Plea Bargaining and Price Theory

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Abstract

Like other markets, the plea bargaining market uses a pricing mechanism to coordinate market functions and to communicate critical information to participants, information that permits rational decisionmaking in the face of uncertainty. Because plea bargaining plays such a prominent role in the administration of criminal justice, and because the pricing mechanisms inherent in plea bargaining can—like pricing mechanisms generally—both explain past conduct by market participants and predict future conduct, close scrutiny of the pricing mechanisms at work in plea bargaining is amply justified. This Article explores several features of the plea bargaining system in light of economic insights borrowed from basic price theory. That analysis suggests several structural flaws of the plea market that could, in theory, be amenable to reform efforts. Those flaws include an oversupply of penal leniency, overreliance on wholesale pricing mechanisms, and a devaluation of factual innocence resulting from procedural time-constraints on the effective use of exculpatory evidence.

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INTRODUCTION

Economists have long recognized that the main function of prices is to communicate information.[1] Like other markets, the plea bargaining market uses a pricing mechanism to coordinate market functions and to communicate critical information to participants, information that permits rational decisionmaking in the face of uncertainty.[2] Because plea bargaining plays such a prominent role in the administration of criminal justice, and because the pricing mechanisms inherent in plea bargaining can—like pricing mechanisms generally—both explain past conduct by market participants and predict future conduct, close scrutiny of the pricing mechanisms at work in plea bargaining is amply justified.

The result of such scrutiny is both enlightening and unnerving. Most significantly, examination of the primary influences on plea prices undermines claims by defenders of plea bargaining that the system is "fair" simply because both sides "voluntarily" enter into plea bargains when permitted to do so. The primary factors in determining plea prices—expected sentences, probability of conviction, and cost of litigation—all are, and have been, subject to manipulation by the government.[3] As such, the deck is stacked to ensure that prosecutors usually get what they want (convictions accompanied by substantial punishment) without giving up any real bargaining concessions. By exposing the factors that determine plea prices, price theory provides

1 *See* MILTON FRIEDMAN, PRICE THEORY: A PROVISIONAL TEXT 10 (1962); F. A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 519–30 (1945).

2 *See infra* Section II.A.1.

3 *See infra* Section I.B.

a robust explanation not only for why guilty plea rates are so high, but also for several dominant trends in criminal justice over the past three decades, including why the dramatic increase in criminal defendants has been accompanied by a dramatic increase in the severity of sentences and the expansion of criminal liability,[4] why sentencing guideline regimes have grown increasingly popular among state legislators,[5] and why state legislatures consistently underfund legal services for criminal defendants.[6] In short, examining the impact of the major trends in criminal justice through the lens of price theory reveals how the state has managed to manipulate the plea bargaining market to achieve precisely the ends it wants while maintaining the illusion of a system of mutually voluntary choices by individual defendants.

Using the insights gained from price theory, this Article critiques several assumptions made by plea bargaining's various defenders as well as its critics. Faulty assumptions by plea bargaining advocates undermine their conclusions and should shake our confidence that the system does what its most vigorous backers contend.[7] But plea bargaining's critics rest their attack on some equally shaky assumptions.[8] The analysis conducted here calls a number of these assumptions into question and suggests a range of conclusions: prosecutors do not maximize penalties, but instead minimize trials.[9] Plea bargains are not only reserved for the easy cases and trials for the hard ones.[10] Abolition of plea bargaining would not necessarily improve the lot of innocent defendants.[11] Defendants' guilty pleas are not typically well informed, but it might not matter given the enormous size of plea discounts.[12]

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4 *See* U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 6–14 (1991) (detailing increased use of mandatory minimum sentencing provisions).

5 Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190, 1192 (2005) (noting popularity and increasing adoption of state sentencing guidelines by state legislators).

6 *See* NAT'L RIGHT TO COUNSEL COMM., THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 7 (Apr. 2009), http://www.constitutionproject.org/pdf/139.pdf; Robert P. Mosteller, *Protecting the Innocent: Part of the Solution for Inadequate Funding for Defenders, Not a Panacea for Targeting Justice*, 75 MO. L. REV. 931, 937, 973–74 (2010).

7 *See infra* Section II.A.1.

8 *See infra* Section II.A.1.

9 *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2471 (2004) (noting that for prosecutors, the "statistic of conviction . . . matters much more than the sentence"); *see also infra* Section II.C.

10 *See infra* Section I.D.

11 *See infra* Section III.A.

12 *See* AVINASH K. DIXIT & ROBERT S. PINDYCK, INVESTMENT UNDER UNCERTAINTY 13 (1994); *see also infra* Section I.B.

Discounting effects are wildly overstated.[13] Close issues relevant to guilt do not make enough of a difference given the variety of other inputs to plea prices, especially given the size of the plea discount.[14] And finally, fixed discounts and partial bans on plea bargaining are too easily evaded.[15] By probing the factual basis underlying a number of assumptions made by analysts of plea bargaining, this Article shows that the optimistic assessments of plea bargaining's advocates—from the Supreme Court to law and economics scholars—are implausible. At the same time, the analysis reveals that many criticisms of plea bargaining are unwarranted and casts substantial doubt on some of the reforms advocated by plea bargaining's critics, ranging from expanded pre-plea discovery to outright abolition.

The argument proceeds as follows. Part I reviews the familiar economic structure of plea bargaining, and then describes some of the fundamental micro- and macro-economic factors that determine plea bargain prices. Part II reviews some of the most significant market imperfections that impede the plea bargaining market's ability to generate accurate and just outcomes. Drawing from the prior analysis, Part III then summarizes the insights that a focus on plea prices helps clarify and suggests structural changes to counteract identified market distortions, including improved plea pricing mechanisms, "innocence options" that might allow innocent defendants to negotiate better plea deals by extending the valuation horizon of plea bargains beyond trial, reductions in the oversupply of "penal leniency," and the introduction of alternate plea "buyers" to create more competitive plea market conditions.

I. Pricing, Price Theory, and Plea Bargaining

A. Economic Theory of Plea Bargaining

Plea bargaining has been the subject of extensive analysis by economists and lawyers with an economic bent.[16] In contrast to legal

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13 *See infra* note 200 and accompanying text.

14 *See infra* Part I.

15 *See* Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 Harv. L. Rev. 1037, 1045 (1984) (noting that, in several studies of bargaining bans, while the trial rate did not increase, the ban only covered limited forms of bargaining, and that some forms of bargaining could have continued or were never investigated); *see also infra* Section III.A.

16 *See, e.g.*, Richard A. Posner, Economic Analysis of Law 775–79 (8th ed. 2011); Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. Legal Stud. 289, 295–96 (1983); Gene M. Grossman & Michael L. Katz, *Plea Bargaining and Social Welfare*, 73 Am. Econ. Rev. 749, 753–55 (1983); William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & Econ. 61, 61 (1971); Louis M. Natali, Jr., *Plea Bargaining in the Free Enterprise System*, 5

scholars with a stronger "due process" approach,[17] economists have generally defended plea bargaining as an important attribute of a "well-functioning market system,"[18] and concluded that it is, "for the most part, efficient and fair."[19]

Economic analysis begins with the observation that plea bargaining, like any market transaction, involves an exchange of valuable assets. In the plea bargaining bazaar, defendants command two important assets: a right to trial[20] and information about the conduct of other criminals.[21] The value of the right to trial stems from two of its aspects: it provides defendants a robust claim on the state's resources, including both government employees' time and budget dollars,[22] and it provides a chance of acquittal.[23] Defendants sometimes also possess information about other criminals, which the state may want—sometimes quite desperately—and for which the state is frequently willing to pay, often handsomely.[24]

The system of plea bargaining is predicated on the willingness of prosecutors to pay for these assets—and pay they do. The prosecutor's currency in this market is penal leniency, which is available to them as a byproduct of prosecutorial discretion.[25] Most economic models of plea bargaining incorporate the assumption of unrestricted prosecutorial discretion to pay as much or as little for any particular guilty plea as they wish.[26] This assumption is fairly realistic, given that prosecutors have virtually absolute discretion when deciding whom to

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LITIG. 27, 31 (1978); Jennifer F. Reinganum, *Plea Bargaining and Prosecutorial Discretion*, 78 AM. ECON. REV. 713, 713–14 (1988).

17 *See, e.g.*, Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 934 (1983); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1979–91 (1992).

18 Easterbrook, *supra* note 16, at 289.

19 Robert E. Scott & William J. Stuntz, *A Reply: Imperfect Bargains, Imperfect Trials, and Innocent Defendants*, 101 YALE L.J. 2011, 2015 (1992).

20 *See* Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1246 (2008).

21 *See id.* at 1288 n.223.

22 In a typical case, a trial imposes resource demands on the time of, among others, a prosecutor, a judge, an appointed lawyer, usually one or more witnesses, and a jury. The state must shoulder the bill for each such participant.

23 Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1949 (1992).

24 *See* Covey, *supra* note 20, at 1288 n.223.

25 *See, e.g.*, Reinganum, *supra* note 16, at 713.

26 *See, e.g.*, *id.* at 714–15 (modeling plea bargaining based on assumption of unrestricted prosecutorial discretion and comparing it to a model that restricts discretion to individualize offers).

charge, and in many cases, for what and how much.[27] Prosecutors also have the power to influence sentences, either directly through their charging decisions or through sentencing "recommendations" to judges.[28] Because judges usually defer to these recommendations,[29] prosecutors effectively command the power to set sentences even in jurisdictions that formally allow judges wide sentencing discretion.[30] In a nutshell, economic theory conceptualizes the plea bargaining market as one in which defendants sell "trial waivers"[31] and cooperation to prosecutors in exchange for "plea discounts"—that is, some package of charge and sentence reductions substantial enough to entice a defendant to relinquish his right to a trial and, a fortiori, his chance of acquittal.[32]

The cumulative magnitude of these reductions constitutes the "price" of the plea.[33] Several variables, at both the micro (case spe-

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27 *See, e.g.*, Easterbrook, *supra* note 16, at 299 ("Prosecutors have absolute discretion."); James Vorenberg, *Decent Restraint of Prosecutorial Discretion*, 94 HARV. L. REV. 1521, 1523 (1981) (arguing that "prosecutors have acquired essentially unreviewable discretion"). The precise degree of freedom is a product of the criminal code of the jurisdiction. Codes that contain many highly graduated choices of crimes and sentences provide prosecutors with the greatest degree of discretion over the charging decision. *See generally* Ronald F. Wright & Rodney L. Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, 84 N.C. L. REV. 1935 (2006) (assessing data on movement of charges from initial filing and concluding that depth and distance of criminal code constrains plea bargaining decisions).

28 *See* 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).

29 *See, e.g.*, Welsh S. White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439, 443 (1971) ("While the assistant prosecutor's sentence recommendation is not binding, Philadelphia judges generally adhere to it."); Alschuler, *supra* note 28, at 567 (noting that "judges usually follow the course of least resistance and simply ratify the prosecutors' sentencing [recommendations]"); Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1064 (1976) (citing study of Houston courts showing that in sample of eighty-two felony guilty-plea cases in which prosecutors had offered sentence recommendations, the court imposed the recommended sentence in eighty).

30 Moreover, as Malcolm Feeley's account of plea bargaining in a lower state court indicates, by using a wide variety of non-traditional "penalties" such as pre-charge diversion, drug and alcohol treatment programs, fines, and community service, negotiated punishments can be calibrated with a fair degree of precision. *See generally* MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1979).

31 Trial waivers are typically accompanied by "appeal waivers"—a waiver of the right to appeal most aspects of the conviction and sentence, and perhaps are more accurately referred to as "rights waivers." *See* R. Michael Cassidy, *Some Reflections on Ethics and Plea Bargaining: An Essay in Honor of Fred Zacharias*, 48 SAN DIEGO L. REV. 93, 105–06 (2011).

32 *See, e.g.*, Russell D. Covey, *Plea-Bargaining Law After* Lafler *and* Frye, 51 DUQ. L. REV. 595, 613, 618 (2013).

33 Defense lawyers typically define the "value" of cases as the size of the discount they believe can be won through plea bargaining from the expected trial sentence ("ETS"). *See* DEBRA S. EMMELMAN, DEFENDING INDIGENTS: A STUDY OF CRIMINAL DEFENSE WORK 167–68

cific) levels and macro (system specific), interact to determine the size of the discount a prosecutor is willing to offer,[34] and whether the defendant will be likely to sell his trial waiver for his asking price.[35]

B. Micro-Pricing in Plea Bargaining

From the defendant's perspective, whether any particular plea offer should be accepted turns on a relatively straightforward calculation: does acceptance of the plea offer at the offered price minimize expected punishment? The classic economic theory of legal bargaining provides that the primary factors determining whether a settlement is reached are the value of the settlement offer and the estimated amount of a trial judgment discounted by its likelihood.[36] Economic analysis of plea bargaining follows suit, providing that the value of any plea offer can be evaluated by comparing the expected trial sentence ("ETS") to the offered disposition.[37] There are two variables of overarching importance in calculating the ETS: the probability of conviction (P), and the likely sentencing disposition that will result if the defendant is convicted at trial (ES).[38] The ETS is "the product of the probability of conviction and the anticipated sentence upon conviction at trial."[39] The expected sentence, of course, must take into account such factors as the background and personal characteristics of the defendant, the sentencing tendencies of the judge, and

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(1990) (explaining that lawyers studied defined "the overall value of a criminal case" as "essentially the exchange value of a defendant's plea of guilty for some sort of reduction in overall costs which s/he is liable to incur"); *see also In re* United States, 503 F.3d 638, 642 (7th Cir. 2007) ("Whether to reward a given defendant's cooperation depends on how much assistance the prosecution needs; defendants may compete to supply assistance, and a reduced sentence is a price that the prosecutor pays. How steep the price may be depends on conditions of supply and demand, which prosecutors and law-enforcement agencies observe but judges do not.").

34 *See* Russell D. Covey, *Signaling and Plea Bargaining's Innocence Problem*, 66 WASH. & LEE L. REV. 73, 77–79 (2009).

35 *See* Covey, *supra* note 32, at 613 ("[R]ational criminal defendants, regardless of guilt or innocence, will base their decisions on whether to plead guilty on the size of the plea discount offered, the probability of conviction at trial, and the costs of contesting the case.").

36 *See* Robert J. Rhee, *A Price Theory of Legal Bargaining: An Inquiry into the Selection of Settlement and Litigation Under Uncertainty*, 56 EMORY L.J. 619, 629–30 (2006).

37 *See* Russell Covey, *Reconsidering the Relationship Between Cognitive Psychology and Plea Bargaining*, 91 MARQ. L. REV. 213, 216–17, 220 (2007).

38 These inputs have been identified as the governing considerations not only by theoreticians, but also by field researchers. *See* EMMELMAN, *supra* note 33, at 165 (describing research that has identified two features as most important to defense attorneys in evaluating cases for possible plea bargaining: (1) strength of the prosecution's case, and (2) the seriousness of the case, in terms of severity of sentence upon conviction).

39 Reinganum, *supra* note 16, at 714 (discussing conclusion of Weimer research).

the number of counts or offenses charged.[40] Any sentence, moreover, can be parsed into its individual components, each of which imposes negative value on defendants. The punishment imposed, such as probation, fine, prison, or execution, represents one component of a sentence.[41] The stigmatic effects of conviction (felony or misdemeanor) represent another, and the collateral consequences of a conviction (e.g., mandatory registration for convicted sex offenders, deportation, impact on employment opportunities) yet another.[42] As many law and economics scholars have observed, "the probability that a trial will be demanded is a decreasing function of the difference between the anticipated sentence upon conviction at trial and the sentence offered in plea negotiations."[43] Although the attractiveness of any ultimate disposition will vary based on individual preferences and circumstances, greater certainty in sentencing outcomes will make predictions about ultimate dispositions relatively easier to perform.[44]

Likelihood of conviction turns on an analysis of the evidence in the case. If the evidence signals a high likelihood of conviction, then the plea price will be relatively low; that is, a rational defendant will

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40 *See, e.g.*, MILTON HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS 77 (1977) (quoting lawyer explaining factors that go into assessing "what a case is worth" as "[y]ou've got to put together a lot of things. You got to start off with the offense and the circumstances surrounding the events . . . the defendant, his record, his proximity to his last involvement, the kinds of last involvements, his family situation, anything good that you have going for you," and in addition, such added intangibles as "[t]he month of the year," how certain prosecutors feel about "certain types of crimes, [or] certain types of defendants," or whether they have had previous experience with this particular defendant).

41 Brian M. Murray, *Beyond the Right to Counsel: Increasing Notice of Collateral Consequences*, 49 U. RICH. L. REV. 1139, 1147 (2015).

42 *See id.* at 1143, 1147–56 (describing high collateral costs of criminal convictions); *see also* Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103, 1105 (2013) (urging policymakers to "take account of informal collateral consequences, which can have an equal if not greater effect on individuals' lives").

43 Reinganum, *supra* note 16, at 714 (citing David L. Weimer, *Plea Bargaining and the Decision to go to Trial: The Application of a Rational Choice Model*, 10 POL'Y SCI. 1 (1978)).

44 Guideline-based systems that predicate benchmark sentences on standardized ranges based on real offense conduct, such as those used in the federal system, help to regularize the process and hence make outcomes more predictable. Because the prosecutor retains authority over what offenses to charge and what facts to allege, guideline sentencing does not alter the basic economics of plea bargaining. *See* Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1977–78 (1992) (noting that plea rates have been stable notwithstanding introduction of formal limits on plea discounts introduced under federal sentencing guidelines); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2560 (2004) ("[P]lea bargains outside the law's shadow depend on prosecutors' ability to make credible threats of severe post-trial sentences. Sentencing guidelines make it easy to issue those threats.").

sell his right to jury trial for only a minimal discount.[45] If the evidence appears weak, however, then a much larger discount is necessary to induce a plea.[46] The size of the penalty and the probability of conviction thus together determine the value of the case.[47] In some cases, the most significant variable will be the strength of the prosecutor's case, in others, the severity of the available sentence.[48] Together, however, the two factors create one economically coherent variable, ETS, which drives plea bargaining.[49] Economic analysis of plea bargaining is thus predicated on what this Article refers to as a "unitary pricing model." It is "unitary" because only a single case-specific variable—ETS—determines the baseline market price.[50]

Although all guilty pleas involve a tradeoff of outcome uncertainty for a reduced penalty, economic theory predicts that plea bargaining would occur even in the absence of outcome uncertainty, simply as a function of the prosecutor's (and to a lesser extent, the defendant's)[51] interest in saving the resources that otherwise would be expended on a trial and the willingness to "pay" a corresponding price to avoid it.[52] Most plea offers therefore incorporate a discount reflecting the expected savings in prosecutorial resources in trying the case.[53]

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45 *See* Scott & Stuntz, *supra* note 23, at 1946.

46 *See id.*

47 *See* EMMELMAN, *supra* note 33, at 165.

48 *See id.*

49 *See* Scott & Stuntz, *supra* note 23, at 1947.

50 *See id.* at 1948 (concluding that "[t]he structural dynamic of plea bargaining leads . . . to a single variable contract in which all defendants—whether guilty or innocent—are offered a sentence based upon the prosecutor's estimate of the strength of the case at the time of bargaining plus the expected savings in transaction costs"). The market price is also determined by the expected savings of resources, but that expected savings is much less case-sensitive in typical cases, which likely do not vary substantially in the amount of resources necessary to try the case. This Article uses the word "baseline" here to signify that cooperation deals, or other factors, might frequently result in plea offers different from the norm. But the starting point for determining the post-cooperation sentence will normally be the baseline market price from which other discounts can be calculated.

51 The vast majority of criminal defendants are indigent, and do not bear the direct costs of their defense, which makes them largely indifferent to the monetary costs of trial. Even indigent defendants, however, absorb indirect costs of litigation. The most important indirect cost is the extended pretrial incarceration suffered by those who cannot make bail. *See id.* at 1941.

52 *See id.* at 1935, 1941 (noting that the great majority of plea bargains can probably be understood as a decision to share the savings of the reduced adjudication costs brought about by guilty pleas); *see also* John G. Douglass, *Fatal Attraction? The Uneasy Courtship of* Brady *and Plea Bargaining*, 50 EMORY L.J. 437, 447 (2001) ("even where both the prosecution and defense are convinced that conviction is assured at trial . . . there is an incentive to bargain").

53 *See, e.g.*, Schulhofer, *supra* note 17, at 1980 (noting conventional plea bargaining theory, which is defended as maximizing deterrence benefits, "tailor[s] each plea offer to the expected costs of trial, the likelihood of success, and the expected trial sentence"); *see* Scott & Stuntz,

Because the resource savings discount represents a relatively fixed and stable value added on to the uncertainty discount, the market price for a guilty plea under standard conditions should almost always fall below the defendant's ETS. As a result, rational defendants should prefer to sell their trial waiver for such a price.[54] Therefore, as long as the prosecutor values the savings that result from guilty pleas, is willing to pay for those savings through the currency available to her—penal leniency—and is free of any constraints on her ability to manipulate charges and sentences, standard law and economics theory predicts that plea bargains should result in every case, or at least in every case in which the preconditions of fair bargaining are present, including full information and rational choice.[55]

The unitary pricing model for plea bargaining shares many features with pricing models in other markets in which participants buy and sell based on expectations about future price movements. Speculators on commodity futures markets, for instance, must decide whether to buy or sell interests in commodities based on predictions about the selling prices of those commodities at some future date.[56] Each speculator makes an independent assessment of "the probabilities of various conditions of supply and demand at a given future date."[57] The market develops by assembling these various assessments in such a way as to center around the "average expected price," which is "simply the sum of the products of the expected prices and their probabilities."[58]

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supra note 23, at 1936–37 (both sides' estimates of likelihood of conviction "will determine the price that each will insist on as a condition of reaching a bargain"); *see also* Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1174 (2001) ("What defendants really need to know is the price of the plea bargain, the maximum sentences to which they are agreeing, including enhancements.").

54 As Robert Rhee points out, according to conventional analyses of legal bargaining, "settlement is a function of transaction cost economics." Rhee, *supra* note 36, at 632.

55 *See* Stuntz, *supra* note 44, at 2568 (noting that the federal guilty plea rate in some districts exceeds 99%, and arguing that "[i]f defendants were rational—if the process ensured that they accepted all deals that served their interests—the rate would approach 100%"). Steve Bogira, in his fascinating journalistic account of what really happens in a crowded urban courthouse, uses more colorful language to describe the plea bargaining process. Writes Bogira, "the proper sentence is whatever both sides can agree on to belch out one defendant and make space for the next." STEVE BOGIRA, COURTROOM 302: A YEAR BEHIND THE SCENES IN AN AMERICAN CRIMINAL COURTHOUSE 41 (2005). Limitations on bargaining, however, arise where the structure of the criminal code limits bargaining options. *See* Wright & Engen, *supra* note 27, at 1940 ("Plea bargaining is not an entirely Coasian exercise that allows the parties to negotiate a customized outcome without regard to the legal rules that create starting points.").

56 *See* GEORGE J. STIGLER, THE THEORY OF PRICE 99–100 (3d ed. 1966).

57 *Id.* at 99–101.

58 *Id.* at 100.

In financial theory, standard option valuation models underscore that a significant component of the present value of any future right to purchase an asset at a particular price is the possibility that the underlying asset price will fluctuate.[59] The more volatile the asset price, the greater the time value of holding the option.[60] These observations provide some critical perspective on one of plea bargaining's most frequently criticized features: the plea discount/trial penalty.

Many commentators have observed the existence of the plea discount and concluded that something is awry.[61] Indeed, some have described the trial penalty as "difficult to distinguish from the constitutionally condemned practice of imposing a penalty on the exercise of constitutional rights."[62] Price theory, however, provides an economic explanation for plea discounts. First, the price of any pretrial plea must necessarily be lower than the expected sentence upon conviction because a pretrial plea, which has positive value to the prosecutor and negative value to the defendant, eliminates uncertainty.[63] In addition, pretrial pleas shorten the time to execution of the sentence, and standard discounting theory demonstrates that the acceleration of a penalty increases its relative magnitude.[64] In other words, basic price theory predicts the existence in every case of a "plea discount." We thus should not be shocked by empirical evi-

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59 *See* Charles T. Terry, *Option Pricing Theory and the Economic Incentive Analysis of Nonrecourse Acquisition Liabilities*, 12 AM. J. TAX POL'Y 273, 328–30 (1995).

60 *See id.*

61 *See, e.g.*, Robert A. Weninger, *The Abolition of Plea Bargaining: A Case Study of El Paso County, Texas*, 35 UCLA L. REV. 265, 295 (1987) (arguing that because of sentence differentials between sentences after guilty pleas and trials, the defendant who takes his case to trial and is convicted, "in effect, is punished twice—once for the crime and then again for 'enjoy[ing] the right to . . . trial . . . by an impartial jury'") (citing U.S. CONST. amend. VI).

62 Graham Hughes, *Pleas Without Bargains*, 33 RUTGERS L. REV. 753, 753 (1981).

63 *See* DIXIT & PINDYCK, *supra* note 12, at 13. The time value of options explains, in part, why plea discounts must be so high to induce guilty pleas. In the options market, "[w]aiting remains optimal even though the expected rate of return on immediate investment is substantially above the interest rate or the 'normal' rate of return on capital." *Id.* Thus, "[r]eturn multiples of as much as two or three times the normal rate are typically needed" to induce early exercise of an option. *Id.* In the plea market, waiting rather than pleading guilty is preferable, all other things equal, because (1) it delays the commencement of sentence, and (2) it preserves the chance of case "appreciation," that is, that the defendant's case will improve or the prosecutor's case will deteriorate. *See* PAUL H. ROBINSON & MICHAEL T. CAHILL, LAW WITHOUT JUSTICE: WHY CRIMINAL LAW DOESN'T GIVE PEOPLE WHAT THEY DESERVE 58 (2006); Hughes, *supra* note 62, at 759.

64 *See* Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 954 (2003) ("Even if the punishment is certain, the more distant it is, the more its weight as a threat will be discounted.").

dence that such a discount in fact exists.[65] As will be discussed further below, the important question is not whether there is a plea discount, but how large the plea discount is. It is not plea discounts, but overly large plea discounts, that cause distortions in the plea market.[66]

In general, prices in speculative markets are determined by the sum of all estimated probabilities of conditions that impact future price.[67] Futures markets do not discriminate between different sources of future price uncertainty.[68] The unitary pricing model of plea bargaining functions in the same manner, calculating "future market prices" based on expected trial sentences that themselves are estimations of very dynamic processes.[69] Trials are notoriously unpredictable: witnesses testify in unexpected ways, evidence changes or degrades, procedural errors occur or are discovered, juries are not always rational.[70] Even after a conviction is secured, judges sometimes depart from expected sentencing norms.[71] Lawyers learn to take these various factors into account, and experienced criminal lawyers pride themselves on their ability to reliably predict outcomes.[72] Nonetheless, predictions about expected punishment are predicated on unstable inputs. They are not always reliable, much less correct.

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65 *See, e.g.*, Nancy J. King et al., *When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States*, 105 COLUM. L. REV. 959, 962 (2005) (reporting empirical finding of "a significant plea discount . . . for most offenses in all five states" studied); *see generally* Weninger, *supra* note 61 (discussing data indicating that in El Paso, even after a limited ban on plea bargaining had been implemented, a sentence differential between defendants who pleaded guilty and those convicted at trial remained). The existence of a persistent plea discount, but not a persistent bench trial discount, as reported by the King study's authors, is consistent with price theory in that bench trial convictions need not discount either for possible acquittal or for the delay of imposition of punishment.

66 *See* John Kaplan, *American Merchandising and the Guilty Plea: Replacing the Bazaar with the Department Store*, 5 AM. J. CRIM. L. 215, 217, 222 (1977). Option theory also suggests that cases with the greatest "beta"—that is, potential to change in value over time—should be subject to greater plea discounts than relatively stable cases. High beta cases might include those that rely overwhelmingly on eyewitness evidence, evidence from informants, or which require juries to make difficult normative judgments about the defendant's conduct. Low beta cases, in contrast, might include those that rely principally on physical or other types of nontestimonial evidence, or which do not require difficult normative evaluations. Narcotics cases, gun cases, and immigration cases are all examples of low beta cases. Price theory therefore would predict that, all other things being equal, plea discounts should be lower in these cases than in higher beta cases like assault or rape cases.

67 *See supra* notes 56–58 and accompanying text.

68 *See supra* notes 56–58 and accompanying text.

69 *See supra* notes 56–58 and accompanying text.

70 *See generally* FEELEY, *supra* note 30 (providing an in depth case study of criminal trial court proceedings).

71 *See id.*

72 *See, e.g.*, *id.*

There is one instance in which the unitary pricing model completely breaks down: cases in which a guilty plea is taken to avoid a potential death sentence. It is incredibly difficult, perhaps impossible, to quantify avoidance of a substantial risk of death in terms of a certain prison term. How many years of imprisonment is a good trade when facing a fifty percent chance of receiving a death sentence? Although individuals are surely forced to weigh the risk of death in a wide variety of situations (i.e., when deciding whether to wear a seatbelt, engage in high-risk activities such as mountain climbing, etc.), the "rational" response is hard to decipher.[73] This suggests that pleas taken to avoid possible death sentences are categorically suspect as a matter of economic theory.[74]

C. Macro-Pricing Inputs on the Demand Side

A market system is essentially a mechanism for "adjusting changes in supply, demand[,] and price to one another."[75] Plea bargain prices, like the prices of other goods or services, are influenced by a wide variety of factors and are no more or less sensitive to the effects of supply and demand.

1. Judicial Scarcity

One of the most critical factors in plea pricing is the extreme scarcity of judicial resources.[76] Trials, in particular, are a scarce commodity. Indeed, the time and attention of all the actors in the criminal

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73 *See* Ilyana Kuziemko, *Does the Threat of the Death Penalty Affect Plea Bargaining in Murder Cases? Evidence from New York's 1995 Reinstatement of Capital Punishment*, 8 AM. L. & ECON. REV. 116, 117 (2006).

74 *See* Kaplan, *supra* note 66, at 217 (arguing that retention of death penalty is largely motivated, not by retributive theory, but by interest in using threat of capital punishment to induce guilty pleas); Kuziemko, *supra* note 73, at 138–39 (evaluating empirical data to conclude that death penalty induces plea bargains in anywhere from 2.8% to 34% of cases where it otherwise would not have occurred, and that death penalty diminishes frequency of charge bargaining in first degree murder cases).

75 JOAN MITCHELL, PRICE DETERMINATION AND PRICES POLICY 34 (1978).

76 Scarcity in the criminal justice system is largely the function of the failure to expand judicial resources in proportion to population growth. *See, e.g.*, Darryl K. Brown, *The Perverse Effects of Efficiency in Criminal Process*, 100 VA. L. REV. 183, 183–84 (2014) ("The number of cases that courts must resolve has grown relentlessly for decades, and the public infrastructure has not kept pace. Courts lack the staff and resources to adjudicate all cases by trial. On the criminal side, prosecutors' offices likewise lack the capacity to try every case they initiate. Hence the necessity for settlement, alternative dispute resolution, and summary judgment on the civil docket, and plea bargaining on the criminal."); H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63, 75–76 (2011) (noting that plea bargaining is, inter alia, "ultimately a function of a burgeoning population").

justice system—prosecutors, police detectives, defense attorneys, criminal investigators, judicial law clerks, and judges most of all—are fixed and subject to the laws of scarcity,[77] as are, for that matter, courtroom availability for trying and processing defendants[78] and jail beds for housing them both before and after disposition of the charges.[79] Given the current size of the judicial infrastructure, the number of trials that can be conducted in any given year cannot exceed some fixed ceiling. As Figure 1 illustrates, there is a strong correlation between judicial caseloads and the guilty plea rate. As judicial caseloads increase, so too does the rate of guilty pleas.[80] This relationship follows from the fact of judicial scarcity. If there are ten courtrooms in the county courthouse, and each trial consumes on average three days of court time, and those courts are in session 200 days a year, simple arithmetic suggests that no more than 666 trials could be conducted per year. Add in the amount of additional court time consumed by pretrial hearings, arraignments, plea colloquies, sentencing hearings, and the like, and that number will shrink even further. If 600 defendants are charged each year in that district, then the scarcity of courtrooms and judges will not matter much to the price of a guilty plea. Indeed, if adjudicative (and prosecutorial) capacity ever greatly exceeded the supply of defendants, the price prosecutors would be willing to pay for guilty pleas might plummet or even disappear.[81] If 6000 defendants are prosecuted in the district each

77 Data suggest that these fixed inputs have become scarcer relative to the amount of crime. For example, one study suggested that the "number of state and local assistant prosecutors grew from approximately 17,000 in 1974 to approximately 20,000 in 1990," even as core crime rates quintupled during that period. *See* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 25 (1997) (citing study).

78 *See* Brown, *supra* note 76, at 183–84 (discussing the increasing strain on adjudication resources).

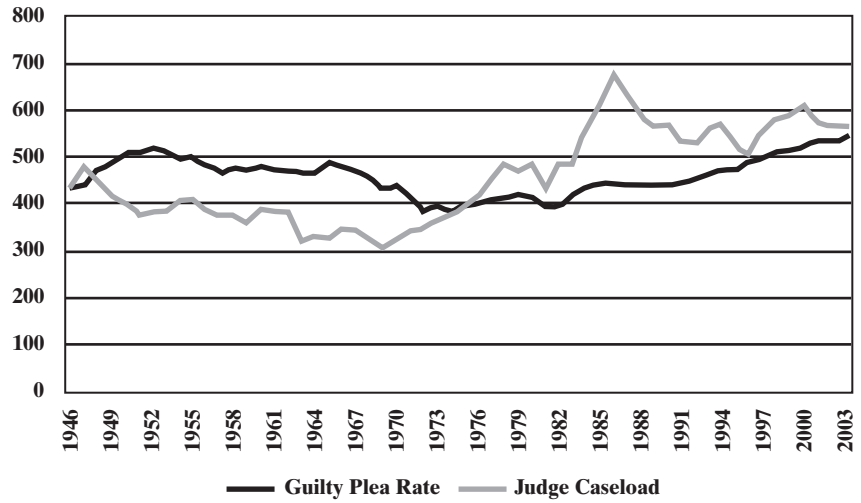
79 *See infra* note 123 and accompanying text.

80 The data used here was borrowed from RONALD F. WRIGHT, FEDERAL CRIMINAL WORKLOAD, GUILTY PLEAS, AND ACQUITTALS: STATISTICAL BACKGROUND app. 1 (Sept. 2005), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=809124. The caseload data used here includes criminal plus civil trials, with the criminal trial figure adjusted for average length of trial to reflect the increased workload resulting from an increase in trial lengths that otherwise would not be apparent from pure caseload data. For an excellent recent study demonstrating empirically the relationship between judicial vacancies, guilty plea rates, and corresponding penal leniency, see Crystal S. Yang, *Resource Constraints and the Criminal Justice System: Evidence from Judicial Vacancies*, *in* THE HARVARD JOHN M. OLIN DISCUSSION SERIES 3 (Apr. 1, 2015), http://ssrn.com/abstract=2594019 (finding that in jurisdictions with courts that are 10% vacant, guilty plea rates increase by 0.15% to 0.29% and incarceration rates decrease by 0.29% to 0.67%).

81 Most prosecutors affirmatively desire to try some cases each year. After all, the opportunity to try cases often is the reason that the prosecutor took the job. This is especially true among junior prosecutors eager for trial experience. *See* Ronald F. Wright & Kay L. Levine,

year, however, demand for the scarce resource of court time will be quite intense. With 6000 defendants, it is quite clear that ninety percent or more of those cases must be resolved without trial.[82] All things being equal, prosecutorial demand for guilty pleas will skyrocket, and prices will rise, given the limited supply of court time for trials.[83]

FIGURE 1. RELATIONSHIP OF FEDERAL GUILTY PLEA RATES AND FEDERAL CASE LOADS



The Cure for Young Prosecutors' Syndrome, 56 ARIZ. L. REV. 1065, 1088 (2014) ("Many prosecutors enter the profession because of the appeal of trial work, and they are anxious to prove and improve their litigation skills."). In some District Attorney's offices, moreover, an attorney must try a certain number of cases to advance within the office. *See* BOGIRA, *supra* note 55, at 82 (noting that rookie prosecutors must complete six trials before they can move from third-chair to second-chair).

82 These figures, which are merely hypothetical, almost surely overstate the actual capacity of courts to handle trials. In the late 1960s and early 1970s in New York, for instance, "limited courtroom and other administrative resources" prevented the conduct of more than 150 to 175 criminal trials, during a time period in which approximately 5000 felony cases had to be disposed of each year. Not surprisingly, 96.2% of felony cases between January and April of 1970 were disposed of with guilty pleas. *See* White, *supra* note 29, at 446–47; *see also* JUDGE HAROLD J. ROTHWAX, GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE 144–45 (1996) (explaining that in the mid-1990s in Manhattan, the annual volume of criminal cases averaged 125,000, but the physical capacity for courtrooms, lawyers, and judges allowed for only 1350 trials.). In his book, Judge Rothwax sheds light on the plea bargaining process, explaining that, "[o]f necessity . . . the overwhelming majority of cases must be plea-bargained." MARY E. BUSER, LOCKDOWN ON RIKERS: SHOCKING STORIES OF ABUSE AND INJUSTICE AT NEW YORK'S NOTORIOUS JAIL 174 (2015).

83 White, *supra* note 29, at 447–48 (comparing plea bargaining in Philadelphia and New York City and noting that "because more guilty pleas must be entered in New York [due to limited resources], the concessions offered to defendants are concomitantly increased").

Figure 1 illustrates this correlation. In 1946, the average federal judge carried 558 civil and criminal cases on his docket.[84] That same year, 82.3% of all federal criminal convictions were obtained through guilty pleas.[85] After a brief uptick, federal judicial caseloads steadily declined, reaching their nadir in 1968, when they averaged 311.7 per judge.[86] After 1946, the guilty plea rate continued to increase until 1951, five years after the peak in judicial caseloads, after which it too fell into a decline, bottoming out in 1973 at 78.5%, again five years after the recent bottoming out of judicial caseloads in 1968.[87] Meanwhile, beginning in 1968, caseloads began to rise.[88] The guilty plea rate remained relatively stable for five years and then it too took another uptick in the early 1980s.[89] Since then, caseloads and the guilty plea rate have both trended higher, with caseloads spiking in 1985 (reaching an all-time high of 640 cases per judge), while the guilty plea rate jumped to a then-new high in 1991 of 85.2%.[90] The movement of the two lines strongly suggests that judicial caseloads are a leading indicator of the guilty plea rate.[91] Intuitively, that conclusion makes sense. Where judges face high caseloads, they may well pressure prosecutors to settle cases rather than try them; prosecutors may feel compelled to resolve the case with a plea bargain rather than let it linger, risking potential speedy trial problems, evidence deterioration, and decreasing the deterrent sting of the sentence. Judges might also increase trial penalties where they perceive a need to induce more guilty pleas.

2. Value of Legal Entitlements

By far, the biggest determinant of the "value" of a guilty plea is the bundle of rights that are available in exchange for it (and the bundle of duties imposed on others as a result of the exercise of those rights), much as the value of a deed to a piece of property is determined by the attributes of ownership recognized and enforced by law.[92] As William Stuntz has observed, constitutional criminal proce-

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84 All data drawn from WRIGHT, *supra* note 80, at 3, 8.

85 *See supra* Figure 1; *see also* WRIGHT, *supra* note 80, at 3.

86 *See supra* Figure 1; *see also* WRIGHT, *supra* note 80, at 8.

87 *See supra* Figure 1; *see also* WRIGHT, *supra* note 80, at 2–9.

88 *See supra* Figure 1; *see also* WRIGHT, *supra* note 80, at 8–9.

89 *See supra* Figure 1; *see also* WRIGHT, *supra* note 80, at 2–4.

90 *See supra* Figure 1. These figures are not adjusted to reflect the increasing length and complexity of criminal trials, which steadily increased between 1946 and 1997, but dipped somewhat thereafter. *See* WRIGHT, *supra* note 80, at 2–9.

91 *See supra* Figure 1.

92 *See* Easterbrook, *supra* note 16, at 309–10. You would not likely give me much in ex-

dure has a powerful impact on the contours of the criminal justice system by establishing and allocating the costs of criminal procedure, but because of the dynamic interaction between different parts of the criminal justice system—legal rules established by judges, resource allocations of legislatures, and charging decisions by prosecutors—there is no one-to-one correlation between legal rules and plea prices.[93] Nonetheless, the legal rules defining the procedural entitlements available to defendants (established both by legislatures and courts) are the primary macro-determinant of plea prices.

The right to trial carries with it substantial opportunities to consume state resources. Not only do trials take up court and prosecutor time, but the continuing presence of the case on court dockets provides additional opportunities, through pre-trial motions practice and a myriad of other calendar considerations, to slow up the judicial process.[94] It should be noted that, at the macro level, the value of pleas is influenced by the *amount* of process the legal regime affords defendants, at least as much as the *quality* of process it affords.[95] In other words, a legal right that requires the state to expend more resources (such as the right to an evidentiary hearing) will increase the price of guilty pleas even if that legal right does nothing to increase the chances of acquittal.[96] Similarly, the value of the right to that hearing will increase the greater the number of legal claims that can be raised in it.[97] Guilty pleas are worth more, all else being equal, the more

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change for my "deed" to the Brooklyn Bridge unless you were pretty sure that the deed was legally, or practically, enforceable in some way. If it was, however, it would be a pretty valuable deed. One scholar has observed that criminal defendants need not treat their procedural rights as a single lump. Rather, rights may be "unbundled" in a way that increases the parties' ability to fine-tune the bargaining process. *See* John Rappaport, *Unbundling Criminal Trial Rights*, 82 U. CHI. L. REV. 181, 181 (2015) (arguing that "[c]riminal defendants can, and sometimes do, "unbundle" their jury trial rights and trade them piecemeal"). Gregory Gilchrist has similarly proposed unbundling trial rights and encouraging defendants to swap a portion of those rights for protection against harsh trial penalties. *See* Gregory M. Gilchrist, *Counsel's Role in Bargaining for Trials*, 99 IOWA L. REV. 1979, 1981 (2014) (proposing "trial bargaining" in which "defendants could bargain away limited trial rights in exchange for leniency").

93 *See* Stuntz, *supra* note 77, at 4.

94 *See* Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 56 (1968) (noting that "defense attorneys commonly devise strategies whose only utility lies in the threat they pose to the court's and the prosecutor's time").

95 *See id.*

96 *See id.* (explaining defense attorney's view that effectiveness of pre-trial motions does not depend on merits of motion, but on forcing prosecutors to have to prepare written response).

97 One example of a legal issue that fits this description is the Fourth Amendment consent search doctrine, which requires the state to prove that any search predicated on consent reflect the voluntary acquiescence of the defendant. *See* DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 32 (1999) (citing study based on review of

days (or even hours) it will take to try the underlying case.[98] Greater procedural rights inflate the price of pleas, but whether the higher plea price translates into fewer pleas, as Judge Easterbrook has surmised,[99] depends on a variety of factors, most important of which is whether prosecutors have sufficient purchasing power to pay the higher prices.

3. Other Factors Affecting Demand for Pleas

These relatively mechanical inputs apply the most immediate pressure on plea bargaining prices, but they in turn are affected by other, meta-level conditions. The number of defendants is heavily dependent on political choices about substantive criminal law, prosecutorial policy, and law enforcement efficacy.[100] The shape of substantive criminal law affects plea prices in two primary ways: by dictating the number of market participants and the value of legal entitlements. First, the more conduct that the substantive law makes criminal, the more defendants there will be. A world that did not criminalize narcotics would be a world with many fewer criminal defendants. The more defendants there are, the more demand there is for resource-conserving guilty pleas.[101] Second, substantive law also affects plea prices by manipulating the quantum of proof necessary to convict.[102] When the criminal law requires proof of many elements, or imposes high burdens of proof for conviction, plea prices will rise because convictions will be marginally harder to win.[103] When the substantive law dispenses with elements (as do strict liability offenses, for instance) or eases proof burdens, plea prices should fall.[104]

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all cases involving consent searches in the D.C. Circuit over six-year period, and finding that court upheld validity of search over challenge in every case). The Supreme Court's post-*Furman* capital punishment jurisprudence arguably reflects a strategy of increasing the costs of litigating capital cases, with the intention or effect of decreasing the number of capital cases pursued by the state.

98 Thus, as John Langbein has pointed out, the inflation in legal process that characterizes the American jury trial is in large part directly responsible for the almost total reliance on guilty pleas to resolve criminal charges. *See* John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 9–10 (1978).

99 *See* Easterbrook, *supra* note 16, at 310 (arguing that "an increase in the value of procedural rights leads to fewer pleas").

100 *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509 (2001).

101 *See id.* at 520.

102 *See id.*

103 *See id.*

104 The trend of substantive law has been in the direction of easing proof standards. Examples abound. For instance, many federal statutes punishing false statements have dispensed

Prosecutorial policies have similar effects. Undoubtedly, there are a core of offenses—murders, rapes, child molestations, kidnappings, major drug dealing—as to which prosecutors have virtually no discretion to decline to prosecute.[105] If they did, public outrage and political pressure would quickly sweep them out of a job. But beyond the core, prosecutors have substantial leeway to decide how many of those arrested will be charged, and how many of those charged will be *nolle prossed*.[106] Likewise, police officers may exercise a great degree of discretion in determining whom to arrest.[107] Presumably, in urban centers swamped with criminal defendants, police officers and prosecutors decline to arrest and press charges more often than in less overburdened areas. Different jurisdictions pursue different enforcement strategies, with minor drug offenses getting prosecuted in some locations and not others, and disturbances against the peace, or domestic incidents, getting prosecuted more frequently in others. Enforcement priorities will change even within districts over time.[108] Prosecutorial and enforcement policies will again have a significant impact on the number of criminal defendants in the system and, as a consequence, the demand for guilty pleas to relieve the pressure caused by those defendants.[109]

The demand for pleas is also a function of the efficacy of law enforcement in the jurisdiction, which impacts demand primarily in two ways. First, given any particular set of criminal laws, the more efficacious law enforcement is in identifying infractions of those laws, the more potential defendants there will be.[110] Vigilant and efficient enforcement will produce many potential plea opportunities, which will drive up plea prices.[111] On the other hand, the more admissible and persuasive evidence that law enforcement produces per identified infraction, the greater the likelihood of conviction, driving down the price that defendants can command for their pleas.[112] Plea prices in a

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with the requirement that false statement be "material." Many states now criminalize possession of "burglar's tools" as an easier-to-prove alternative to burglary itself. Gun possession offenses serve similar purposes. *See id.*

105 *See id.* at 533–34.

106 *See id.* at 537.

107 *See id.* at 521–22.

108 *See id.* at 522 (discussing different enforcement strategies of different localities).

109 *See id.* at 536–37 (discussing ways prosecutors keep costs down and "reduce the time and energy spent on each case" by pursuing plea deals instead of limiting the number of cases filed).

110 *See* Brown, *supra* note 76, at 199–204.

111 *See id.* at 204.

112 *See* Covey, *supra* note 34, at 78–80.

given jurisdiction, therefore, should be marginally higher where law enforcement focuses its resources on breadth, and lower where resources are focused on depth.[113] The number and mix of defendants is strongly influenced by the prosecutorial and enforcement policies in effect in that jurisdiction, but the effects of those policies on plea prices will sometimes be counterintuitive. For example, intense popular "demand" for more rigorous law enforcement will increase the number of defendants in the system if police respond to that pressure by increasing arrests. The increased arrests, however, means more defendants in the system, which in turn means greater demand for guilty pleas and as a result, higher plea prices.[114] Without some exogenous inputs to counteract the effect of increasing demand, the actual effectiveness of such campaigns may be exceedingly minimal.[115] For instance, as Josh Bowers describes, when New York City pursued its famous "zero tolerance" campaign in the late 1980s and early 1990s, the policy of mass arrests for low-level offenses was accompanied by a policy of lenient plea bargaining, the latter serving as a functionally inevitable corollary to the former.[116]

D. Supply Constraints

Of course, plea prices are determined by supply as well as demand. At the macro level, the supply of pleas is largely a product of the number of persons charged with crimes and the distribution and value of legal entitlements to the criminally accused. Because prosecutors control the overall number of defendants (subject to exogenous

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113 This dynamic can be observed in a comparison of state and federal criminal justice systems. State criminal justice is necessarily focused on breadth, as it is required to enforce the entire penal code, and especially to prosecute core violent offenses and property offenses. *See* Stuntz, *supra* note 44, at 2554–56, 2567. This obligation tends to produce an overabundance of defendants, a correspondingly large demand for pleas, and correspondingly lower prices. *See* King, *supra* note 65, at 962. Low plea price in state systems is evidenced in empirical and anecdotal studies of plea bargaining at the state level. *See* Stuntz, *supra* note 100, at 513–15. The federal system, in contrast, has the ability to focus resources on a much smaller number of cases, resulting in deeper case files in those cases that enhance the likelihood of conviction in each case. *See id.* at 542–43. Fewer defendants and stronger cases means less competition and less relative value for pleas, which pushes prices lower. *See id.* at 520. As a result, all else being equal, plea prices can be expected to be lower in the federal system than in the state system, an empirically testable prediction. *See id.* at 513–15.

114 *See infra* Section II.A.2.

115 *See* Josh Bowers, *Grassroots Plea Bargaining*, 91 MARQ. L. REV. 85, 99 (2007).

116 *See id.* ("As indicated, the NYPD tried to maximize arrests under the guise of order-maintenance policing. Prosecutors, however, took a more nuanced approach. They levied charges with increasing frequency but concurrently offered progressively more lenient bargains.").

factors such as crime rates), prosecutors in some sense ultimately control the plea supply, at least at the bottom end—if prosecutors stopped charging defendants with crimes, the supply of pleas would fall to zero.[117]

Criminal defendants can usefully be regarded as the suppliers of pleas in the plea market, however, because, regardless of how many defendants there are in the system, the supply of pleas will remain negligible as long as defendants value the legal entitlements the law provides them more than the inducements offered to them by prosecutors.[118] The attributes of those entitlements that are valued by defendants are different than those valued by prosecutors. Legal entitlements that improve non-bargained outcomes, such as rights that make it harder for the state to convict them at trial, or which limit their sentencing exposure upon conviction, have an intrinsic value to defendants and directly impact the supply of pleas.[119] Other entitlements, such as the recently recognized Confrontation Clause right to the live testimony of forensic analysts before their forensic tests are admissible,[120] increase the prosecutor's costs while not directly contributing to improved outcomes, and thus have little effect on plea supply. Indeed, if anything, they might marginally increase supply to the extent that defendants bear litigation costs. Their primary impact will be on the demand side.

The supply of pleas is further influenced by the costs that defendants incur when they withhold them. Those costs often can be substantial. Many defendants prefer to plead guilty rather than contest a charge because they desire simply to "get it over with."[121] Contesting charges can absorb substantial time waiting for cases to be called, making repeated visits to the courthouse, and suffering the frequent

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117 *See, e.g.*, Alschuler, *supra* note 94, at 52–53, 78, 86; Daniel C. Richman, Old Chief v. United States*: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939, 956–57 (1997); Vorenberg, *supra* note 27, at 1522, 1526–31.

118 *See* Alschuler, *supra* note 17, at 937, 954, 957 (discussing the legal entitlements valued by defendants).

119 One such collateral right is the right of appeal, which often can only be preserved by contesting guilt at trial. Like other procedural rights, which impose litigation costs on the state, prosecutors have proved eager to "buy" the defendant's appeal rights—typically and specifically sentencing appeals—in plea bargaining cases. *See* Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1187 n.25 (1975). Basic price theory suggests that where appeal rights are purchased, plea prices should be marginally higher.

120 *See* Bullcoming v. New Mexico, 564 U.S. 647, 652 (2011) (holding that "accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist").

121 BOGIRA, *supra* note 55, at 26.

delays and continuances common in the typical busy criminal court.[122] This incentive is particularly acute in the case of defendants who have been detained prior to trial.[123] The conditions in the local jails in which pretrial detainees are housed are often significantly worse than prison conditions.[124] Frequently, the amount of time a detainee spends awaiting trial can exceed the expected sentence upon conviction. Needless to say, the price such a detainee is willing to accept for his plea is substantially diminished. Indeed, in extreme cases (like the owner of a broken-down car who not only cannot sell his car but must pay someone to tow it away) the defendant subjected to lengthy pretrial detention may even be willing to "pay" for the privilege of pleading guilty. Experience suggests that defendants often plead guilty to more serious charges, or accept harsher formal plea sentences than they would expect after trials, where the net effect of the plea is to minimize the total amount of jail time experienced.[125] The coercive effect of pretrial detention creates powerful incentives for prosecutors to oppose release on bond even where the prosecutor does not really believe the defendant poses a threat or flight risk.[126]

All of these factors conspire to set the background pricing level of pleas, and recognition of these factors helps us to understand several major trends in the criminal law. But the background price level does not determine, in individual cases, the final plea price. Case-specific pricing determinations are often, though not always, the result of bilateral negotiation and, in those cases, depend on case-specific predic-

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122 *See* Alschuler, *supra* note 17, at 950–51, 954–56.

123 The number of individuals in pretrial detention is astounding. On June 30, 2005, 62% of people in jails had not been convicted and were awaiting trial. *See* Bryan Vander Brug, *Inmate Population Rises 2.6% from Previous Year*, USA TODAY (May 21, 2006, 7:16 PM), http://www.usatoday.com/news/nation/2006-05-21-inmates_x.htm. Steve Bogira describes a defendant that had spent five months in jail awaiting trial, and who suspected that despite his insistence on trial, the prosecutor and his public defender "were ganging up on him, trying to squeeze out his guilty plea." If convicted at trial, the defendant faced a sentence of 30 years. If he pleaded guilty, he was promised a recommendation from the state of the minimum six years. According to Bogira, the defendant "was so sick of the jail that he'd pretty well decided to take the deal today and go ahead on downstate, do his bit, and get it over with." BOGIRA, *supra* note 55, at 26.

124 COLUMBIA HUMAN RIGHTS LAW REVIEW, A JAILHOUSE LAWYER'S MANUAL 931 (9th ed. 2011).

125 Milton Heumann describes one such case from the prosecutor's perspective: "I think I gave the defense attorney a fair deal [in a case involving a client charged with rape of a child]. The relatives say she was raped, but the doctors couldn't conclusively establish that. I offered him a plea to a lesser charge, one dealing with advances toward minors, but excluding the sex act. If he takes it, he'll be able to walk away with time served [the defendant had not posted bail and had spent several months in jail]. It's the defendant's option though." HEUMANN, *supra* note 40, at 115.

126 *See* Kaplan, *supra* note 66, at 218.

tions made against a backdrop of background prices. But virtually everyone associated with the plea bargaining system agrees that predictions about expected trial outcomes are the primary determinant of plea prices.[127] Although the unitary pricing model seems to capture the fundamental dynamic of the plea bargaining system with a high degree of accuracy, the articulation of the model also reveals some unsettling aspects of the manner in which the plea-bargaining system functions.

II. Plea-Bargain Market Imperfections

Plea bargaining supporters contend that the system enhances accuracy by providing critical checks or test cases on which accurate plea prices can be derived.[128] Of course, the case for plea bargaining prohibition strengthens if the unrealistic assumption that plea bargaining actually and accurately reflects "shadow of trial" prices is relaxed. If it does not, then the choice between standard plea bargaining and no plea bargaining depends on how far plea bargaining practice diverges from the shadow of trial model. There are many reasons, both economic and contextual, that suggest a wide divergence between typical plea prices and the shadow of trial ideal.

First, we should query how "accuracy" is defined and measured. Second, even if we accept the "shadow of trial" definition of accuracy, we are confronted with a problem of gross valuations and margins of error.

A. Defining Accuracy

Under the "shadow of trial" model, a case is said to be priced "accurately" if the plea discount fairly reflects the expected outcome of the case, were that case to go to trial.[129] Case prices rise and fall relative to the strength or weakness of the evidence tending toward conviction.[130] As already noted, likelihood of conviction does not always correlate perfectly with guilt or innocence.[131] It would be preferable, from the standpoint of justice, if there was some way that plea prices might bear a more direct relationship to actual guilt or innocence.

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127 *See, e.g.*, *id.* at 223.

128 *See id.*

129 *See* Bibas, *supra* note 9, at 2465, 2528 (arguing that goal of plea bargaining reform "is to bring plea bargains more in line with expected trial outcomes").

130 *See id.* at 2467.

131 *See supra* note 50 and accompanying text.

1. *Margins of Error*

For predictions regarding trial outcomes to be reliable, both sides need accurate information about the evidence that will be presented at trial. The "shadow of trial" model assumes both parties' have access to full information—an unrealistic assumption.[132] Numerous scholars have argued for expanded pre-plea discovery rights to facilitate plea bargaining discussions.[133]

Consider different ways in which plea bargain prices might be set. First, prices might be set based on full information pricing—that is, based on a thorough evaluation of evidence gathered after an in-depth investigation in which both sides to the negotiation have a clear picture of all the evidence that will be presented at trial. The full information pricing model might be realistic in a small number of high-profile cases, typically involving well-compensated private counsel. It does not, however, correspond to the typical plea negotiation context, which normally takes place under conditions of limited information and little or no investigation, in which the negotiating parties have only a vague conception of how much of the evidence will actually be available or admissible at trial.[134]

Defendants often engage in plea bargaining with little or no information about the evidence in the prosecutor's file, either because the prosecutor refuses to share the evidence or because the defendant's lawyer has not asked to see it, or has not invested much time investigating the case.[135] Given current resource levels, there are too many cases and too many defendants for overburdened public defend-

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132 *See* Bibas, *supra* note 9, at 2531.

133 *See, e.g.*, *id.* at 2531 (contending that practical problems that create distortions in shadow of trial model suggest that the "obvious remedy is to liberalize discovery"); Erica Hashimoto, *Toward Ethical Plea Bargaining*, 30 CARDOZO L. REV. 949, 949 (2008) ("the ethical rules governing prosecutors should be interpreted to require pre-plea disclosure of exculpatory information and impeachment information.").

134 *See* Scott & Stuntz, *supra* note 19, at 2012 (noting that bargaining usually occurs prior to the completion of the investigation and evidence-gathering, "when only the bare outline of the case is known to either side").

135 *See, e.g.*, BOGIRA, *supra* note 55, at 118 (describing 1992 DOJ study in which some public defenders representing clients in drug courts reported feeling "pressured to advise their clients to decide in five minutes whether to plead guilty or not"); *id.* at 124 (discussing public defender's assertion that "[s]ome PDs keep their head above water by routinely advising their clients to plead guilty, . . . [t]hey skim the police reports and decide, without any investigation, that the case is a loser"); *id.* at 125 (describing public defender whose methodology for assessing cases is to review the police reports and defendant's rap sheets, and if this review "convinces him his client's chances are dim—the usual situation—he'll advise the client to plead"); Stuntz, *supra* note 77, at 42 (summarizing study showing that "most cases receive almost no investment of attorney time and energy; resource constraints presumably make such an investment impossi-

ers and court-appointed lawyers (who represent the vast majority of criminal defendants) to conduct proper investigations of the evidence in each case prior to bargaining.[136] The typical plea bargaining context thus corresponds more closely to what we might call a "limited information pricing model," in which case prices are set based on a quick glance at the police report and a brief hallway chat with the defendant.[137]

Limited information pricing may be "accurate" *vis-a-vis* the broad class and yet quite insensitive to individual variations among cases within the class, somewhat in the way that a wholesale buyer of apples might determine that seller A's apples are worth $10 a crate, notwithstanding that a retail buyer looking for an individual apple might be willing to pay $1 for the best apple in the crate, while a few wormy apples might not be saleable at all. In some bargaining conditions, it appears that cases are priced like apples.[138] In busy urban courthouses, prosecutors and public defenders routinely sit down with a large stack of case files and commence the bargaining process. The result of such bargaining may still lead to "accurate" overall estimates of case values, given the amount of information available at the time the price is set.[139] That is, if prosecutors tend to win convictions in five out of ten similar cases, the case price might be calculated based on an expected likelihood of conviction of fifty precent, even though further investigation could change expectations substantially.[140]

For instance, imagine that a prosecutor and a public defender sit down to negotiate a dozen burglary cases, all of which involve a single eyewitness. Imagine that the case file does not further describe any

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ble") (citing Michael McConville & Chester L. Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. REV. L. & SOC. CHANGE 581 (1986–1987)).

136 *See* Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1039–40 (2006).

137 *See* Malcolm M. Feeley, *Pleading Guilty in Lower Courts*, 13 LAW & SOC'Y REV. 461, 462 (1979) (observing that, at least in lower courts, plea bargaining resembles a modern American supermarket, in which prices are fixed and non-negotiable, more than a "Middle Eastern bazaar" where prices are the direct product of haggling between the parties); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 154–55 (2005) (speculating that "[g]iven the huge volume of cases involved and the limited scrutiny each receives [in state criminal courts], there is little reason to hope that the outcomes of plea negotiations come close to replicating the outcomes that a trial would produce").

138 *See* Schulhofer, *supra* note 17, at 2007–08.

139 *Id.* at 2008.

140 *See id.* (describing current plea-bargaining process as one that "does not seek to separate guilty from innocent individuals but only applies the law of averages to groups of cases, sorted by rough guesses about what investigation or cross-examination, if conducted, might reveal").

additional evidence. It may well be true that, if all twelve of those cases were tried, juries would convict fifty percent of the time. However, it may also be true that where the defendant's fingerprint also was found, the likelihood of conviction rises to ninety-eight percent, and where the defendant's alibi witness is credible, the likelihood of conviction drops to five percent.[141] Accordingly, whether or not an estimate regarding the chances of conviction is accurate depends on the degree of specificity that one applies to the particulars of any case. If plea bargaining occurs before factual investigation of the case, which is not atypical, then most estimates of trial outcomes will be based on limited pricing information.[142] And all this assumes that, at minimum, criminal defendants have lawyers representing them. In all too many resource-poor communities, even that supposed constitutional nicety is illusory.[143] Under such conditions, bargains rarely hinge on case-specific facts such as the actual guilt or innocence of the defendant.[144]

Further, the amount of information that can be incorporated into the system is bounded by the possibility of surprise and perjury. Sometimes, the evidence both sides expect to be admitted will not be available in the expected form. More distressingly, sometimes—perhaps even most of the time—witnesses can and will flat out lie.[145]

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141 Scott and Stuntz argue that where a quick glance results in overpricing of a case, the defendant's personal knowledge of his role in the incident should serve as a check. *See* Scott & Stuntz, *supra* note 23, at 1922–24.

142 *See* Stuntz, *supra* note 100, at 537 (noting that "[t]he literature on plea bargaining suggests that most prosecutors insist on bargains very early in the process, and punish defendants who resist settlement until shortly before trial."). But practices plainly vary from time to time and jurisdiction to jurisdiction. *See, e.g.*, White, *supra* note 29, at 445 (reporting that in Philadelphia and New York during time period studied prosecutors frequently deferred plea negotiations "until the day the case is listed for trial").

143 *See* Jonathan A. Rapping, *Who's Guarding the Henhouse? How the American Prosecutor Came to Devour Those He Is Sworn to Protect*, 51 WASHBURN L.J. 513, 549 (2012) (noting that "[a]lthough presiding over coerced pleas en masse is surely inconsistent with the duty to seek justice, it is far from uncommon" in "resource-challenged jurisdictions").

144 *See id.* ("'On a daily basis . . . indigent defendants take the deal. They plead guilty, without regard to their actual innocence or guilt. They plead guilty to get out of jail sooner rather than later. They come in court chained together and in keeping with the lowest form of human processing, they engage in mass pleas of guilty.'") (quoting Robb Fickman, *Judges Must Act to End Jail Overflow*, HOUS. CHRON. (Aug. 9, 2009, 5:30 AM), http://www.chron.com/opinion/outlook/article/Judges-must-act-to-end-jail-overflow-1747232.php#page-2).

145 *See* Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 107 (1992) (reporting results of survey of Cook County judges, prosecutors, and public defenders in which ninety-two percent of respondents expressed their belief that police officers lie at least some of the time in motions to suppress evidence).

Limited pricing information is also accompanied in at least some cases by limited processing time. Defendants may have only hours, or even minutes, to decide whether to accept a plea bargain or to risk conviction at trial, and the consequences of their decision may be measured in years or decades of prison time.[146] Even if full information about the expected trial outcome is available, it may be difficult to process that information rationally under such high-pressure conditions.[147]

While freely acknowledging these defects, plea bargaining's defenders contend that there is a critical safeguard that prevents innocent defendants from accepting plea offers based on inaccurate estimates: the defendant's own knowledge of his guilt or innocence.[148] They contend that where the prosecutor overestimates the probability of conviction because she fails to incorporate relevant exculpatory information in her estimate, the defendant will simply decline the offer.[149] The prosecutor will then be forced either to reevaluate her estimate, or take the case to trial.[150]

Scott and Stuntz suggest one reason—different distributions of risk-aversion among innocent and guilty defendants—that undermines the validity of the assumption that innocent defendants will reject improperly priced pleas.[151] For this reason—and a variety of other reasons discussed below—the problem of inaccurate estimates is unlikely to lead innocent defendants to contest their cases at trial. Moreover, innocent defendants might frequently receive accurately discounted plea offers based on the objective odds of trial convictions. The decision to accept or reject such offers puts innocent defendants

146 *See* BOGIRA, *supra* note 55, at 79–83 (describing case in which defendant, in midst of trial, is offered plea bargain of thirty-six years—carrying an effective eighteen years after good-time is subtracted, and minus time served—or risk conviction and a maximum sentence of sixty years—twenty-eight after the same adjustments—and had twenty minutes to make a decision).

147 The accuracy of the pricing process is further complicated by "bluffing," conduct either party can and does engage in, which further distorts the information available on which to base pricing decisions. *See* Rebecca Hollander-Blumoff, *Getting to "Guilty": Plea Bargaining as Negotiation*, 2 HARV. NEGOT. L. REV. 115, 124 (1997) (noting research studies showing that prosecutors sometimes bluff when evidence against a defendant is weak).

148 *See* Easterbrook, *supra* note 44, at 1969–70; Grossman & Katz, *supra* note 16, at 753–755.

149 *See* Easterbrook, *supra* note 44, at 1969–70; Grossman & Katz, *supra* note 16, at 753–755.

150 *See* Easterbrook, *supra* note 44, at 1969–70; Grossman & Katz, *supra* note 16, at 753–755.

151 *See* Scott & Stuntz, *supra* note 19, at 2012.

in a tragic bind. The rational decision is to accept the guilty plea, notwithstanding actual innocence.[152]

2. *Monopsonist Pricing*

First, the plea bargaining market differs radically from the conventional paradigm of a perfectly competitive market.[153] In any transaction, there are only two parties—neither the prosecutor's office, nor the defendant, has much (if any) freedom to "shop" for better terms elsewhere.[154] The prosecutor's office, however, has much greater freedom to bargain.[155] The prosecutor always retains the power of exit by dropping the prosecution.[156] The defendant has no such ability.[157]

The structure of the plea bargaining market, therefore, is largely a bilateral monopoly, in which prosecutors possess all of the price-setting power.[158] Prosecutors are "monopsonists"—that is, the sole available buyer of a product.[159] As such, they are price makers, not price takers. Given their advantageous position in a monopsonistic

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152 *See* John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157, 169 (2014) ("The lack of advantage to many innocent defendants is exacerbated by the fact that prosecutors often offer the strongest incentives to defendants in cases where the evidence is weakest; it is necessary to do so to secure a conviction.").

153 *See* Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CALIF. L. REV. 1471, 1480 (1993).

154 *See* Shayna M. Sigman, Comment, *An Analysis of Rule 11 Plea Bargain Options*, 66 U. CHI. L. REV. 1317, 1323 (1999). Some scholars, such as Judge Easterbrook, have suggested that the freedom to "shop" takes place earlier, when the decision to commit the crime is first made, and that this opportunity for choice permits the criminal justice process to evade the charge of monopoly. *See* Easterbrook, *supra* note 16, at 291. This argument is entirely specious, however, because it is inapplicable to innocent defendants, who obviously did not choose to be wrongly charged in any jurisdiction. Because one of the most important functions of the criminal justice process is to separate the wrongly charged from the properly charged, a theoretical description of the system that presupposes that it has properly selected its subjects is obviously inadequate.

155 *See* Reinganum, *supra* note 16, at 713.

156 *See id.*

157 *See id.* at 714 (noting that the defendant's inability to seek other bargaining partners enhances the bargaining strength of prosecutors).

158 Some commentators describe the plea bargaining market as a bilateral monopoly. *See* Benjamin A. Naftalis, *"Queen for a Day" Agreements and the Proper Scope of Permissible Waiver of the Federal Plea-Statement Rules*, 37 COLUM. J.L. & SOC. PROBS. 1, 41–42 (2003). Alternatively, one could also conceptualize plea bargaining as a case of pure (rather than bilateral) monopoly. That is, with respect to a set of "consumers" of their product—resolution of a set of criminal charges—prosecutors are the only producer. They need not fear a rival's competition, nor are there any substitutes for the product they are selling. *See* DONALD STEVENSON WATSON, PRICE THEORY AND ITS USES 345 (3d ed. 1972).

159 *See* Standen, *supra* note 153, at 1477–79, 1478 n.25 (discussing the "prosecutor as monopsonist"); *see also* Roger D. Blair & Jeffrey L. Harrison, *Antitrust Policy and Monopsony*, 76 CORNELL L. REV. 297, 297 n.6 (1991).

market structure, standard economic theory predicts that prosecutors should be able to "obtain exchanges of pleas at subcompetitive prices."[160] This means, in theory, that prosecutors have the ability to induce defendants to agree to plead guilty by providing just enough of a plea discount to make the deal attractive. Any "surplus" created by the deal—that is, the part of the sentence (or number of charges) that the prosecutor would have been willing to forgo, if necessary, to secure the bargain—can be extracted entirely by the prosecutor.[161]

Now, this characterization of the market structure for pleas is not entirely correct. Criminal defendants who do not like the deal offered by prosecutors retain the option to seek a better deal from the judge. Lacking any offer from prosecutors, such defendants can go into court and enter a so-called "open" plea.[162] This is the fallback option for defendants unable to bargain with prosecutors who are still hoping to obtain some of the benefits of pleading guilty, and it is always an available option. Indeed, when Alaska temporarily prohibited prosecutors from engaging in plea bargaining, criminal defendants still pled guilty in approximately eighty percent of all criminal cases by simply entering open pleas.[163]

Still, the ability to enter an open plea does little to alter the essentially monopsonistic structure of the plea market. First, courts have only limited power to reward guilty pleas. They generally lack legal authority to dismiss charges on their own, and are often constrained by the sentencing laws of the jurisdiction regarding the size of sentenc-

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160 Standen, *supra* note 153, at 1473. The term "subcompetitive" however may lack coherence in the plea bargaining context. If defendants could pick and choose which prosecutor in the office, or which office in the county, or which county in the state, or which state in the union they could negotiate plea agreements with, and prosecutors and their respective jurisdictions had some incentive to win their "business," the price of pleas would no doubt fall drastically. The plea bargaining market is not the only feature of the criminal justice system susceptible to a monopsonistic characterization. The same structure also pertains to the market for indigent criminal defense services. *See* Dru Stevenson, *Monopsony Problems with Court-Appointed Counsel*, 99 Iowa L. Rev. 2273, 2274 (2014) (noting that "monopsonist buyer dictates below-market prices").

161 Standen, *supra* note 153, at 1478–79.

162 *See, e.g.*, Bureau of Justice Statistics, U.S. Dep't of Justice, The Prevalence of Guilty Pleas, 2 n.4 (1984) (citing Michael L. Rubenstein, Stevens H. Clarke, & Teresa J. White, Alaska Bans Plea Bargaining (1980)).

163 *See id.* Some research suggests an increase in the entry of open pleas in federal courts after *United States v. Booker* and in some state courts as well. *See* Jeffrey Ulner, *Beyond Disparity: Changes in Federal Sentencing After* Booker *and* Gall, 23 Fed. Sent'g Rep. 333, 338 (2011) (stating that "use of open pleas by defense attorneys to circumvent prosecutors and gamble on judicial leniency was found in case processing under Pennsylvania guidelines" and in federal courts post-*Booker*).

ing discounts they might offer.[164] More significantly, constitutional and ethical rules often prohibit judges from bargaining directly with defendants, as the judge's ultimate sentencing authority makes such bargaining overtly coercive.[165] As a result, judges have only limited ability and modest incentives to show criminal defendants any significant leniency.[166] Finally, open pleas are notoriously risky. Because a defendant enters a sentencing hearing already having relinquished his strongest bargaining chip, such defendants are entirely at the mercy of sentencing courts and vulnerable to nasty sentencing shocks.[167] Prosecutors remain defendants' first—and best—hope of obtaining sizeable bargaining value.

Both full and limited information pricing assume fixed charging decisions and predetermined sentencing exposure. These assumptions, however, do not take into account the effects of prosecutorial discretion to select charges and, therefore, to exercise control over the background price structure of the exchange. Plea bargaining's dirty secret—one that its advocates rarely acknowledge—is that the state has the ability to, and does, manipulate the supply of penal leniency to pay for guilty pleas.[168] The primary way the supply of penal leniency can be increased is to increase baseline sentences. This can be accomplished by either (1) increasing the maximum sentence exposure for particular offenses, or (2) by increasing the number of offenses or counts of an offense that can be charged and cumulating the sentences for each.[169] It appears that both strategies have been widely put to use, as both the length of sentences and the number of chargeable offenses have grown markedly over the past several decades.[170]

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164 *See* Standen, *supra* note 153, at 1478.

165 *See* Colin Miller, *Anchors Away: Why the Anchoring Effect Suggests That Judges Should Be Able to Participate in Plea Discussions*, 54 B.C. L. REV. 1667, 1690 (2013) (but also noting that a "growing minority of states allow or encourage judges to participate in such discussions").

166 Assuming a judicial interest in conserving resources, judges would want to provide enough of a reward for entering an open plea to create incentives for other criminal defendants to do so as well.

167 *See, e.g.*, Kyle Graham, *Crimes, Widgets, and Plea Bargaining: An Analysis of Charge Content, Pleas, and Trials*, 100 CALIF. L. REV. 1573, 1589 (2012) (noting that entering open plea generally "amounts to capitulation, not bargaining, and normally bespeaks a compelling prosecution case"); Lisa Schreibersdorf, *Bringing the Best of Both Worlds: Recommendations for Criminal Justice Reform for Older Adolescents*, 35 CARDOZO L. REV. 1143, 1154 (2014) (noting, based on personal experience representing young respondents in sentencing proceedings, that generally "the risk of what could happen with an 'open' plea is not worth taking").

168 *See* Stuntz, *supra* note 100, at 594.

169 *See id.* at 509, 530, 594.

170 *See* Rachel E. Barkow, *The Political Market for Criminal Justice*, 104 MICH. L. REV. 1713, 1713 (2006) (citing Bureau of Justice Statistics demonstrating that average federal

The dramatic expansion of penal leniency explains why the increase in the supply of defendants[171] has not resulted, overall, in a dramatic decrease in the severity of plea-bargained sentences.[172] Imagine that any defendant convicted of possession of a kilogram of cocaine faces a sentence of four years. Now consider the class of defendants for which there is a fifty percent chance of conviction if tried.[173] It is possible to draw a supply curve reflecting the supply of guilty pleas among such class of defendants. Some defendants, especially those who are risk-averse, would be willing to plead guilty in exchange for any guaranteed offer less than four years.[174] Others who are less risk-averse would hold out, but will plead guilty if the discount is increased.[175] The supply of guilty pleas among a group of defendants with varying case profiles, therefore, will increase substantially the more lenient the standard plea offer is to the group.[176] Most defendants should be willing to plead guilty once the offered sentence falls below two years. A few defendants who are either not risk-averse or who have high discount rates will refuse to settle unless offered an extremely lenient deal.[177] As prosecutors (or judges) demand

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sentences have increased from 26.9 months to 44.4 months between 1988 and 2000). Legislators have expanded both the number of chargeable offenses and the severity of sentences upon conviction. *See* Stuntz, *supra* note 100, at 513–14, 530. Prosecutors make routine use of both tools to induce guilty pleas. *See* Alschuler, *supra* note 94, at 86–87 (discussing practice of vertical and horizontal overcharging, in which prosecutors charge numerous non-overlapping counts of a similar offense type, or charge a higher offense than the evidence can likely support, respectively); Oren Bar-Gill & Omri Ben-Shahar, *The Prisoners' (Plea Bargain) Dilemma*, 1 J. LEGAL ANALYSIS 737, 770 (2009) ("Legislatures have increased statutory sentences to enhance the bargaining power of the resource-constrained prosecutor." citing Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1282–83 (2005)); R. Michael Cassidy, *(Ad)ministering Justice: A Prosecutor's Ethical Duty to Support Sentencing Reform*, 45 LOY. U. CHI. L.J. 981, 999–1000 (2014) ("Many judges and former prosecutors now candidly admit that it is common for the government to use mandatory sentences as a bargaining chip to coerce guilty pleas"); Kaplan, *supra* note 66, at 217 (noting that prosecutors have strong interest in lobbying legislatures for harsher sentences not because they wish to impose such sentences on defendants, but so they can use them as a "club to coerce more guilty pleas").

171 This Article relies on Ron Wright's data on the federal courts to illustrate the dramatic increase in the number of defendants. *See* WRIGHT, *supra* note 80.

172 *See* Richard S. Frase, *Recurring Policy Issues of Guidelines (and non-Guidelines) Sentencing: Risk Assessments, Criminal History Enhancements, and the Enforcement of Release Conditions*, 26 FED. SENT'G REP. 145, 150 (2014) (explaining that "where almost all defendants do in fact plead guilty, it seems likely that plea sentences will come to approximate what officials view as appropriate levels of sanction severity (or closer to it)").

173 *See infra* Section II.B.

174 *See infra* Section II.B.

175 *See infra* Section II.B.

176 *See infra* Section II.B.

177 *See infra* Section II.B.

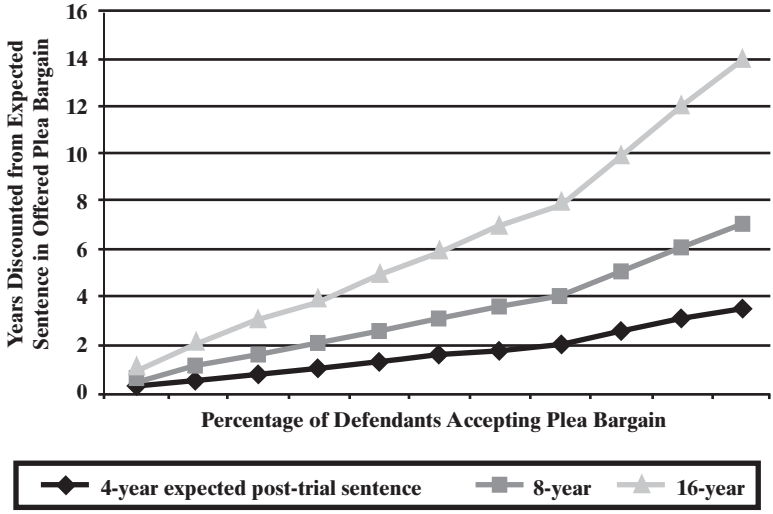
more and more guilty pleas, they are required to travel up the supply curve to buy the additional pleas.

With no increase in the currency supply (and insufficient resources to effectively price discriminate), prosecutors would be forced to succumb to the demands of those at the top of the supply curve, and serious criminals might routinely be permitted to plead guilty in exchange for minimal sentences.[178] But increase the sentencing exposure of defendants convicted at trial, and prosecutors can now make plea bargain offers that capture a much broader band of defendants without lowering actual sentences.[179] For instance, exposure can be doubled either by doubling the maximum penalty or by charging each defendant with two counts rather than one. Under the same assumptions as above, most defendants now rationally will be willing to plead guilty in exchange for any offer carrying a sentence below four years, and a much greater proportion of defendants would be willing to plead guilty in exchange for the two-year deal. Double the expected penalty again, and, as Figure 2 illustrates, virtually every defendant's plea, regardless of his or her individual supply curve, can be purchased by the prosecutor in exchange for that same two-year deal. Assuming an even distribution of risk-aversion, although a substantial percentage of defendants might be willing to take their chances at trial if the maximum sentence were only four years, only a tiny percentage (those who discount the ETS below two years) would perceive trial as a preferable option to pleading guilty.

178 *See* Chantale LaCasse & A. Abigail Payne, *Federal Sentencing Guidelines and Mandatory Minimum Sentences: Do Defendants Bargain in the Shadow of the Judge?*, 42 J.L. & ECON. 245, 248 (1999) (noting that economic models of plea bargaining predict that "[l]ower proposed pleas increase the probability that the defendant accepts").

179 *See id.* (noting that economic models of plea bargaining predict that "[a]n increase in the average severity of the trial outcome makes a defendant willing to accept a higher sentence and puts the prosecutor in a position to demand a higher plea").

FIGURE 2. FUNDAMENTAL PRICING DYNAMIC



As some commentators have noted, prosecutorial discretion to charge coupled with constantly inflating guideline-determined sentences provides almost unchecked prosecutorial power over sentencing outcomes.[180] Where prosecutors have the freedom to charge multiple counts of the same crime, or to charge several overlapping crimes arising from the same transaction, and each carries even the potential of a separate term, the fundamental pricing dynamic will be deeply impacted by the number of counts charged.[181] As long as prosecutors have the power to "set[ ] the range from which the prosecutor and defense counsel discount to reflect the likelihood of conviction and the costs of trial,"[182] it is not unfair to describe the price-setting mechanism as virtually unilateral.[183]

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180 *See* Cassidy, *supra* note 170, at 988 (stating that prosecutors "enjoy unfettered discretion to dismiss or reduce a charge carrying a mandatory sentence in exchange for a guilty plea"); Standen, *supra* note 153, at 1475.

181 Of course, this dynamic is greatly enhanced where mandatory minimums remove the risk that a judge might impose concurrent sentences.

182 Standen, *supra* note 153, at 1475.

183 *See id.* (explaining that as a result of federal sentencing guidelines the "prosecutor now sets the range from which the prosecutor and defense counsel discount to reflect the likelihood of conviction and the costs of trial"). Modern penal codes uniformly permit prosecutors the freedom to charge multiple overlapping offenses, each of which contains somewhat different elements and thus evades double jeopardy restrictions, and thereby to vastly multiply prospective sentences. *See* Stuntz, *supra* note 100, at 519 ("To put this pattern in geometric terms, criminal codes consist of a great many more sets of overlapping circles than concentric circles. Which is to say that defendants who commit what is, in ordinary terminology, a single crime can be treated as though they committed many different crimes—and that state of affairs is not the exception, but the rule."); *id.* at 519–520 ("By threatening all four charges, prosecutors can, even

The state's monopoly on the currency used in plea bargaining and its blatant manipulation to discourage exercise of the trial right is, more than anything else, what makes plea bargaining unfair. The appropriate analogy is not the remote gas station that charges high prices to travelers unlucky enough to run out of gas in the desert.[184] That analogy presupposes drivers free to choose their course and mode of travel. Criminals may make comparable choices, but the fairness of plea bargaining cannot be evaluated from the perspective of the guilty. Innocent defendants wrongfully charged with criminal offenses certainly did not "choose" to be charged with a criminal offense. A more apt analogy, therefore, is a passenger bus that makes a mid-journey stop in the desert and threatens to abandon its passengers if they refuse to pay the requested toll.[185] Alternatively, the state's inflation of sentencing exposure looks like a simple protection racket, in which locals are "asked" to pay a price to avoid some intolerable harm. When individuals get an offer they cannot refuse, it is no surprise that most do not.

3. Discriminatory Pricing

Price discrimination occurs when "a firm charges two or more prices for the same thing at the same time" and "is an extension of monopoly pricing."[186] As a function of the monopsonistic market structure, plea bargaining is subject to extensive price discrimination. Where price discrimination is most extensively at work—that is, under conditions of perfect discrimination—the monopolist/monopsonist extracts virtually the entire surplus obtained from trade.[187] Prosecutors in a perfect discrimination model, therefore, might be expected to obtain plea bargains on terms that impose sentences just lenient enough

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in discretionary sentencing systems, significantly raise the defendant's maximum sentence, and often raise the minimum sentence as well. The higher threatened sentence can then be used as a bargaining chip, an inducement to plead guilty."); *id.* at 531 ("Raising the threatened sentence raises the cost of going to trial just as effectively as raising the likelihood of conviction.").

184 *See* Scott & Stuntz, *supra* note 23, at 1920.

185 Scott & Stuntz acknowledge the potential of strategic behavior by the prosecutor, but contend that solutions must therefore be directed at controlling such strategic behavior rather than at eliminating plea bargaining. *Id.* But as Stuntz's later work recognizes, the criminal justice system is currently predicated on facilitating plea bargaining, and the obstacles to constraining strategic behavior are great where prosecutorial discretion is a bedrock principle. *See* Stuntz, *supra* note 100, at 511. Accordingly, pragmatism suggests that the best way to alter the system is to attack the governing payoff structures.

186 Watson, *supra* note 158, at 371.

187 *See id.* at 345 ("Monopolists are price makers, not price takers, as are the firms in purely competitive industries.").

to induce defendants to prefer the plea offer over trial.[188] Defendants never receive any "windfall" deals.[189]

The plea bargaining market, in reality, does not conform to the perfect discrimination model for at least two reasons. First, there are too many consumers to permit the prosecutor to determine, with any degree of accuracy, the optimal monopsonistic price. The transaction costs necessary to do so would quickly swamp the prosecutors' limited resources. Because of these transaction cost limitations, observers of plea bargaining usually report the existence of fairly rigid pricing structures, suggesting that "first degree" price discrimination is not the norm. Although the size of the plea discount varies from case to case, most accounts of plea bargaining (at least in large urban criminal courts) indicate that variation routinely is held within relatively narrow parameters, with a small number of outliers.[190] Second, prosecutors generally lack any real incentive to extract the maximum surplus.[191] As a result, most defendants probably receive a larger discount than necessary to induce their plea.

But that does not mean that selective price discrimination does not occur. The degree of price discrimination undoubtedly varies substantially from jurisdiction to jurisdiction, and different types of cases

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188 *See id.* ("[m]onopolists have freedom in price making because they sell to many consumers").

189 *See id.*

190 The outliers usually arise in high-profile or politically-sensitive cases, or in cases in which defense counsel is abnormally ineffective or disfavored by the prosecutor. *See* EMMELMAN, *supra* note 33, at 212 (noting that prosecutors more often refuse to make "reasonable" offers if it is a "highly publicized" case). Case prices reflect a composite estimation of trial outcomes; that is, they incorporate all of the various factors or inputs that affect the likelihood of a particular outcome. *See* Gerard E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off?*, 55 STAN. L. REV. 1399, 1403 (2003) ("Most plea negotiations, in fact, are primarily discussions of the merits of the case, in which defense attorneys point out legal, evidentiary, or practical weaknesses in the prosecutor's case, or mitigating circumstances that merit mercy . . . ."). But note the asymmetry in the negotiating process. Although both sides can make estimates about what a jury would do if presented with the evidence, only the prosecutor has discretion to negotiate an outcome that diverges from the accurate case price. *See* ROGER A. ARNOLD, ECONOMICS 501 (9th ed. 2008). That is, both sides might agree that there is a ninety percent likelihood that a jury would convict a defendant of murder if tried, but nonetheless agree that a conviction for manslaughter rather than murder is more appropriate, given the circumstances of the defendant or the offense. Defense lawyers cannot make comparable concessions, even if both defense lawyer and prosecutor agreed that the defendant was a vile human being, they could not agree that the defendant should plead guilty to murder where the evidence could only sustain a verdict from a jury of manslaughter.

191 *See* HEUMANN, *supra* note 40, at 73 ("[A]s trial approaches, the prosecutor's offer improves. Sometimes these offers are so lenient that [the defense attorney] is left with little choice but to accept them.").

will be subject to different degrees of discrimination.[192] The evidence suggests, however, that price discrimination typically occurs where prosecutors perceive a stronger than normal need to maximize sentences, either because the case has received public scrutiny[193] or because the defendant's conduct is viewed as "extremely serious."[194] In such cases, the monopsonistic market structure permits prosecutors to offer substantially lower prices.

B. Discounting and Risk-Aversion

The flaws inherent in the unitary pricing model—the total emphasis on predicted outcome without regard to actual guilt or innocence—are exacerbated by two other factors that affect the micropricing of cases: discounting and risk-aversion.

Discounting is a function of timing preferences.[195] Rational actors seek to accelerate consumption of benefits and to delay imposition of costs.[196] In economic theory, the present value of a good is greater than its future value proportionate to the discount rate.[197] The higher the discount rate, the greater the future benefit must be to entice someone to trade a present benefit for it, and the greater the future cost must be to entice that person to make an upfront payment now to avoid it.[198] Defendants with a high discount rate will require a larger plea discount—i.e., a higher price—before accepting a plea offer because the costs of future punishment are said to diminish proportionately the more distant they are.[199] Where lengthy sentences are at issue, the effects of even relatively small discount rates can have

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192 *See* Emmelman, *supra* note 33, at 172.

193 *Id.* at 212 (noting that prosecutors more often refuse to make "reasonable" offers if it is a "highly publicized" case).

194 *Id.* at 172 (quoting defense attorney explaining that prosecutors will charge typical first-time offenders with relatively light misdemeanor charges for minor felony offenses, in contrast, in an "extremely serious case . . . [t]hey're gonna . . . want as much time as they feel they can milk out of you without forcing you to go to trial").

195 *See* Olivier Vardakoulias, *Discounting and Time Preferences*, NEW ECON. FOUND. 1–2 (Apr. 2013), http://www.neweconomics.org/page/-/publications/Economics_in_policymaking_Briefing_5.pdf.

196 *See id.*

197 *See id.*

198 *See id.*

199 *See* Easterbrook, *supra* note 44, at 1974–75. Although money has a demonstrative time-value, it is not so clear that time itself can be thought of as having time-value. Indeed, it risks incoherence to speak of the present-value of any future block of time, as theorists do who attempt to evaluate the present-value of a long prison term. One can measure and discount the foregone income streams resulting from a long prison sentence, but that is separate from the detrimental cost of imprisonment itself.

a substantial impact on the size of the plea discount necessary to induce a rational defendant to plead guilty.[200]

Risk-aversion will affect the supply of pleas in similar ways. Defendants who are not risk-averse will more likely gamble on winning an acquittal at trial than accept any given plea offer.[201] Accordingly, it will require a larger plea discount to induce non-risk-averse defendants to plead guilty. Conversely, defendants who are risk-averse will tend to accept a smaller plea discount to avoid the risk of receiving the maximum sentence at trial. It has been hypothesized, moreover, that persons who are innocent are likely both to be more risk-averse than persons who are guilty and to have a steeper discount rate.[202] After all, it is reasoned, engaging in criminal conduct is highly risky behavior probably not favored by the risk-averse, and criminal conduct reflects a character preference for immediate consumption to delayed gratification. As a result, all things being equal, wrongly charged innocent defendants are more likely to accept any given plea offer than their guilty brethren.

C. Agency Costs

Negotiation is further complicated by acute agency problems. Although agency costs create distortions in many markets, few functioning markets are as afflicted by conflicts of interest between principals and agents as the plea-bargaining market. The most troubling agency problem arises from the economic structure of the criminal de-

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200 *See* Easterbrook, *supra* note 16, at 308–09. There is some reason to be skeptical of claims that discounting plays as large a role in plea bargaining as some law and economics theorists suggest. Unlike fines, time-based penalties cannot be paid in a "lump sum." *See* Easterbrook, *supra* note 44, at 1975. Easterbrook has suggested that although intradefendant discounting effects are conceptually problematic, the concept can be understood in an interdefendant context. Thus, the deterrent effect of sentencing ten defendants to one year may be greater, as a result of discounting, than sentencing one defendant to ten years.

However, it is not obvious that people's actual decisions are based on time-discounting. Although many persons with some control over when they serve a jail sentence probably prefer to delay serving the sentence as long as possible, as discounting theory would predict, other defendants prefer to serve the sentence as soon as possible so that they can "get it over with." It is far from clear that either choice is significantly more rational than the other. Two factors do make delay a marginally preferential strategy. First is the ever-present possibility of death, which diminishes the certainty that the sentence will in fact be served. Second is the possibility of reprieve—as long as the sentence has not been served, there always is a possibility that some circumstance will arise (a pardon, new evidence, bureaucratic error) that will obviate the punishment.

201 *See* Scott & Stuntz, *supra* note 19, at 2012.

202 *See id.*

fense bar.[203] Most defense lawyers are not compensated for achieving optimal outcomes for their clients.[204] Instead, they maximize their income, and minimize their workload, by disposing of their clients' cases as quickly as possible.[205] Accordingly, the litigation strategy that might be most beneficial to an individual client may not be pursued by a lawyer concerned with the need to settle cases quickly, either to recoup the highest ratio of fee per hour expended, or to make even minimal time available to service the needs of the other clients assigned to the lawyer.[206]

This agency problem diminishes plea prices for defendants who cannot afford to retain and pay for a vigorous, no-holds-barred defense.[207] The amount of "process" available to such defendants (the vast majority) is substantially less than their wealthier brethren.[208]

The agency problem is aggravated by the fact that the state is the primary provider of defense services, and there is an inverse relation between the amount of resources the state devotes to criminal defense and the price it pays for guilty pleas.[209] The more process each defendant can command from the legal system, the higher the price the state will be willing to pay for a process-terminating plea.[210] Accordingly, the more the state spends on providing defendants with legal services, the more expensive guilty pleas become. Any state interested in conserving public dollars spent on criminal justice, therefore, can obtain double savings by reducing expenditures on defense lawyers, a point apparently well-taken by most state legislatures.[211]

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203 *See generally* Alschuler, *supra* note 119 (describing at length the multifold of conflicts of interest inherent in plea-bargaining system, including flat-fee structure that rewards attorneys equally regardless of whether they plead or go to trial, creating overwhelming incentives for defense lawyers to try to plead out most cases quickly rather than invest the time and resources into trying a case).

204 *See id.*

205 *See id.*

206 *See* Schulhofer, *supra* note 17, at 1988–91.

207 *See id.* at 1984, 1988–89.

208 *See id.*

209 *See* Am. Bar Ass'n Standing Comm. on Legal Aid & Indigent Defendants, *Gideon*'s Broken Promise: America's Continuing Quest for Equal Justice 7–8 (Dec. 2004), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf [hereinafter Am. Bar Ass'n, *Gideon*'s Broken Promise]; Schulhofer, *supra* note 17, at 1984.

210 *See* Schulhofer, *supra* note 17, at 1984, 1988–91.

211 *See* Am. Bar Ass'n, *Gideon*'s Broken Promise, *supra* note 209, at 9–10; Backus & Marcus, *supra* note 136, at 1045–55 (describing chronic underfunding of indigent defense). Low funding of defense services has been a consistent feature of our system of criminal justice. *See* Schulhofer, *supra* note 17, at 1999, 1999 n.69 (noting that according to 1986 data, the average expenditure per case nationwide was $223, and in some states, the average expenditure dipped

Agency problems also exist on the other side of the bargaining table. Prosecutors' interest in resolving cases do not neatly align with those of the "general public," and are influenced by a wide variety of factors, including political considerations, professional advancement, and the desire to minimize workload.[212] Plea pricing theory is especially confounded by the lack of parallelism in the incentives of bargaining parties. Although defendants have a uniformly strong interest in minimizing punishment and the legal right to contest allegations at trial, contrary to many simple models of bargaining, prosecutors are neither consistently interested in maximizing punishment nor do they possess any parallel "right to seek the maximum sentence for the maximum offense that can be proven."[213] Unlike bargaining in civil litigation, where both parties value each marginal dollar of settlement relatively equally, and where negotiations over settlement offers constitute a zero-sum game in which one party's loss is the other party's gain, in plea bargaining, the maximization of punishment may impose negative payoffs on both sides, given the high costs of incarceration, the lost economic value of the prisoner, and the collateral costs imposed on the prisoner's family and community.[214]

Contrary to the assumptions of many economic theorists,[215] prosecutors do not consistently seek to maximize punishment.[216] Instead, they typically seek to impose a sentence that accords with their own sense of "justice."[217] In many cases, prosecutors may believe that justice is best served by a sentence that not only falls well below the

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as low as $63 (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL DEFENSE FOR THE POOR, 1986, at 5 (1988))).

212 *See* Nirej Sekhon, *The Pedagogical Prosecutor*, 44 SETON HALL L. REV. 1, 9 (2014) ("The prevalence of plea-bargaining in our criminal justice system generates significant agency costs that pull in the direction of undue harshness or leniency."). *See generally* Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959 (2009) (discussing prosecutorial agency problems and incentives).

213 Scott & Stuntz, *supra* note 23, at 1914. The assumption that prosecutors have a parallel right to charge as severely as the law permits is one of the primary supports for the view that plea bargaining represents an equal exchange of entitlements. It is more accurate, however, to say that prosecutors have the discretion to select the charges, but they have an overriding ethical and professional duty to "do justice," which often means pursuing less than the maximum available penalties against a particular defendant.

214 *See infra* Section III.B.2.

215 *See* Nicola Boari & Gianluca Fiorentini, *An Economic Analysis of Plea Bargaining: The Incentives of the Parties in a Mixed Penal System*, 21 INT'L REV. L. & ECON. 213, 219 (2001) (stating that in the "positive analysis of the incentives in accusatorial settings it is assumed that the prosecutors' objective function is the total punishment inflicted").

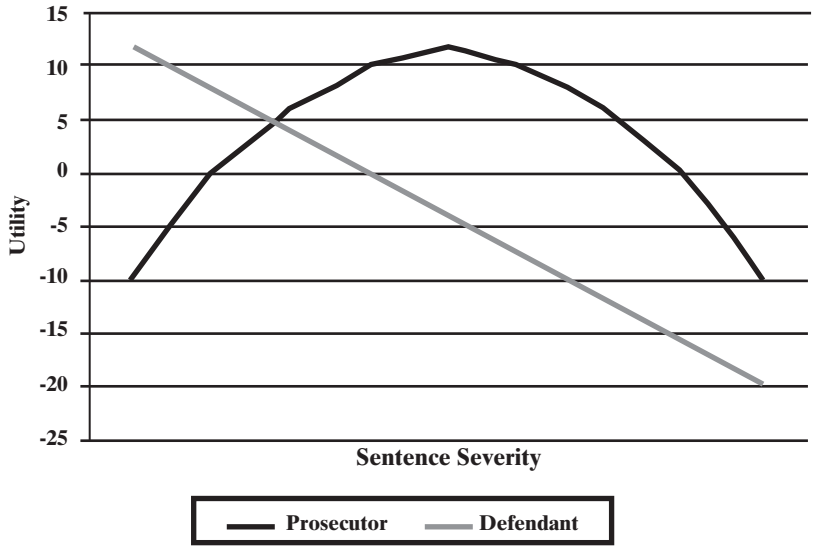
216 *See* Bibas, *supra* note 9, at 2471 (noting that for prosecutors, the "statistic of conviction . . . matters much more than the sentence").

217 *See id.* at 2470.

maximum authorized by law, but by a sentence that falls below what otherwise would be the expected trial sentence.[218] Plea offers are often made based on the prosecutor's estimation, not only of the likelihood of conviction, but also of the severity of the offense and the culpability of the offender.[219] Many prosecutors routinely permit defendants to plead guilty a less serious charge, notwithstanding an overwhelming likelihood of conviction on a more serious charge, simply because the prosecutor is satisfied that the offender will receive sufficient punishment if convicted of the lesser offense.[220]

The prosecutor's demand curve for punishment might best be graphically represented in the shape of an inverted U.[221] If the prosecutor's preferred sentence is below the ETS, then the prosecutor has an independent incentive to negotiate a discounted plea bargain, one that aligns with defendants own incentives and dramatically increases the chances that a mutually beneficial plea bargain can be reached.

FIGURE 3. PROSECUTOR'S AND DEFENDANT'S DEMAND CURVE



218 *See id.*

219 *See id.*

220 *See* HEUMANN, *supra* note 40, at 105 (describing case in which prosecutor permitted defendant to plead guilty to simple rather than aggravated assault in the third degree, notwithstanding factual basis for more serious charge, to avoid impact of mandatory minimum sentence of that charge based on assessment of the context of the offense and the defendant's clean record, making a suspended sentence appropriate).

221 *See* Grossman & Katz, *supra* note 16, at 751 (hypothesizing that the "social welfare derived from penalizing the guilty" can be graphically depicted as an upside-down U-shaped curve, wherein the maximum utility is derived from a level of punishment that "fits the crime" and diminishes from that point equally in both directions).

If, in Figure 3, the X-axis represents sentences of increasing severity, the prosecutor negatively values outcomes at both extremes.[222] Too much punishment is as bad as too little punishment. The defendant's demand curve, in contrast, is a steeply falling line, representing the defendant's consistent preference for a less severe sentence.[223]

The prosecutor's inverted U-shaped demand curve has important ramifications for plea pricing. As will be discussed further below, it permits prosecutors to consistently "overpay" for guilty pleas—that is, offer a substantially larger discount over expected trial outcomes than straight application of the unitary pricing model might suggest—which in turn assures that an even larger percentage of cases will be resolved by plea bargaining rather than by trial.[224]

D. The Problem of Overlarge Discounts

When we put these various factors together, we emerge with a quite disturbing picture of the plea bargaining market, one in which flawed pricing inputs, rampant currency manipulation, predatory pricing, price discrimination, and systematically tilted distributions of certain key variables regarding risk and discounting, conspire to ensure that guilty and innocent defendants alike opt for guilty pleas rather than trials.[225] In short, although estimates of the probability of conviction are deeply flawed, those inaccuracies do not translate into corrective action by innocent defendants because the typical plea discount offered is so large that it more than consumes the margin of error.

III. The Economics of Justice

So what to do about fixing a broken plea pricing system? Commentators have offered a variety of fixes to plea bargaining's ills, from minor adjustments in judicial review of plea bargaining to more ambitious systemic changes, including partial bans, fixed discounts, screening improvements, and wholesale abolition. This Article contends that the answer is smart regulation and looks to the financial options market for a model upon which a solution can be crafted. As one economist has noted:

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222 *See id.*

223 *See id.*

224 Contrary to the simplistic assumptions of most commentators, prosecutors may not even be interested in maximizing convictions. *See* Richman, *supra* note 117, at 981–89 (arguing that motivations other than conviction maximization control prosecutorial decisions about which gun cases to pursue); *see also* Easterbrook, *supra* note 16, at 295–96.

225 *See supra* Part II.

> Markets do not automatically work smoothly or benevolently; not all bargains are good or socially desirable, nor do they necessarily aggregate to a best or better national interest. So intervention by law and policy is widespread. However, the market suitably constrained is a most powerful and useful regulator of price.[226]

A. Prohibition and Its Discontents

Plea bargaining's staunchest critics argue that the only fix to the unacceptable pressure that plea bargaining imposes on innocent defendants to plead guilty is the outright abolition of plea bargaining.[227] Under the abolitionist (or as this Article refers to it, the "prohibitionist") view, even if plea bargaining perfectly reflected trial outcome probabilities (which it does not), plea bargaining would still be unjust and unacceptable.[228]

Although there may be proceduralist and systemic reasons to prohibit plea bargaining,[229] from the perspective of plea pricing, the prohibitionists' case is at best uncertain.[230] The prohibitionists contend that plea bargaining harms the innocent by inducing them to plead guilty to crimes they did not commit.[231] The mechanism of inducement is the plea discount/trial penalty. Abolish plea bargaining,

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226 MITCHELL, *supra* note 75, at 35.

227 *See, e.g.*, Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652, 652 (1981) (arguing for abolition of plea bargaining because it is "an inherently unfair and irrational process"); Alschuler, *supra* note 119, at 1180 (arguing that "nothing short of the abolition of plea bargaining promises a satisfactory resolution" of plea bargaining's shortfalls); Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 752 (1996) (noting that in 1973 "the National Advisory Commission on Criminal Justice Standards and Goals argued that plea bargaining should be prohibited 'as soon as possible.'"); Schulhofer, *supra* note 15, at 1037–38; Schulhofer, *supra* note 17, at 1979 ("I argue . . . that abolition would serve both justice and efficiency.").

228 Other prominent calls for abolition of plea bargaining include a proposal made by the National Commission on Criminal Justice Standards and Goals. *See* Clarence C. Kegel, Jr. & Timothy S. Hardy, *American Criminal Justice: The Defendant's Perspective*, 121 U. PA. L. REV. 1209, 1220 (1973) (book review) (noting call for reform).

229 Numerous commentators have argued that plea bargaining makes all participants, including criminal defendants themselves, jaded about the real purposes of the criminal justice system. *See, e.g.*, TASK FORCE ON THE ADMIN. OF JUSTICE, PRESIDENT'S COMM'N ON LAW ENF'T AND ADMIN. OF JUSTICE, TASK FORCE REPORT: THE COURTS 112 (1967) (arguing that "a real vice in the procedure may be that it often gives the defendant an image of corruption in the system" making "[c]ynicism, rather than respect" the "likely result"); Kaplan, *supra* note 66, at 218 (arguing that plea bargaining convinces criminals that "the law is a fraud").

230 Many more ills have been alleged against plea bargaining by its critics. For one extensive bill of particulars, see Alschuler, *supra* note 17, at 932–934 (listing criticisms in "summary" form).

231 *See* Alschuler, *supra* note 227, at 658.

and the trial penalty necessarily disappears.[232] Although it is by definition true that the prohibition of plea bargaining would eradicate the "trial penalty," as noted above, plea discounts are an inherent part of the true economic value of the decision to forfeit the right to trial.[233] It is as economically irrational to view a plea discount as inherently unjust as it is to decry the fact that stock options have positive value even when the underlying stock trades below the option exercise price. Innocent defendants need some other compensation in exchange for abolishing the plea discount.

From the perspective of price theory, prohibition appears problematic. Economists generally disfavor prohibitions on trade.[234] Prohibition prevents mutually beneficial exchanges of goods, disrupts normal market functioning, and almost invariably leads to the creation of parallel black market structures.[235] Black markets, in turn, are difficult to regulate or control and create additional negative externalities that impose unwanted costs on the economy.[236] What little empirical evidence there is regarding attempts to abolish plea bargaining suggests that prohibition in the plea bargaining context is no different than elsewhere.[237] In Philadelphia, for instance, the number of guilty pleas is far lower than in most comparable jurisdictions.[238] However, guilty pleas are largely replaced by bench trials that some allege function, in essence, like slow guilty pleas.[239] Alaska's experiment with a plea-bargaining ban led, over time, to the replacement of sentence bargaining with charge bargaining,[240] suggesting that attempts to abolish formal bargaining will likely result in the emergence of alternative, informal, forms of bargaining.[241]

In short, prohibition of plea bargaining is as difficult to enforce as any other prohibition in the face of strong demand, and only channels

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232 *Id.* at 656 (describing sentence differential between plea bargain sentences and trial sentences as assuming "shocking proportions").

233 *See supra* Section I.A.

234 RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 152, 175 (9th ed. 2014) (noting that "[t]he economist's standard response to a black market is to propose abolition of the price control that has brought it into existence").

235 *See id.* at 173–74.

236 *See id.* at 174–76.

237 *See, e.g.*, Schulhofer, *supra* note 15, at 1037–38.

238 *See generally id.* (describing effects of Philadelphia's ban on plea bargaining).

239 *Id.* at 1083–84.

240 Teresa White Carns & John A. Kruse, *Alaska's Ban on Plea Bargaining Reevaluated*, 75 JUDICATURE 310, 313 (1992).

241 *See id.* at 314 (noting that charge bargaining that arose in the wake of the ban on sentence bargaining in Alaska occurred in the form of charge bargains that were "never formalized as Rule 11 agreements").

demand into black markets. Prohibition is not, in any event, a realistic option. Few lawyers actually believe that our criminal justice system could survive without substantial reliance on plea bargaining.

B. Plea Market Regulation

That said, there is no reason why the plea bargaining market could not be subject to a more aggressive regulatory regime. The above analysis suggests three main areas in which market regulation could make substantial improvements in plea outcomes. First, regulators might address the oversupply of penal leniency that has severely distorted the plea market.[242] Second, regulators might address the pricing structure by reducing the incentives for prosecutors to engage in wholesale rather than retail bargaining.[243] Third, regulators might develop better mechanisms to ensure that the appropriate facets of individual cases are taken into account in setting plea prices.[244] Most importantly, but also most difficult, regulators need to devise mechanisms that allow proper pricing of cases involving actual innocence claims.[245]

1. Improving Plea Pricing

Markets work best when prices accurately reflect the underlying value of products, and plea markets are no different. Plea market pricing can be improved, price theory suggests, with two regulatory changes. First, plea market prices can be made more accurate by regulatory enforcement of rules that increase the amount of information available to the parties at the time of bargaining. This means, in the first instance, that more plea bargaining should be undertaken at the retail, rather than wholesale, level. It also requires mechanisms to induce heightened evidentiary disclosure prior to the negotiation of plea bargains. Second enhanced plea pricing must come to terms with the problem of innocence. Current practices penalize criminal defendants who make innocence claims, putting innocent defendants in a catch-22.[246] Price theory suggests ways that criminal procedure might be altered to extract more of the hidden value embedded in an innocent defendant's guilty plea.

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242 *See supra* Section I.A. and Part II.

243 *See supra* Section II.A.1.

244 *See supra* Part II.

245 *See supra* Section II.A.

246 *See supra* Section II.A.I.

a. Retail Not Wholesale

Descriptive accounts of plea-bargaining practices, particularly in large urban settings, make clear that the bulk of plea bargaining, like the bulk of criminal justice in general, takes place at the wholesale level.[247] Where plea dispositions are negotiated in bundles based only on generic descriptions of case quality or features, plea prices will also be generic. They might be accurate as a class, but that generic price will mask significant differences within it, leading to serious inaccuracies in many cases.

Bargaining at the retail, rather than the wholesale, level means bargaining based on greater information about individual cases. It means greater pre-plea discovery by prosecutors and more factual investigation by defense attorneys. Of course, the shift from wholesale to retail plea bargaining justice will require an increase in resources devoted to individual cases. It undoubtedly would require an increase in resources devoted to indigent defense, a reduction in attorney caseloads, and, in particular, an increase in the investigatory resources of public defender offices. Wholesale bargaining may not be fair to individuals, but it is relatively cost efficient.

The shift to retail bargaining might be part of the emerging constitutional law of plea bargaining set in motion by the Supreme Court's decisions in *Lafler v. Cooper*[248] and *Missouri v. Frye*.[249] The concept of effective assistance of counsel in plea bargaining could easily be expanded to ensuring that the facts of individual cases are sufficiently developed prior to plea negotiation to satisfy minimum standards of pricing accuracy. Plea hearings might incorporate procedures to establish a record of the extent of pre-plea prosecutorial disclosure, factual investigation, and the results thereof.[250]

Ideally, information enhancement should be reciprocal. Prosecutors will be far more inclined to disclose factual information if that disclosure is part of a quid pro quo. Although obligatory defense disclosures are limited by the Constitution, defendants are free to waive

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247 *See supra* Section II.A.1 (describing frequent bulk nature of plea bargaining markets).

248 Lafler v. Cooper, 132 S. Ct. 1376, 1384 (2012) (finding constitutional right to effective assistance of counsel in plea bargaining).

249 Missouri v. Frye, 132 S. Ct. 1399, 1407–08 (2012) (finding constitutional right to effective assistance of counsel in plea bargaining).

250 Miriam Baer has made this suggestion for improving the scope and timing of *Brady* disclosures to improve guilty plea outcomes. *See* Miriam H. Baer, *Timing* Brady, 115 COLUM. L. REV. 1, 63–64 (2015) (proposing that the "legislature might require that prior to accepting a guilty plea or sending a case to the jury, the court must question the prosecution on each of the categories of evidence she had listed in her mandatory early-disclosure filing").

their Fifth and Sixth Amendment rights in exchange for better plea bargains. Reciprocal disclosure rules can be enhanced to increase party access to information at the time of bargaining and thereby make the bargaining process more transparent to both sides of the deal.

b. Innocence

By far the stickiest problem in the practice of plea bargaining is the plight of the innocent defendant. Rare as they might (or might not) be, such defendants do exist, and actually innocent criminal defendants find themselves in a no-win position at the bargaining table.[251] Often, the positive incentives that flow from pleading guilty entice innocent defendants to abandon their claims of innocence.[252] Neither the theory nor the practice of plea bargaining has developed anything like a satisfactory solution to this problem. In a guilty plea system that places a heavy penalty on defendants who lose at trial, the out-of-hand rejection of a plea offer, simply on principle, is perhaps admirable but certainly not rational.[253]

In economic terms, the problem faced by actually innocent defendants is one of mispricing based on faulty data. Innocent defendants suffer from the mismatch between available and potential evidence.[254] Currently available evidence suggests a relatively low plea price that does not reflect the actual value of the defendant's plea.[255] Because the plea price is negotiated based on the expected

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251 *See* Adam N. Stern, Note, *Plea Bargaining, Innocence, and the Prosecutor's Duty to "Do Justice"*, 25 GEO. J. LEGAL ETHICS 1027, 1027–28 (2012) (stating that "[f]aulty convictions based on inaccurate guilty pleas are suspected to be relatively prevalent, particularly as they are encouraged by the availability of nolo contendre and *Alford* pleas").

252 For a description of the psychological forces at play that compel innocent defendants to plead guilty, and the presentation of research demonstrating this tendency, see Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1, 48 (2013) (presenting research study in which "more than half of the study participants were willing to forgo an opportunity to argue their innocence in court and instead falsely condemned themselves in return for a perceived benefit").

253 *See, e.g.*, Ellen S. Podgor, *White Collar Innocence: Irrelevant in the High Stakes Risk Game*, 85 CHI.-KENT L. REV. 77, 77–78 (2010) ("[O]ur existing legal system places the risk of going to trial, and in some cases even being charged with a crime, so high, that innocence and guilt no longer become the real considerations. . . . [M]aneuvering the system to receive the least onerous consequences may ensure the best result for the accused party, regardless of innocence.").

254 *See* Bibas, *supra* note 9, at 2494–95 (discussing effect of information deficit to defendants in plea bargaining before trial).

255 *See* Gregory M. Gilchrist, *Plea Bargains, Convictions and Legitimacy*, 48 AM. CRIM. L. REV. 143, 146–47 (2011).

value of the defendant's case at Time(X)—the time of trial—the data relevant to calculation of plea value is limited to what is available prior to or at Time(X).[256]

Actual innocence cases consist of two groups: cases in which evidence of innocence will never be uncovered, and cases in which such evidence emerges post-conviction. The first group can be further divided into two subcategories: cases in which actually innocent defendants are subjectively aware of their actual innocence, and cases in which they are not aware. From a pricing perspective, this latter subgroup of actual innocence cases is indistinguishable from non-innocence cases. There is no available or future information that exists to distinguish the two sets of cases, and no available pricing mechanism can differentiate the groups.

Not so with respect to the other two groups. First, with respect to the subcategory of actually innocent defendants with subjective knowledge of their innocence, procedural mechanisms can be designed to extract that data, providing criminal defendants an opportunity to signal innocence through their willingness to cooperate with investigators and wager on the outcome of factual investigation.[257] Reliable signaling can be enhanced, for example, by forcing defendants who contend factual innocence to commit early to their factual account, well before discovery produces corroborating or impeaching evidence. Using such tactics, reasonably reliable signaling data can be incorporated into plea pricing to make such pricing at least marginally more accurate. In contrast, bluffing by both prosecutors and defendants should be penalized.[258]

Second, consideration of other pricing strategies, such as options and futures in the financial markets,[259] might suggest a way that plea prices can be modified to better incorporate future valuation of the guilty pleas of actually innocent defendants for whom evidence of innocence does not currently exist but will eventually emerge. Options and futures represent bets on the future value of assets.[260] They provide investors with the ability to transfer risk of future valuation changes between buyers and sellers.[261] Actually innocent defendants are like investors with inside information regarding the likely future

256 *See* Bibas, *supra* note 9, at 2494–95.

257 *See* Covey, *supra* note 34, at 73.

258 *See* Alschuler, *supra* note 94, at 65–67 (describing frequent prosecutorial and defense attorney bluffing).

259 *See supra* Section I.B.

260 *See* STIGLER, *supra* note 56, at 99–100.

261 *See id.*

appreciation of asset value. Those defendants could benefit by buying "call options" on their case—that is, paying a small up-front cost now in exchange for the opportunity to profit from future appreciation.

Actually innocent defendants currently have little ability to bet on the long-term appreciation of their cases because factual development tends to come to a halt in the vast majority of cases with the entry of conviction—death-row inmates representing the only significant exception. Meaningful factual development ends with conviction in two senses. First, in most cases, there is literally no continuing expenditure of investigatory resources devoted to examining the question of guilt/innocence once a conviction is entered. Second, even where new exculpatory evidence is discovered post-conviction, procedural rules greatly devalue it. The standard of proof on appellate review, for example, shifts from the defendant-friendly beyond a reasonable doubt standard to the *Jackson* no-rational-trier-of-fact-could-convict standard.[262] Exculpatory evidence that raises a reasonable doubt as to guilt, but is not dispositive of the guilt/innocence question, is worth far less after conviction. Collateral review standards, which require even more stringent showings of innocence, further devalue post-conviction evidence.[263]

The options model suggests that such defendants would benefit from the opportunity to buy what might be called an "innocence option." Innocence options might involve the trade of an immediate benefit, perhaps a portion of any plea discount, for a commitment by the legal system to continue to devote investigatory resources to their cases and access to procedural mechanisms that would allow them to make use of subsequently discovered exculpatory evidence in more meaningful ways. For instance, defendants who invested in an innocence option might be entitled to a mid-sentence evidentiary review in which factfinders conducted a thorough examination of the factual record applying the beyond reasonable doubt standard, which would dramatically enhance the value of post-conviction exculpatory evidence.[264] At the same time, misuse or overuse of the innocence option might be constrained if additional inculpatory evidence that was discovered post-conviction could be used to increase punishment. By

262 Jackson v. Virginia, 443 U.S. 307, 319 (1979) (stating standard of review for evaluating sufficiency of evidence claims is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt").

263 *See id.* at 336 n.9.

264 *See supra* note 262 and accompanying text.

better capturing future fluctuations in plea value by permitting defendants to bet on case appreciation, plea prices for innocent defendants might well be made more accurate in the near term and case outcomes for such defendants improved in the long term.

There are other steps that might also enhance the value of actually innocent defendant's guilty pleas. One such step might be to refrain from penalizing defendants who claim factual innocence for "failure to take responsibility" unless there is overwhelming evidence of guilt, and to tighten appellate scrutiny of the sufficiency of the evidence in cases brought by persons claiming factual innocence. Defendants who pled guilty but have consistently claimed factual innocence should be provided access to post-conviction DNA or other forensic testing. Finally, more aggressive compensation of exonerated defendants, and mechanisms to sanction prosecutors or police officers responsible for wrongful convictions, would increase the value of an innocent defendant's guilty plea and ensure better outcomes—either at the bargaining table or after exoneration.

2. *Restricting the Supply of Penal Leniency*

Undoubtedly, a major source of plea-market distortion stems from the oversupply of penal leniency that is a product of draconian sentencing laws and prosecutorial discretion.[265] Reducing this oversupply is critical to establishing a fairer plea market equilibrium. Obvious steps in this direction would include abolishing mandatory minimum sentences, habitual offender and three strikes laws, and the like, and reducing maximum sentences across the board. In addition, greater restrictions must be devised to limit the size and scope of plea discounts available for offer. Reasonable restrictions on plea discounts, for example, might be achieved by establishing ceilings on trial sentences based on plea bargain offers.[266] More stringent limitations on amending charges following the rejection of plea offers, or on reducing or dismissing charges in exchange for guilty pleas, might also inhibit prosecutors from engaging in the most coercive types of charge bargaining.[267]

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265 *See, e.g.*, Alschuler, *supra* note 94, at 85–86.

266 I have written about such possible limitations at length elsewhere. *See* Covey, *supra* note 20, at 1290.

267 *Cf.* Bordenkircher v. Hayes, 434 U.S. 357, 364–65 (1978) (affirming conviction following filing of amended indictment charging Hayes as a habitual offender after he declined to accept prosecutor's plea offer).

Penal leniency can be reduced not only by minimizing plea discounts but also by minimizing trial penalties.[268] One potentially plausible way this might be accomplished is by rewarding trial defendants whose defenses are not undermined by unforeseen, corroborating evidence. Sentencing courts might be encouraged to more actively review guilt-phase evidence and expressly withhold imposition of maximum sentences on defendants convicted on the basis of weak or equivocal evidence of guilt.

An alternative way to decrease trial penalties would be to force the relevant participants in the market to internalize the costs of oversentencing. The prosecutor's reverse-U-shaped demand curve for punishment[269] here provides an opportunity in this regard. After all, excessive sentences impose a negative cost not only on the defendant but also on the public.[270] As sentencing scholars have observed, the costs and benefits of incarceration are frequently unequally distributed. Local communities pay the immediate costs of crime, while the costs of incarceration are absorbed at the state or national level.[271] This creates a kind of tragedy of the commons problem wherein locally-elected prosecutors and judges can reap the benefits of committing criminal defendants to extended terms of incarceration at state expense.[272] By shifting the costs of incarceration to the localities that produce the sentences, prosecutors and sentencing courts might be forced to evaluate the costs and benefits of punishment more conservatively. Such a reevaluation might dissuade prosecutors from threatening, and judges from imposing, draconian trial sentences.[273]

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268 *See* Gilchrist, *supra* note 92, at 1996 (explaining that defendants have the limited options of either exchanging a complete waiver of trial rights for penal leniency or going to trial and "remain[ing] exposed to the often draconian trial penalties").

269 *See supra* Section II.C.

270 *See, e.g.*, Murray, *supra* note 41, at 1147–49 (providing examples of costs of sentences to defendants and society).

271 *See* Barkow, *The Political Market for Criminal Justice*, *supra* note 170, at 1721–22 (noting the different incentives to control sentencing costs between state and federal governments); Lawrence Rosenthal, *Policing and Equal Protection*, 21 YALE L. & POL'Y REV. 53, 85 (2003) (stating that "crime is not geographically fungible").

272 *See* Rachel E. Barkow & Kathleen M. O'Neill, *Delegating Punitive Power: The Political Economy of Sentencing Commission and Guideline Formation*, 84 TEX. L. REV. 1973, 1981 (2006) (explaining that both elected judges and prosecutors have political interests in harsher sentencing laws).

273 *See* Barkow, *Federalism and the Politics of Sentencing*, *supra* note 170, at 1285–88 (noting that sentencing and incarceration costs have caused states to evaluate their sentencing laws).

3. *Breaking Down the Monopsonistic Structure of the Plea Market*

Finally, and perhaps most radically, the focus on plea pricing mechanisms suggests that market fairness might be improved by breaking down the monopsonistic structure of the plea market. Under current practice, there is a sole buyer of guilty pleas—the prosecutor.[274] Sellers must either do business with the prosecutor or take their chances at trial, or at best, through entry of a formally uncompensated "open plea."[275] Might it be possible to restructure criminal process to undermine this monopsony?

One way this might be accomplished is by enhancing the power of courts to deal directly with criminal defendants, to set the courts up, as it were, as an alternative plea buyer. Perhaps defendants could be given the choice to accept the prosecutor's plea offer or to take the case before a judicial arbitrator, who might make an independent evaluation of the "worth" of the case and make a binding recommendation regarding disposition. The judges who act as plea arbitrators would need to be different from the judges who preside over plea and sentencing proceedings to reduce potential coercion, and they would need to possess the authority not only to make sentencing recommendations, but also to propose charge reductions. These would function, in effect, as open pleas with teeth, and would require that courts act with sufficient independence to induce prosecutors from engaging in the more egregious forms of coercive bargaining tactics.[276]

Another alternative would be to devise protections that would encourage more defendants to enter open pleas. Such protections would need to include providing defendants with reliable information about the sentence prior to entry of the plea.[277] As Ron Wright and Marc Miller have argued, open pleas should also be accompanied by a greater prosecutorial emphasis on screening out marginal or weak cases and abandonment of overcharging defendants to minimize the number of innocents who plead guilty to avoid false but harsh convic-

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274 *See* Albert W. Alschuler, Book Review, 46 U. CHI. L. REV. 1007, 1041 (1979) (reviewing CHARLES E. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE (1978)) (describing plea bargains as a commodity sold by defendants to prosecutors).

275 *See* Alschuler, *supra* note 17, at 1031–32.

276 *See* Lissa Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 AM. U. INT'L L. REV. 1241, 1265–66 (2001) (attributing the coerciveness and unfairness inherent in the plea-bargaining system to prosecutor's unchecked and "unbridled discretion").

277 *See* Ellen Yaroshefsky, *Ethics and Plea Bargaining: What's Discovery Got to Do With It?*, CRIM. JUST., Fall 2008, at 28, 33. http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_cjmag_23_3_yaroshefsky.authcheckdam.pdf.

tions.[278] In any event, development of an effective alternate bargainer could significantly alter the shape of the present monopsonistic plea market structure.

Conclusion

The criminal justice system's reliance upon, and overproduction of, guilty pleas is certainly not news. Thinking about plea bargaining from the perspective of price theory does not reveal any fundamental features of the system that were not already known. It does, however, highlight some structural dynamics that underlie the plea-bargaining system and helps to identify the directions in which we need to travel if that system is to be made any more equitable. The focus on plea prices helps make clear that severe sentencing laws, mandatory minimum sentences, and prosecutorial discretion combine to provide prosecutors with unprecedented amounts of bargaining leverage, which has been used to drive guilty plea rates to historic highs.[279] By reigning in this oversupply of penal leniency, policymakers could reduce the number of coercive guilty pleas and restore equilibrium to the plea bargaining market. In addition, as policymakers continue to grapple with the increasing costs of mass incarceration policies,[280] a supply and demand analysis of guilty pleas suggests that areas of commonality between prosecutors and criminal defendants might be exploited to reduce coercive bargaining and overly punitive trial sentences.

Inevitably, a focus on plea prices leads to consideration of the role of defense counsel in plea production. Plea prices negotiated at the wholesale level will inevitably be inaccurate, but shifting from a wholesale to a retail plea bargaining model will require an infusion of resources into indigent criminal defense that for decades has failed to materialize. What is more, this increase in defense expenditures will likely result either in better deals for criminal defendants or fewer guilty pleas. Mass retail plea bargaining might trigger the need for increases in prosecutorial, and possibly judicial, budgets as well. None of this will come cheap. As a nation, we will need to decide just what price we wish to pay for justice in the criminal courts.

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278 *See* Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 Stan. L. Rev. 29, 32–33 (2002).

279 *See supra* Section I.C.1.

280 *See, e.g.*, Murray, *supra* note 41, at 1147–49 (providing examples of costs of sentences to defendants and society).