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Overcriminalization, Discretion, Waiver: A Survey of Possible Exit Strategies

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Abstract

In both the constitutional law of American criminal justice and the scholarly literature that law has generated, substance and procedure receive radically different treatment. The Supreme Court, even in this conservative political period, continues to require costly procedural safeguards that go beyond what elected legislatures have provided by statute. The Court, however, has shown great deference to the choices these same legislatures have made about what conduct may be made criminal and how severely it may be punished.

The distinction between substance and procedure pervades academic thinking all the way down to its foundations. Substantive criminal law still holds its place in the sacred precincts of the first year curriculum. Criminal Law's cognate discipline is philosophy; the standard method of analysis is to measure general principles according to how well they track intuition's response to hypothetical cases. Criminal Procedure's cognate discipline is Constitutional Law; the standard method of analysis is to subject the operation of the criminal justice system to the same rhetoric of text, history, and precedent that frames the issues in separation of powers or freedom of speech cases. The philosophy mediated by doctrine is political, rather than moral theory.

In trial level courthouses, however, the distinction fades, as the defendant trades his procedural rights for reductions in his substantive liability. The substantive law endows the prosecution with the ability to charge the same conduct at many different levels of potential punishment. The procedural law also endows the defense with its stock in trade - the rights to suppression motions, discovery, elaborate jury selection procedures, confrontation of the victim, and so on.

These endowments are dynamic rather than static. A legislature that adopts a three-strikes law increases the prosecution's bargaining power. A court that reads the confrontation clause to bar excited utterances from the government's proof increases the defendant's bargaining power. In the trenches of criminal justice, these entitlements may well be traded off, erasing the distinction between substance and process.

Admirable scholarship has exposed this basic dynamic. Debate continues about two great issues. First, is this state of affairs normatively defensible or not? Second, if the present relationship between substance and procedure is undesirable, what, if anything, can be done about it?

In this paper I take up the second question, which seems to me to have drawn too little systematic attention (perhaps because it is so daunting). The literature has devoted considerable debate to alternatives to plea bargaining. But these discussions have been self-contained; they do not take account of the substance/procedure feedback loop already in place. The principal point against proposals to ban bargaining is not that we should not but that we cannot; self-interested, repeat-playing actors in the criminal justice process will find ways to bargain. The debate, naturally enough, has not gotten to the point of "what if we succeeded in banning plea bargaining?"

As things stand, the prohibition of bargaining would leave prosecutors with unregulated discretion to select charges from overbroad and draconian criminal codes. Prohibiting bargaining would mean that defendants could not trade their constitutional procedural entitlements off against the state's substantive criminal law entitlements. The new model would be one in which defendants, facing decades in prison for relatively modest crimes, would stand trials they have little chance of winning.

The discussions on plea bargaining have the same isolated quality as the discussions on individual bodies of criminal procedure doctrine. Of course they matter, in some cases; but the bigger picture is the relationship between substantive criminal law sentencing and the procedural rights of the defendant. So serious are the difficulties that I shall not - yet - defend any doctrinal reform on the ground that the relation between substance and procedure would be harmonized thereby. My task is one more modest, but I hope still useful. I aim to survey the possible strategies by which the system might escape the current impasse.

The possible strategies fall into five basic categories. First, we might continue what we seem to be doing now: increasing constitutional procedural entitlements in the hope of mitigating the excesses of the substantive criminal law. Second, we might give up on the constitutional distinction between substance and process by deconstitutionalizing procedure altogether, or at least to a dramatic degree. Responsible then for both substance and process, legislatures might strike a better balance than is produced by the current division of labor. Third, we might achieve the same sort of unification by constitutionalizing substance. Robust judicial review of substantive criminal legislation might curb overcriminalization, which might in turn lead the courts to develop a more rational body of procedural rights. Fourth, we might look for more rigorous restrictions on prosecutorial discretion, building on administrative law and experience with sentencing guidelines. Fifth, we might look for more rigorous restrictions on the defendants' right to waive procedural rights for substantive advantage.

What I hope to add to the scholarly conversation is a brief assessment of the promise and pitfalls that attend each of these strategies.

*Overcriminalization, Discretion, Waiver: A Survey of Possible Exit Strategies**

In both the constitutional law of American criminal justice and the scholarly literature that law has generated, substance and procedure receive radically different treatment. The Supreme Court, even in this conservative political period, continues to require costly procedural safeguards that go beyond what elected legislatures have provided by statute.[1] The Court, however, has shown great deference to the choices these same legislatures have made about what conduct may be made criminal and how severely it may be punished.[2]

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[1] *See, e.g.,* Crawford v. Washington, 541 U.S. 36 (2004) (holding that Sixth Amendment's confrontation clause prohibits prosecution use of accusatory out of court statements by declarants who are not subject to cross-examination by the defense either at or before trial; dying declarations excepted); Blakely v. Washington, 124 S. Ct. 2531 (2004) (holding that Sixth Amendment right to jury trial requires jury determination of facts that trigger increases in sentence authorized by guidelines within statutory maximum for offense of conviction).

[2] *See, e.g.,* Ewing v. California, 538 U.S. 11 (2003) (rejecting Eighth Amendment challenge to twenty-five years to life sentence under recidivism statute, when offense of conviction was theft of three golf clubs valued at $399 each); Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981) (rejecting equal protection challenge to statutory rape law applicable solely to males); Harmelin v. Michigan, 501 U.S. 957 (1991) (rejecting Eighth Amendment challenge to sentence of life without parole for private consensual sale of less than one kilogram of cocaine); Hutto v. Davis, 454 U.S. 370 (1982) (per curiam) (rejecting Eighth Amendment challenge to sentence of two consecutive twenty year terms for possession with intent to distribute nine ounces of marijuana); Minnesota ex rel. Whipple v. Martinson, 256 U.S. 41 (1921) (rejecting substantive due process challenge to state law criminalizing sale of narcotics); Powell v. Texas, 392 U.S. 514 (1968) (rejecting Eighth Amendment challenge to conviction of compulsive alcoholic for offense of public intoxication).

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For example, a defendant might plead guilty in exchange for the prosecution's agreement to drop the recidivism charge, a deal the government would not have taken but for the risk of acquittal posed by the exclusion of the victim's 911 call. In such cases, the Court's judgment about fair procedure has turned into a trump on the legislature's judgment about the appropriate sentence; and the legislature's sentencing determination has served to circumvent the Court's procedural ruling. The theoretical distinction has collapsed in practice.

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[3] For a representative sample of recent work, *see, e.g.,* Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Culpability,* 88 CAL. L. REV. 931 (2000); Kenneth W. Simons, *Does Punishment for 'Culpable Indifference' Simply Punish for 'Bad Character'? Examining the Requisite Connection Between Mens Rea and Actus Reus,* 6 BUFF. CRIM. L. REV. 219 (2002); Stephen J. Morse, *Reason, Results, and Criminal Responsibility,* 2004 U. ILL. L. REV. 363.

[4] For illustrative recent work, *see, e.g.*, Tracey Maclin, *The Pringle Case's New Notion of Probable Cause: An Assault on* Di Re *and the Fourth Amendment,* 2004 CATO SUP. CT. REV. 395; Richard S. Frase, *What Were They Thinking? Fourth Amendment Unreasonableness in* Atwater v. City of Lago Vista, 71 FORDHAM L. REV. 329 (2002); George C. Thomas III, *History's Lesson for the Right to Counsel,* 2004 U. ILL. L. REV. 543.

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The procedural law, moreover, imposes only negligible restraints on the choices of the parties. Absent clear evidence of an invidious motive that is hard to prove even when it exists, the prosecutor's charging discretion is plenary.[5] The two procedural entitlements the defendant is legally precluded from waiving for personal advantage are competence to stand trial[6] and awareness of the risks and benefits of the trade-off he is making when pleading guilty.[7] He may plead guilty even though he maintains his innocence[8] and even though he does so to avoid being killed by the state.[9]

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[5] *See, e.g.,* United States v. Armstrong, 517 U.S. 456 (1996) (holding that evidence that U.S. Attorney's office had prosecuted no Caucasians for cocaine offenses did not overcome presumption of prosecutorial propriety; facts alleged insufficient to justify district court's discovery order).

[6] *See* Pate v. Robinson, 383 U.S. 375 (1966) (holding that when evidence raises bona fide question of defendant's competence, trial court has constitutional obligation to hold hearing to determine competence).

[7] *See* United States v. Ruiz, 536 U.S. 622, 629 (2002) (holding that defendant need be informed of impeachment evidence disclosable before trial under *Brady* doctrine before entering voluntary guilty plea). ("Given the seriousness of the matter, the Constitution insists, among other things, that the defendant enter a guilty plea that is 'voluntary' and that the defendant must make related waivers 'knowing[ly], intelligent[ly], [and] with sufficient awareness of the relevant circumstances and likely consequences.'") (citation omitted).

[8] North Carolina v. Alford, 400 U.S. 25 (1970).

[9] Brady v. United States, 397 U.S. 742, 755 (1970) ("[A] plea of guilty is not invalid merely because entered to avoid the possibility of a death penalty.") (footnote omitted).

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Admirable scholarship has exposed this basic dynamic.[10] Debate continues about two great issues. First, is this state of affairs normatively defensible or not? Second, if the present relationship between substance and procedure is undesirable, what, if anything, can be done about it?[11]

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[10] The possibility that legislatures might make trade-offs between substance and procedure was noted by the Supreme Court in *Patterson v. New York*, 432 U.S. 197, 207-08 (1977), and before that in Justice Black's dissenting opinion in *Goldberg v. Kelly*, 397 U.S. 254 (1970):

> Since this [court-mandated hearing] process [before revoking welfare benefits] will usually entail a delay of several years, the inevitable result of such a constitutionally imposed burden will be that the government will not put a claimant on the rolls initially until it has made an exhaustive investigation to determine his eligibility. While this Court will perhaps have insured that no needy person will be taken off the rolls without a full 'due process' proceeding, it will also have insured that many will never get on the rolls, or at least that they will remain destitute during the lengthy proceedings followed to determine initial eligibility.

Id. at 279 (Black, J., dissenting).

The seminal contribution identifying substance/procedure tradeoffs at the adjudicatory level via plea bargaining is Frank H. Easterbrook, *Criminal Procedure as a Market System,* 12 J. LEGAL STUD. 289 (1983). Professor Stuntz has done the most to expose how the substance/procedure tradeoff undermines the Supreme Court's project of regulating criminal procedure, but not the substantive criminal law, as a field of constitutional law. *See, e.g.,* William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow,* 117 HARV. L. REV. 2548 (2004); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997); William J. Stuntz, *The Pathological Politics of Criminal Law,* 100 MICH. L. REV. 505 (2001).

Due largely to Stuntz' work, the substance/procedure feedback loop now pervades a great deal of scholarly commentary. For example, commentators with quite different views of the merits have evaluated the *Apprendi* doctrine based on its perceived tendency to increase or decrease prosecutorial leverage in plea bargaining. *See* Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas,* 110 YALE L.J. 1097 (2001) (arguing, inter alia, that invalidating judicial fact-finding at sentencing will hurt defendants and reinforce prosecutors); Nancy J. King & Susan R. Klein, Apprendi *and Plea Bargaining,* 54 STAN. L. REV. 295 (2001) (contesting the Bibas thesis). The facial question in *Apprendi* cases—whether trial jurors or sentencing judges better serve constitutional goals such as checking government power and accurately finding the facts—seems almost beside the point.

[11] The two questions are of course connected. For a sample of views, see *PBS Frontline: the plea*, *at* http://www.pbs.org/wgbh/pages/frontline/shows/plea/interviews (June 17, 2004) (excerpting interviews on plea bargaining with various experts including Albert Alschuler, John Langbein, and Stephen Schulhofer); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004) [hereinafter Bibas, *Outside the Shadow*]; Stuntz, *Disappearing Shadow*, *supra* note 10; Robert Scott & William Stuntz, *Plea Bargain as Contract,* 101 YALE L.J. 1909 (1992); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979 (1992) [hereinafter Schulhofer, *Disaster*]; Frank H. Easterbrook, *Plea Bargaining as Compromise,* 101 YALE L.J. 1969 (1992).

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The first question has drawn more attention, and I have little to add to that literature other than to record my general sympathy with plea bargaining's critics. The very features of the system that provoke widespread criticism are rather obvious; the system persists, I think, because of the difficulties attending the plausible alternatives. What seems inescapable is that the balance of advantage between the parties bears only an arbitrary relationship to the ends of justice. Albert Alschuler articulates a variety of objections to plea bargaining, but he captures the fundamental one in a single sentence: "Plea bargaining makes a substantial part of an offender's sentence depend, not upon what he did or his personal characteristics, but upon a tactical decision irrelevant to any proper objective of criminal proceedings."[12]

The cost of the defendant's procedural rights does not vary directly with the probabilities of guilt and innocence. One major cost of trial to prosecutors is the risk of acquittal. Procedural rights that benefit the innocent more than the guilty thus make the trials of defendants with strong cases more costly than trial of those with weak cases, other things equal. But many procedural rights are more valuable to the guilty than the innocent (suppression motions, the privilege against self-incrimination) and others (speedy trial, demographically representative jury selection) seem to operate without regard to guilt or innocence.

The risk of error is only one cost of trial for the government. The resources devoted to trial are another. No apparent reason exists to believe that trying innocent defendants is less costly than trying guilty ones. One of the primary determinants of the government's expected resource cost is the resources available to the defense, a factor that tracks the defendant's socioeconomic status rather than the evidence against him.

[12] Albert Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 932 (1983) [hereinafter Alschuler, *Alternatives*] (footnote omitted).

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If the system is doing justice now, it is by accident – the accident that particular prosecutors bargain prudently and humanely. There is good reason to doubt that this happy accident is really taking place.[13] And even if executive discretion produces now something tolerably close to justice, the grotesque concentration of power in so few hands conflicts directly with the rule of law. The system we have is far too close to "kadi justice" for comfort.[14]

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[13] One reason is the lesson of history; arbitrary power is rarely exercised benignly. Another reason is experience; evidence is coming to light to confirm the supposition that the pressures brought to bear on the accused are powerful enough to induce factually innocent persons to plead guilty in significant numbers.

> Only 19 of the exonerees in our database pled guilty, less than 6% of the total: 15 innocent murder defendants and 4 innocent rape defendants who took deals that included long prison terms in order to avoid the risk of life imprisonment or the death penalty. By contrast, 31 of the 39 Tulia defendants pled guilty to drug offenses they did not commit, as did the majority of the 100 or more exonerated defendants in the Rampart scandal in Los Angeles. Most of the Rampart and Tulia defendants had been released by the time they were exonerated, 2 to 4 years after conviction. They were exonerated because the false convictions in their cases were produced by systematic programs of police perjury that were uncovered as part of large scale investigations. If these same defendants had been falsely convicted of the same crimes by mistake – or even because of unsystematic acts of deliberate dishonesty – we would never have known.

Samuel R. Gross et al., *Exonerations in the United States 1989-2003*, *at* http://www.mindfully.org/Reform/2004/Prison-Exonerations-Gross19apr04.htm (Apr. 19, 2001) (footnote omitted).

[14] *Cf.* Terminiello v. City of Chicago, 337 U.S. 1, 11 (1949) (Frankfurter, J., dissenting) ("We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency.").

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Objectionable as a judicial tribunal proceeding from case to case on an entirely *ad hoc* basis may be, the actual practice of plea bargaining poses a still worse separation-of-powers problem. For if the prosecutor dominates plea bargaining, and plea bargaining simply *is* the criminal justice process, the real trial is the one, quite informal and necessarily based mostly on hearsay, at which the prosecutor decides what charges to file and what plea to accept.[15] At least the kadi is a judge; an assistant U.S. attorney, or an assistant state's attorney, is an agent of the very executive the trial is supposed to protect the citizen against.

In this paper I take up the second question, which seems to me to have drawn too little systematic attention (perhaps because it is so daunting). The literature has devoted considerable debate to alternatives to plea bargaining.[16] But these discussions have been self-contained; they

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[15] Judge Lynch, who has extensive first-hand knowledge of the federal practice, frankly describes plea bargaining in these terms:

> 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, and argue based on these considerations that the defendant is entitled to a more lenient disposition than that originally proposed by the prosecutor's charge. The literature of negotiation suggests, indeed, that most sophisticated negotiation takes this form. To me, the essence of this practice, and what radically distinguishes it from the adversarial litigation model embodied in textbooks, criminal procedure rules, and the popular imagination, is that the prosecutor, rather than a judge or jury, is the central adjudicator of facts (as well as replacing the judge as arbiter of most legal issues and of the appropriate sentence to be imposed). Potential defenses are presented by the defendant and his counsel not in a court, but to a prosecutor, who assesses their factual accuracy and likely persuasiveness to a hypothetical judge or jury, and then decides the charge of which the defendant should be adjudged guilty. Mitigating information, similarly, is argued not to the judge, but to the prosecutor, who decides what sentence the defendant should be given in exchange for his plea. If I am correct in this description of the prevailing process, the defining characteristic of the existing "plea bargaining" system is that it is an informal, administrative, inquisitorial process of adjudication, internal to the prosecutor's office, in absolute distinction from a model of adversarial determination of fact and law before a neutral judicial decision maker.

Gerard E. Lynch, *Screening Versus Bargaining: Exactly What Are We Trading Off?,* 55 STAN. L. REV. 1399, 1403-1404 (2003) (footnotes omitted).

[16] For a thorough canvassing of the possibilities, see Alschuler, *Alternatives*, *supra* note 12. The two most widely discussed alternatives are substituting jury waiver for guilty pleas, and directly banning negotiations between prosecutors and the defense. On the possibility of substituting adversary bench trials for negotiations between the parties, see Stephen Schulhofer, *Is Plea Bargaining Inevitable?,* 97 HARV. L. REV. 1037, 1087-89 (1984). On the possibility of prohibiting negotiations between the parties by official policy, thereby leaving the trial penalty to judicial discretion rather than bargaining, see, for example, Schulhofer, *Disaster*, *supra* note 11, at 2003-09. For a review of the experiments along these lines, see Ronald Wright & Marc Miller, *The Screening/Bargaining Trade-Off,* 55 STAN. L. REV. 29, 43-48 (2002). Wright and

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do not take account of the substance/procedure feedback loop already in place. The principal point against proposals to ban bargaining is not that we should not but that we cannot; self-interested, repeat-playing actors in the criminal justice process will find ways to bargain. The debate, naturally enough, has not gotten to the point of "what if we *succeeded* in banning plea bargaining?"

As things stand, the prohibition of bargaining would leave prosecutors with unregulated discretion to select charges from overbroad and draconian criminal codes. Prohibiting bargaining would mean that defendants could not trade their constitutional procedural entitlements off against the state's substantive criminal law entitlements. The new model would be one in which defendants, facing decades in prison for relatively modest crimes, would stand trials they have little chance of winning.

The discussions on plea bargaining have the same isolated quality as the discussions on individual bodies of criminal procedure doctrine. Of course they matter, in some cases; but the bigger picture is the relationship between substantive criminal law sentencing and the procedural rights of the defendant. So serious are the difficulties that I shall not - yet - defend any doctrinal reform on the ground that the relation between substance and procedure would be harmonized thereby. My task is one more modest, but I hope still useful. I aim to survey the possible strategies by which the system might escape the current impasse.

Miller add to this approach the useful insight that bargaining loses value to the prosecutor when prosecutors more vigorously screen out weak cases, and that the costs of prohibiting bargaining depend on how prosecutors respond. If they respond by trying the same population of files that were previously bargained, the trial rate has to go up, with corresponding costs; but if they respond by dropping the weaker cases, the trial rate need not rise, at least dramatically. On their account, vigorous screening might obviate the pressure to bargain and thereby provide independent alternatives. Relative to prevailing practice, a few more cases might go to trial, significantly more would be dropped, and the rest would end in "open" guilty pleas. *Id*. at 34.

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The possible strategies fall into five basic categories. First, we might continue what we seem to be doing now: increasing constitutional procedural entitlements in the hope of mitigating the excesses of the substantive criminal law. Second, we might give up on the constitutional distinction between substance and process by deconstitutionalizing procedure altogether, or at least to a dramatic degree. Responsible then for both substance and process, legislatures might strike a better balance than is produced by the current division of labor. Third, we might achieve the same sort of unification by constitutionalizing substance. Robust judicial review of substantive criminal legislation might curb overcriminalization, which might in turn lead the courts to develop a more rational body of procedural rights. Fourth, we might look for more rigorous restrictions on prosecutorial discretion, building on administrative law and experience with sentencing guidelines. Fifth, we might look for more rigorous restrictions on the defendants' right to waive procedural rights for substantive advantage.

What I hope to add to the scholarly conversation is a brief assessment of the promise and pitfalls that attend each of these strategies.

I. Strategy 1: Coping and Hoping

In a remarkable statement in a remarkable opinion, the Supreme Court of the United States declared that "given the sprawling scope of most criminal codes, and the power to affect sentences by making (even nonbinding) sentencing recommendations, there is already no shortage of *in terrorem* tools at prosecutors' disposal."[17] No majority of the Court has yet mounted a direct constitutional attack on the multiplicity or severity of potential charges under modern penal codes.[18] Instead, the Court holds fast to the substance/procedure dichotomy. The same Court that gave us *Blakely* and *Crawford* also gave us *Ewing* and *Andrade*.

Blakely and *Crawford* go beyond prior law - perhaps dramatically so - in their recognition of costly procedural rights for the defense. If legislative impulses remain invisible, however, *Blakely* gives us a good window on the considerations influencing the judicial aspect of the substance/procedure game playing out with legislatures. *Blakely*'s open focus on the dynamics of plea bargaining to justify or criticize doctrine not itself about the plea process appears to be novel. Legislative motives are more plural than judicial motives, and less likely to be recorded in detail; but it seems plausible to believe that a trade-off motivating the court is not lost on the members of the House or Senate judiciary committees.

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[17] *Blakely*, 124 S. Ct. at 2542.

[18] *See, e.g.,* Ewing v. California, 538 U.S. 11; United States v. Dixon, 509 U.S. 688, 703-711 (1993) (rejecting "same conduct" test of Double Jeopardy Clause's "same offense" language).

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Judicial considerations of course include formal constraints on legitimate interpretation, especially on authority to invalidate legislative enactments as unconstitutional. Much, perhaps most, of what divides Justice Scalia and Justice O'Connor in *Blakely* is the old tension between understanding criminal procedure as a check on government and understanding criminal procedure as an instrument for accurate determination of disputed historical facts. Both conceptions have considerable support in text, history, and precedent.

Some of what divides the majority and the dissenters in *Blakely*, however, is a technical disagreement about whether the *Apprendi* doctrine will counteract or exacerbate the practical unification of substance and process. I say the disagreement is technical because both sides agree that the unification of substance and process is undesirable. The disagreement centers on whether invalidating judicial factual determinations of sentencing factors will help defendants counteract the prosecution's advantages in plea bargaining, or whether confining judicial sentencing discretion will increase prosecutorial power to coerce guilty pleas.[19] Whoever is right on this score, judicial reference to plea bargaining assets in formulating constitutional doctrine is now admitted on the record.

Blakely beautifully illustrates prevailing doctrine in its pragmatic context. In a legal ecology where quotidian criminal behavior can plausibly support multiple charges carrying sentences that range from the trivial to the draconian, one possible response to the concentration of power in prosecutorial hands is to increase the value to the prosecutor of guilty pleas by the defense. The courts can do this by insisting on costly procedural protections with significant risks of factual error or nullification (quintessentially the jury trial right at issue in *Blakely* itself). It is no accident that the ultimate target of the *Blakely* majority is the Federal Sentencing Guidelines, institutional embodiments of both the growth of federal criminal law and the expansion of executive relative to judicial power over criminal justice.[20]

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[19] Compare the *Blakely* majority's statement quoted *supra* text accompanying note 17, with Justice Breyer's dissent, to which Justice O'Connor also subscribed:

> [I]n a world of statutorily fixed mandatory sentences for many crimes, determinate sentencing gives tremendous power to prosecutors to manipulate sentences through their choice of charges. Prosecutors can simply charge, or threaten to charge, defendants with crimes bearing higher mandatory sentences. Defendants, knowing that they will not have a chance to argue for a lower sentence in front of a judge, may plead to charges that they might otherwise contest. Considering that most criminal cases do not go to trial and resolution by plea bargaining is the norm, the rule of *Apprendi,* to the extent it results in a return to determinate sentencing, threatens serious unfairness.

124 S. Ct. at 2553 (Breyer, J., dissenting) (citing Bibas, *World of Guilty Pleas*, *supra* note 10, at 1100-01).

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[20] The other shoe has now dropped. *See* United States v. Booker, 125 S. Ct. 738 (2005).

To call this approach a strategy may be an exaggeration. It is more of a symptom than a response to the tendency of prosecutors and defendants to find terms of trade between substance and procedure. The *Blakely* majority is unequivocally clear that *Blakely* rights can be waived.[21] Thus we may soon see sentencing schemes in which defendants who refuse to accept fact-finding by the Court are subjected to the prospect of dramatically heightened sentences. More likely, it seems, is a world in which either the costs of jury-sentencing at trial, or prosecutorial fear of judicial discretion in an indeterminate sentencing regime, will induce prosecutors to put more pressure still on defendants to plead guilty.[22]

If the procedure/substance trade-off is a game in which courts, representing elite opinion, have sought to reduce the severity of the substantive law, favored by legislatures representing popular opinion, the courts have been losing the game for decades. Between 1970 and the most recent statistics, the per capita prison population has grown almost threefold.[23] Growth continued despite the decline in crime during the 1990s.[24]

Do cases like *Blakely* and *Crawford* foreshadow a late rally, in which the courts furnish defendants with a dramatically more generous inventory of procedural rights? This seems as

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[21] *Blakely*, 124 S. Ct. at 2541 ("If appropriate waivers are procured, states may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty.").

[22] The text was written before *Booker* came down. The new regime of advisory guidelines plus appellate review of sentencing either will, or will not, lead to widespread downward departures from the now-advisory guidelines. If we do see widespread downward departures, we are likely to see prosecutorial bargaining of the sort described in the text, and/or congressional intervention of some sort.

[23] "Bureau of Justice Statistics figures for year end 2003 indicate that there were nearly 2.1 million inmates in the nation's prisons and jails, representing an increase of 2.6% (52,600) over the previous twelve months." The Sentencing Project, *New Incarceration Figures: Rising Populations Despite Falling Crime Rates, at* http://www.sentencingproject.org/pdfs/1044.pdf (last visited Dec. 2004). The new figures represent a record thirty-one year continuous rise in the number of inmates in the U.S. The current incarceration rate of 714 per 100,000 residents places the United States first in the world in this regard. Russia had previously rivaled the U.S., but substantial prisoner amnesty in recent years has led to a decline of the prison population, resulting in a current rate of incarceration of 548 per 100,000. Rates of incarceration per 100,000 for other industrialized nations include Australia, 114; Canada, 116; England/Wales, 141; France, 95; and Japan, 58. *Id.*

[24] According to The Sentencing Report: The continued growth in incarceration comes during a period of sustained, falling crime rates over the last decade that have led to historic lows in crime. In addition, a number of states have implemented reforms in sentencing and corrections policy with the intent of diverting more people from prison and increasing the use of parole. Despite these developments, the prison and jail population has continued to grow to unprecedented levels, with 1 in every 140 U.S. residents incarcerated. *Id.*

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improbable as it seems undesirable. After all, genuine doctrinal limits on constitutionalizing defense entitlements exist, and this is still the Rehnquist Court. Moreover, the bargaining value of procedural rights does not track guilt or innocence very well.

The fundamental problem with a judicial strategy of creating procedural entitlements to offset legislative excesses, however, is that the courts have no reliable baseline judges can point to as the optimal balance of advantage between the two sides in plea bargaining. An arbitrary defense advantage would still be an arbitrary advantage. The reason why the substance/procedure feedback loop is a problem in the first place is its tendency to derange rational calculations about both fair procedure and just punishment.

Absent a neutral baseline for the balance of advantage in plea negotiations, courts can justify *any* procedural rule as a counter to excessive prosecutorial leverage (just as legislators can justify any penalty, however savage, as a prosecutorial bargaining chip rather than a serious judgment of desert or utility). This makes any overt reliance on plea bargaining advantages problematic for procedural purposes. The better judicial course, in my view, is to fashion the best procedure authoritative constraints permit, and then to protect that rational body of procedural safeguards against legislative and executive subversion via bargaining.

If we want to achieve a world where procedure serves substance with as little distortion as possible, we must look to new approaches. One possible strategy, if it may be called that, is surrender: the courts could simply get out of the business of declaring constitutional rules of procedure. This would unify substance and procedure not just in practice but on the plane of constitutional doctrine as well.

II. Strategy 2: Procedural Retreat

One possible response to the substance/procedure connection would be for courts to leave legislatures in charge of both substance and procedure. Colorable arguments support extreme pro-government interpretations on many issues in constitutional criminal procedure. If the courts accepted all of these interpretations, the content of the criminal procedure rules would be left to Congress and the states.

For instance, respectable authority supports the claim that the Confrontation Clause requires only that witnesses who testify at trial be subject to cross.[25] On this reading, the Clause never operates to prohibit proof of hearsay statements by declarants the jury never sees as witnesses. A similar reading could permit the use of coerced confessions by unsworn criminal defendants, who are, because unsworn, something other than "witnesses" against themselves. Absent the exclusionary rule, the Fourth Amendment would be a dead letter.

Pro-government reductionism, then, is plausible across many areas of doctrine, and one could imagine successive majorities of the Supreme Court embracing these positions. They might do so, not because authoritative materials compel these reductionist interpretations, but because they

[25] *See* White v. Illinois, 502 U.S. 346, 358-60 (1992) (Thomas, J., concurring) (summarizing authority for this view).

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might conclude that the substance/procedure feedback loop proved the Warren Court's criminal procedure revolution to have been a failure, while the authoritative legal materials do not clearly forbid the reductionist readings.

The first obstacle to this approach is how powerful the authoritative case against it really is. The most costly of the defendant's procedural entitlements, from both the risk and resource points of view, is jury trial; and jury trial could not be abolished without "burn[ing] the Sixth Amendment." [26] The right to counsel might rival the jury trial right in terms of cost, both direct and derivative; but *Gideon* enjoys unanimous support from both the left and the right.[27]

Constitutional text aside, the criminal procedure revolution is now embedded in a deep fortress of precedent.[28] When change comes, the justices who might find reductionism attractive do not always reduce in favor of the prosecution - witness Justice Scalia's performances in *Blakely* and *Crawford*. The judicial commitment to procedure seems too deeply entrenched to offer a promising target.

The second obstacle is that judicial abdication of responsibility for criminal procedure rules would gravely disserve procedure without improving substance. The current scope and severity of the substantive criminal law derives from tough-on-crime political incentives that bear no close or direct relation to judge-made procedural rules, except to the highly unlikely degree judicial doctrine causes crime. For example, California adopted the three-strikes legislation long after the state's constitution had been amended to eliminate any procedural rights for the criminal defendant beyond those required by federal law, and during a period when the U.S. Supreme Court was doing more for the government than for the defense in constitutional cases.[29]

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[26] The phrase comes from H. RICHARD UVILLER, VIRTUAL JUSTICE: THE FLAWED PROSECUTION OF CRIME IN AMERICA 311 (1996).

[27] Even those, such as Tracey Meares and myself, who are troubled (for somewhat different reasons) about the switch from due process to the Bill of Rights that *Gideon* represented, agree that indigent defendants ought to have a constitutional right to appointed counsel. *See* Tracey Meares, *What's Wrong With* Gideon, 70 U. CHI. L. REV. 215, 215 (2003) ("I have no quarrel with Gideon's conclusion establishing the constitutional right of indigent defendants to appointed representation."); DONALD A. DRIPPS, ABOUT GUILT AND INNOCENCE 116-17 (2003) [hereinafter DRIPPS, GUILT AND INNOCENCE] ("Everyone, myself included, agrees that the constitutional right of indigent defendants to appointed counsel announced in *Gideon* provides a critical safeguard against unjust conviction, and a noble symbol of our commitment to equal justice.") (footnote omitted).

[28] *See, e.g.,* Dickerson v. United States, 530 U.S. 428, 443 (2000) ("Whether or not we would agree with *Miranda's* reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now.").

[29] For an account of the political origins of the law, see FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 3-28 (2001).

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If one doubts that pro-defendant procedural rights *caused* the expansion of substantive criminal liability, even stronger reasons exist to doubt that judicial retreat from current safeguards would cause *the repeal* of duplicative or draconian legislation. The winners from tough-on-crime legislation continue to be the law enforcement bureaucracy, including the prison industry, and the majority of the voting population that is either female and/or over thirty. Such forces may on occasion make rhetorical use of court decisions, but their incentives do not derive from legal doctrine and are unlikely to change in direct response to doctrinal changes.[30]

The losers from a judicial retreat on procedure would be innocent suspects, who have a hard enough time vindicating themselves under the existing set of procedural rules. Rational legislatures have little self-interest in providing safeguards against the unjust conviction of suspects drawn disproportionately from underclass communities. The legislative record on this front, whether before or after the criminal procedure revolution, reflects no such incentives.

This is not to say that some pro-government changes in the procedural rules might not contribute to rationalizing the substance/procedure relationship. The more the procedural rules promote rational adjudication (protecting the innocent without obstructing convictions of the guilty), the more attractive limits on defendants' waiver of those procedural rights might become.[31] The case for limits on prosecutorial pressure to obtain waivers of innocence-protecting procedural rights likewise might become more attractive.

III. Strategy 3: Constitutionalizing Substance

If judicial withdrawal from the procedural front seems unpromising, perhaps the prospects are brighter for the judicial invasion of the substantive criminal law. Either substantive due process or the Eighth Amendment could provide the doctrinal predicate for a more robust

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[30] On the basic incentive structure, see Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice: OR, Why Don't Legislatures Give a Damn About the Rights of the Accused?,* 44 SYR. L. REV. 1079, 1088-95 (1993). The possibility that Congress may show more concern about the privacy rights of the middle class (see Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution,* 102 MICH. L. REV. 801, 855-57 (2004)), or the procedural safeguards for white-collar defendants in corruption cases (see Craig S. Lerner, *Legislators as the "American Criminal Class": Why Congress (Sometimes) Protects the Rights of Defendants,* 2004 U. ILL. L. REV. 599, 628-33), does more to reinforce than disturb the basic point.

[31] For an extended argument that criminal procedure ought to take this very turn, see DRIPPS, GUILT AND INNOCENCE, *supra* note 27, at 131-73.

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judicial review of criminal law's substance. *Lawrence v. Texas*[32] has emboldened libertarian speculations along these lines.[33]

[32] 539 U.S. 558 (2003) (invalidating state sodomy statute on substantive due process grounds).

[33] *See, e.g.,* Randy E. Barnett, *Justice Kennedy's Libertarian Revolution:* Lawrence v. Texas, 2003 CATO SUP. CT. REV. 21.

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Lawrence, however, is unlikely to support the kind of substantive judicial review of criminal legislation that might harmonize the substance/procedure connection. *Lawrence* seems far more likely to become a case about gay rights understood as fairness to an identity group than it is to become a case about a more general human right to be let alone.[34] But that is not the strongest reason for seeking a solution to the substance/procedure dilemma elsewhere.

Substantive due process rights insulate individual conduct from government interference; the weight of the government's pressure to conform matters little, if at all. But the most disturbing distortions of both substance and process, produced by their interaction, occur in cases in which the government has undoubted constitutional authority to punish private conduct of the sort charged as a crime.[35] Charges under drug laws against simple possession, or under prostitution or gambling laws, are themselves too minor to be brought and then dropped to induce guilty pleas to other offenses.

On the other hand, any generalized constitutional limit on conduct that might be made criminal poses a significant risk of undemocratic and unwise *Lochner*-style limitations on legislative police powers. A wide range of regulatory measures, including those directed at pollution and firearms, are backed by criminal sanctions, both to deter violations and to authorize police agencies to investigate violations. A thorough-going libertarianism would subject such legislation to judicial oversight without any principled or even determinate standard of review.

The most prominent principle in the literature addressing limits on the criminal law is J.S. Mill's famous harm principle. Assuming this principle could be connected to American constitutional doctrine in a plausible way, the concepts of harm and consent that give the principle its content have become far more uncertain than they were in the nineteenth century.[36] Either one admits that the wage and hour law in the *Lochner* case harmed no unconsenting parties and was properly struck down, or one adopts an understanding of harm or consent so slippery that the judges could uphold or strike laws at their whim. Neither prospect is very attractive.

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[34] *See* Dale Carpenter, *Is* Lawrence *Libertarian?*, 88 MINN. L. REV. 1140, 1166-67 (2004) (arguing that *Lawrence* will not give rise to general right to be let alone).

[35] The central case in the plea bargaining literature is Bordenkircher v. Hayes, 434 U.S. 357 (1978). Hayes was charged with a forgery count, offered a recommendation for a five year sentence for pleading guilty, and threatened with a recidivism charge carrying a mandatory life sentence if he chose to go to trial. *Id*. at 358-59. No one defends a constitutional right to commit forgery (or homicide, rape, robbery, burglary, theft in all its forms, and so on). A libertarian constitutional revolution would leave the challenge of the substance/procedure feedback loop substantially intact.

[36] *See, e.g.,* Donald A. Dripps, *The Liberal Critique of the Harm Principle,* 17 CRIM. JUST. ETHICS NO. 2 3, 8-11 (1998); Bernard E. Harcourt, *The Collapse of the Harm Principle,* 90 J. CRIM. L. & CRIMINOLOGY 109, 118-20 (1999).

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A more vigorous judicial role in limiting the penalties for conduct that the legislature has constitutional power to define as criminal presents a different question. If the Eighth Amendment imposed robust limits on the prison terms that may be meted out for what are conceded to be serious offenses, prosecutors would lose some of their present power to make functionally coercive offers. Attractive as this avenue appears initially, on closer inspection it turns out to be blocked by at least two serious obstacles.

The present Eighth Amendment proportionality jurisprudence is extraordinarily deferential to legislative choice.[37] Time works changes on the Court, however, with or without changes in personnel. In the *Ewing* case four justices joined Justice Steven's dissenting opinion advocating a general proportionality limit on prison sentences. To the extent that draconian sentences for minor crimes enable prosecutors to terrorize defendants into pleading guilty, the case for a robust proportionality test is strengthened. Penalties imposed on only a small minority of similar offenders are obviously not required by retributive justice. From a utilitarian perspective one can imagine reasons for imposing very heavy penalties on a few offenders for lottery-like reasons,[38] but the empirical evidence suggests that it is certainty, rather than severity, that deters.[39]

Proportionality review, however, contributes only partially to rationalizing the substance/procedure relationship. Many felony suspects are arrested under circumstances including the commission of multiple criminal offenses. For instance, a defendant charged with robbery at a poker game is guilty of robbing each of the victims.[40] The single transaction thus supports multiple charges, inviting the prosecutor to charge multiple counts with potentially consecutive sentences, each of which would withstand even vigorous proportionality review.

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[37] *See Ewing*, 538 U.S. at 20; *Harmelin*, 501 U.S. at 962; *Hutto*, 454 U.S. at 374-75.

[38] *See, e.g.,* Louis Kaplow & Steven Shavell, *Fairness Versus Welfare,* 114 HARV. L. REV. 961, 1299 (2001).

[39] *See, e.g.,* Bibas, *Outside the Shadow*, *supra* note 11, at 2510 n.195 (reviewing studies).

[40] The scenario is drawn from Ashe v. Swenson, 397 U.S. 436, 437 (1970).

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A more restrictive compulsory joinder rule, whether constitutional or statutory, might respond to this possibility. Such a move might also be justified as a free-standing reduction in the severity of the criminal code. If *Grady v. Corbin's* transactional interpretation of double-jeopardy returned, prosecutors would have to bundle all charges based on the same incident into a single proceeding.[41] But even *Grady's* return would not deny prosecutors great power over the potential sentence, because *Grady* only limited the timing, not the number, of offenses that might be charged.

A more overtly substantive doctrine would require the prosecution to bring only a single charge out of any common nucleus of operative fact, or to prohibit the imposition of consecutive sentences. This would prevent prosecutors from exploiting the authority to seek consecutive sentences, but it seems impossible to justify on double-jeopardy grounds and dubious as a policy matter. Homicides or robberies involving multiple victims pose the decisive counter-example.

Many felony suspects also have records of conviction for prior serious offenses. Where recidivism laws permit the prosecution, in one way or another, to add or subtract a recidivism count, they give the prosecutor formidable leverage indeed. In *Bordenkircher v. Hayes*, the Supreme Court upheld the imposition of a life sentence for a recidivism conviction after the defense had rejected the state's offer to recommend a five year sentence if the defendant pleaded guilty to the instant offense.[42] So long as very long prison terms are permitted for repeat players, the government will have the opportunity to convert a substantive threat into the waiver of procedural safeguards.

If we are to come to grips with the substance/procedure interface, we will need to look to the two remaining possible strategies: crafting limits, whether constitutional, statutory, or customary, on either the discretion of prosecutors to bring substantive charges; or the discretion of defendants to waive procedural rights.

IV. Strategy 4: Limiting Prosecutorial Discretion

Hypothesize an ideal set of criminal procedure rights held by defendants, using your own favored criteria (originalist, dignitary, instrumental, or what you will). The thought experiment includes only one limit on your power to alter legal doctrine: you may not modify defendants' rights to waive whatever procedural rights you select. Now project this ideal set of procedural rules into the otherwise real world of overbroad and overly harsh substantive legislation and limited systemic resources. In this scenario, we want prosecutors to exercise discretion to reduce the excessiveness of the theoretical statutory maximum, without circumventing the ideal procedural rules by threatening defendants with penalties that in the prosecutor's best judgment are excessive from a substantive point of view.

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[41] Grady v. Corbin, 495 U.S. 508, 510 (1990) (adopting a "same offense" test which barred subsequent prosecution for an offense whose elements included conduct for which the defendant have previously been prosecuted). The Court overruled *Grady* in *Dixon and Foster*, 509 U.S. at 703-711.

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[42] *See Bordenkircher*, 434 U.S. at 357.

I don't mean "we" in the sense of public-spirited academics; I mean we in the sense of a supermajority of the polity that is stable across time. Legislatures could provide that the statutory maxima are mandatory. They cannot force the executive to bring charges, but legislatures could easily require very harsh penalties for any offense, forcing prosecutors to either decline prosecution or impose the harsh sentence. Instead, in a consistent pattern, legislatures continually create new offenses, and ratchet up the theoretical maximum penalty for existing ones, knowing that these provisions will be applied in a discriminating way by prosecutors.

The analogy to legislative delegations of other difficult public policy problems to administrative agencies is illuminating. Faced with difficult trade-offs between costs and benefits, whether in entitlement or regulatory programs, legislatures typically adopt statutory language to the effect of "do good and avoid evil" and leave the unpopular details to an appointed agency.[43] Thus Congress declares that OSHA shall guarantee worker safety "to the extent feasible,"[44] or that the FCC shall regulate the airwaves "in the public interest."[45] So too in criminal justice, legislatures simply declare crime to be bad, authorize an enormous range of discretionary outcomes, and leave the difficult and politically controversial judgments to prosecutors.

Given this basic framework, two variations on the basic strategy of regulating prosecutorial discretion suggest themselves. The first is to try to protect the procedural rules directly, by putting an explicit limit on the additional penalties that may be imposed on defendants because they refuse to waive their procedural rights. The second is to admit, but regulate, prosecutorial primacy in criminal justice, just as we admit but regulate administrative primacy in environmental law. Neither strategy is at all hopeless.

It is widely agreed that offenders who admit responsibility for their crimes deserve some reduction in their penalty. Compared to defiance or denial, repentance suggests a less bad character, more capacity for making hard choices rightly, and a reduced danger to the

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[43] *See,* Lowi Theodore J., THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES 92-126 (2d ed. 1979). Debate about the nondelegation doctrine revolves around the justifiability, rather than the ubiquity, of this legislative practice.

[44] *See* Am. Textile Mfr. Inst. v. Donovan, 452 U.S. 490, 545 (1981) (Rehnquist, J., dissenting) (Congress "could have required the Secretary to engage in a cost-benefit analysis prior to the setting of exposure levels, it could have prohibited cost-benefit analysis, or it could have permitted the use of such an analysis. Rather than make that choice and resolve that difficult policy issue, however, Congress passed. Congress simply said that the Secretary should set standards 'to the extent feasible'.").

[45] National Broadcasting Co. v. United States, 319 U.S. 190, 216 (1943) ("The touchstone provided by Congress was the 'public interest, convenience, or necessity', a criterion which 'is as concrete as the complicated factors for judgment in such a field of delegated authority permit'.") (citations omitted).

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community. Thus, imposing a higher penalty on those who plead guilty is not wrong on principle. The question is when the trial penalty becomes excessive.

The first challenge in any such inquiry is figuring out just what the trial penalty actually is.[46] To do this we need to know what part of a prosecutor's charge reflects a judgment about the ideal punishment for the particular offender on the instant occasion, and what part reflects a threat to encourage a plea. This is not easy to ascertain. "For just as a prosecutor may forgo legitimate charges already brought in an effort to save the time and expense of trial, a prosecutor may file additional charges if an initial expectation that a defendant would plead guilty to lesser charges proves unfounded."[47]

The assessment is difficult, but perhaps not impossible. Suppose the rules required the prosecutor to file charges that were nonnegotiable; the defendant could plead to those charges but not others. In this sort of system, new charges could not be added to the original ones. The defendant could take the prosecution's offer or leave it in favor of trial, subject to a significant but not *in terrorem* trial penalty, set as a percentage of the sentence due on conviction.

The prosecution would still have the opportunity to negotiate before charges are filed. In many cases, however, the investigative process puts a short fuse on when charges must be brought, and that fuse could be made shorter by appropriate doctrinal changes. Moreover, if the trial penalty were properly set, prosecutors might not feel the need to bargain before charging. They might do so to turn a potential informant, but they would not need to do so to encourage pleas.

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[46] *See* Schulhofer, *supra* note 11, at 1993 n.52:

> The U.S. Sentencing Commission has estimated that in the federal system, pre-guidelines, the average difference between guilty plea sentences and those imposed after trial was 25-35%. [citation omitted] In some state courts, posttrial sentences can be two to four times higher than sentences imposed after a plea in a comparable case. See, Thomas M. Uhlman & Darlene N. Walker, *"He Takes Some of My Time; I Take Some of His": An Analysis of Judicial Sentencing Patterns in Jury Cases*, 14 LAW & SOC'Y REV. 323, 328 (1980) (in large Eastern city, controlling for prior record and seriousness of charge, average sentence after jury trial was nearly three times more severe than average guilty plea sentence). An important qualification, however, is that "bargains" in many jurisdictions prove to be illusory, especially when judges use the low-visibility practice of "real-offense" sentencing to offset prosecutorial concessions. Where this practice still exists, post-trial and bargained sentences tend to converge. See, e.g., Stephen J. Schulhofer, *Due Process of Sentencing*, 128 U. PA. L. REV. 733, 757 (1980); H. Joo Shin, *Do Lesser Pleas Pay?: Accommodations in the Sentencing and Parole Processes,* 1 J. CRIM. JUST. 27, 34-35 (1973).

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[47] United States v. Goodwin, 457 U.S. 368, 379 (1982) (footnote omitted).

Absent bargaining, the prosecutor's ideal number of trials is not zero, and the defendant's ideal number of trials is not one hundred percent. One of the reasons lawyers work in prosecutor's offices (and public defender's offices) is to gain trial experience. In a few cases the government really is interested, for legitimate policy reasons, in maxing the defendant out. In a no-questions asked or given dispute (a death case would be the paradigm example), the government of course expects a trial. Defendants who delay a highly-probable conviction lose time with a cloud over their heads (and may be in pretrial detention as well). Those paying private counsel face a monetary trial penalty as well.

Professor Givelber's version of this strategy is to somehow screen defense decisions to go to trial and protect the nonfrivolous ones from any enhanced penalty.[48] The suggestion here is that a trial penalty might be a better way to screen defense cases for trial. Rather than ask some sort of review panel (or a sentencing court) to pass on the good faith of a defendant's assessment of his trial chances, a significant trial penalty might force defendants to do the screening themselves. Trial screening that incorporates existing resource constraints would likely replicate plea bargaining outcomes; trial screening that did not reflect resource constraints might bankrupt the system.

Setting the trial penalty poses another difficult problem. The trial penalty cannot be monetized; defendants with the means to hire private counsel already face such a monetary incentive, while the majority of defendants represented by publicly-funded counsel are judgment-proof or close to it. We might, however, imagine an auction system, in which the legislature provides funds for a fixed number of trials, and defendants bid against each other according to how high a trial penalty they stand ready to serve if they win the auction but lose the trial. The more serious the penalty for the offense, and the greater the age of the accused, the more the trial penalty would become cumulative with the offense penalty; a fifty-year-old defendant facing a fifty-year offense penalty could freely accept a hundred-year trial penalty, while a twenty-year-old defendant facing a ten-year offense penalty would have to be virtually certain of acquittal to do the same. Many might also have paternalistic objections to permitting irrational defendants to mortgage their lives for trials that appear highly likely to end in convictions.

If defendants act rationally, a trial penalty far smaller than prosecutors may threaten at present would suffice to discourage frivolous trials. If one were to design an experiment, we might start with this model. First, no defendant should be incarcerated solely as a trial penalty. The coercive effects of the binary in/out alternatives are very strong. A defendant may be inappropriately incarcerated for going to trial, while some other defendant could get a slap on the wrist because the prosecutor's office is too concerned about its conviction rate. Second, any defendant convicted after rejecting the prosecution's initial offer would be sentenced to a penalty computed as a percentage of the otherwise applicable sentence, whether measured in dollars in fines, periods of supervision, or time in prison.

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[48] Daniel Givelber, *Punishing Protestations of Innocence: Denying Responsibility and Its Consequences,* 37 AM. CRIM. L. REV. 1363 (2000).

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A fixed limit should, however, be placed on the amount of prison time an individual should do for going to trial. The shocking thing about *Bordenkircher* is not the existence of a trial penalty but the coercive size of that penalty. We would be better off than at present if we accepted a high percentage trial penalty (say, 100%) but capped the trial penalty at ten years in prison. Khafkaesque as that sounds, it's a step up from *Bordenkircher*.[49]

This arrangement would eliminate much of the prosecution's current arbitrary power, while still giving defendants with weak cases good reasons to plead. Those who insist on a higher trial penalty are trusting prosecutors not to exploit the power they certainly have, and on diverting resources from trials in close criminal cases to other uses (some worthy and some not-so-worthy). Those who resist a modest trial penalty are inviting defendants to spend public money without any self-scrutiny of their cases' strength or weakness. Although identifying the baseline charge and the appropriate trial penalty may be difficult, the pursuit of such approximations may be a better course than what we are doing now.

The alternative substrategy for regulating prosecutorial discretion forgoes any rigid limits on either the prosecution's baseline assessment of the offender's culpability or the appropriate trial penalty. Instead, this approach to regulating prosecutorial discretion looks to administrative law, where agencies entrusted with vast discretion are checked by procedural requirements of transparency and accountability.[50] Prosecutors would need to develop guidelines for their exercise of discretionary power, and compliance with those guidelines in particular cases would be reviewable either by a body of supervisory government lawyers or by courts.

The predictable claim that executive charging authority must be plenary as a constitutional separation of powers matter would be subordinated to individual constitutional rights to due process and equal protection. Current law rightly recognizes that executive power to select factually supportable criminal charges does not override the First Amendment or the Equal Protection Clause.[51] The same should hold for procedural due process.

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[49] The problem of regulating the trial penalty in potentially capital cases is sufficiently distinctive that I here express no view on the best approach.

[50] *See* Gerard E. Lynch, *Our Administrative System of Criminal Justice,* 66 FORDHAM L. REV. 2117 (1998) (describing system as prosecutor-centered administrative law system; rejecting whole-sale administrative law model because pretense of legislative primacy serves useful functions and because cost of APA type procedures would be excessive; but commending a right to be heard regarding prosecutorial charging decisions). *Cf.* Erik Luna, *Principled Enforcement of Penal Codes,* 4 BUFF. CRIM. L. REV. 515 (2000) (arguing for administrative-law rulemaking approach to regulate discretionary enforcement by police of overbroad penal codes).

[51] *See, Armstrong*, 517 U.S. at 464-465:

> Of course, a prosecutor's discretion is "subject to constitutional constraints." *United States v. Batchelder,* 442 U.S. 114, 125 (1979). One of these constraints, imposed by the equal protection component of the Due Process Clause of the Fifth Amendment, *Bolling v. Sharpe,* 347 U.S. 497, 500 (1954), is that the decision whether to prosecute may not be based on

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"an unjustifiable standard such as race, religion, or other arbitrary classification," *Oyler v. Boles,* 368 U.S. 448, 456, 82 S. Ct. 501, 506 (1962). A defendant may demonstrate that the administration of a criminal law is "directed so exclusively against a particular class of persons ... with a mind so unequal and oppressive" that the system of prosecution amounts to "a practical denial" of equal protection of the law. *Yick Wo v. Hopkins,* 118 U.S. 356, 373 (1886).

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If *in fact* the key decisions about the defendant's liberty are made by prosecutors, rather than by legislators and courts, then it makes sense to admit this openly as a matter of constitutional doctrine.[52] The defendant, on this account, would have an administrative due process liberty interest in freedom from the filing of charges. Due process, of course, requires a trial to protect the factually innocent; it might also require a right to be heard and a right to review. The latter rights protect individuals against the arbitrary exercise of the discretionary power to bring greater rather than lesser charges, when either option can be justified on the facts. This would permit prosecutorial power but subject it to procedural safeguards.[53] In a nutshell, the argument is that if due process prohibits entrusting the cancellation of retirement benefits by the Social Security Administration absent a hearing applying public criteria, due process certainly prohibits entrusting the infliction of decades behind bars to a single junior functionary making an unreviewable and secret decision according to secret (or no) criteria.

Ironically, a right to be heard by the prosecutor would be inconsistent with the prohibition of plea discussions. From the perspective of procedural due process, prohibiting citizen input on a decision that clearly has major life consequences for the individual is wrong on principle. The choice between attacking plea bargaining by standardizing the trial penalty and prohibiting

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[52] Judge Lynch quite rightly argues that regulating prosecutorial practices should not be regarded as displacing the defendant's right to insist on an adversary trial. *See* Lynch, *supra* note 50, at 2144-45. I suspect that administrative law type regulation of prosecutorial decision-making would actually strengthen the trial option, by reducing the ability of prosecutors to penalize resort to it. At any rate, recognizing a right to be heard with respect to prosecutorial charging decisions, an idea Judge Lynch certainly seem receptive to, would not in any way undermine the various trial rights written into the constitutional text. *Id.*

On the larger point of whether the prosecutor's office should morph in the direction of an administrative agency *sua sponte* or under judicial compulsion, there is no reason why this choice should be treated as binary. The more prosecutors' offices formalize procedures or formulate criteria to guide charging decisions, the more these will come to look like legal entitlements protected by procedural due process. Some judicial intervention might speed the process along considerably. All I suggest here is that we need not accept the current assumption that because prosecutorial discretion exists it must also exist in arbitrary form.

[53] *See* Lynch, *supra* note 50, at 2145. As to the considerations of cost and simplicity Judge Lynch points out they are important, but taken into account by the test of Mathews v. Eldridge, 424 U.S. 319, 323 (1976). *Id.* If suspension from public school is serious enough to call for at least notice and an opportunity to be heard, *see* Goss v. Lopez, 419 U.S. 565, 567 (1975), we should be able to devise an affordable procedure that requires some input from the defense before the prosecutor's discretionary charging decision becomes final. *How much* procedure is an important and difficult question. We should remember, however, that the criminal defendant will have counsel, and the present plea bargaining regime of course involves discussions between defense counsel and prosecutors. Discovery, as Judge Lynch points out, is a vital aid to defense lawyers seeking to persuade a prosecutor. Lynch, *supra* note 50, at 2147-49. If discussions are going to happen anyway, they might as well happen a little later and with a lot more information.

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negotiations, or by subjecting prosecutorial discretion to procedural safeguards, really is a fork in the road.

Both Sentencing Guidelines schemes in every form, and prosecutorial policies of the sort discussed by Ron Wright in this symposium, suggest the feasibility of regulating criminal justice discretion according to general criteria. Sentencing guidelines may be unwise, and prosecutorial policies may be unusual. If the issue is the possibility of regulating discretion according to general standards, however, these examples are powerful evidence of feasibility.

The objection that public and enforceable criteria for the exercise of prosecutorial discretion would enable violation of some laws seems to me a strong point in favor of such an approach. People have a right to know the law, and if the real law is made by prosecutors, then people have a right to know which criminal statutes the legislature has authorized prosecutors to nullify. Legislators know very well that prosecutors ameliorate the law in practice; the more opaque and standardless the process by which this amelioration occurs, the more it favors the privileged over the disempowered.

V. Strategy 5: Limiting Waiver

The final possible strategy surveyed here is to limit the defendant's right to waive procedural safeguards. Defendants at present may not waive a determination of competency to stand trial and every effort is made to discourage the waiver of counsel. Before pleading guilty the defendant must be advised of the charges, his right to trial by jury, his right to confront adverse witnesses, and the range of possible penalties he subjects himself to by plea.[54] Everything else can be waived, and usually is.

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[54] *See Brady,* 397 U.S. at 754-55:

> The standards to the voluntariness of guilty pleas must be essentially that defined by Judge Tuttle of the Fifth Circuit Court of Appeals:
>
> > A plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g., bribes). (footnote omitted).

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The simplest doctrinal move in the direction of limiting waiver rights is to prohibit the entry of a pleas or plea discussions until the adversary process has advanced further toward trial. Suppose, for instance, that the defendant could not plead guilty until after an adversarial probable cause hearing. A preliminary hearing does not eliminate plea bargaining, but it does defer bargaining until the defense has heard the prosecution's case, at least in outline form.

The more of the litigation process that takes place before accepting a plea, the smaller the marginal cost of trial. Trial de novo systems work this way: if convicted by the court, the defendant may up the ante by seeking a new trial, this time by jury, in the felony court.[55] If the defendant could not waive the initial part of the process, the bulk of defendants who ultimately plead would have the benefit of much greater scrutiny of their particular cases. The costs of criminal litigation would increase accordingly, unless the number of trials went down at the same time. That seems unlikely; the point to a hearing requirement would be to expose weaknesses in the state's case that might otherwise go unnoticed. Few defendants who now refuse to plead would be convinced to do so by a preliminary hearing; the likely effect would be to enable defense counsel to persuade prosecutors to make concessions, or to increase the frequency of trials on balance.

A more radical approach would permit the defendant to waive his right to waive his rights, *a la* Ulysses and the sirens.[56] If we are interested in counterbalancing the prosecution's bargaining leverage, we might make an analogy to the traditional case for trade unions. Employers cannot fire all their workers, but the threat to fire a particular individual is perfectly credible and powerfully coercive. Enter trade unions: the employer cannot afford to replace all of the employees at once, and so employees gain collectively greater leverage than they can exert individually.

The government can afford to try any given case and hammer the defendant who insisted on that one trial. But there are not enough judicial or prosecutorial resources to try every defendant (that, after all, is the strongest point in favor of plea bargaining). Nor is there enough prison space to max out every defendant. If defendants could coordinate their bargaining positions a major shift in bargaining power would result.[57]

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[55] The Supreme Court rejected a constitutional challenge to such systems in Colten v. Kentucky, 407 U.S. 104, 105 (1972).

[56] For the story, see HOMER'S ODYSSEY book XII. On the rationality of precommitment strategies, see, e.g., ELSTER JON, ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY (Cambridge Univ. Press 1990); SCHELLING THOMAS C., CHOICE AND CONSEQUENCE: PERSPECTIVES OF AN ERRANT ECONOMIST ch. 4 (Harvard Univ. Press 1984).

[57] Defense lawyers on occasion have organized mass refusals to plead out, with some albeit not unqualified success. *See* Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1249-53 (1975).

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This might be done in different ways, but here is the most direct (and the most radical). What if we took the plea-bargain-as-contract idea further than ever, and said that defendants may enter into legally enforceable covenants not to compete, *i.e.*, not to plead except on terms acceptable to all members of the agreement? In the strong version of this proposal, there need be no factual connection between the cases; they need only be pending at the same time when the agreement is made.

The prosecution might try and encourage cheating on these agreements by entering into deals whereby defendants forced to stand trial by the covenant put on no defense in exchange for sentencing advantages. But a trial would still be held, and the cost of assembling the jury and presenting the case would still have to be paid. Moreover, defendants seeking true precommitment could agree in advance to joint counsel representing all members of the cartel. Such a lawyer would be ethically obliged to fight the prosecution's case on behalf of cartel members not on trial. The defendant's right to take the stand and confess might also be something that could be assigned, by contract, to the group.

At some point, too many defendants in an agreement would doom all to trial because agreement would be impossible. Larger groups would have to adopt some sort of majority rule concept, which poses difficult duty-of-loyalty problems. Small groups could manage the unanimity requirement. If a number must be suggested, we might look to the jury and start with covenants not to exceed twelve members.

The idea sounds unthinkable, but it is simply the mirror image of plea bargaining. At present defendants waive procedural rights to avoid higher penalties for their crimes. Why shouldn't they have the right to waive their individual rights to plea bargain, in exchange for what they rationally anticipate to be higher concessions for the ultimate joint decision to waive? The answer is not that they do not own their procedural rights or cannot alienate them for advantage, for these are the very premises on which plea bargaining depends. If The Brotherhood of Criminal Defendants Local 116 is unthinkable, it is not because it would create a market for guilty pleas; we already have that. If The Brotherhood is unthinkable, it must be because it would create a market for guilty pleas in which the terms of trade are not to our liking.

Conclusion

The risk that discretionary applications of criminal law's substance to obtain waivers of procedural rights will distort both substance and procedure seems very great. Indeed, that risk is realized on an everyday basis. This paper has sought to survey the possible responses to the often perverse relationship of substance and procedure. None of the plausible responses is sure to succeed; all have risks, and most cannot exclude the possibility of demanding additional resources for criminal justice relative to other pressing public needs. Reasonable people may adhere to the status quo as the least of evils. For my part I would hope that the scholarly conversation I've sought to frame leads to the formulation of at least one strategy that calls into question the sophistication of despair.

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