as such punishment.²²⁷ For that reason, an accurate statement of the post-trial sentence by the judge may well sound threatening and seem coercive to a defendant.²²⁸ But the coercion in such a case may stem not from any impropriety on part of the judge, but from the sentencing structure that encourages plea bar-

370–71 (2016); *see, e.g.*, ARIZ. R. CRIM. P. 17.4(a) (2018); FLA. R. CRIM. P. 3.171(d) (1993); Haw. R. Penal P. 11(f)(1) (2014).

²²¹ Broder, *supra* note 220, at 371.

²²² *See, e.g.*, Fed. R. Crim. P. 11; FLA. R. CRIM. P. 3.171(d); *State v. Revelo*, 775 A.2d 260, 267–68 (Conn. 2001); *People v. Cobbs*, 505 N.W.2d 208, 211–12 (Mich. 1993). Notwithstanding prohibitions such as FRCP Rule 11 prohibiting judicial involvement in the bargaining process, nothing stops the court from continuing to reject plea agreements until the parties present one that the judge likes. Such an approach was described by the U.S. Court of Appeals for the Fourth Circuit:

By appellant's standard, a judge who refuses to ratify the first of several plea bargains, has not become involved in the plea bargaining process. However, continued bargaining, with repeated submission of agreements to the judge for his ratification, would involve the judge in the formulation of the final agreement. Such a procedure would only be an indirect manner of judicial participation in the plea bargaining process. It would be an exercise in judicial circuitousness that is not necessary to insure the voluntariness of guilty pleas.

Brown v. Peyton, 435 F.2d 1352, 1356 (4th Cir. 1970).

²²³ *See* Broder, *supra* note 220, at 371–74.

²²⁴ *Cobbs*, 505 N.W.2d at 212; *State v. Warner*, 762 So.2d 507, 514 (Fla. 2000); *Revelo*, 775 A.2d at 268.

²²⁵ *See, e.g.*, *United States v. Sanya*, 774 F.3d 812, 816 (4th Cir. 2014); *Davis v. State*, 860 So.2d 1058, 1060 (Fla. Dist. Ct. App. 2003); *Commonwealth v. Carter*, No. 01-P-1139, 2002 WL 1012615, at *1–*2 (Mass. App. Ct. 2002).

²²⁶ *See* cases and materials cited *supra* notes 30–94.

²²⁷ *See* cases and materials cited *supra* notes 20–151.

²²⁸ *See* Turner, *supra* note 120, at 243.

gaining through substantial sentence discounts.²²⁹ Allowing judges to provide assessments of the post-trial sentence, as they do in Germany,²³⁰ is not likely to have any independent coercive effect on the defendant. On the contrary, in some instances it may diminish the coercive influence of our sentencing schemes by narrowing the range between the expected post-trial and post-plea sentences. The difference in this instance is that the judge acknowledged it and did so early on when the defendant was making his decision whether to accept a plea (although, even when the judge so comments at the time of sentencing after a trial, that too will usually lead to an invalidation of the sentence). What traditionally warrants reversal then is not the deed of sentencing more harshly after trial, but the word of acknowledging this reality. Whether a jurisdiction permits or prohibits judicial participation in plea bargaining, it is generally deemed to be unduly coercive to tell the defendant what his likely post-conviction sentence will be or even hint that it will be more severe than that which he will receive based on his plea.²³¹

This almost universally accepted limitation on providing the defendant with any information regarding what his sentence might be if he rejects a plea bargain and is convicted at trial, however, is paternalistic in nature and in most cases harms the party it is designed to protect.²³² This can be seen quite clearly by considering a similar type of information limitation regarding other crucial decisions in a person's life. Imagine, for example, being told that you had a possible life-threatening tumor. After exploring the various medical issues with you, the doctor suggests that you seriously consider a complicated surgery to have the growth removed. Inevitably, you will inquire as to your chances for survival if you have the surgery. Let's say the doctor tells you your chances of survival are 50 percent with the operation. Can you make an intelligent decision based on that information alone? I hope so, because when you ask the obvious next question which is, "what are my chances if I do not have the surgery", the doctor politely demurs. He chooses not to tell you that your chances of survival without the surgery are only about 25 percent or even that they are

²²⁹ See McConkie, *supra* note 183, at 76–78. For example, judges are permitted to inform defendants of the higher possible sentence they can receive for criminal charges they face if convicted of these charges after trial. Given this, "it is difficult to see why permitting a judge to give the defendant earlier notice of the likely trial sentence adds to the coercive effect of a prosecutor's plea offer." King & Wright, *supra* note 134, at 385–86.

²³⁰ TURNER, *supra* note 23, at 107–08.

²³¹ Even in Florida where judicial participation in plea bargaining is permissible, "[j]udges generally refrain from giving information about the possible post-trial sentence, because such statements may be perceived as coercing the defendant into waiving his right to trial." Turner, *supra* note 120, at 243. See also *People v. Cobbs*, 505 N.W.2d. 208, 212 (Mich. 1993) (wherein the Michigan Supreme Court modified then-existing law to permit judges to offer their views on an expected sentence after a plea, but admonished judges not to allow the sentencing decision to be affected by whether the defendant pleads guilty or goes to trial). *But see* King & Wright, *supra* note 134, at 385 (relating that certain judges will tell the likely post-trial sentence).

²³² McConkie, *supra* note 183, at 75–76.

less than if you have the surgery because he does not wish to coerce you into having the surgery. Time to find another doctor.

As with plea bargaining, it is true that being told of the greater likelihood of negative consequences in forgoing surgery might persuade or even pressure you into making a certain decision. Still, would you want to make such a critical decision in your life without having access to that information? The intelligent patient might wish to get a second opinion before choosing the surgery, just as the accused in a criminal case will seek the opinion of his counsel and perhaps his family before making his critical decision about whether to accept a plea-based sentence that a judge will mete out in lieu of going to trial. As the attorney in our criminal justice system is entrusted with protecting the rights of the accused in many situations, she can be a barrier to most kinds of coercion in the plea bargaining process as well.²³³

This is not to suggest that the judge's role in plea bargaining, particularly when discussing with the defendant and or his counsel the likely range of sentence if he is convicted at trial, cannot become unduly coercive.²³⁴ As with the hypothetical surgeon discussed above, such coercion can come from the manner in which the judge communicates the expected likely post-trial sentence range.²³⁵ Just as the surgeon can browbeat a patient into surgery by overdramatizing the benefits of the operation or using terrifying language to warn of the dangers of rejecting the surgery, judges can use threatening language and other coercive means to pressure a defendant into accepting a plea. In such situations, appellate courts would be the bodies to protect against such judicial abuse. It would be nothing new for appellate courts to base their decisions regarding judicial impropriety on the manner that a judge communicated something to a defendant.²³⁶

²³³ *Id.* at 80–82; see also King & Wright, *supra* note 134, at 386–87 wherein defense attorneys acknowledged their responsibility to protect their clients in such situations and confidence in their ability to do so.

²³⁴ See King & Wright, *supra* note 134, at 383, wherein the authors spoke with attorneys, judges, and prosecutors who alluded to this risk, but believed that “the benefits to the defense far outweighed [the] risk.” In fact the authors reported that those they interviewed thought that judicial involvement in the process rather than making it more coercive, actually reduced the coercive nature of plea bargaining.

²³⁵ See, e.g., *United States v. Hemphill*, 748 F.3d 666, 675 (5th Cir. 2014) (wherein the court held that the judge's repeated comments to the defendant, of the consequences that similarly situated defendants who rejected pleas faced, rendered the plea involuntary); *United States v. Baker*, 489 F.3d 366, 376 (D.C. Cir. 2007); *Kelly v. State*, 208 So.2d 217, 217 (Ala. Ct. App. 1968); *McCranie v. State*, 782 S.E.2d 453, 458 (Ga. Ct. App. 2016); *Barnes v. State*, 523 A.2d 635, 635 (Md. Ct. Spec. App. 1987); *Letters v. Commonwealth*, 193 N.E.2d 578, 579 (Mass. 1963) (wherein the judge instructed the Defendant that if he plead guilty he would receive one life sentence, but if he went to trial he would be sentenced to two life sentences); *People v. Johnson*, 406 N.Y.S.2d 125, 125 (N.Y. App. Div. 1978) (wherein the judge's statement to the Defendant that he would not receive concurrent sentences if the case went to trial rendered the plea coerced).

²³⁶ See *supra* note 235; see, e.g., *United States v. Werker*, 535 F.2d 198, 202 (2d Cir. 1976) (citing *United States ex rel. Elksnis v. Gilligan*, 256 F. Supp. 244, 254 (S.D.N.Y. 1966)).

There is another means by which judges might abuse their role in a system that permits them to provide defendants with information about what a post-trial sentence might look like. Should the defendant reject the sentence offered by the judge as part of a guilty plea and be convicted at trial, the disparity between the length of the judge's plea offer and post-trial sentence could be excessive.²³⁷ In responding to this type of apparent vindictiveness, courts should use a robust proportionality analysis, somewhat similar to, but even stricter than, the overall approach they take when determining if any sentence is cruel and unusual under the Eighth Amendment due to its length.²³⁸ Here, the determination would be based not only on the actual length of the sentence, but also whether it was grossly disparate to the sentence the judge agreed to if the defendant pled guilty.²³⁹

Understandably, even with these protections, there is a tension between the knowing and intelligent nature of a guilty plea and its voluntariness.²⁴⁰ Resolving this tension requires acknowledging just how much the American system of criminal justice has become beholden to plea bargaining.²⁴¹ We permit pleas to offenses that are logical impossibilities such as attempted resisting arrest or at-

²³⁷ *State v. Pennington*, 693 A.2d 1222, 1225 (N.J. Super. Ct. App. Div. 1997) (“That a sentence imposed after a trial is more severe than a previously-rejected plea offer is not alone a basis for finding the actual sentence excessive. However, an extreme disparity between the State’s offer and the sentence imposed after trial can be considered by this court when reviewing the reasonableness of the sentence.”); *see, e.g.*, cases cited *supra* note 20. One area in which courts consider the disparity between a sentence offered as part of a plea and the ultimate sentence meted out after a trial is in reviewing claims of inadequate representation stemming from counsel’s failure to communicate or assess competently a plea offer. Prejudice is one of the elements required by the Supreme Court to establish such a Sixth Amendment claim. *See Hill v. Lockhart*, 474 U.S. 52, 57–58 (1985); *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The disparity noted above is used to demonstrate prejudice in such Sixth Amendment claims. *See, e.g.*, *Pham v. United States*, 317 F.3d 178, 178, 180, 183 (2d Cir. 2003) (Defendant rejected offer of 78–97 months ultimately being sentenced to 210 months. Court holds lower court should have considered this disparity); *Carrion v. Smith*, 644 F. Supp. 2d 452, 471–72 (S.D.N.Y. 2009) (Court finds difference between plea offer of 10 years to life and post-trial sentence of 125 years to life to be “*extremely large*” and meets prejudice requirement); *Shiwochan v. Portuondo*, 345 F. Supp. 2d 242, 263–64 (E.D.N.Y. 2004) (Court regards “vast difference” between plea offer of 15 years to life and post-trial sentence of 41 2/3 years to life to be prejudicial).

²³⁸ *Ewing v. California*, 538 U.S. 11, 20–25 (2003); *Harmelin v. Michigan*, 501 U.S. 957, 959 (1991); *Solem v. Helm*, 463 U.S. 277, 284–90 (1983); *Rummel v. Estelle*, 445 U.S. 263, 288–95 (1980).

²³⁹ Inevitably, the post-trial sentence would be harsher than the one rejected by the defendant during plea negotiations, and the question would be only whether that difference was so great that it exceeded the normal price a defendant paid in such situations. *See, e.g.*, *People v. Dennis*, 328 N.E.2d 135, 137–38 (Ill. App. Ct. 1975) (Defendant was offered a plea of two years. Defendant rejected the plea, went to trial, and was sentenced to forty to eighty years).

²⁴⁰ *See supra* notes 20–24 and accompanying text.

²⁴¹ *Lafler v. Cooper*, 132 S. Ct. 1376, 1381 (2012) (“[T]he reality [is] that criminal justice today is for the most part a system of pleas, not a system of trials”).

tempted bribery.²⁴² We permit defendants to plead guilty without acknowledging their guilt and even when they proclaim their innocence.²⁴³ We do so because, on balance, the courts have decided that the advantages of accepting such pleas outweigh the problems that would exist if such pleas were not allowed.²⁴⁴ Why else would a criminal justice system that values so highly the right of confrontation, the right to a jury trial, the requirement of proof beyond a reasonable doubt, and other due process protections permit convictions largely in the absence of these protections, even as the defendant affirmatively denies his guilt?

In permitting guilty pleas by those protesting their innocence, the Supreme Court in *North Carolina v. Alford* observed that although the defendant was pleading guilty solely out of his fear of a heavier penalty after his likely conviction at trial,²⁴⁵ so long as he was making a knowing decision, the Constitution did not prohibit him from doing what he perceived to be in his best interest.²⁴⁶ In the Court's words, "[t]he prohibitions against involuntary or unintelligent pleas should not be relaxed, but neither should an exercise in arid logic render those constitutional guarantees counterproductive and put in jeopardy the very human values they were meant to preserve."²⁴⁷ In other words, the courts need not protect a defendant from doing what he regards to be in his best interest as long as there is some basis for believing that is precisely what he is doing.²⁴⁸ The Court's holding in *Alford*, a clear triumph for the notion of a robust bargaining system in criminal cases, demonstrates that absent exceptional circumstances, when the prosecutor, the defendant as advised by competent counsel, and the judge agree on a bargaining process and result, the constitution will

²⁴² *Solomon v. Auburn Hills Police Dep't*, 389 F.3d 167, 172 (6th Cir. 2004) (Defendant plead guilty to trespass and attempted resisting arrest); *People v. Lotito*, 495 N.Y.S.2d 483, 483 (N.Y. App. Div. 1985) (Defendant plead guilty to second degree attempted bribery); *People v. Foster*, 225 N.E.2d 200, 201 (N.Y. 1967) (Defendant plead guilty to attempted manslaughter).

²⁴³ Regarding nolo contendere pleas, see, e.g., FED. R. CRIM. P. 11(a)(2). For the sanctioning of guilty pleas when the defendant denies his guilt, see *North Carolina v. Alford*, 400 U.S. 25, 25 (1970).

²⁴⁴ *Alford*, 400 U.S. at 25. Although not explicitly expressed by the Court in *Alford*, if Defendants were required to acknowledge guilt in order to plead guilty, Defendants would be forced to lie as in the old days when they said no promises were made to induce their pleas. See Robert L. Segar, *Plea Bargaining Techniques* § 2, 25 AM. JUR. TRIALS § 69 (1978).

²⁴⁵ *Alford*, 400 U.S. at 29 n.2. At trial, the Defendant told the court:

I pleaded guilty on second degree murder because they said there is too much evidence, but I ain't shot no man, but I take the fault for the other man. We never had an argument in our life and I just pleaded guilty because they said if I didn't they would gas me for it, and that is all.

In response to questions from his attorney, Alford affirmed that he had consulted several times with his attorney and with members of his family and had been informed of his rights if he chose to plead not guilty.

²⁴⁶ *Id.* at 37.

²⁴⁷ *Id.* at 39.

²⁴⁸ For example, in *Alford*, the Court required that there be a strong basis in fact establishing the defendant's guilt before an Alford plea is accepted. *Id.* at 37-38.

rarely stand in the way of the conclusion at which they arrive.²⁴⁹ Implicitly, the decision rejects the paternalistic notion that the courts should “protect” defendants by not letting them do what they perceive to be in their best interest and when advised by competent counsel.²⁵⁰

This approach to the plea bargaining process should be applied to the issue of whether a judge can offer her thoughts at some point during plea negotiations regarding the range of the accused’s sentence should he be convicted at trial. Such an approach would offer the accused the ability to make a genuinely informed and intelligent choice about whether to accept a plea offer.²⁵¹ At the very least, the judge should be permitted to confirm what any competent attorney would have told his client: that the sentence will almost assuredly be greater than the one you are being offered in exchange for your guilty plea.²⁵² Such an obvious observation should not be prohibited as it is now, by the equally obvious conclusion, that this creates a trial penalty. To do so would prohibit not the act, but only the acknowledgment of the act.²⁵³ Beyond that however, a judge, normally in possession of most of the details that will affect the defendant’s post-trial sentence, such as the nature of the crime, the defendant’s background, and the general manner in which such cases are sentenced both in her jurisdiction and by her, should be able to offer a range of likely post-trial sentences.²⁵⁴ The judge should take care to convey this information in a neutral manner that applies no additional pressure on the defendant to accept the plea.²⁵⁵ The judge should not forget that her role here is to inform, not advocate for acceptance of the plea.

As in many other aspects of representing a client, the role of defense counsel here is crucial.²⁵⁶ His duties, as always, include providing a thoughtful assessment of the plea offer, the likelihood of conviction at trial, the probable

²⁴⁹ See *id.* at 39.

²⁵⁰ See George C. Thomas III, *Helping Innocent Defendants in High Stakes Cases*, 157 U. PA. L. REV. PENNUMBRA 58, 59 (2008). Defending Alford pleas, one commentator wrote that, “Ultimately, a system that respects the autonomy of the guilty to forfeit trial rights should respect the autonomy of the innocent to do the same.” Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1164 (2008).

²⁵¹ McConkie, *supra* note 183, at 84.

²⁵² *Id.* Presumably such confirmation by the person meting out the sentence would provide a degree of certainty that most defendants would welcome.

²⁵³ See, e.g., *Euziere v. United States*, 249 F.2d 293, 294 (10th Cir. 1957); *United States v. Tateo*, 214 F. Supp. 560, 565–67 (S.D.N.Y. 1963).

²⁵⁴ See *supra* Section I.C. Information regarding the potential post-trial sentence is even more important for attorneys in jurisdictions that do not utilize sentencing guidelines. Turner, *supra* note 120, at 258.

²⁵⁵ For example, a judge, upon request of the defendant or his counsel, might say, “If you are convicted after trial on Robbery in the 2nd Degree, and I learn nothing new of significance concerning the crime or your participation in it, I am likely to sentence you to something in the range of four to six years in prison. Should you accept the plea offered by the government, I have agreed to a sentence of thirty months incarceration.”

²⁵⁶ Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 YALE L.J. 2650, 2650 (2013) (arguing that defense counsel plays a critical role in the plea bargaining process).

sentence if convicted, and to act as a barrier to any coercion by the prosecutor or the judge.²⁵⁷ The difference now would be that he could perform his job with more information.

There is a legitimate concern that judicial participation in the bargaining process adds pressure on the defendant to plead guilty.²⁵⁸ Especially in a negotiation process, during which the judge offers information on a possible sentence if the defendant rejects the plea and is convicted at trial, defendants might fear judicial vindictiveness if they opt for a trial.²⁵⁹ There are several ways to mitigate this potential for coerciveness while still deriving the benefits that come from negotiating a truly informed plea.

First, the judge should avoid providing the defendant with information about what sentence she will mete out if a rejected plea leads to a conviction at trial unless the defendant through his attorney asks for such information.²⁶⁰ When the judge volunteers without first being asked by the defendant the likely sentence he will receive if he rejects the plea offer and is convicted at trial, this creates too great a risk that the judge will be viewed as the primary force behind the plea offer.²⁶¹ Such affirmative judicial conduct adds to the coercive nature of plea bargaining and does so entirely unnecessarily.²⁶² To deny the defendant such information when he affirmatively requests it, however, results in compelling the defendant to make a crucial life decision without the material he understandably believes he needs to make a fully knowing decision about whether to accept a plea offer.²⁶³ Doing so supposedly for the defendant's own benefit, that is, to avoid coercing him into taking the plea, smacks of paternalism and deprives the defense attorney of the means to effectively represent his client.²⁶⁴

²⁵⁷ Joel Mallord, Comment, *Putting Plea Bargaining on the Record*, 162 U. PA. L. REV. 683, 699–705 (2014).

²⁵⁸ Broder, *supra* note 220, at 363.

²⁵⁹ See, e.g., *United States v. Bradley*, 455 F.3d 453, 457, 460 (4th Cir. 2006); *United States v. Barrett*, 982 F.2d 193, 194, 196 (6th Cir. 1992); *United States v. Bruce*, 976 F.2d 552, 554, 558 (9th Cir. 1992); *Euziere v. United States*, 249 F.2d 293, 294 (10th Cir. 1957).

²⁶⁰ Turner, *supra* note 120, at 257–58.

²⁶¹ See, e.g., *United States v. Rodriguez*, 197 F.3d 156, 158–59 (5th Cir. 1999); *United States v. Stockwell*, 472 F.2d 1186, 1187–88 (9th Cir. 1973); *Euziere*, 249 F.2d at 295; *Wilson v. State*, 845 So. 2d 142, 151 (Fla. 2003); *United States v. Tateo*, 214 F. Supp. 560, 567 (S.D.N.Y. 1963).

²⁶² *Rodriguez*, 197 F.3d at 158–59; *Stockwell*, 472 F.2d at 1187–88; *Euziere*, 249 F.2d at 295; *Wilson*, 845 So. 2d at 151; *Tateo*, 214 F. Supp. at 567.

²⁶³ McConkie, *supra* note 183, at 76–78.

²⁶⁴ If you doubt that, put yourself in the role of a defense attorney having been offered a plea deal for your client by the prosecutor. If the proposed sentence was acceptable to your client, it is obvious you would want the judge's commitment that she would go along with the agreed sentence. But what if you knew, if asked, this judge would also share with you her thoughts on what range of sentence your client would receive if he were convicted at trial? What competent attorney would not want that information before recommending to his client whether to accept the plea offer? Speaking generally about the defense attorney's role in plea bargaining, one court asserted, "[i]n many, or even most, cases, the only defense available is

Second, the judge should avoid giving the precise sentence she will mete out as it is possible, albeit not the usual course, that something genuinely material and unknown to the judge during the negotiations will be learned during the trial or an event might occur between the plea offer and the trial that appropriately could affect the sentence.²⁶⁵ Therefore, the judge should provide only a range for the likely sentence the defendant will receive if convicted at trial, while putting on the record any caveats that could affect the ultimate sentence.²⁶⁶ Some information about a potential post-trial sentence is certainly better than none to a defendant trying to make the best decision for himself about whether to accept a plea.

Third, in jurisdictions where there are enough judges, the judge who handles the negotiations and offers the information about a post-trial conviction sentence range perhaps should not be the one who conducts the trial and then sentences the defendant.²⁶⁷ As judges have differing views about the appropriate sentence to mete out in particular cases, this clearly reduces the information the defendant will have about his actual post-trial sentence.²⁶⁸ Accordingly, I would recommend that such a change of judges not take place unless the defendant so requested the change and no other impediments to such a change existed.

As with the plea offer, the judge's response to the defendant's request for a post-trial sentence range should be placed on the record.²⁶⁹ This would act as a deterrent to judges ultimately sentencing the defendant out of vindictiveness for rejecting the plea offer.²⁷⁰ Under this regimen, post-trial sentences substantially harsher than those accepted by the judge as part of a plea negotiation process would raise red flags as being suggestive of judicial vindictiveness.²⁷¹ In the current plea bargaining process, such vindictiveness happens frequently but is harder to identify.²⁷² Providing the defendant with information about a likely

the determination and nerve of the defense attorney. To deprive the attorney of the opportunity to talk to the judge about a guilty plea before a defendant has made up his mind to plead guilty, would deprive him of one of the most valuable tools of his defense."

Brown v. Peyton, 435 F.2d 1352, 1356 (4th Cir. 1970).

²⁶⁵ See generally cases and notes discussed *supra* Section I.C; see also *Wilson v. State*, 845 So. 2d 142, 157 (Fla. 2003) ("The trial judge must make clear that the sentence is based on what the judge presently has before him or her, and must caution that there is no guarantee that this same sentence will be imposed if the defendant elects to go to trial."); *McConkie*, *supra* note 183, at 87–88.

²⁶⁶ *Vondervor v. State*, 847 So. 2d 610, 614 (Fla. Dist. Ct. App. 2003); *McConkie*, *supra* note 183, at 88.

²⁶⁷ Daniel Klein, *Judicial Participation in Guilty Pleas—A Search for Standards*, 33 U. PITT. L. REV. 151, 159 (1971).

²⁶⁸ See *id.*

²⁶⁹ *Turner*, *supra* note 120, at 262.

²⁷⁰ *Broder*, *supra* note 220, at 380 (arguing that putting plea negotiations on the record deters judicial coercion).

²⁷¹ *Turner*, *supra* note 120, at 262.

²⁷² See *e.g.*, *Anderson v. State*, 335 N.E.2d 225, 227 (Ind. 1975):

post-trial sentence and placing this on the record during plea negotiations, therefore, could reduce the likelihood of such judicial vindictiveness.²⁷³ It is this potential for judicial vindictiveness that is often offered as the argument in opposition to judge's providing post-trial sentencing information to defendants.²⁷⁴ Yet, ironically, providing this information and placing it on the record should have the effect of curtailing that vindictiveness.

In an important recent study of the role of judges in the plea bargaining system, Professors Nancy King and Ronald Wright interviewed prosecutors, defense attorneys, and judges throughout the United States.²⁷⁵ Through these interviews, the authors were able to enumerate the advantages of a more robust

We are confronted in this case with a record which does not permit us to look at all the circumstances surrounding the Appellant's guilty plea. The trial judge, while presiding over the Appellant's trial, conducted plea bargaining negotiations. What was the extent of these negotiations? When did they take place? What did they consist of? The record is silent. The Appellant's "Petition to Enter a Plea of Guilty" is self-contradictory, stating at one point that no promises were made and at another that the sentence on the bargained plea is to be a determinate sentence of eleven years. . . . While we cannot say that the trial court here induced an involuntary guilty plea, neither can we say that, based on the record, it did not. The irregularity of a presiding trial judge conducting plea bargaining makes it even more imperative that a sound record affirmatively showing voluntariness be made.

²⁷³ *People v. Cobbs*, 505 N.W.2d 208, 212 (Mich. 1993) ("The judge's neutral and impartial role is enhanced when a judge provides a clear statement of information that is helpful to the parties.").

²⁷⁴ See cases cited *supra* note 26. The case of *United States v. Stockwell*, 472 F.2d 1186 (9th Cir. 1973) offers an example of the dilemma posed by judges who offer pre-plea information to defendants about their likely sentence if convicted at trial. For the defendant considering whether to accept a plea offer, the requirement that he choose between a sentence he may know he will receive (if he accepts the plea deal) and one about which he has no idea (the sentence if he is convicted at trial) deprives him of information critical to making an informed choice. In *Stockwell*, the judge agreed to the three-year prison sentence if the defendant plead guilty. *Id.* at 1187. He then told Stockwell that if he rejected the plea and was convicted at trial, his sentence range would be from five to seven years. *Id.* Stockwell rejected the plea and was convicted of a charge, the maximum prison time for which was fifteen years, and other counts for which he could receive additional prison time. *Id.* The judge honored what he told Stockwell before the plea was rejected and sentenced him to seven years. *Id.* The Court of Appeals invalidated the sentence because "courts must not use the sentencing power as a carrot and stick to clear congested calendars, and they must not create an appearance of such a practice." *Id.* In this case, the record failed to show that "the court sentenced the defendant solely upon the facts of his case and his personal history, and not as punishment for his refusal to plead guilty" *Id.* at 1188. Of course, Stockwell received more prison time for choosing to go to trial and rejecting the plea offer as does virtually every defendant who opts for trial over a plea offer. In fact, the additional time he received is nowhere near that which has been regarded by some courts as excessive. *Id.* at 1187. What is different in Stockwell's case is that he had the ability to make an informed choice at the time he decided to reject the plea offer. It was the fact that the judge provided him with this information that the Court of Appeals regarded as punishment. The obvious message to the trial judge is that you can sentence the defendant to more prison time if he rejects a plea and is convicted at trial. Just don't signal you are going to do so by mentioning it before he decides on the plea offer. In the mind of this court and virtually all courts who decide the same way about providing defendants with such information, the defendant's ignorance is bliss.

²⁷⁵ King & Wright, *supra* note 134, at 325.

role for judges in plea negotiations for all the parties involved. Prosecutors reported that judicial participation helped them manage their relationships with the police, victims, and the public.²⁷⁶ By shifting some of the responsibility for the plea deal to judges, there is less chance that the prosecutor will receive negative publicity, and victims are assuaged by the knowledge that no efforts of the prosecutor could have led to a greater sentence for their victimizer.²⁷⁷ Defense attorneys reported that judicial involvement leads to more appropriately lenient sentences,²⁷⁸ in part because the judge gives the prosecutor a face-saving way to admit the weaknesses in her case.²⁷⁹ Judges saw their contribution as a means to correct errors by perhaps inexperienced attorneys on either side and to offer options that may not have been considered by the attorneys.²⁸⁰ There was substantial agreement that the more a judge could offer to the settlement of a criminal case, the more the system could achieve a greater degree of certainty regarding the resolution of the case, a benefit to all parties.²⁸¹

A more substantial role for the judge in plea negotiations, if conducted and monitored properly, would make the plea bargaining system more transparent and honest, and would benefit all parties involved in tangible ways. Prosecutors could better explain to the victims and the public why they disposed of a case as they did and judges could use their wisdom, neutrality, and experience to offer the parties sensible and creative options to settle a case without the costs and uncertainty that result from trials. Most profoundly, we could minimize the counterproductive paternalism that prevents defendants from access to information, the possession of which is usually in their best interest, as they decide whether to accept a plea offer.

CONCLUSION

For some time now, disposing of cases through plea agreements has been the rule, rather than the exception, throughout American criminal justice systems.²⁸² Over time we have moved slowly but significantly towards making the plea process more transparent. It is time now to complete that move and to inject meaningful honesty into what the system does and why it does it in the vast majority of cases. Specifically, when the severity of sentences is based to a significant extent on the defendant's decision whether to opt for a trial, we have to acknowledge that this is usually as much a penalty for exercising a constitutional right as it is a benefit for surrendering that right.²⁸³

²⁷⁶ *Id.* at 365.

²⁷⁷ *Id.* at 369.

²⁷⁸ *Id.* at 365.

²⁷⁹ *Id.* at 371–72.

²⁸⁰ *Id.* at 365.

²⁸¹ *Id.* at 373.

²⁸² *See supra* note 24.

²⁸³ *See supra* Section I.A.

This article has shown why the justifications offered to deny this reality are either fatally flawed or largely insignificant.²⁸⁴ Additionally, it has argued that this punishment for exercise of a constitutional right does not doom the practice of differential sentencing necessary for plea bargaining to exist.²⁸⁵ Cases have demonstrated that a price may be placed on the exercise of a constitutional right if the need for doing so is great enough.²⁸⁶ Arguably, the benefits to society of plea bargaining meet that test.

Finally the article has advocated for a more robust role for judges during plea negotiations.²⁸⁷ Judges are uniquely positioned to provide benefits for all parties in the criminal justice system if they are permitted to offer some information about the sentence they would impose should the defendant plead guilty or reject the plea offered and be convicted after trial.²⁸⁸ Such advice provides a degree of certainty that benefits everyone involved and avoids the kind of system imposed paternalism that prevents defendants from access to information that would help them make a crucial decision in their lives.²⁸⁹

²⁸⁴ See *supra* Sections I.A–I.D.

²⁸⁵ See *supra* Part II.

²⁸⁶ See *supra* Part II.

²⁸⁷ See *supra* Part III.

²⁸⁸ See *supra* Part III.

²⁸⁹ See *supra* Part III.