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## Justice in Plea Bargaining

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# JUSTICE IN PLEA BARGAINING

FRED C. ZACHARIAS\*

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\* Professor, University of San Diego School of Law. The impetus for this article stems from a series of questions raised by David Luban many years ago, when commenting on a previous work of the author. The author also gratefully acknowledges the more recent help provided by colleagues who reviewed drafts of this piece, including Professors Larry Alexander, Kevin Cole, Bruce Green, Rory Little, Shaun Martin, Allen Snyder, Charles Wiggins, and Chris Wonnell. Finally, additional thanks are owed to research assistants Jason Baker, Larry Nishnick, and Marty Reed.

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## INTRODUCTION

Plea bargaining occupies an ambivalent position in the criminal justice system. Most observers of the system subscribe to its practical benefits, but acknowledge that it is an imperfect method for dispensing justice.<sup>1</sup> The academic literature has consisted

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1. See, e.g., JAMES E. BOND, PLEA BARGAINING AND GUILTY PLEAS § 1.04 (1978) (arguing the importance of plea bargaining to the criminal justice system); MILTON HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS 157-62 (1978) (identifying the reasons why plea bargaining is "inevitable"); WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 21.1, at 898-904 (2d ed. 1992) (describing and critiquing the plea bargaining system); Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 51 (1968) (noting that most "observers recognize that the guilty-plea system is in need of reform, but the legal profession now seems as united in its defense of plea negotiation as it was united in opposition less than a half-century ago"); Charles P. Bubany & Frank Skillern, *Taming the Dragon: An Administrative Law for Prosecutorial Decision Making*, 13 AM. CRIM. L. REV. 473, 502 (1976) (calling for administrative guidelines to structure plea negotiations); Theodore S. Green et al., *Plea Bargaining: Fairness and Inadequacy of Representation*, 7 COLUM. HUM. RTS. L. REV. 495, 507-12 (1975-76) (criticizing the quality of defense counsel in many plea bargaining settings); H. Richard Uviller, *Pleading Guilty: A Critique of Four Models*, LAW & CONTEMP. PROBS., Winter 1977, at 102 (analyzing various model codes governing plea bargaining); Welsh S. White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439, 440 (1971) ("The advisability of attempting to provide sufficient resources to eliminate the need for guilty pleas is doubtful."); Frank V. Ariano & John W. Countryman, Note, *The Role of Plea Negotiation in Modern Criminal Law*, 46 CHI.-KENT L. REV. 116, 122 (1969) (accepting the necessity of plea bargaining, while also noting problems with the practice); John A. Lundquist, Comment, *Prosecutorial Discretion—A Re-evaluation of the Prosecutor's Unbridled Discretion and its Potential for Abuse*, 21 DEPAUL L. REV. 485, 517-18 (1971) (criticizing prosecutorial discretion as a part of plea bargaining, but conceding its necessity for the operation of the criminal justice system); cf. Stephen J.

largely of attempts to provide a theoretical justification for plea bargaining<sup>2</sup> and, conversely, of calls for the system's abolition.<sup>3</sup>

This Article accepts plea bargaining as a given. It focuses on the ethical role of prosecutors who find, in particular cases, that the system is not operating in its expected fashion. Courts<sup>4</sup> and professional responsibility codes<sup>5</sup> impose on prosecutors an undefined obligation to "do justice."<sup>6</sup> In the trial context, that obli-

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Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43, 80-81 (1988) (describing market failures and other flaws inherent in plea-bargaining system).

2. See, e.g., Thomas W. Church, Jr., *In Defense of "Bargain Justice,"* 13 L. & SOC'Y REV. 509, 511 (1979) (reviewing empirical evidence and defending the rationality of the plea bargaining system against critics); Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 308-09 (1983) (arguing that plea-bargaining is desirable as a mechanism for setting the price of crime); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1910-11 (1992) (setting forth a contract theory of plea bargaining and urging structural modifications to account for innocent defendants); cf. William F. McDonald et al., *Prosecutorial Bluffing and the Case against Plea-Bargaining*, in PLEA-BARGAINING 1, 21-22 (William F. McDonald & James A. Cramer eds., 1980) (defending plea bargaining against the criticism that prosecutors induce unjust bargains through bluffing).

3. See, e.g., Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1313-14 (1975) (arguing that the plea bargain system must be reformed or eliminated); Kenneth Kipnis, *Plea Bargaining: A Critic's Rejoinder*, 13 L. & SOC'Y REV. 555, 563-64 (1979) (arguing that plea bargaining undermines citizens' "inalienable rights"); Raymond I. Parnas & Riley J. Atkins, *Abolishing Plea Bargaining: A Proposal*, 14 CRIM. L. BULL. 101, 102, 114-15 (1978) (calling for the abolition of plea bargaining and arguing for a "charge-setting" procedure early in the criminal process); Schulhofer, *supra* note 1, at 80 (challenging the factual validity of the plea bargaining system); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 2008-09 (1992) (criticizing the contract defense of plea bargaining); cf. Alschuler, *supra* note 1, at 50-53 (revealing significant conflicts in prosecutors' perceived roles within plea bargaining context); David Lynch, *The Impropriety of Plea Agreements: A Tale of Two Counties*, 19 L. & SOC. INQUIRY 115, 133 (1994) (arguing for reduced reliance on plea bargaining).

4. See, e.g., *Berger v. United States*, 295 U.S. 78, 88 (1935) ("[T]he prosecution's interest . . . is not that it shall win a case, but that justice shall be done."); *People v. Pelchat*, 464 N.E.2d 447, 451 (N.Y. 1984) (stating that the prosecutor "is charged with the duty not only to seek convictions but also to see that justice is done").

5. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 cmt. (1995) (characterizing prosecutors as "minister[s] of justice"); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-103(A) (1981).

6. For discussions of the prosecutorial duty to serve justice, see *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1218 (1958) (discussing prosecutors' "dual role"). See also J. Allison DeFoor II, *Prosecutorial Misconduct in Closing Argument*, 7 NOVA L.J. 443, 448 (1983) (citing prosecutor's "semijudicial position" under Florida law); George T. Frampton, Jr., *Some Practical and Ethical*

gation is best understood in terms of the adversarial process.<sup>7</sup> The plea-bargaining stage, however, does not fit the adversarial model,<sup>8</sup> nor is its goal the same.<sup>9</sup> It is therefore unclear what duties, if any, prosecutors have to defendants involved in plea bargaining, or to the legal system, other than to believe that a defendant is guilty before accepting a plea.

Consider just one example:

A defense counsel acts ineffectively during pretrial representation by failing to request discovery or exculpatory material. The prosecutor knows that, ordinarily, he would have to produce exculpatory material to the defense but also knows that in this case defense counsel is unaware of the material.

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*Problems of Prosecuting Public Officials*, 36 MD. L. REV. 5, 7 (1976) (characterizing prosecutor's role as the administration of the criminal justice system).

7. See generally Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 56-65 (1991) (analyzing prosecutors' duty to "do justice" at trial).

8. Under the theory of the adversarial model, equal adversaries introduce conflicting versions of the facts and law for decision by a neutral and passive arbitrator. See *id.* at 60-61 (identifying the essential premises of the adversarial model). In plea bargaining, the adversaries may be equally at odds, but there is no arbitrator to draw the best from their presentations, to ensure that they "play fair," or to make a decision on the merits. See *id.* at 62 ("the divergence from the core expectations may undermine valid competitive adjudication"); cf. Roberta K. Flowers, *A Code of Their Own: Updating the Ethics Codes to Include the Non-Adversarial Roles of Federal Prosecutors*, 37 B.C. L. REV. 923, 927 (1996) (arguing that ethics codes should be amended to require non-adversarial lawyering by prosecutors during the investigative stage of prosecutions).

9. As discussed below, there are various justifications for plea bargaining. See *infra* Part II. At root, however, most seek to justify the systemic goal of preserving resources through the use of plea bargaining. See BOND, *supra* note 1, § 1.04, at 5-7; Ariano & Countryman, *supra* note 1, at 122. The adversarial trial-model, in contrast, is justified either as achieving fair results or honoring individuality and autonomy in legal process. See, e.g., ALAN H. GOLDMAN, *THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS* 117 (1980) (discussing justifications for the adversary system other than truthseeking); STEPHAN LANDSMAN, *THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE* 1-6 (1984) (analyzing the theory of the adversary system); Lon L. Fuller, *The Adversary System*, in *TALKS ON AMERICAN LAW* 35, 40 (Harold J. Berman ed., 1972) (discussing ways the adversary system produces truth); David Luban, *The Adversary System Excuse*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 83, 92-93 (David Luban ed., 1984) (discussing and debunking the typical justifications for the adversary system); Zacharias, *supra* note 7, at 53-56 (discussing the justifications for the adversary system).

The law of criminal discovery does not always require disclosure of helpful information prior to the defendant's plea.<sup>10</sup> The hypothetical prosecutor, if she<sup>11</sup> believes the defendant to be

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10. Under *Brady v. Maryland*, 373 U.S. 83 (1963), prosecutors must disclose "evidence favorable to an accused . . . material either to guilt or to punishment . . ." *Id.* at 87. However, in most cases, defense counsel must make a specific request for exculpatory material before it becomes discoverable. *See id.* at 87-88. Only if the information in and of itself "creates a reasonable doubt" of the guilt of the accused need the prosecutor disclose material in the absence of a request. *United States v. Agurs*, 427 U.S. 97, 112 (1976). In the scenario discussed in the text, only information in the latter category would have to be disclosed.

Courts are split on the issue of when *Brady* information must be disclosed. A few courts suggest that a prosecutor must disclose "clearly exculpatory" evidence before accepting any plea. *See, e.g., Sanchez v. United States*, 50 F.3d 1448, 1453 (9th Cir. 1995) (finding a prosecutor's failure to disclose exculpatory information to be a potential basis for vacating a plea); *Tate v. Wood*, 963 F.2d 20, 25 (2d Cir. 1992) (holding that a defendant must be permitted to withdraw a guilty plea when the prosecutor's failure to disclose exculpatory material caused the defendant to plead guilty when there is a reasonable probability that he would have "insisted on going to trial" had the prosecutor disclosed the material); *Fambo v. Smith*, 433 F. Supp. 590, 598 (W.D.N.Y.) ("[A] prosecutor has a duty, during the course of plea bargaining, to disclose to the defendant evidence that is as clearly exculpatory of certain elements of the crime charged as is the contested evidence in this case."), *aff'd*, 565 F.2d 233 (2d Cir. 1977); *People v. Benard*, 620 N.Y.S.2d 242, 245 (1994) (accepting the theory that plea agreement can be vitiated by prosecutor's failure to disclose). Most courts, however, suggest that the information need not be disclosed until the time of trial. *See, e.g., Campbell v. Marshall*, 769 F.2d 314, 324 (6th Cir. 1985) (holding that prosecutorial nondisclosure that would have constituted a *Brady* violation at trial was insufficient to compromise an otherwise voluntary plea agreement); *United States v. Kidding*, 560 F.2d 1303, 1313 (7th Cir. 1977) (holding that the defendant is not entitled to know the strength of the government's case before deciding whether to plead guilty); *United States v. Victor Teicher & Co.*, 726 F. Supp. 1424, 1442-43 (S.D.N.Y. 1989) (holding that *Brady* material need not be produced for the defendant by the prosecution immediately); *United States v. Ayala*, 690 F. Supp. 1014, 1016 (S.D. Fla. 1988) ("A violation of *Brady* would not affect the consensual nature of the plea thereby impairing its validity."); *United States v. Wolczik*, 480 F. Supp. 1205, 1210 (W.D. Pa. 1979) ("[A] defendant cannot expect to obtain *Brady* material for use in a pretrial decision to plead guilty."); *People v. Simone*, 401 N.Y.S.2d 130, 134 (Sup. Ct. 1977) (noting that "many courts have declined to impose a pretrial duty on prosecutors to disclose exculpatory material"), *aff'd*, 71 A.D.2d 554 (N.Y. App. Div. 1979); *cf. White v. United States*, 858 F.2d 416, 421-22 (8th Cir. 1988) (holding that resolution of the issue depended in part upon the nature of the evidence that the prosecutor failed to disclose); *United States v. Autullo*, Nos. 88 CR 91-4, 93 C4415, 1993 WL 453446, at \*2 (N.D. Ill. Nov. 4, 1993) (holding that by pleading guilty, a defendant waives his *Brady* claim).

11. To avoid confusion, throughout this Article, I refer to the prosecutor in the female gender. Other actors in the process (*e.g.*, defense counsel and defendants) are treated as male.

guilty,<sup>12</sup> could convince the defendant to accept a plea higher than he would accept if aware of the information—and higher than other, better-represented defendants would have to accept. Do, or should, the prosecutor's obligations to justice require her to take steps that might keep her from maximizing the defendant's punishment?

To resolve this issue, the prosecutor needs to be able to refer either to a theory of what just plea bargaining is all about or to a theory of how bargaining, in general, achieves appropriate results. Part I of this Article discusses negotiation in the civil context, analyzes whether traditional bargaining notions apply equally to criminal cases, and considers whether those notions obviate the need for special conduct by prosecutors in plea bargaining. Part I concludes that society's presumptive tolerance for civil pretrial settlements cannot extend to the criminal context.

Part II considers the dominant justifications for plea bargaining, identifies their premises, and attempts to identify a concept of justice that fits those justifications. Part III analyzes these different justifications using a series of hypothetical scenarios that might implicate the prosecutor's obligation to do justice. In part, examining how these justifications work in practice illustrates weaknesses—or lack of definition—in some of the rationales themselves. More importantly for this Article, however, the analysis suggests that just behavior by prosecutors depends, in a very concrete way, upon the theory under which they operate. Prosecutors cannot identify proper conduct unless they have a clear notion of what plea bargaining should accomplish.

Part IV thus offers a practical solution to the problem of doing justice. It argues that prosecution offices, in their internal guide-

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12. Most professional codes impose upon prosecutors some initial responsibility to believe in a defendant's guilt, or likely guilt, before pressing the prosecution. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8(a) (1995) (forbidding prosecutors to prosecute "a charge that the prosecutor knows is not supported by probable cause"); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-103(A) (1981) (stating that a prosecutor "shall not institute . . . criminal charges when he knows . . . that the charges are not supported by probable cause"); ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION Standard 3-3.9(a) (3d ed. 1993) [hereinafter ABA STANDARDS FOR CRIMINAL JUSTICE] ("A prosecutor should not . . . permit the continued pendency of criminal charges . . . in the absence of sufficient admissible evidence to support a conviction.").

lines or procedures, should set forth the plea-bargaining theory or theories that justify the offices' participation in the process.<sup>13</sup> In contrast to the status quo, that simple step would enable individual prosecutors to respond to specific plea-bargaining dilemmas and to make meaningful determinations of what constitutes justice in the individual case.

Even if prosecutorial agencies resist adopting a policy, individual prosecutors will be able to use this Article's analysis to deal with many of the dilemmas they face. In selecting a theory of plea bargaining, individual prosecutors would need to reflect on the goals they seek to achieve in plea bargaining. Part V concludes that society is better off when prosecutors are self-conscious about their ends, because such reflection helps prevent arbitrary behavior and renders prosecutors less subject to corruption or manipulation. At a minimum, identifying plea-bargaining priorities will encourage negotiating prosecutors to reason and act in an internally consistent way.<sup>14</sup>

## I. DISTINGUISHING PRETRIAL SETTLEMENT IN CIVIL LITIGATION

Most of the literature regarding negotiation in civil litigation tends to assume that pretrial settlements are good, or appropriate, results.<sup>15</sup> If one could make a similar, definitional assump-

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13. Twenty-five years ago, Welsh White proposed that prosecutors' offices should "formulate plea bargaining policies" in order to reduce the pernicious effects of unbridled prosecutorial discretion. White, *supra* note 1, at 457. Professor White focused on the need for some policy, rather than on the separate question of where prosecutors' offices should look for guidance in setting their policies. *See id.* at 457-58. This Article, in contrast, considers the substantive issue of what would constitute just plea bargaining and offers specific content for the content of plea bargaining policies.

14. This Article, of course, addresses the many well-intentioned prosecutors who take the duty to do justice seriously. Prosecutors who wish only to justify the results that they pursue can be constrained only through specific, enforceable, and enforced rules of conduct. *See* Zacharias, *supra* note 7, at 107-09 (discussing the effects of ethical codes on scrupulous and unscrupulous attorneys).

15. *See, e.g.,* XAVIER M. FRASCOGNA, JR. & H. LEE HETHERINGTON, *NEGOTIATION STRATEGY FOR LAWYERS* 205 (1984) (assuming that "[e]veryone has something to gain from striking a deal"); ROGER S. HAYDOCK, *NEGOTIATION PRACTICE* 1 (1984) ("[T]hrough the negotiation process 'things can only get better' for clients."); Oran R. Young, *Introduction: Manipulative Models of Bargaining*, in *BARGAINING: FORMAL THEORIES OF NEGOTIATION* 303-07 (Oran R. Young ed., 1975) (analyzing game and bargaining theories and assuming that the goal of outnegotiating the adversary is



tion about criminal case settlements reached through plea bargaining, then the need to identify the meaning of plea-bargaining justice would disappear.

In approving civil settlements, most commentators have pointed to the resource-saving nature of settlements, the anguish avoided, and the speed with which negotiated dispositions can be achieved.<sup>16</sup> These benefits, though real, do not alone explain a societal preference for settlement, because the same benefits could be achieved equally well by resolving disputes through a coin flip. Something about the quality of the resolution itself must justify society's preference.

At its root, the substantive rationale for favoring civil settlements is probably identical to the rationale for upholding contracts.<sup>17</sup> Two parties can maximize their total utility in the use

appropriate); Otomar J. Bartos, *Simple Model of Negotiation: A Sociological Point of View*, 21 J. CONFLICT RESOL. 565, 576 (1977) (postulating that "most men will find Nash solution fair"); cf. Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 320 (1991) ("[L]awyers, judges, and commentators agree that pretrial settlement is almost always cheaper, faster, and better than trial.").

16. See, e.g., LINDA R. SINGER, *SETTLING DISPUTES: CONFLICT RESOLUTION IN BUSINESS, FAMILIES, AND THE LEGAL SYSTEM* 10-11 (1990) (discussing the savings realized through negotiating a settlement); SAMUEL D. THURMAN ET AL., *CASES AND MATERIALS ON THE LEGAL PROFESSION* 250-51 (1970) (discussing the importance of settlements in saving money, time, emotional distress, and judicial resources); Edward C. King & Don W. Sears, *The Ethical Aspects of Compromise, Settlement, and Arbitration*, 25 ROCKY MTN. L. REV. 454, 456-57 (1953) (discussing the ethical propriety of cost savings that settlements realize when compared with litigation); Allen M. Linden, *In Praise of Settlement: Towards Cooperation, Away from Confrontation*, 7 CAN. COMMUNITY L.J. 4, 4-7 (1984) (approving settlements as avoiding cost, needless expenditure of time, and anxiety); cf. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) (arguing that settlement is not "preferable to judgment" and should be treated "as a highly problematic technique for streamlining dockets").

17. See ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, *INTERVIEWING, COUNSELING, AND NEGOTIATING* 358 (1990) (describing the "economic approach to negotiating [as] address[ing] conflicts where . . . each [party] would prefer to reach an agreement rather than accept a deadlock"); A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 109-12 (2d ed. 1989) (applying an economic efficiency model to civil litigation settlements); John G. Cross, *Negotiation as a Learning Process*, 21 J. CONFLICT RES. 581, 585 (1977) (describing the perspective that the bargaining process is a "mechanism for dividing the fruits of cooperation"); Gary T. Lowenthal, *A General Theory of Negotiation Process, Strategy, and Behavior*, 31 U. KAN. L. REV. 69, 73-74 (1982) (discussing the maximization of all involved interests achieved through noncompetitive negotiations); cf. *People v. Evans*, 673 N.E.2d 244, 247 (Ill. 1996) (noting that "plea agreements . . . are governed to some extent by contract

of their separate resources when they trade assets and services.<sup>18</sup> If each party has access to full information and can assess his own preferences, then contract law assumes that any agreement will make both parties better off.<sup>19</sup> A settlement is societally efficient, compared to the alternative of requiring each party to keep what they have; namely, their chance of winning at trial, with all attendant risks and benefits.<sup>20</sup> So long as both parties end up in relatively better positions, society does not care who got the better of the deal.<sup>21</sup>

This economic model does not apply equally in the criminal setting for a variety of reasons. First, the model assumes, at a minimum, fully available information by both negotiating parties.<sup>22</sup> Civil contract theory has developed a substantial com-

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law principles") (citations omitted).

18. See, e.g., BASTRESS & HARBAUGH, *supra* note 17, at 377 (discussing the goal of self-maximization within the context of adversarial negotiation); MARVIN A. CHIRELSTEIN, *CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS* 2 (2d ed. 1993) ("The trading process is not a poker game in which one player wins what another loses; rather, it is a kind of joint undertaking which increases the wealth of both parties and from which both emerge with a measure of enhanced utility."); CHESTER L. KARRASS, *THE NEGOTIATING GAME* 141-45 (1970) (analyzing ways bargaining can maximize each party's preferences); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 10 (4th ed. 1992) ("[R]esources tend to gravitate toward their most valuable uses if voluntary exchange . . . is permitted."); THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 57 (2d ed. 1980) (discussing the ways negotiations help identify "focal points" that benefit both sides); I. William Zartman, *Negotiation as a Joint Decision-Making Process*, 21 J. CONFLICT RES. 619, 622 (1977) (discussing negotiation as a "positive-sum exercise").

19. See CHIRELSTEIN, *supra* note 18, at 59.

20. See THURMAN ET AL., *supra* note 16, at 250-51.

21. See, e.g., Andrew F. Daughety & Jennifer F. Reinganum, *Settlement Negotiations with Two-Sided Asymmetric Information: Model Duality, Information Distribution, and Efficiency*, 14 INT'L REV. L. & ECON. 283, 286 (1994) (noting the assumption that "the social objective function is . . . indifferent about the distribution of wealth").

22. Different bargaining models make varying assumptions about the kind of information that the parties must have. See Oran R. Young, *Strategic Interaction and Bargaining*, in BARGAINING: FORMAL THEORIES OF NEGOTIATION, *supra* note 15, at 1, 10 (1975) (noting, in the introduction to an anthology of bargaining theories, "the widespread habit of assuming perfect information along all dimensions . . . in constructing models of rational decisionmaking"). In any negotiation, the parties have differing expectations regarding the value of a well-understood product. See KARRASS, *supra* note 18, at 142-43. Sometimes, in addition, the parties are aware that their intelligence about the item may be inferior to the adversary's. See BASTRESS & HARBAUGH, *supra* note 17, at 367 ("Bargaining theory is premised on the existence

mon law addressing the problems that exist when this assumption is not satisfied.<sup>23</sup> The criminal context, however, builds on

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of imperfect information . . ."). The bargaining models mostly expect these negotiators to adjust their bargaining positions accordingly. *See id.* For some of the growing mathematical and economic literature analyzing information disparities between negotiating litigants, see Lucian Arye Bebchuk, *Litigation and Settlement Under Imperfect Information*, 15 RAND J. ECON. 404, 414 (1984) (analyzing the effects of information asymmetry on settlement negotiations); I. P. L. P'ng, *Strategic Behavior in Suit, Settlement, and Trial*, 14 BELL J. ECON. 539, 549 (1983) (applying game theory "with incomplete information"); Urs Schweizer, *Litigation and Settlement Under Two-Sided Incomplete Information*, 56 REV. ECON. STUD. 163, 175 (1989) (concerning "a game of litigation and settlement under two-sided incomplete information"); Gyu Ho Wang et al., *Litigation and Pretrial Negotiation under Incomplete Information*, 10 J.L. ECON. & ORG. 187, 187-88 (1994).

The game theory model of bargaining assumes a nearly perfect information system. *See* C.E. FERGUSON & J.P. GOULD, MICROECONOMIC THEORY 327 (5th ed. 1980) (elaborating on the assumption of full information under game theory). Under an economic, contract theory of bargaining, this assumption is relaxed somewhat and is replaced by an assumption that each attorney will adjust his expectations in bargaining based on his assessment that the other side has an informational advantage. *See* BASTRESS & HARBAUGH, *supra* note 17, at 361 (noting that "[t]he economic model of bargaining . . . builds in a dynamic for adjusting the previously developed 'confident expectations'"); Cross, *supra* note 17, at 597 ("[A]s anticipated settlement dates approach, however, the parties will get down to business, and the information flows will become much more reliable."); Young, *supra*, at 13, 16 (outlining the "outguessing regress" that may become part of strategic bargaining). A third, psychological theory of bargaining assumes *imperfect* information, in the sense that each lawyer tries to manipulate the adversary's perceptions. *See, e.g.,* Young, *supra* note 15, at 303-04 (describing the manipulation). Yet, the manipulation is of the perception, or inferences to be drawn from information, rather than of the basic information itself. *Cf.* Thomas C. Schelling, *An Essay on Bargaining*, 46 AM. ECON. REV. 281, 282-83 (1956) (distinguishing between deceiving the adversary on the facts and bluffing about their importance). The theory assumes that each side knows of the potential for manipulation and will adjust their expectations upwards or will investigate for further information as the attempted manipulation takes place. *See* BASTRESS & HARBAUGH, *supra* note 17, at 367 (discussing informational disparities in bargaining); *cf.* G.L.S. Shackle, *Foreword* to ALAN CODDINGTON, THEORIES OF THE BARGAINING PROCESS at viii-x (1968) (analyzing how an economically optimizing agreement can be reached when the assumption of full information is not satisfied).

23. The legal doctrines that may apply where one side to a contract takes advantage of a significant information disparity include: misrepresentation, both intentional and unintentional, *see* RESTATEMENT (SECOND) OF CONTRACTS §§ 162-64 (1981); mistake, *see id.* §§ 152-53; and unconscionability, *see id.* § 208. Normally, parties to a contract have no duty to disclose information. *See, e.g.,* JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 9-20 (3d ed. 1987). However, concealing information or interfering with the other party's access to it may vitiate the contract. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 160, 164 (1981); W. Page Keeton, *Fraud—Concealment and Non-Disclosure*, 15 TEX. L. REV. 1, 2-7 (1936) (discussing

the premise that information typically is not accessible.<sup>24</sup> In most jurisdictions, bilateral discovery is limited severely.<sup>25</sup> Each party dominates access to the witnesses who have information benefitting its side.<sup>26</sup> The theoretical framework of civil bargaining—however counterfactual it may be<sup>27</sup>—thus differs in

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liability for concealing information prior to contract). Moreover, numerous statutes require disclosure in situations in which one party has a significant information advantage. See CALAMARI & PERILLO, *supra*, § 9-20; cf. Scott and Stuntz, *supra* note 2, at 1921-24 (discussing unconscionability resulting from information deficits and applying the doctrine to plea-bargaining theory); *id.* at 1957-60 (describing material mistake doctrine and analyzing its effect on plea bargaining).

24. It is perhaps for this reason that Candace McCoy views much of plea bargaining as "bad plea bargaining." CANDACE MCCOY, *POLITICS AND PLEA BARGAINING* xvii (1993). She argues:

The most important characteristic of good plea bargaining is that the attorneys and the judge have thoroughly investigated, analyzed, and discussed the case. Only then can they know its facts, what is likely to be proven, what legal defenses may be plausible, and what a fair sentence would be. If they do not address these issues fully, they have not accorded the defendant . . . due process . . . .

*Id.* at xvi-xvii.

25. See, e.g., *State v. Tune*, 98 A.2d 881, 884-86 (N.J. 1953) (noting and explaining reasons for limited criminal discovery); LAFAYE & ISRAEL, *supra* note 1, § 20.2, at 843-46 (surveying variations among criminal discovery rules); William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U. L.Q. 279, 285 (arguing for broader discovery in criminal cases); Stephen Gillers, *The Prosecution and Defense Functions: Do they Promote Justice?*, 42 REC. ASS'N B. CITY N.Y. 626, 633 (1987) (summarizing a proposal by Richard Uviller that discovery be liberalized in criminal cases); Uviller, *supra* note 1, at 115 (discussing limited discovery requirements in criminal cases); Zacharias, *supra* note 7, at 74-77 (discussing the prosecutor's obligation to do justice with respect to discovery issues); Eleanor J. Ostrow, Comment, *The Case for Preplea Disclosure*, 90 YALE L.J. 1581, 1622 (1981) (arguing for increased discovery before the acceptance of a plea).

26. In theory, neither side may block access to its witnesses. See, e.g., *Gregory v. United States*, 369 F.2d 185, 187-89 (D.C. Cir. 1966) (reversing a conviction when the prosecution instructed a witness not to speak with the defense); *State v. York*, 632 P.2d 1261, 1263-65 (Or. 1981) (holding that the prosecution may not "order or advise a witness not to speak to the defense"); *People v. Peter*, 303 N.E.2d 398, 403-04 (Ill. 1973) (implementing an Illinois statute forbidding the prosecution to prevent access to witnesses). In practice, however, prosecution and defense witnesses tend to align themselves with the side for which they are testifying and readily accept indications from the lawyers that they "have no obligation" to speak with the adversary. See, e.g., *United States ex rel. Trantino v. Hatrak*, 408 F. Supp. 476, 481-82 (D.N.J. 1976) (allowing the refusal of a witness to cooperate with the defense); *State v. Reichenberger*, 182 N.W.2d 692, 695-96 (Minn. 1970) (approving the prosecutor's suggestion that witness not speak to defense counsel outside of the prosecutor's presence).

27. The practical reality of civil litigation may bring it closer to the criminal set-

its core premises from criminal plea bargaining.

Second, the range of bargaining is limited in criminal prosecutions. In most civil cases, the parties can reach a settlement for any dollar amount between total victory and total capitulation. Pleas in criminal cases ordinarily represent an all or nothing choice between accepting guilt or establishing innocence.<sup>28</sup> A range of pleadable offenses and sentences may exist, but stigma and incarceration usually will result from any type of plea. One therefore cannot blithely assume that a middle ground exists somewhere in the spectrum of results that will make both the prosecution and defendant better off.

A related factor distinguishing criminal negotiations from most civil negotiations is the difficulty of quantifying and comparing the benefits that the parties receive from a plea agreement.<sup>29</sup> The prosecutor is charged with achieving a result that satisfies society's sometimes conflicting desires for vengeance, deterrence, and fairness.<sup>30</sup> The defendant seeks to minimize incarceration, loss of reputation, and damage to his personal affairs. These factors cannot be measured in comparable units, so society may not be able to tell when a trade-off between the prosecutor's prefer-

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ting. Numerous scholars have noted the prevalence of information asymmetries in civil litigation, which may result in cases being settled with significant facts undiscovered. See, e.g., Wayne D. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 789, 812-24 (discussing lawyers' perceptions concerning whether, in most litigation, one party has significant information that the other side does not have); Frank F. Flegal, *Discovery Abuse: Causes, Effects, and Reform*, 3 REV. LITIG. 1, 21-22 (1982) (discussing inefficiencies in discovery). In the criminal context, most defendants at least have some information that the prosecution does not have, namely, whether they committed the crime. This may serve to counterbalance prosecution informational advantages. Similarly, some civil defendants, particularly corporate defendants sued for employee misconduct, may not be able to discover the basic truth or falsity of plaintiff's claims. In some cases, therefore, the assumption that civil litigants have more information than criminal litigants does not flow from the mere availability of broader civil discovery.

28. See Fred C. Zacharias, *Reconceptualizing Ethical Roles*, 65 GEO. WASH. L. REV. 169, 179-80 (1997) (noting an absence of intermediate solutions in criminal cases). In a few situations, usually involving first offenders and non-serious offenses, diversionary programs that limit the stigmatic effect of a plea may be available.

29. Cf. BASTRESS & HARBAUGH, *supra* note 17, at 377 ("[A]dversarial theories assume that the parties to a negotiation want the same thing and possess the same values.").

30. See Carol A. Corrigan, *On Prosecutorial Ethics*, 13 HASTINGS CONST. L.Q. 537, 538-39 (1986) (discussing multiple constituents and goals of prosecutors).

ences and the defendant's preferences enhance total utility.<sup>31</sup> From a societal perspective, one cannot even assume that an increase in the defendant's utility is a good thing.<sup>32</sup>

Finally, arguably, a plea bargain itself should not be conceptualized as a voluntary agreement, because of its coercive elements. Both the prosecution and plaintiffs in civil suits force defendants into bargaining by filing their lawsuits. Once civil litigation commences, however, adversarial theory assumes that the opposing litigants can inflict equal costs upon each other for proceeding to trial.<sup>33</sup> The prosecution, in contrast, can exercise

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31. This, in part, arises from the fact that the prosecutor simultaneously may represent constituencies with differing utility curves. The victim and some portions of society may place a premium on vengeance, although other portions of society may consider vengeance unimportant, or even antisocial. (Consider, for example, the view in some segments of the community that O.J. Simpson's prosecution was racist). The prosecutor also may have to factor in the concurrent views of the defendant's family, for whom the defendant's incarceration imposes separate costs.

32. In the contract setting, for example, one would assume that if a trade leaves Party A as he was and improves the position of Party B, then the trade by definition serves societal utility. In the plea bargaining setting, a deal that improves the defendant's position may in fact disserve the public by letting a dangerous person go free or exacting a lesser degree of vengeance.

33. Cf. Zartman, *supra* note 18, at 622 (noting that in the ideal negotiation, "[b]oth sides have power over each other"). One side in the litigation may well be in a better position to bear or withstand the costs, but, in theory, each side's potential weapons are roughly the same. See, e.g., Robert J. Kutak, *The Adversary System and the Practice of Law*, in *THE GOOD LAWYER: LAWYERS' RULES AND LAWYERS' ETHICS*, *supra* note 9, at 172, 177 (discussing the adversary system's premises of equal quality and quantity of resources).

Numerous commentators have challenged the theory of the adversary system in civil litigation on the grounds that resources are rarely equal and that one litigant can frequently impose his will upon the other. See, e.g., Fiss, *supra* note 16, at 1075-78 (arguing against wholesale approval of settlements because consent to settlements "is often coerced" and a product of an "imbalance of power" between the parties); Marvin E. Frankel, *From Private Fights Toward Public Justice*, 51 N.Y.U. L. REV. 516, 518 (1976) (noting that the civil litigation system loses its moral justification when parties' resources are unequal); Luban, *supra* note 9, at 93-97 (noting some of the challenges to the justifications for the adversary system). The common reality of one side's discovery advantage in large litigation, one side's unilateral access to the threat of punitive damages, and the financial disparities between most litigants lends credence to the commentators' argument.

Nevertheless, analyzing the discrepancy between the theory and practice of the civil litigation system is beyond the scope of this Article. Determining that the adversary system as a whole relies on a fiction would require us to reexamine, and perhaps ultimately replace, the system in civil and criminal litigation alike. Because this Article focuses only on bargaining in the criminal context, it is sufficient for our

coercion unilaterally for the purpose of encouraging a settlement; for example, by threatening lengthy pretrial detention<sup>34</sup> and interfering with the defendant's ability to earn his livelihood. The defendant can do nothing in response, other than to refuse a plea. Thus, in a limited sense,<sup>35</sup> plea bargaining is inherently unequal. Defendants may be forced to agree to a settlement reflecting something other than their evaluation of the objective benefits of

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purposes to conclude that aspects of the criminal system make plea bargaining inherently unequal—perhaps more obviously so than bargaining in civil litigation. As a consequence, we cannot assume that plea bargaining works according to the overall theory of a well-working civil adversarial system.

34. See White, *supra* note 1, at 450 (noting that "[t]he prosecutor's unrestrained discretion may also reinforce his tendency to take advantage of the relatively ineffective bargaining position of defendants unable to make bail"). The starkest example of such coercion occurs when a defendant may be incarcerated for a longer period in pretrial detention than he can receive as the maximum sentence upon plea or conviction.

35. I do not suggest, as some commentators have, that a plea bargain is inherently coercive because the defendant must choose among unpleasant choices. Cf. Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 38, 55 (arguing that most plea bargains are unconscionable because they are a product of unequal bargaining power and involuntary because defendants have no real concept as to the reality of their situation, understanding only the possible penalties for *not* plea bargaining); Kenneth Kipnis, *Criminal Justice and the Negotiated Plea*, 86 ETHICS 93, 97-100 (1976) (arguing that pleas are the product of duress). Regardless of whether he pleads, the defendant is in a position that encompasses the risk of conviction; this is a fact of life with which the defendant literally must deal with as best he can. See Conrad G. Brunk, *The Problem of Voluntariness and Coercion in the Negotiated Plea*, 13 L. & SOC'Y REV. 527, 546-47 (1979) (explaining why plea bargains are not inherently coercive as long as certain criteria are met); Easterbrook, *supra* note 2, at 311-17 (arguing that a plea is no more coercive than the threatened sentence after trial); Joseph Goldstein, *For Harold Lasswell: Some Reflections on Human Dignity, Entrapment, Informed Consent, and the Plea Bargain*, 84 YALE L.J. 683, 699 (1975) (noting that the possibility of conviction and sentence "is part of any accused's reality in the plea bargain setting"); Schulhofer, *supra* note 1, at 70 (criticizing plea bargaining, but conceding problems in labeling it as inherently coercive); Alan Wertheimer, *The Prosecutor and the Gunman*, 89 ETHICS 269, 278-79 (1979) (arguing that plea bargaining is not coercive because the prosecutor's threat is legitimate); cf. Michael Philips, *The Question of Voluntariness in the Plea Bargaining Controversy: A Philosophical Clarification*, 16 L. & SOC'Y REV. 207, 219 (1981-82) (distinguishing voluntariness in the legal and voluntary senses). My point simply is that the prosecutor is in a position to up the ante in a way that may distort the attractiveness of the choices available to the defendant on the basis of issues only tangentially related to the merits. Cf. Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 865 (1995) (arguing that a prosecutor's ability to "overcharge" allows the prosecutor to "control the plea context").

pleading guilty. To be equivalent to the civil litigant's evaluation, the calculus would need to be based more on the defendant's risk averseness and his assessment of the chances at trial.<sup>36</sup>

These observations are not intended to suggest that plea bargaining is inappropriate. They instead suggest simply that one cannot make the same assumption of appropriateness that typically is made regarding civil settlements. The fact that the parties have reached an agreement does not mean presumptively that a settlement is a good thing. To accept plea bargaining as achieving just results, one either must modify the contract theory or identify other rationales for the negotiating process. Part II of this Article discusses some of the other possible justifications, as well as a rationale for plea bargaining that builds upon the contract model.<sup>37</sup>

## II. THE JUSTIFICATIONS FOR PLEA BARGAINING

In order to identify a lodestar for determining the justness of plea bargain process or results, one must be able to refer to particular premises or expectations regarding how the plea-bargaining system should work. These premises change as one considers different rationales for the plea-bargaining system.

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36. I hasten to recognize that the distinction between the civil and criminal contexts does not always hold true. See *supra* note 33. There are civil cases in which one party can pressure the other into conceding. The most notable recent example was the Office of Thrift Supervision's seizure of the assets of the Kaye, Scholer law firm as a means to force the law firm to settle an administrative proceeding. See Joyce A. Hughes, *Law Firm Kaye, Scholer, Lincoln S & L and the OTS*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 177 (1993); Charles R. Zubrzycki, *Current Development, The Kaye, Scholer Case: Attorney's Ethical Duties to Third Parties in Regulatory Situations*, 6 GEO. J. LEGAL ETHICS 977, 979-80 (1993); see also Dennis E. Curtis, *Old Knights and New Champions: Kaye, Scholer, the Office of Thrift Supervision, and the Pursuit of the Dollar*, 66 S. CAL. L. REV. 985, 985-1001 (1993) (detailing the history of the Kaye, Scholer seizure and settlement); Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335, 368-69 (1994) (detailing the history of Kaye, Scholer seizure and settlement). Similarly, claims of wrongdoing against celebrities frequently have resulted in quick and private settlements because the defendant cannot afford the negative publicity. Cf. Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303, 1323 n.67 (1995) (describing settlements purchased by wealthy public figures). The exercise of injunctive power and the threat of punitive damages also can bring significant pressure to bear on parties in civil settlement negotiations. It is, however, fair to assert that the unequal bargaining power is heightened and more universal in the criminal context.

37. See *infra* note 52 and accompanying text.



As Figure I illustrates, justifications for plea bargaining can be divided into two categories. First, some justifications assume that the plea-bargaining process will bring about an appropriate, perhaps even an optimal, result as measured by the traditional purposes of criminal prosecution and punishment. Some proponents of plea bargaining argue that the system reflects the likely results of the trial system, but at a lower cost.<sup>38</sup> Others suggest that flexible plea bargaining produces results for defendants that are fairer than the results of the trial process because: (1) prosecutors will take equitable factors into account in pleas that simultaneously encompass guilt and sentencing issues;<sup>39</sup> and (2) prosecutors will equalize results among similarly situated defendants and limit the effects of rigid legislation.<sup>40</sup> Finally, some commentators suggest that a plea-bargaining system empowers defendants by giving them choices regarding the outcome over which they have no control in the trial process.<sup>41</sup>

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38. See, e.g., Church, *supra* note 2, at 512 (stating that negotiated dispositions in a properly constructed system will approximate the probable results of trial); cf. Robert B. Gordon, *Private Settlement as Alternative Adjudication: A Rationale for Negotiation Ethics*, 18 U. MICH. J.L. REFORM 503, 504 (1985) (arguing that "a proper goal of negotiation is to produce a pattern of outcomes that reflects the would-be results of the controversies were they formally litigated").

39. See, e.g., LAFAYE & ISRAEL, *supra* note 1, § 21.1, at 900 (discussing flexibility inherent in plea bargaining that enables prosecutors to achieve fair, intermediate judgments that are unavailable at trial); Alschuler, *supra* note 1, at 71 ("Plea negotiation plainly has a marked advantage over traditional forms of adjudication in that it . . . affords a far greater range of alternatives than do most trial proceedings."); Gifford, *supra* note 35, at 45 (citing the prosecutor's ability to adjust pleas based on equitable factors as "[t]he key to understanding the so-called 'plea bargaining' process").

40. See, e.g., Bubany & Skillern, *supra* note 1, at 482 (noting that plea bargaining is "[j]ustified in the name of individualized treatment"); Gifford, *supra* note 35, at 61 (arguing that prosecutors in plea bargaining should be guided by the principle that "the criminal justice system should treat similarly situated defendants in an equal manner"); Lundquist, *supra* note 1, at 514 (arguing that notions of equality have been forgotten in the practice of plea bargaining); cf. Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1, 4-7 (1971) (arguing the importance of consistency in prosecutorial decision making).

41. See, e.g., Goldstein, *supra* note 35, at 685 (arguing that the rules governing plea bargaining "are rooted in a basic commitment . . . to respect human dignity by protecting the right of every adult to determine what he shall do and what may be done to him").

## FIGURE I — JUSTIFICATIONS FOR PLEA BARGAINING

*Just Result Theories*

1. Bargains reflect what would happen at trial.<sup>42</sup>
2. Prosecutors (*P*) can take equitable factors into account in deciding upon a combined guilt and sentence plea.<sup>43</sup>
3. *P* can equalize among Defendants (*D*) and limit the effect of unfair legislation.<sup>44</sup>
4. Bargaining empowers the participants.<sup>45</sup>

*Resource/Efficiency Theories*

5. Bargaining is inevitable/people would do it anyway.<sup>46</sup>
6. Bargaining saves resources.
7. Bargaining maximizes deterrence, releases resources, and is not unfair to *Ds*.<sup>47</sup>
8. Bargaining makes both parties better off than would proceeding to trial.<sup>48</sup>

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42. This rationale hereinafter is referred to as the "trial approximation theory."

43. This rationale hereinafter is referred to as the "equity theory."

44. This rationale hereinafter is referred to as the "equality theory" or "equalization theory."

45. This rationale hereinafter is referred to as the "empowerment theory."

46. This rationale hereinafter is referred to as the "inevitability theory."

47. This rationale hereinafter is referred to as the "Easterbrook theory."

48. This rationale hereinafter is referred to as the "contract theory."

The second category of justifications rests on notions of efficiency or resource preservation. A few proponents of the system simply accept plea bargaining as inevitable, in the sense that prosecutors and defendants would find a way to bargain even in the absence of an accepted plea bargaining process.<sup>49</sup> Most efficiency-oriented proponents, however, focus on the comparative costs of convictions obtained through pleas and convictions obtained after trial. At the most basic level, some justify plea bargaining simply because it saves prosecutorial and judicial resources.<sup>50</sup> Frank Easterbrook's more sophisticated account argues that the plea-bargaining system releases law enforcement resources in a way that enables prosecutors to maximize deterrence, while at the same time being fair to defendants (i.e., because they benefit from bargains).<sup>51</sup> A related, "contractarian" theory suggests that the plea-bargaining system is sound, in a utilitarian sense, because it both saves judicial resources and makes all participants better off than they would be if they had taken the risk of losing at trial.<sup>52</sup>

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49. Cf. John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 L. & SOC'Y REV. 261, 262-65 (1979) (noting that the plea-bargaining system replaced an efficient common law summary jury trial process).

50. See, e.g., *Santobello v. New York*, 404 U.S. 257, 260 (1971) ("Properly administered, [plea bargaining] is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities."); LAFAYE & ISRAEL, *supra* note 1, § 21.1, at 899 (citing an address by Chief Justice Burger in which he stated that a guilty plea saves the judiciary manpower and resources); Bubany & Skillern, *supra* note 1, at 483 ("[T]he primary justification for plea bargaining is system maintenance—the necessity of its use if most criminal offenders are to be processed."); John S. Edwards, *Professional Responsibilities of the Federal Prosecutor*, 17 U. RICH. L. REV. 511, 529 (1983) ("[P]lea bargaining is essential to conserve the time and resources of the prosecutor and the courts . . ."); Lynch, *supra* note 3, at 115 (noting that "many have concluded that . . . without [plea bargaining], the courts would be overwhelmed by a mass of trials they would be unable to handle"); Dominick R. Vetri, Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865, 881-82 (1964) (identifying one of the goals of plea bargaining as the preservation of judicial and prosecutorial resources).

51. See Easterbrook, *supra* note 2, at 308-10; see also Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1974-78 (1992) (refining the theory); Schulhofer, *supra* note 1, at 44-46 (analyzing and criticizing the Easterbrook theory).

52. See, e.g., *United States v. Krasn*, 614 F.2d 1229, 1233 (9th Cir. 1980) ("[A] plea bargain itself is contractual in nature and 'subject to contract-law standards.'") (citation omitted); Scott & Stuntz, *supra* note 2, at 1966-68 (elaborating on contract

Let us consider what assumptions the just result justifications make about how the system will bring those results about. There are two ways in which plea bargaining might approximate trials. First, adversary bargaining might be expected to produce similar results as adversary trials. Second, prosecutors might refuse to agree to pleas that reflect anything other than likely trial results.

On the surface, it seems improbable that the first scenario can hold true. As a process, plea bargaining lacks many of the building blocks of adversarial theory, including the presence of neutral and passive decision makers and rules that govern the evidentiary and arbitration process.<sup>53</sup> For a convergence to be plausible, several premises need to be satisfied. The bargainers, like trial lawyers, must be active and aggressive on behalf of their clients.<sup>54</sup> They must have roughly equal access to resources and information.<sup>55</sup> They must also respond to one another in a fashion that in some way makes up for the absence of a judge and jury.<sup>56</sup> Perhaps most importantly, their goals—the desired outcome—must be the same as at trial. For the most part, that goal is to gain an advantage in the determination of legal, rather than factual, guilt.<sup>57</sup>

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theory); cf. Church, *supra* note 2, at 513-15 (arguing that a contractual plea is valid because it will, in practice, approximate the likely results of trial); Gifford, *supra* note 35, at 38 (arguing that plea bargains are not viewed accurately as "consensual agreements entered into by defendants after adversarial negotiations"); Lynch, *supra* note 3, at 115 ("A second defense is that plea bargaining is . . . morally legitimate, since both sides voluntarily engage in and benefit from the practice.").

53. See LANDSMAN, *supra* note 9, at 2-4 (discussing the adversary system's premise of a neutral and passive decision maker).

54. See Zacharias, *supra* note 7, at 61 (discussing the nature of counsel required by the adversary system).

55. See, e.g., Frankel, *supra* note 33, at 518 (noting that the system cannot operate as intended when the parties' resources are unequal); Murray L. Schwartz, *The Zeal of the Civil Advocate*, 1983 AM. B. FOUND. RES. J. 543, 547 (noting the premise of the adversary system that the parties should be "roughly equal in their ability to perform"); see also *supra* text accompanying note 22 (noting the varying assumptions different bargaining models make about the kind of information the parties must have).

56. Under the adversarial model, the presence of a neutral, passive arbiter of the evidence provides the objectivity that counteracts, or draws the best from, the one-sided nature of the adversaries' presentations. See Zacharias, *supra* note 7, at 61-62 (explaining the building blocks of the adversary model).

57. The distinction between "factual" and "legal" innocence can be traced to Herbert Packer's seminal work, HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968). Someone who is factually innocent did not commit the crime.

Alternatively, one might replace the notion that adversarial bargaining works like adversarial trial advocacy with a notion that some independent feature of the bargaining system—most likely, the actions of prosecutors—assures that results will be similar. For this to hold true, one must believe that prosecutors can accurately estimate the likelihood of conviction and will gear plea offers exclusively to that factor.

One could interpret the trial approximation model in a more systemic way. Rather than viewing individual plea bargains as a "snapshot" of what would occur at trial, one could conceive the corpus of plea bargains as producing a body of results that parallels trial results.<sup>58</sup> In other words, bargained results approximate the average trial outcome for similar cases. At one level, this interpretation is appealing because it helps explain how bargaining reduces risk for the class of pleading defendants; if bargains merely mirrored individual trials, then the outcome of individual cases would remain unpredictable.

This approach has at least two difficulties. First, the moral justification for trials is that they produce good, or fair, results.<sup>59</sup> Alternatively, litigation is justified on the basis that the sum of all trials produces appropriate outcomes.<sup>60</sup> Extending these justi-

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Someone who is only legally innocent engaged in the offending facts, but is, should be, or will be acquitted because evidence is suppressed or because of other deficiencies of proof. *See id.* at 167.

58. *See, e.g.,* Gordon, *supra* note 38, at 504 ("[A] proper goal of negotiation is to produce a pattern of outcomes that reflects the would-be results of the controversies were they formally litigated.").

59. *See, e.g.,* Monroe H. Freedman, *The Professional Responsibility of the Prosecuting Attorney*, 55 GEO. L.J. 1030, 1030-31 (1967) (arguing that partisan combat is the best method for arriving at truth); John Thibaut et al., *Adversary Presentation and Bias in Legal Decisionmaking*, 86 HARV. L. REV. 386, 399-401 (1972) (concluding, based upon empirical study, that adversarial trials moderate the effect of juries' biases). Of course, many commentators dispute that the adversary system achieves "truth." *See, e.g.,* Alan Donagan, *Justifying Legal Practice in the Adversary System*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS*, *supra* note 9, at 123, 126-33 (arguing that the adversary system cannot be justified on the basis of truth, but can be justified as a means of ensuring human dignity); Luban, *supra* note 9, at 91-93 (challenging the standard justifications for the adversary system); Stephen A. Saltzburg, *Lawyers, Clients, and the Adversary System*, 37 MERCER L. REV. 647, 651-55 (1986) (arguing that the adversary system is "misdescribed as a search for truth").

60. *See, e.g.,* CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS*, § 10.1, at 565-69 (1986) (discussing the contribution that an adversary presentation makes to a prop-

fications to plea bargaining attenuates the logic. It is difficult to imagine that a series of bargains that approximate trials by balancing faulty bargains in one direction against faulty bargains in the opposite direction produces justice.<sup>61</sup> Similarly, to the extent that the systemic justification for litigation already assumes that trials are a rough approximation for fair results, approximating the approximation further dilutes the product. One could justify the systemic result on an efficiency basis,<sup>62</sup> as under the Easterbrook model discussed above,<sup>63</sup> but efficiency is not the main thrust of the trial approximation models.<sup>64</sup>

Second, if there is a moral justification for the systemic trial approximation model, then it must be the notion that plea bargains, on average, will produce similar results within a group of similar cases, which will, in turn, moderate risk while maintaining relatively fair outcomes for defendants. This is equivalent to the theory that plea bargains equalize the treatment of similarly situated defendants, a theory that this Article analyzes separately.<sup>65</sup> While acknowledging the possibility that the "snapshot" approach may be an oversimplification—or only one view—of the trial approximation model, this Article treats it as an independent theory.

As I have just suggested, the trial approximation rationale both merges and diverges with the other prosecutor-oriented justifications for plea bargaining; namely, that prosecutors will produce

erly grounded decision, taking due account of all its faults); Fuller, *supra* note 9, at 45 (discussing the benefits of the adversary system).

61. Of course, to a limited extent, this is precisely the theory embraced by advocates of the adversarial system who claim that the system, overall, produces fair results.

62. In other words, society should be concerned not with whether an individual plea bargain achieves a trial-like outcome, but rather whether all plea bargains together achieve what would be the average results for similar cases that are litigated. Under this approach, prosecutors should not focus on individual defendants, their lawyers, or the equities of any particular case. Rather, they should focus on whether the process moves in a way that assures the result will contribute to an appropriate averaging. On one view, the prosecutor might accomplish this by seeking to equalize results among cases (as under the equality theory). On another, Easterbrook-like, view, she does the job merely by assuring that prosecutors and defendants know about the bargain, which in turn helps establish the "price" of similar crimes. See *infra* note 78.

63. See *supra* note 51 and accompanying text.

64. Except, of course, to the extent that the theorists prefer bargained results to the parallel trial results because they save resources.

65. See *infra* note 68 and accompanying text.

equitable pleas in combined guilt/sentencing bargains and will equalize results among similarly situated defendants or among defendants unfairly penalized by rigid legislation. Both of the latter justifications assume, probably correctly,<sup>66</sup> that prosecutors dominate the offer that is set on the table. However, they make different assumptions about how prosecutors will act.

To produce equitable pleas, one must assume that prosecutors have a standard, other than the likelihood of conviction, to which they can refer in assessing each case.<sup>67</sup> In offering a plea, the prosecutor must look only to that fair result, rather than to what benefits herself or her office. One must assume further that the prosecutor will decide what form an offer will take independently of tactical or resource factors (such as the quality of the opposition).

If, however, equalizing results among defendants is the key to plea bargaining, then different premises provide the foundation for the system. Equalization must be important to the prosecutor. For this to be true, prosecutors must consider legal innocence at least as much as factual innocence. A guilty defendant who is likely to be acquitted at trial arguably should receive the same plea as one who is innocent and likely to be acquitted.<sup>68</sup>

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66. See generally Alschuler, *supra* note 1, at 65-100 (referring to a study by the *University of Pennsylvania Law Review* tending to show control by prosecutors over the choice of most pleas); Gifford, *supra* note 35, at 38 ("[T]he prosecutor substantially dictates the terms of plea agreements in most cases.").

67. Far from identifying standards used by prosecutors, the available empirical studies disagree even on whether prosecutors make plea-bargaining decisions based on sympathy for the defendant. One study suggests that almost 27% of prosecutors rely on sympathy as a determinant. See Vetri, *supra* note 50, at 901. Another argues that "almost every prosecutor" considers this factor. Alschuler, *supra* note 1, at 59.

68. The notion of equality, of course, is malleable. See, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1437-39 (2d ed. 1988) (discussing various models of equality); Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. PA. L. REV. 149, 191 (1992) ("['E]quality' itself is an empty concept for purposes of normative criticism."); Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 542 (1982) (arguing that the idea of equality "should be banished from moral and legal discourse as an explanatory norm"); see also discussion *infra* notes 99, 110, 126 (discussing different conceptions of "equality"). Arguably, for example, a prosecutor should compare the guilty defendant who will be acquitted to equally guilty defendants who are convicted. Selecting a base of comparison reflects a normative choice that includes an evaluation of practical factors; for example, the emphasis to be placed on obtaining some punishment, even if imperfect. When one analyzes the notion of equalizing results among defendants in the context of

Implicit in this rationale is the premise that the prosecutor can obtain the information necessary to determine how the defendant is situated, information that is often solely in the hands of the defendant and his attorney.

The final just result theory supporting plea bargaining is substantially different in nature. It assumes that bargaining is good as a process, because it includes and empowers the defendant in making decisions that affect his life.<sup>69</sup> The assumptions essential to this model have less to do with the numerical outcome of bargaining than with its mechanics. The process must include the defendant in a meaningful way. Defendants must receive information necessary to make choices, be able to transmit information that will be heard and taken seriously, and have some meaningful influence over both the nature of the plea offer<sup>70</sup> and whether to accept it.<sup>71</sup>

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specific cases, one becomes increasingly aware that the theory itself requires definition in order to be useful. Cf. James S. Fishkin, *Do We Need a Systematic Theory of Equal Opportunity?*, in *EQUAL OPPORTUNITY* 15, 15-17 (Norman E. Bowie, ed., 1988) (arguing the impossibility of defining priority rules to define equality).

69. See *supra* note 41 and accompanying text.

70. That is not to say that the defendant must be able to require a lower plea than the prosecutor is willing to offer, for that would undermine the whole notion of bargaining. The key, however, is that the defendant must be able to have some input, including pre-offer discussions over the range of punishment that is acceptable to him and exploration of creative alternatives to pleas the prosecutor may offer, such as diversion or restitution possibilities.

71. Technically, legal requirements assure that guilty pleas are "voluntary," in the sense that the defendant understands the nature of the plea and freely gives up his right to trial. See, e.g., *Brady v. United States*, 397 U.S. 742, 745 (1970) (holding that a guilty plea was not involuntary merely because it was prompted by the defendant's fear of the death penalty); *McCarthy v. United States*, 394 U.S. 459, 463-64 (1969) (holding that the judge's failure to evaluate the voluntariness of a plea is grounds for automatic reversal). This type of voluntariness is meaningless, however, if the defendant's choice to plead is prompted by his belief that the alternative of trial, in reality, is unavailable—for example, because the defense counsel's ineptness or unwillingness to spend the necessary time on trial preparation eliminates the chance of acquittal. See, e.g., *Alschuler, supra* note 3, at 1200-03 (discussing the financial incentives to defense counsel to avoid trial); Brunk, *supra* note 35, at 546 (arguing that a noncoercive plea process requires that there "be an assurance of full due process at trial if the defendant refuses a bargain and opts for trial"); Stephen J. Schulhofer, *Effective Assistance on the Assembly Line*, 14 N.Y.U. REV. L. & SOC. CHANGE 137, 142 (1986) (noting that counsel's failure to investigate may, realistically, undermine a defendant's ability to make an intelligent plea); cf. Charles W. Thomas & W. Anthony Fitch, *Prosecutorial Decision Making*, 13 AM. CRIM. L. REV. 507, 546 (1976) (arguing that, despite the voluntariness requirements, defendants still plead guilty "without a full understanding of the bargain struck").



Figure II summarizes some of the essential premises underlying the just result justifications for plea bargaining.

FIGURE II — THE PREMISES UNDERLYING  
THE JUST RESULT THEORIES

*PLEA BARGAINS APPROXIMATE TRIALS*

- *P* AND DEFENSE COUNSEL MUST BE ACTIVE AND AGGRESSIVE
- *P* AND *D* MUST HAVE EQUAL ACCESS TO RESOURCES/INFORMATION
- *P* OR DEFENSE COUNSEL MUST HAVE OBJECTIVITY THAT SUBSTITUTES FOR JUDGE AND JURY
- *P* MUST FOCUS ON *D*'S LEGAL INNOCENCE OR *P* MUST CONTROL THE ULTIMATE OFFER
- *P* CAN AND WILL ESTIMATE THE LIKELIHOOD OF CONVICTION
- *P* MUST BASE OFFER PRIMARILY ON *D*'S LEGAL INNOCENCE/GUILT

*PLEA BARGAINING PRODUCES EQUITABLE RESULTS*

- *P* CONTROLS THE ULTIMATE OFFER
- *P* MAINTAINS STANDARDS FOR WHAT CONSTITUTES FAIR RESULTS
- STANDARDS MUST NOT INCLUDE TACTICAL OR RESOURCE FACTORS
- *P* MUST BASE OFFER EXCLUSIVELY ON THE STANDARDS

*PLEA BARGAINING EQUALIZES RESULTS FOR SIMILAR DEFENDANTS*

- *P* CONTROLS THE ULTIMATE OFFER
- *P* CAN OBTAIN INFORMATION ABOUT *D*'S INNOCENCE/SITUATION
- *P* MUST FOCUS ON LEGAL INNOCENCE (PROSECUTORS THROUGHOUT THE JURISDICTION MUST ACT SIMILARLY)

*PLEA BARGAINING EMPOWERS DEFENDANTS*

- *D* MUST RECEIVE INFORMATION
- *D* MUST BE ABLE TO TRANSMIT INFORMATION
- *D* MUST HAVE INPUT INTO PLEA OFFER
- *D* MUST CONTROL THE DECISION TO ACCEPT OR REJECT THE PLEA

As Figure II illustrates, each of the just result theories focuses primarily on the actions of the bargaining participants.

The efficiency rationales, in contrast, rely more on basic assumptions about the nature of the criminal justice system itself. The argument that plea bargaining is inevitable is simply an assertion,<sup>72</sup> probably unverifiable,<sup>73</sup> about the nature of the system. Similarly, the proposition that bargaining saves resources makes only one assumption: a voluntary settlement costs less, in time and resources, than a trial.<sup>74</sup>

The Easterbrook resource allocation theory, however, adds significant premises. It assumes that the prosecutor can make an assessment of how best to use trial resources and how best to balance the certainty of pleas and the risk of losing at trial in order to maximize overall deterrence.<sup>75</sup> The theory then further assumes that prosecutors will act on that basis when making plea offers.<sup>76</sup> Perhaps most significantly, recognizing that the crimi-

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72. See, e.g., Lynch, *supra* note 3, at 116 (noting the argument that "the abolition of plea bargaining would be impossible because the parties would continue the practice even if higher authorities tried to curb it"); cf. HEUMANN, *supra* note 1, at 157-58 (pointing to the inevitability of some pretrial disposition processes).

73. One experiment and attempt to study the effects of banning plea bargaining began in 1975 in Alaska. See NAT'L INSTITUTE OF JUSTICE, U.S. DEPT OF JUSTICE, ALASKA BANS PLEA BARGAINING viii (1980). A report on that experiment found ambiguous results regarding whether other mechanisms had substituted for bargaining. See *id.* at 31. The overall rate of conviction and imprisonment seems to have increased, but the frequency of disposition by plea remained fairly constant. See *id.* at 110, 112.

74. See Edwards, *supra* note 50, at 529 (approving plea bargains as avoiding the costs and risks of litigation).

75. According to the Easterbrook theory, prosecutors set the price of crime by deciding what combination of negotiated convictions and penalties will maximize deterrence, while at the same time freeing up sufficient resources to allow further prosecution (and trials) in other cases that will further enhance deterrence. See Easterbrook, *supra* note 2, at 309. Easterbrook assumes that prosecutors will not prosecute defendants they know to be factually innocent, and that, in an ideal world, innocent defendants generally will refuse to plead guilty. See Easterbrook, *supra* note 51, at 1969. For defendants who are factually guilty, but may be legally innocent, the theory assumes that prosecutors have the information necessary to determine the likelihood of acquittal and will make their plea offers so as to maximize deterrence. See *id.* at 1970.

76. As Stephen Schulhofer effectively argues, the Easterbrook theory (and several others) assume away the reality of agency costs. See Schulhofer, *supra* note 1, at 51. Prosecutors have significant incentives to base plea offers on factors other than maximizing deterrence, including feathering their own reputations, personal workload considerations, and their relations with the private bar. See *id.* at 50-51. The problem of agency costs and how prosecutors should reconcile them with their duty to do justice in plea bargaining is explored in Part III.H *infra*.

nal justice system is about more than just maximizing resources, Easterbrook's theory assumes that defendants, too, are better served by a plea bargain.<sup>77</sup> For this to hold true, the defendant's lawyer must be in position to make a realistic assessment of the chances of acquittal at trial and the likely sentence after conviction, and must in fact make the decision of whether to accept an offer in light of those considerations alone.<sup>78</sup>

Robert Scott and William Stuntz's complex contract model is similar.<sup>79</sup> Rather than make assumptions about optimality of deterrence, Scott and Stuntz instead justify bargaining on the utilitarian principle that freedom to contract is a good thing. Voluntary bargains tend to make both sides better off when resource considerations and the risk of losing at trial are taken into account; prosecutors obtain "a larger net return from criminal convictions . . . [and] defendants, as a group, are able to reduce the risk of the imposition of maximum sanctions."<sup>80</sup> Each party generally is in the best position to assess their own utility and risk averseness. By

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77. See generally Easterbrook, *supra* note 2, at 309 ("If defendants and prosecutors . . . both gain, the process is desirable."). The notion that defendants are better off with plea bargains than with the trial alternatives is an essential element of the moral justification for Easterbrook's theory. Maximizing deterrence, alone, would not suffice to justify plea bargaining because the benefits of deterrence might be outweighed by fairness costs to defendants. If defendants can be seen to benefit, however, then bargains make everyone better off. *But cf.* Kipnis, *supra* note 3, at 556-57 (noting the public benefits of open jury trials).

78. Recognizing that some defendants will act more "ignorantly" than others, Easterbrook rejects the argument that each individual counsel and defendant must be informed and make intelligent decisions. See Easterbrook, *supra* note 2, at 309. For him, the key is that the defense bar as a whole can assess the information about "the going rate" that a series of plea bargains provides. *Id.* at 310. Nevertheless, to justify contractual arrangements between prosecution and defense, Easterbrook needs to be able to conclude that both parties end up better off, because otherwise, "they would not strike the deals." *Id.*; see also Easterbrook, *supra* note 51, at 1975 ("Settlements of civil cases make both sides better off; settlements of criminal cases do so too."). For this premise to hold true, Easterbrook implicitly must be assuming some level of informed and self-interested bargaining on the defendants' behalf.

79. Scott and Stuntz are not the creators of the contract theory, but their recent analysis and refinement of contract reasoning represents the best elaboration of the theory. See generally Scott & Stuntz, *supra* note 2, at 1910-11 (arguing that the norm of expanded choice justifies plea bargaining and that limitations on bargaining autonomy should not apply in the plea-bargaining context).

80. *Id.* at 1915.

definition, therefore, most bargains can be presumed to be good, provided they are based on realistic assessments and not coerced.

As Scott and Stuntz recognize, their logic depends on several structural assumptions. First, it assumes that plea bargains are dickered or individualized, so that the participants in fact are making meaningful choices and concessions about their preferences.<sup>81</sup> Second, it assumes that counsel on both sides act aggressively to further their side's actual interests, at least as aggressively as they would act at trial.<sup>82</sup> Deficiencies in representation may arise simply from an advocate's lack of information<sup>83</sup> or from personal interests that conflict with the client's (i.e., agency costs).<sup>84</sup>

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81. *See id.* at 1922-23.

82. *See generally id.* at 1924 (arguing that, given the defendant's entitlement to a trial, it is in the best interest of the prosecutor to bargain for a deal with each defendant). Scott and Stuntz recognize that lawyers of differing quality may reach different results. A poor plea bargain negotiated by a bad lawyer, however, still may benefit the client when it is compared to the likely result the defendant's bad lawyer will achieve at trial. *See id.* at 1922.

83. Scott and Stuntz focus on one class of information in which prosecutors routinely fail to obtain adequate information. They argue that the plea-bargaining process encourages prosecutors to assume for purposes of plea bargaining that all defendants are guilty. Structural aspects of the process prevent defense counsel from being able to transmit the information establishing defendants' innocence. Scott and Stuntz therefore stake out the position that innocent defendants who plead guilty to avoid the risk of trial receive overly harsh plea offers. *See id.* at 1942-44.

84. *See id.* at 1928. In other words, clients may not benefit even from a dickered bargain when counsel negotiates to serve his own interests, such as avoiding trial for financial or reputational reasons. Because most criminal defense lawyers are not paid at an hourly rate by willing clients, their calculus of when going to trial is beneficial may be significantly different than the calculus of lawyers in the civil litigation context. Defense counsel agency costs are discussed in Part III.F.2 *infra*.

Figure III summarizes the premises underlying the efficiency justifications.

FIGURE III — THE PREMISES UNDERLYING  
THE EFFICIENCY THEORIES

*PLEA BARGAINING IS INEVITABLE*

*PLEA BARGAINING SAVES PROSECUTORIAL AND JUDICIAL  
RESOURCES SETTLEMENT COSTS LESS THAN TRIAL*

*PLEA BARGAINING OPTIMIZES DETERRENCE/IS FAIR TO THE D*

- *P* CONTROLS THE ULTIMATE OFFER
- *P* HAS THE INFORMATION NEEDED TO ASSESS *D*'S LEGAL INNOCENCE
- *P* CAN ASSESS THE OPTIMAL USE OF RESOURCES FOR DETERRENCE
- *P* ACTS IN THE INTERESTS OF OPTIMIZING DETERRENCE
- DEFENSE COUNSEL REALISTICALLY ESTIMATES LIKELIHOOD OF CONVICTION AND PROBABLE SENTENCE
- DEFENSE COUNSEL ACTS PRIMARILY<sup>85</sup> ON THE BASIS OF THE LIKELIHOOD OF CONVICTION AND PROBABLE SENTENCE

*PLEA BARGAINING MAKES EVERYONE BETTER OFF*

- PLEA OFFERS ARE INDIVIDUALIZED
- *P* AND DEFENSE COUNSEL BARGAIN AGGRESSIVELY
- *P* AND DEFENSE COUNSEL HAVE ADEQUATE INFORMATION
- *P* AND DEFENSE COUNSEL ACT ONLY IN THEIR CLIENTS' INTERESTS

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85. Easterbrook recognizes that sometimes defendants might act on the basis of the potential costs of litigation, but suggests that ordinarily a defendant's self-interest will depend on the likely results. See Easterbrook, *supra* note 2, at 297.

Together with Figure II, it provides a reference point for evaluating whether, in any given case, the various justifications for plea bargaining hold water. To the extent a justification is used and its premises are not satisfied, the justification necessarily fails *unless* the defect is counteracted through artificial means. Arguably, a prosecutor who imposes or takes advantage of a plea bargain when its justification is absent fails to serve justice.

### III. ANALYZING THE PROSECUTOR'S DUTY TO BARGAIN JUSTLY

In critiquing the plea-bargaining system, scholars have noted numerous scenarios or ways in which plea bargaining may produce undesirable results.<sup>86</sup> Some of these scenarios arise from the possibility that prosecutors will offer pleas or take advantage of a plea situation based on an unfair advantage;<sup>87</sup> for example, situations in which prosecutors have information that is unavailable to the defense. Alternatively, plea-bargaining quandaries may occur when prosecutors are tempted to pressure defendants to take unfavorable pleas or to offer pleas that inadequately consider societal interests, perhaps for self-serving reasons.<sup>88</sup> Finally, ethical issues may stem from defects in the

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86. For the most comprehensive studies of questionable plea-bargaining scenarios by one of plea bargaining's harshest and most erudite critics, see Alschuler, *supra* note 1, and Alschuler, *supra* note 3. See also Sarah J. Cox, *Prosecutorial Discretion: An Overview*, 13 AM. CRIM. L. REV. 383, 426 (1976) (discussing coercive pleas); Gifford, *supra* note 35, at 63 (noting scenarios involving agency costs, corruption, racism, and other "invidious factors"); Green et al., *supra* note 1, at 503 (discussing problems associated with inadequate counsel and irregularities in the process); Scott & Stuntz, *supra* note 2, at 1947 (discussing unfair pleas offered to innocent defendants willing to plead guilty).

87. See, e.g., McDonald et al., *supra* note 2, at 9 (discussing instances of improper "bluffing" by prosecutors in cases in which the prosecutor had unique access to information); Schulhofer, *supra* note 71, at 142-43 (noting the failure of defense counsel to investigate adequately before plea); Ostrow, *supra* note 25, at 1608 (arguing that most defendants' lack of information makes many guilty pleas nonconsensual).

88. See, e.g., Alschuler, *supra* note 1, at 62-64, 106-07 (discussing the prosecutor's tendency to offer defendants excessive leniency or to pressure defendants to plead guilty when the defendant is most likely to be innocent); Bruce A. Green, "Package" Plea Bargaining and the Prosecutor's Duty of Good Faith, 25 CRIM. L. BULL. 507, 514-16 (1989) (discussing scenarios involving related defendants in which prosecutors may coerce pleas); Kipnis, *supra* note 3, at 556-57 (discussing forgotten benefits of public trials); Schulhofer, *supra* note 1, at 49-60 (discussing agency costs and other reasons why prosecutors may encourage inappropriate pleas).

plea-bargaining process, as in the case of the prosecutor who faces an ineffective adversary in negotiations.<sup>89</sup>

Addressing all the individual scenarios, or even discussing them grouped as above, risks creating an unhelpful laundry list of problems. The following section therefore attempts to distill the criticisms of plea bargaining into a series of dilemmas, punctuated by hypothetical examples, that delineate the issues of how prosecutors should act when confronted by alleged flaws in the process.<sup>90</sup> Throughout the analysis, the answers necessarily depend on how the prosecutor in question initially defines the function of pleas. The proof is in the pudding: applying different theories of plea bargaining produces different conceptions of justice.

In the following pages, I remit some hypotheticals and some uncertain applications of the plea-bargaining theories to the margins. The uncertainties reflect, in part, a subsidiary point mentioned earlier.<sup>91</sup> By applying the bargaining theories, one can notice deficiencies or superficialities in the theories. The goal of equalizing the treatment of defendants through plea bargaining, for example, seems less workable when one tries to identify to whom prosecutors should compare particular defendants.<sup>92</sup> The contract and Easterbrook models become problematic when one analyzes the level of information participants to the bargain are presumed to share.<sup>93</sup> The exercise of working through the plea-bargaining scenarios, therefore, may help us identify weaknesses in and rethink the theories themselves.

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89. See, e.g., Alschuler, *supra* note 3, at 1205 (discussing reasons why defense attorneys may act ineffectively in the plea context); Cox, *supra* note 86, at 428 (discussing the reality of ineffective defense counsel in plea bargaining); Goldstein, *supra* note 35, at 701 (arguing that a prosecutor should have responsibilities to a defendant beyond ensuring that his plea is technically voluntary); Green et al., *supra* note 1, at 507-08, 515-21 (discussing practice and case law governing inadequacy of counsel in the plea context); Schulhofer, *supra* note 71, at 142 (arguing that plea bargaining should be eliminated, in part because of inadequacy of defense counsel in plea bargaining).

90. This Article does not address the related, but somewhat separate, issue of whether prosecutors should be forbidden to "overcharge" as a method of coercing a favorable plea. See, e.g., Alschuler, *supra* note 1, at 85-105 (discussing the practice of overcharging).

91. See *supra* p. 1126.

92. See *infra* notes 99, 111, 126.

93. See *supra* notes 22, 23, 78; *infra* notes 105, 106, 112, 114.

*A. Confronting the Possibility That the Defendant is Factually Innocent*

One criticism that has been leveled at plea bargaining is that the bargaining system is deficient in identifying which defendants are guilty of the crimes charged and that, as a result, many innocent defendants plead guilty.<sup>94</sup> Of course, if a prosecutor knows that a defendant is factually innocent<sup>95</sup>—for example, because another person has confessed to the crime—the prosecutor must, under any theory, release the defendant.<sup>96</sup>

Suppose, though, that a prosecutor truly believes that a defendant has committed the crime charged, but has information that may cast doubt on that conclusion. Suppose further that the defense counsel does not have the information, so that one cannot argue that an innocent defendant would be making a reasonable, informed decision on whether the risks of conviction justify pleading guilty. May the prosecutor nonetheless proceed to offer and accept a plea?

Consider this realistic scenario:

A defense counsel fails to request discovery and potentially exculpatory material. The prosecutor knows that under constitutional or state law she would have to produce certain helpful material to the defense if the material were requested and also knows that defense counsel is unaware of the material.

For purposes of discussion, let us assume that the law of discovery does not take care of the problem by requiring the prosecutor to disclose the information before accepting a plea.<sup>97</sup> Let us

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94. See, e.g., Alschuler, *supra* note 3, at 1278-80 (discussing the ethics of pleading an innocent defendant guilty to avoid risk of trial); Kipnis, *supra* note 35, at 105 (arguing that the danger of convicting the innocent is greater in plea bargaining than at trial); cf. Schulhofer, *supra* note 3, at 1985-86 (noting the need to minimize convictions of innocent defendants).

95. In other words, the prosecutor knows that the defendant did not engage in the criminal acts. See *supra* note 57.

96. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.8(a) (1995) (forbidding the prosecutor to proceed in the absence of probable cause to believe the defendant is guilty).

97. Courts are split on when prosecutors must disclose so-called *Brady* material. See *supra* note 10 and accompanying text. At least some courts would not require



also postpone the issue of how prosecutors should respond to ineffective assistance of defense counsel.<sup>98</sup> The issue is whether the prosecutor's sense that the defendant could be factually innocent, even though the prosecutor does not believe he is, ethically requires the prosecutor to take steps to help the defendant that she would not take in the absence of that sense.

If one justifies plea bargaining on the rationale that it enables prosecutors to produce equitable results, then the defendant's possible innocence is relevant. The prosecutor's appropriate reaction, however, is not necessarily to reduce the plea offer based on the lesser chance of conviction if the defendant were informed. The theory assumes that the *prosecutor* controls the offer. The prosecutor is to use an objective standard to decide what would be fair for a guilty defendant who agrees to cooperate. The key therefore is for the prosecutor to be as certain as she can be that the defendant is guilty. She best accomplishes this either by investigating further or by disclosing the helpful information to defense counsel, so that counsel can investigate and produce more information for the prosecutor to consider in evaluating the equities.

The plea-bargaining justification that seeks to equalize the treatment of similar defendants also would call for the prosecutor to act, but in a different way. Under this theory, justice requires the prosecutor to assure that this defendant receives an offer and makes his decision to accept a plea based on the same assessment of the risk of conviction, or chance of acquittal, as other defendants whose lawyers obtain the helpful information.<sup>99</sup> The key is not the possible factual innocence of the de-

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discovery pre-plea. See, e.g., *United States v. Wolczik*, 480 F. Supp. 1205, 1208-10 (W.D. Pa. 1979) (holding that the failure to disclose impeachment evidence is insufficient to taint plea). But cf. Ostrow, *supra* note 25, at 1583 (arguing for broad, mandatory pre-plea discovery).

98. The problem of dealing with ineffective defense lawyers is discussed in detail in Part III.E *infra*.

99. The equality theory often seems overly simplistic, in the sense that prosecutors theoretically can compare the particular defendant to more than one other category of defendant. See *infra* note 111 and accompanying text. This hypothetical scenario, however, characterizes the defendant whose counsel fails to obtain the information as aberrational. The fairest understanding of equality here is therefore that this defendant should not simply be compared to other guilty defendants or to other

fendant, but rather the possibility that the helpful information would result in an acquittal or better bargain if defense counsel were informed. The prosecutor can remedy the situation in one of two ways: she can reveal the information, or she can reduce the plea offer to approximate the result that other informed defendants would accept. She may not, however, ignore the fact that other defendants in the same situation would probably end up in a better position.

Several of the other plea-bargaining models, however, justify proceeding on the belief that the defendant is guilty and encouraging a plea to the maximum. For example, the existence of helpful information is irrelevant to the rationales that approve bargains simply because they are inevitable,<sup>100</sup> save resources, empower defendants, or limit the effect of rigid legislation. These theories suggest that any bargain in our scenarios—at least ones in which defendants participate<sup>101</sup>—would advance the reasons supporting pleas.

Consider, next, the notion that plea bargaining is appropriate because it approximates the results of trials. Defense counsel's error presumably would continue through trial and would affect the likely result at trial.<sup>102</sup> Whether the theory assumes that the prosecutor should gauge the likelihood of conviction or assumes that the bargaining process parallels trial, it must recognize that defense counsel's error would influence the verdict. Arguably, the plea offer therefore may be adjusted to take advantage of the error. The prosecutor would be justified in pro-

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defendants whose counsel act negligently.

100. The plea-bargaining theory which justifies bargaining simply because of its "inevitability" is a tautology. Presumably, under that theory, a prosecutor is always justified in plea bargaining, in any way, unless it can be shown that the result would be unlawful if plea bargaining were not allowed. To avoid repetition, I will not analyze what constitutes justice under this theory in each of the following scenarios.

101. The element of personal participation by the defendant is essential only under the empowerment theory. The other justifications largely assume that defendants' interests are adequately protected by having active and informed defense counsel. See, e.g., *supra* text accompanying note 54 (noting the need for active and aggressive bargaining on behalf of clients under the trial approximation theory).

102. In a few cases, of course, defense counsel may concentrate more and work harder as a case gets closer to trial. These lawyers may correct their earlier oversight. As a general matter, however, defense counsel who are too sloppy to make a routine discovery request are unlikely to identify their mistakes in time to correct it.

ceeding with the plea.<sup>103</sup>

The contract and Easterbrook models lead to a similar analysis. The models assume that both prosecution and defense are better off bargaining than going to trial, once the risks of conviction are taken into account.<sup>104</sup> When the gap in the defendant's information will continue through trial, the prosecutor's high plea offer and defense counsel's uninformed decision to accept or reject the offer is a realistic assessment of the likelihood of conviction.<sup>105</sup> Under the contract theory, the parties can determine whether an agreement puts them both in an improved situation and can dicker for a mutually beneficial result.<sup>106</sup> In

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103. Consider this variation on the scenario:

Prosecutor has truly exculpatory *Brady* material which she will eventually need to disclose, but not until after a plea would be consummated.

Here, timing of the plea is of the essence; constitutional requirements require a prosecutor to disclose some categories of exculpatory information in time to assist the defendant at trial. *See* United States v. Agurs, 427 U.S. 97, 107 (1976) (requiring disclosure, even in the absence of a request by defense counsel, when the exculpatory material creates a reasonable doubt); *cf.* State v. Martin, 495 A.2d 1028, 1033 (Conn. 1985) (entitling the prosecutor to withhold disclosure of possibly exculpatory material until trial). Under the trial approximation theory, the system would not be working in its anticipated fashion if the prosecutor obtains a plea agreement based on a probability of conviction that is much higher than reality. To achieve a just plea, in these terms, the prosecutor either must adjust the offer downwards or must give defense counsel the information necessary for him to make an accurate assessment of the likely results at trial.

104. *See supra* notes 51-52 and accompanying text.

105. In other words, defense counsel is correctly gauging the likelihood of conviction in a trial in which defense counsel does not have the information.

106. When defense counsel misgauges the likelihood of conviction because of a temporary information gap, however, as in the scenario presented in note 102 *supra*, even aggressive bargaining by defense counsel will not serve his client's interest. From a contract perspective, counsel does not have adequate information to evaluate the fairness of the bargain. Similarly, Easterbrook's approach suggests that the decision to accept the plea would not be a realistic assessment of the case. Under either theory, the prosecutor probably should make sure that counsel is informed adequately before she can assume that a negotiated plea is just.

A prosecutor might rationalize withholding the information on the theory that defense counsel, in assessing the likelihood of conviction, already considers the possibility that circumstances may change. For example, counsel is aware that there is always the possibility that he could discover a new, helpful witness before trial. The chances of such a change are greater the earlier the parties enter the plea. Yet, under the contract theory, there is a qualitative difference between both sides dealing with

Easterbrook's terms, the prosecutor maximizes deterrence by obtaining the highest possible plea agreement from a given commitment of resources.<sup>107</sup>

*B. Confronting the Possibility That the Defendant Might Be Acquitted for Reasons Unrelated to Guilt*

The previous scenario involved the prosecutor's recognition of the possibility that the defendant might be factually innocent. What if, however, the prosecutor is convinced of the defendant's factual guilt, but has sole possession of information that suggests that the defendant might be acquitted at trial?

Consider this situation:

The prosecutor has nondiscoverable information that his truthful key witness is unwilling to cooperate. The prosecutor knows the information would affect the defendant's willingness to plead guilty.

May the prosecutor encourage an unwitting plea?<sup>108</sup> Conversely, would it be appropriate for the prosecutor to act leniently toward the guilty defendant—even dismiss the case—simply because of tactical considerations?<sup>109</sup>

If the justification for plea bargaining is that its results parallel the results at trial, then the prosecutor clearly may not take advantage of the situation. She needs to dismiss the case, or at least offer a plea sufficiently reduced to reflect the defendant's

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unforeseen risks and only one side being in a position to make a realistic assessment. In some respects, the difference may mirror the difference between contract law's mistake and unconscionability doctrines, in which the inequality of bargaining positions may affect both the validity of the bargain and the remedy when circumstances change. See CALAMARI & PERILLO, *supra* note 23, § 9-38; cf. Scott & Stuntz, *supra* note 2, at 1954 (analogizing contract and plea-bargain settings and referring to contract doctrines in proposing a remedy for pleas by innocent defendants).

107. See Easterbrook, *supra* note 2, at 295-96.

108. In his study of prosecutors, Professor Alschuler discussed a related example of the prosecutor who learns that his witness has disappeared. See Alschuler, *supra* note 1, at 67. In the actual case, the prosecutor attempted to bluff the defendant into pleading guilty. See *id.*

109. Cf. *id.* at 59-60 (illustrating, empirically, that prosecutors tend to offer excessive leniency in order to avoid risking a loss at trial).

actual risk of conviction.<sup>110</sup>

Other plea-bargaining rationales justify the opposite extreme of prosecutorial conduct; that is, acting as if the witness still will testify. For example, to the extent equitable results drive justice in plea bargaining, the prosecutor presumably should ignore tactical considerations and follow prosecution standards for what result is fair for persons like the defendant who have committed the crime and are willing to accept responsibility. Similarly, under an empowerment theory, the key is whether the defendant is able to participate in the bargaining. That consideration has nothing to do with whether the resulting bargain is beneficial for the defendant.<sup>111</sup>

The analysis is more complicated under the efficiency rationales. Consider the most simplistic of these theories—that plea bargaining saves prosecutorial and judicial resources. This theory suggests that any bargain is preferable to a trial. Here, however, the alternative may not be trial, but dismissal. When re-

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110. As discussed previously, if one conceives the trial approximation theory as looking at the average result produced by similar cases, the prosecutor's reactions arguably should be different. *See supra* note 58 and accompanying text. She would be more free to take into account factors that have nothing to do with whether this defendant is likely to win—factors such as the brutality of the crime and the defendant's criminal history. Viewed this way, however, the theory merges and, indeed, becomes the equalization theory of plea bargaining. *See infra* note 111.

111. Analyzing our scenario under the equality model illustrates a significant weakness of the model itself. There are several persons against whom this defendant might be compared: an equally guilty defendant who is not lucky enough to face an unwilling witness; an equally guilty defendant who is lucky enough to go to trial and wins because the witness is absent; an equally guilty defendant who goes to trial and faces a compelled but uncooperative witness; and an equally guilty defendant who pleads to a lesser offense because his lawyer learns of the witness's incalitrance. *Cf. LAFAVE & ISRAEL, supra* note 1, § 21.1, at 898-903 (discussing the issue of how much leniency pleading defendants should receive).

The model seems to presume that prosecutors will focus on legal, as well as factual, innocence. On the one hand, defendants with the information would be acquitted, so defendants without it should be treated similarly in the plea process. On the other hand, less fortunate defendants who are no more culpable than the defendant are subject to the full penalty. Unless the model is refined in a way that clearly identifies what factors are to be considered, it loses all but hortatory meaning. *See Easterbrook, supra* note 2, at 302-04 (criticizing the equality argument and concluding that "[i]f equality means that every criminal receives the same desert, then equal treatment could be achieved only by eliminating every source of variance, from differential likelihoods of arrest to the disparate paroling and pardoning policies of postconviction officials").

sources are the sole issue, the prosecutor presumably must assess whether she could proceed without the witness. If so, she may bargain aggressively. If not, dismissal is the most efficient use of resources and therefore the just result.

The Easterbrook and contract models differ in that they include both a measure of what benefits the prosecution *and* a notion of what benefits, or is fair to, the defendant.<sup>112</sup> The first

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112. See *supra* note 51 and accompanying text (describing the Easterbrook model); *supra* note 52 and accompanying text (describing the contract model). Under the contract approach, this occurs only when defense counsel bargains aggressively, based on full, or fully accessible, information. See *supra* note 81 and accompanying text. The assumption of full information may require distinctions under the contract model that are not necessary under other theories that simply require the defendant, factually, to be better off. See generally *supra* notes 39-40 and accompanying text (discussing premises of the equity and equalization theories).

Consider these slight variations on the hypothetical. First, imagine that the key prosecution witness is not simply noncooperative, but has died. See, e.g., *People v. Jones*, 375 N.E.2d 41, 43-45 (N.Y. 1978) (holding that the prosecution was not obliged to disclose the death of a witness before accepting a plea). Second, assume that the witness is still alive and cooperative, but the prosecutor now believes the witness has lied and does not plan on putting him on the stand. Cf. *United States v. Olachea-Jimenes*, No. 95-55132, 1996 WL 285707 (9th Cir. May 29, 1996) (declining to rescind a plea after the defendant learned about the deportation of the government's confidential informant). This will weaken, but not eliminate, the prosecution's case.

In the world of limited criminal discovery, secrets are common. Few jurisdictions authorize depositions and interrogatories. Beyond specific items prescribed by statute, prosecutors and defendants need not disclose their theories of the case nor the substance of their potential witness's testimony. See FED. R. CRIM. P. 16 (providing for and limiting discovery in criminal cases); LAFAYE & ISRAEL, *supra* note 1, § 20.2-3, at 844-58 (describing discoverable items). Both prosecution and defense must prepare for trial with only general knowledge, sometimes merely suspicion, of the other side's approach.

Thus, even a contract model of plea bargaining cannot assume that both sides have full information. See generally CODDINGTON, *supra* note 22 (prescribing a mathematical model to account for changes in information and expectations as bargaining progresses); Schweizer, *supra* note 22, at 164 (arguing that the assumption of rational actors implies that parties will react according to their perception of what information the other side may have); Scott & Stuntz, *supra* note 2, at 1940-49 (describing bargaining as the process through which parties take advantage of, and sometimes trade, information uniquely available to them). At best, it may contemplate simply "adequate information" or "equal access" to information, rather than making the counterfactual assumption that each side in a plea bargain knows everything. This is consistent with civil contract theory, which recognizes that one party often has superior information. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS §§ 153-54 (1981) (presuming that a unilateral information mistake by a party to a contract ordinarily will not suffice to void a contract). Traditional contract doctrines that re-

consideration approves of the maximum obtainable plea for factually guilty defendants. The second consideration suggests that pleas are not just when, taking due account of the risks of trial, defendants make clearly incorrect choices.<sup>113</sup>

Simply reducing the plea offer cannot satisfy justice. The essence of both the Easterbrook and contract models is that the parties themselves are best able to identify and protect their own interests.<sup>114</sup> Disclosure seems the only option if these

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act to informational imbalances—the mutual mistake and unconscionability doctrines—are limited in scope. See *supra* note 23; see also Anthony T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUD. 1, 1-9 (1978), reprinted in ANTHONY T. KRONMAN & RICHARD A. POSNER, *THE ECONOMICS OF CONTRACT LAW* 114, 116 (1979) (discussing when informational mistake or nondisclosure by one party to a contract might necessitate relief from the contract).

In the deceased witness scenario, both sides have access to the fact of death. The contract model thus might allow the prosecutor to take advantage of this limited informational advantage. In the noncooperative witness scenario, however, the information is uniquely in the prosecutor's possession. Without this information, the defendant cannot accurately gauge the risks of going to trial. Arguably, the contract model would require the prosecutor to disclose such critical information.

113. Easterbrook, for example, assumes that the prosecutor will maximize deterrence from her available resources. See Easterbrook, *supra* note 2, at 295-96. That is a net plus for society so long as the defendant receives some benefit. Similarly, the contract model assumes that both sides end up better off. See *supra* text accompanying note 19. The safeguards to ensure the benefit to the defendant are that defense counsel realistically estimates the likely result and promotes the plea solely on the basis of that estimate. Yet, in the absence of some action by the prosecutor, counsel's estimate here will be wildly inaccurate.

An unwise choice can still be a correct one, within limits. Easterbrook assumes there is a range of plea results that will benefit a defendant when compared with the risk of trial, and that the defendant is better off as long as he ends up with a lower sentence than the maximum plea he would accept. See Easterbrook, *supra* note 2, at 297. Mistakes by defense counsel may result in pleas that are high within this range yet still leave the defendant better off. However, a plea that is not rooted in the reality of the defendant's interests—for example, a plea to the maximum penalty that the defendant could receive after trial—would not be in the defendant's interests and therefore cannot be deemed to be one that fits the model of decision makers who Easterbrook assumes fill the system.

114. One's view of the prosecutor's responsibilities may be affected by the timing of the undisclosed event and the plea. If the prosecutor offers the bargain immediately after learning, say, of a witness's death, one might be unable to conclude that the defendant has equal access to the information. Cf. *Virzi v. Grand Trunk Warehouse & Cold Storage Co.*, 571 F. Supp. 507, 512-13 (E.D. Mich. 1983) (setting aside a civil settlement because the attorney failed to disclose the plaintiff's death during a three-week period between mediation and agreement to settlement). Yet, if significant time has elapsed, defense counsel can more easily be blamed for failing to learn the information.

theories are to work.<sup>115</sup>

### *C. Confronting Inequality in the Treatment of Defendants*

We have already noted that one justification for plea bargaining is that bargaining enables prosecutors to equalize treatment among similarly situated defendants.<sup>116</sup> But let us assume, probably accurately, that many prosecutors do not see equalization as their primary charge. Under the other theories of plea bargaining, should a prosecutor nonetheless take into account that a maximum plea offer, if accepted, will result in a guilty defendant receiving worse treatment than other equally guilty defendants?<sup>117</sup>

Consider this case:

A prosecutor knows that his office has adopted a new, unpublished policy of not taking cases to trial in which spousal abuse is not confirmed by medical evidence—such as those in which the wife has complained after her injuries have disappeared. Defense counsel does not know of the policy.

Should the prosecutor quickly offer and accept the maximum plea she can obtain?

What makes this case different from some of the others discussed is that the prosecutor's choices here are between accepting a plea from a presumably guilty defendant and living with a

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Alternatively, the key may be whether the deceased witness is peculiarly within the prosecutor's control; for example, a police officer. In contrast, if the witness is a relative of the defendant, one might well argue that the prosecutor's informational advantage simply reflects better preparation than the defense—a reality that may exist with respect to many plea bargains.

115. In the civil context, lawyers ordinarily would not consider disclosing items not legally required to be disclosed. Some courts, however, have challenged this vision of lawyering. In *Virzi*, for example, the court set aside a settlement because of one attorney's violation of his alleged "ethical obligation" to disclose the death of his client before finalizing the settlement. *Virzi*, 571 F. Supp. at 512; cf. *Southern Trenching, Inc. v. Diago*, 600 So. 2d 1166, 1167 (Fla. Dist. Ct. App. 1992) (reversing a jury verdict because of an attorney's failure to disclose his client's separate accident, prior to trial, involving the same injuries at issue).

116. See *supra* note 40 and accompanying text.

117. One such scenario was discussed earlier: the prosecutor's key witness is recalcitrant or has died unbeknownst to the defendant. See *supra* note 112.



nolle prosequi. In addition, there are two classes against which the prosecutor reasonably might compare this defendant: other equally guilty defendants who are released under the policy and other equally guilty defendants who plead or are convicted because the policy does not apply.

The concept of equal treatment seems irrelevant to several of the plea-bargaining models—most notably, the empowerment theory and the inevitability theory.<sup>118</sup> But evaluating the relevance of the policy under the other plea-bargaining rationales requires more analysis.<sup>119</sup> Consider, for example, the rationale that bargains reflect what would happen at trial. In our scenario, there would in actuality be no trial. If, however, there were a trial, then there would be a possibility of conviction. Which eventuality should control the bargain?

The basis of the theory is that the trial process, with its protections of judge and jury, would produce an appropriate result and that a plea bargain that tracks that result also is appropriate. The fact that the prosecution's office might release a defendant for independent reasons does not affect that calculus. Presumably, the measure of fairness is what would happen if the defendant went on to trial. Thus, in our scenario, the prosecutor reasonably could proceed with the plea despite the office policy.

By contrast, the reality that no trial would occur seems critical to the theory that plea bargains which save resources are, by definition, appropriate. If the alternative to the bargain is dismissal, fewer resources would be devoted to the case if the pros-

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118. Under the empowerment theory, the key is not the ultimate result of the plea bargain, but rather whether this defendant participated fully in the process. *See supra* text accompanying notes 69-71. Even an unfavorable result may satisfy the empowerment theory. The inevitability theory goes even further. It approves virtually all plea bargains, regardless of their fairness. *See supra* text accompanying note 49.

119. Under the equity theory, the result depends upon the reason for the dismissal policy. If the policy itself stems from equitable factors—including the likelihood that claimed abuse probably did not occur in the absence of medical evidence—then presumably it is an objective, equitable prosecution standard that the prosecutor should honor in the plea process; she should dismiss the case. If, however, the policy derives from resource considerations (i.e., that it is difficult to prove abuse in the absence of medical evidence), the policy should not drive the bargain. The equity theory presumes that the prosecutor will base her offers on standards, unrelated to tactical considerations, that define fair results for people with the defendant's background who have committed this kind of crime. *See supra* text accompanying notes 66-67.

ecutor declines to offer a plea (or, in this case, accomplishes the equivalent through a dismissal at the plea-bargaining stage).<sup>120</sup>

### *D. Responding to "Equitable" Arguments*

Let us assume that defense counsel presents the prosecutor with arguments for a lesser plea based on purely equitable factors that are not routinely part of the prosecutor's criteria: "Defendant's mother is dying and she needs his support"; "Defendant is a good, church-going boy"; "He'll lose his job if he goes to jail"; "Under a three-strikes law, he'll get life imprisonment for stealing a loaf of bread." As we have seen, one justification for plea bargaining is, precisely, that it enables prosecutors to take such equitable factors into account,<sup>121</sup> according to preformulated prosecution standards.<sup>122</sup> But how should such considerations contribute to prosecutorial decisions under the

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120. The answer is less clear under the Easterbrook model and contract models, which require that everyone be in a better position with a plea instead of a trial. See Easterbrook, *supra* note 2, at 309. Easterbrook accepts that differences in quality exist among defense attorneys and that sometimes "ignorant" defendants are disserved. *Id.* at 308-10. At the same time, like the contract model, the Easterbrook theory equates plea bargaining with an ordinary market, in which both parties improve their position by contracting. See *id.* at 289, 308-09.

The issue in the hypothetical is what information defense counsel needs in order to evaluate realistically his client's choices and preferences; the client might prefer a plea to trial, but clearly would prefer a dismissal to a plea. In an ordinary civil contract situation, preferences often change over time as information becomes available. Arguably, a plea is appropriate in the hypothetical until the option of dismissal becomes apparent. Yet, one could take the equally reasonable position that the prosecutor cannot gain a unilateral bargaining advantage from information that is unavailable to defense counsel.

The terms of the contract and Easterbrook theories do not resolve the dilemma. Indeed, the theories' presumption that defendants will have "adequate information" in effect restates the issue. Nevertheless, if the theories truly contemplate that defendants receive some benefit from a plea bargain agreement, as compared against a decision not to plead, then that alone should preclude a bargain.

One additional caveat is necessary in applying the Easterbrook theory. Easterbrook's key premise is that prosecutorial decisions are made in the interests of optimizing deterrence. See Easterbrook, *supra* note 2, at 292, 295-96. Presumably, relying on the hypothetical office policy is consistent with that premise because the policy itself makes a resource decision regarding when it is cost efficient to prosecute alleged abusers. To the extent the policy relies on other considerations, it is less valid as a basis for plea bargain decision making.

121. See *supra* text accompanying note 39.

122. See *supra* text accompanying note 67.

other justifications for plea bargaining?

The equitable factors may be relevant to sentencing, but they are largely irrelevant at the trial stage.<sup>123</sup> This discussion thus is limited to the prosecution's decision to offer a plea to a higher or lower offense, rather than to the prosecutor's position at sentencing once a conviction is finalized.<sup>124</sup>

A prosecutor whose goal is to approximate trial results should not take equitable factors into account unless they would affect the trial as well. Similarly, the prosecutor who seeks to use guilty pleas to equalize results among similarly situated defendants should take the factors into account only if other defendants, including those who go to trial, would benefit. In reality, these other defendants might benefit, but probably only at the sentencing stage. Hence, the prosecutor probably should not adjust the level of the plea—i.e., the offense for which the defendant agrees to accept conviction—though the prosecutor might well take a lenient position on sentencing in the same way she might take a lenient position after trial.<sup>125</sup>

The equitable factors are similarly irrelevant to most of the other justifications for plea bargaining. The empowerment theory, for example, looks solely to the defendant's ability to participate in the bargain, which is unaffected by the equitable factors. The factors also have no impact on the efficiency of a plea bargain, except to the extent that, under the Easterbrook rationale, the prosecutor determines that a lesser plea is appropriate as a

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123. Of course, if the trial court admits the information, it may produce sympathy for the defendant and help him gain an acquittal. In the abstract, however, the sympathy factors typically are unrelated to the crime itself and to whether defendant committed it.

124. For ease of analysis, this Article has separated sentencing from conviction. In reality, of course, some pleas encompass a bargain both over the conviction and the potential sentence. Under the plea-bargaining theories, most situations in which sentences are discussed can be analyzed in the same way as those in which the issue simply is plea or trial. Some of the theories may have to be adjusted slightly to require the prosecutor to focus not only on the defendant's factual or legal guilt, but also on the sentence that this defendant (or similar defendants) would be likely to receive after trial.

125. In other words, if the plea encompasses both conviction and sentence, the prosecutor's function under the trial approximation theory is to take equitable factors into account only in a way that mirrors their likely effect on the result in a trial process.

matter of deterrence policy. Nothing, however, obliges a prosecutor to conclude that a lesser plea is necessary to optimize resource allocation. From the defendant's perspective, he and his counsel are equipped with the information and resources necessary to decide whether agreeing to a plea is beneficial.

These conclusions are not as surprising as they seem. For they do not necessarily mean that equitable factors are irrelevant to prosecutorial decisions regarding the justness of pleas. They do signify, however, that these factors are irrelevant *unless* the equity theory of prosecution—reducing plea offers to account for equitable factors or rigid legislative punishment schemes—is deemed to be all, or a significant part, of the prosecutor's function. If the equity theory is to play a role, then presumably prosecution offices need to spell out which factors should contribute to prosecutorial decisions and how. In contrast, if a *pure* efficiency, contract, or empowerment theory is deemed to drive plea bargaining, prosecutors should not take equitable factors into account.<sup>126</sup>

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126. The earlier analysis assumed that equalizing treatment among similarly situated guilty defendants depends upon the prosecutor determining whether the defendant would be convicted at trial and then using equitable factors at sentencing in the same way as at post-trial sentencing. Sometimes, however, a rigid sentencing scheme can render that procedure unworkable as, for example, when a three-strikes law forbids leniency for someone who committed two previous crimes many years ago.

Under one approach, this dilemma can simply be resolved according to the above analysis. The prosecutor should ignore the "equities" unless she assumes, or her office assigns her, an equitable function in plea bargaining, or unless a lesser plea would further a rational deterrence policy.

But assume that, under the prosecutor's routine approach, equitable factors are irrelevant except when necessary to equalize treatment among similarly situated defendants. Compared to other defendants with two strikes, a plea only to a felony seems appropriate. At the same time, however, the stale nature of the prior convictions makes the hypothetical defendant look more like guilty defendants who have no prior convictions. The prosecutor thus may feel a need to compensate for the mandatory sentencing scheme.

As in other arenas, the notion of equality here is not susceptible to easy definition. See, e.g., Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 148-56 (1976) (discussing equality in terms of group discrimination); Christopher Jencks, *What Must Be Equal for Opportunity to Be Equal*, in EQUAL OPPORTUNITY, *supra* note 68, at 47, 72 (describing difficulty in defining what "equal opportunity" might mean); Westen, *supra* note 68, at 559-92 (discussing fallacious "equality" reasoning); *id.* at 558 n.69 (citing authorities examining the relationship

*E. Reacting to Ineffective Defense Representation*

Elsewhere, I have written about the responsibilities of prosecutors who know or learn that defense counsel is acting ineffectively at the trial stage.<sup>127</sup> Those responsibilities, and the appropriate action when the responsibilities come into play, turn largely on elements of the adversarial process that are not present in the plea-bargaining process.<sup>128</sup>

A prosecutor might confront several categories of ineffectiveness at the plea bargaining stage. A defense counsel may act ineffectively in the plea-bargaining process itself. In other cases, prosecutors can foresee that defense counsel will be ineffective at a later stage. Finally, a prosecutor sometimes faces an extraordinarily poor lawyer whose conduct may not fall to the minimal level of ineffectiveness against which constitutional law protects. Although recognizing that the defendant may not have a legal claim to undo the conviction after-the-fact, the prosecutor may still feel a moral inclination to act *ex ante*.

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between the Fifth Amendment Due Process Clause and the Fourteenth Amendment Equal Protection Clause); *see also supra* note 99 and authorities cited *supra* note 111. More to the point, the prosecutor will not be able to choose between the horns of her dilemma in any rational way unless the definition of her "equalizing" role—found in internal prosecution guidelines, supervisory controls, or the prosecutor's personal conception of her role—includes some direction or criteria regarding the proper basis of comparison.

127. *See Zacharias, supra* note 7, at 66-73.

128. My thesis in the trial context was that the prosecutor's obligation to do justice requires her to assure that the premises of the adversarial model are satisfied in a particular case. *See id.* at 49. To the extent the premise of equal adversariness fails, what the prosecutor must do depends on whether the court is in an equally good position to observe and remedy defense counsel's inadequacies. *See id.* at 69. Because negotiations occur—and are designed to occur—largely outside of the court's supervision, that theory cannot apply equally to plea bargaining. *Cf. Flowers, supra* note 8, at 939 (arguing that adversarial theory has no application to prosecutorial investigative activity occurring before a suspect is charged, because the "basic elements of the adversary process are simply not present").

### 1. *Ineffective Assistance in Plea Bargaining*

Defense lawyers act ineffectively in plea bargaining in two primary ways.<sup>129</sup> First, they may fail to pursue information that they need to maximize their clients' position:

The prosecutor knows that the defense counsel often acts ineffectively in pretrial representation by failing to conduct any investigation and failing to request discovery and exculpatory material. The prosecutor also knows that, ordinarily, he would have to produce certain helpful material to the defense, but that in this case defense counsel is unaware of the material.

Second, defense lawyers simply may make extraordinarily poor choices for their clients. For example:

The prosecutor knows that the defense counsel has a track record of being so burnt-out, or so afraid of trying cases, that the defense counsel routinely accepts whatever bargain a prosecutor offers.<sup>130</sup>

Should the prosecutor react, and how?

Both the equity and equalizing-among-defendants models of plea bargaining assume that prosecutors control pleas and will make their offers based on nontactical factors. The prosecutors' decision in our scenarios should not turn on how much they can get from the defendant, but rather on what plea is fair, according to the prosecution's standards, or on what other similar defendants would receive. Hence, under these two theories, the prosecutor should offer only that plea that she would be willing to offer a well-represented defendant.

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129. A third category of ineffectiveness in plea bargaining exists; namely, failing to file motions or to place pressure on the prosecutor to obtain a better plea. Depending on the reasons for counsel's conduct, the issues arising from such ineffectiveness can be analyzed either under the rubric of the counsel who makes bad choices for the client, *see supra* note 113 and accompanying text, or under the rubric of counsel who succumbs to personal considerations (i.e., agency costs). *See infra* Part III.F.2.

130. Professor Alschuler discussed this scenario at length in Alschuler, *supra* note 3, at 1182-206. He concluded that as many as 50% of all paid defense attorneys may fit this model. *See id.* at 1185.

In contrast, the empowerment model focuses on the defendant's ability to participate meaningfully in the bargaining process. When missing information or counsel's passivity affect the defendant's ability to receive and process his choices, an appropriate plea bargain will not result absent some corrective action. The prosecutor cannot remedy the situation simply by adjusting the plea offer, for it is the defendant's participation that is key. The appropriate choice among the alternative remedies, discussed in the margin, is fact sensitive.<sup>131</sup>

Under a trial-approximation theory, the two types of ineffectiveness need to be analyzed separately. Defense counsel's laziness in seeking favorable information might well continue through trial. Some information, however, comes to defense

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131. Whether disclosing the missing information can compensate for defense counsel's laziness depends, in part, on whether counsel will relay the information to the defendant and help the defendant analyze and make use of it. When his counsel simply leaves the defendant on his own, as in the second hypothetical, the defendant does not receive a meaningful opportunity to have input. Two problems confront the prosecutor: she cannot know what has transpired between the defendant and his counsel, and she cannot communicate with the defendant directly to receive or transmit information. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1995) (forbidding lawyers to contact represented parties); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(A)(1) (1981) (same); see also ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-396 (1995) (applying Rule 4.2 to prosecutors even at the preindictment stage); Fred C. Zacharias, *Who Can Best Regulate the Ethics of Federal Prosecutors, Or, Who Should Regulate the Regulators?: Response to Little*, 65 FORDHAM L. REV. 429, 445 n.64 (1996) (relating varying results reached by courts concerning no-contact rules).

The prosecutor must evaluate all of the evidence she can obtain regarding defense counsel's conduct. If, after disclosure, the prosecutor believes that the defendant is now able to participate in the process, then the prosecutor may proceed with a plea. If, however, the prosecutor continues to sense a problem, or if defense counsel continues to act passively, then the prosecutor should take the only available step: she should discuss the matter with defense counsel. Barring a transformation or an acceptable explanation, the prosecutor should not accept any plea until a judge can be advised and corrective action can be taken. See Zacharias, *supra* note 7, at 72 (arguing that in certain trial contexts prosecutors must inform the court of defense counsel's ineffectiveness).

As a practical matter, prosecutors may not be able to encourage judicial involvement immediately because, typically, judges are not involved heavily in the case during the negotiating stages. After the arraignment and preliminary hearing, the judge may not even see the parties until the trial date. Once the court becomes an active participant, however, the judge is in a position to speak directly with the defendant and, if necessary, to replace (at least) appointed counsel. See *id.* at 73; *infra* note 156.

attorneys in a self-executing manner. For example, some categories of *Brady* material<sup>132</sup> and information from witnesses who appear at trial, but whom counsel does not interview beforehand, will be exposed to the defense through the trial process.<sup>133</sup> Whether defense counsel would have particular information at trial depends on the nature of the information in question.

The trial-approximation theory suggests that the hypothetical prosecutor acts reasonably in proceeding with the plea when defense counsel is unlikely to learn the information through the trial process. If counsel would learn the information and the information is significant enough to affect the trial, then an approximation can be achieved in one of two ways. The prosecutor might estimate the true likelihood of conviction and base her offer on that likelihood. Alternatively, if defense counsel is capable of evaluating the risks objectively and bargaining aggressively for his client, the prosecutor could disclose the missing information and rely on the negotiation process to achieve justice.

When, as in the second hypothetical scenario, defense counsel is incapable of pressing his client's interests in the negotiation, prosecutors cannot rely on defense counsel to help achieve the trial approximation. Presumably, the prosecutor might assess the likelihood of conviction herself and offer a plea that is appropriate for those risks. Yet, if the judgment of risks is skewed because defense counsel's inadequacy is likely to continue to hurt defendant at the trial stage,<sup>134</sup> then the prosecutor must ponder a separate question that will be analyzed presently:<sup>135</sup> What should she do when she anticipates that counsel will be inadequate or ineffective at trial?<sup>136</sup>

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132. Prosecutors must disclose *Brady* information that is material and has been requested specifically by defense counsel or information that raises a reasonable doubt, even if not specifically requested. See *United States v. Agurs*, 427 U.S. 97, 110-13 (1976).

133. See Jencks Act, 18 U.S.C. § 3500 (1994) (requiring disclosure of prior statements by prosecution witnesses only after the witnesses testify at trial).

134. This will often, but not always, be the case. Sometimes, counsel are lazy negotiators and investigators, but dynamic and effective trial attorneys.

135. See *infra* Part III.E.2.

136. The efficiency models produce varying results. The theories holding that plea bargaining is inevitable and definitionally good suggest that the prosecutor should



## 2. *Anticipating Ineffective Assistance*

In many cases, a prosecutor who anticipates ineffective assistance of counsel in the future will have the same temptation as the prosecutor who faces bad lawyering in the plea-bargaining process; namely, to take advantage of the defense lawyer's inadequacy by securing an unusually high plea agreement. But sometimes, she faces an additional temptation: she may wish to offer and accept a *lower* plea than usual in order to end the matter quickly.

Consider this scenario:

The prosecutor knows that the defense counsel has acted, and is likely to act in the future, so ineffectively that the prosecutor will have to raise the counsel's ineffectiveness at trial, take remedial steps, or watch the conviction be reversed on appeal.<sup>137</sup>

By offering a plea, the prosecutor can prevent further inquiry into defense counsel's conduct by the trial or appellate court.<sup>138</sup>

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take advantage of the situation. Easterbrook, in part, also encourages this approach, because a plea beneficial to the prosecution will enhance the plea's deterrent effect. *See generally* Easterbrook, *supra* note 2, at 295-96 (discussing the importance of deterrence to prosecutors). Insofar as defense counsel's ineffectiveness eliminates counsel's ability to act as a check on the system, however, any plea becomes problematic. The Easterbrook requirement that the fairness of pleas to defendants be assured through the defense counsel's realistic estimate of the likely results at trial is undermined when defense counsel fails to investigate. Similarly, counsel's decision to accept any plea based on inertia or burnout undermines the theory's premise that counsel's recommendations will depend solely on a realistic assessment of the risk.

The contract model would distinguish the two scenarios. It posits adequate information and aggressive bargaining by defense counsel as lynchpins for achieving mutually beneficial results. *See supra* text accompanying note 82. A prosecutor can remedy the defense counsel's failure to investigate by supplying the information necessary for a realistic estimate by defense counsel, but counsel's burnout and tendency to accept any plea is not counteracted so easily. The prosecutor cannot be sure that any plea agreement will be fair, within the definition of the theory, so long as this defense counsel represents the defendant. The contract rationale thus would forbid the prosecutor to proceed with the plea until adequate defense counsel is in place.

137. *See, e.g.,* LAFAYE & ISRAEL, *supra* note 1, § 11.10(c), at 590 (noting that courts "will far more readily find incompetency where there has been 'an abdication—not an exercise—of professional judgment'").

138. Appeals from guilty pleas are rare because defendants are unlikely to discover

Moreover, the prosecutor may avoid having to take steps on her own to bring the ineffective assistance to the court's attention.<sup>139</sup> Hence, in this scenario, the prosecutor must consider whether she should offer a deal that, in some respects, is simply too good for the defendant given the facts of the case.

Unless the prosecutor is acting for self-serving reasons, such as avoiding the personal unpleasantness of having to challenge the lawyer's competence later on,<sup>140</sup> all of the efficiency models and the empowerment model would sanction the low plea.<sup>141</sup> The prosecutor is making a reasonable judgment that accepting a low plea ultimately will save resources—for example, by avoiding an appeal or retrial—and will optimize deterrence. The defendant too is better off, in the long run, than he would be without the plea.<sup>142</sup>

The result is more problematic under some of the just result models because the models take into account not only the interests of the defendant and the prosecution, but also those of society in

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the error in the trial court before the deadline for an appeal passes. *See generally id.* § 21.5(b) (discussing time limitations on appealing a guilty plea). Numerous procedural obstacles make subsequent habeas corpus relief unlikely. *See id.* §§ 28.4-5 (detailing procedural impediments to obtaining habeas corpus relief). Having pled guilty, the defendant probably also will never recognize, or be able to establish, his attorney's past ineffectiveness. Any claim regarding the attorney's future ineffectiveness could only be viewed as speculative. Moreover, even if the defendant could set forth a claim, the plea under our scenario was unusually favorable, so the defendant has little incentive to pursue the matter. The public—the loser in the too lenient bargain—has no standing to challenge the plea.

139. *See Zacharias, supra* note 7, at 69-72 (discussing situations in which the prosecutor may need to advise the court of defense counsel's poor lawyering).

140. Such conduct by prosecutors is discussed under the rubric of "prosecutorial agency costs" in Part III.H *infra*.

141. For purposes of the empowerment theory, the fact that counsel may be ineffective at trial does not mean the defendant cannot make a meaningful choice on whether a plea offer is beneficial. One important caveat is in order: If the defendant is pleading *because* counsel is ineffective—either because counsel has not given the defendant information or because the defendant fears he cannot get a fair trial because of counsel's inadequacy—then the empowerment theory may call the plea into question.

142. Even if the defendant could file and win an appeal, his only remedy is a new, fair trial with effective counsel. *See generally* LAFAYE & ISRAEL, *supra* note 1, § 11.7(a) (discussing the right to effective counsel on appeal). Because his case would comprise the same facts, the prosecutor would only agree to a *higher* plea once the defendant is represented by an effective lawyer. The defendant now has his trial option, but for purposes of bargaining he is in a significantly worse position.

obtaining socially desirable outcomes. For example, the trial approximation model suggests that there is some objectively appropriate result that the adversary system produces and that achieving this result should be the goal—whoever is, or is not, benefitted. Lacking in our scenario is objectivity on the part of the parties that, in effect, substitutes for the presence of judge and jury. Stated another way, a judge would not acquit or lower a defendant's sentence because of counsel's inadequacy; at most, the judge would order a new trial. Because the trial approximation model relies exclusively on the prosecutor to assure the approximation, it assumes that the prosecutor will make her judgment based exclusively on the defendant's legal innocence or guilt.

Similarly, the equity and equalization theories also disapprove of prosecutorial reliance on resource considerations. The equity rationale requires the prosecutor to focus on standards that define what is fair for this type of defendant. The equalization justification focuses on how other defendants would be treated. Under these just result models, therefore, the prosecutor should only offer a plea that he would offer in the absence of the defense counsel's flaws.

### 3. *Inadequate but Technically "Effective" Assistance*

Let us consider the converse of the situation that we have just discussed:

The prosecutor knows that the defense counsel is a terrible, though not constitutionally ineffective, trial lawyer and that the government is likely to win at trial because of the advantage the skill differential offers.

Should the prosecutor refuse to offer her normal plea, in favor of a *higher* offer, because her chances of conviction are unusually good?<sup>143</sup> Alternatively, should she show some sympathy for the defendant's plight by offering him a standard, or even lower-

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143. In all criminal cases, there is a range of talent on both the prosecution and the defense side that may be taken into account in plea bargaining. For purposes of the above scenario, however, let us assume that the disparity in quality is unusually great.

than-standard, plea?

All the efficiency rationales and the empowerment rationale would permit the higher offer.<sup>144</sup> The defendant is receiving the representation to which he is legally entitled. Indeed, he may even have chosen counsel. Counsel's quality always affects the likelihood of conviction.<sup>145</sup> Given the reality of this lawyer's representation, the choice to plead is informed and voluntary. A plea to the prosecutor's abnormally high offer may produce a better result than would going to trial.

Probably only the Easterbrook model *requires* this result. Under the Easterbrook model, the highest plea agreement possible maximizes deterrence of the crime.<sup>146</sup> In contrast, the pure resource theories simply prefer plea over trial, a preference that the lower offer would satisfy as well.<sup>147</sup>

The equity and equalization models call for the prosecutor to offer her normal plea. For reasons already discussed, tactical factors should not control.<sup>148</sup> In contrast, the trial approximation rationale would require the prosecutor to maximize the offer. According to this rationale, the flaws of defense counsel that will hurt the defendant at trial should hurt him at the bargaining stage as well. A trial approximation model might recognize an exception where defense counsel is not aggressive or active on his client's behalf,<sup>149</sup> but that is not the case we have posited. The client is not getting all he would wish, but he is receiving his due.

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144. These models do not require the prosecutor to up the ante, but simply give her the option to do so. The resources that might be committed to trial are saved under the higher or lower plea. The defendant is in a position to negotiate, based on full information, with counsel's assistance (for whatever it is worth). Justice thus can be served both by a plea agreement in which the prosecutor takes advantage of her superior skill and by one in which she voluntarily exercises restraint in the negotiation.

145. See HARRY T. EDWARDS & JAMES J. WHITE, *THE LAWYER AS A NEGOTIATOR: PROBLEMS, READINGS AND MATERIALS* 237 (1977) (noting that "[s]ome attorneys have more ability than others" and assuming that this should be taken into account in negotiating); KARRASS, *supra* note 18, at 21 (establishing by way of a study that skilled negotiators tend to achieve better results than less skilled negotiators).

146. See generally Easterbrook, *supra* note 2, at 308-10 (defending the legitimacy of plea bargaining based upon its efficiency through its deterrent effect).

147. Under the contract theory, the prosecutor must decide what to offer based exclusively on the state's interests, but there may be wiggle-room on whether plea maximization always serves that interest.

148. See *supra* text accompanying notes 109, 111.

149. See *supra* note 54 and accompanying text.

## *F. Protecting Defendants' Plea Bargaining Rights*

Closely related to the issue of ineffective assistance of counsel is the question of how prosecutors should act if they believe that the defendant cannot rely on defense counsel in the plea-bargaining process. This may occur either because laziness or some external factor interferes with the normal attorney-defendant relationship, or because agency costs prevent defense counsel from doing his job.

### *1. Confronting an Imperfect Attorney-Client Relationship*

The prosecutor has good reason to believe that the defense counsel has not communicated his plea offer to the defendant. The defendant may not be harmed except in the sense that he is deprived of information and the opportunity to make a choice.

For obvious reasons, the relationship between a defendant and his lawyer is most relevant to the empowerment justification for plea bargaining, which focuses on the defendant's state of mind. The justification presumes that the defendant receives information, can transmit information, and freely controls the decision of whether to plead.<sup>150</sup> If the prosecutor realizes that the defendant is uninformed or under duress, then she may not proceed to accept a plea.<sup>151</sup>

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150. See *supra* notes 70-71 and accompanying text.

151. But what is she to do? Under rules governing contacts with represented persons, she may not communicate with the defendant directly. See *supra* note 131. The prosecutor's only method for providing a duress-free environment may be to seek judicial assistance *ex parte*. Presumably, the court would be within its authority to meet with the defendant, to assure itself that the defendant is making voluntary choices. See, e.g., *United States v. Lopez*, 4 F.3d 1455, 1456, 1461-62 (9th Cir. 1993) (approving, in theory, prosecutor's ability to obtain court approval to communicate with defendant directly or under court's supervision), *appeal after remand*, 106 F.3d 309 (9th Cir. 1997).

This option may not be productive for scheduling reasons. See *supra* note 129. No court appearance may be scheduled close in time to the offer. Requesting a special hearing risks displeasing the court. Moreover, if the defendant has not been formally notified of the hearing, his absence may not be grounds for a bench warrant. Thus, there is no guarantee that the defendant will appear or even that counsel will tell him to be present.

Interestingly, none of the other rationales for plea bargaining presume the direct involvement of the defendant in the bargaining. The just result theories look to whether the process achieves an appropriate result. This can be accomplished even when the defendant is uninformed or afraid, provided that either the defense counsel acts aggressively or the prosecutor makes sure the deal reached through plea bargaining is appropriate.<sup>152</sup>

In the hypothetical scenario, the problem is not the potential unfairness of a plea, but rather that the defendant has no chance to accept it.<sup>153</sup> Under a trial approximation model, the failure of defense counsel to communicate with the defendant should not concern the prosecutor. A trial can still achieve the appropriate result.

The issues are more worrisome under the equity and equalization justifications for plea bargaining. The consequence of foregoing a plea may produce a result that is inequitable or prejudicial to the defendant—particularly if the factors the prosecutor considered in offering the plea would not be relevant at a trial.<sup>154</sup>

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The prosecutor can perhaps avoid her dilemma by making the plea offer itself in open court or by asking the court for assistance publicly. For the same practical reasons as above, these approaches also may not solve the problem. Ultimately, the prosecutor may have to confront the choice between foregoing the plea-bargaining process, which itself undermines "justice," and interfering with the right to counsel.

152. Depending on the theory, that may mean that the plea result approximates what would happen at trial, is objectively fair, or is similar to what other defendants would receive.

153. Whether the prosecutor *may* pursue the plea for the prosecution's own benefit despite defense counsel's interference—for example, because the prosecution wants the defendant's testimony as part of the bargain—does not turn on the issue of justice in plea bargaining. It is a practical question involving the defendant's right to counsel, due process, and separate ethical issues—including the problem of communicating with a represented party and interfering with his attorney-client relationship (and confidentiality).

154. Under the equity and equalization theories, at least, the prosecutor may offer the defendant a lenient plea bargain based on factors that have nothing to do with the likelihood of conviction; for example, the defendant's family or employment situation, his past record, or the pleas that other defendants have received. *See generally supra* notes 65-68 and accompanying text (discussing considerations in the equity and equalization theories). Because none of this information would be relevant at trial, the defendant may be convicted of a higher charge than the one to which the prosecutor would accept a plea. The sentencing benefits the defendant might receive because of the information might not be commensurate with the benefits of the lesser plea.

The prosecutor's obligation to justice may require taking steps that will bring the plea to the defendant's attention<sup>155</sup> or will achieve a substitution of counsel.<sup>156</sup>

At first glance, defense counsel's conduct seems equally significant under the efficiency rationales. When counsel imposes

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155. See *supra* notes 128 and 131. Steps to accomplish this include calling for a judicial hearing at which she can announce the offer, filing an equivalent pleading (which the lawyer may allow the defendant to see), or moving for counsel's replacement.

The prohibition against communicating directly with represented parties may seem counterintuitive, because the professional rules against contacting represented parties have as their goal protecting the client. See ABA Comm. on Ethics and Professional Responsibility, *supra* note 131. One aspect of that protection, however, is that one attorney is not supposed to interfere with the attorney-client relationship of the other by casting doubt on the attorney's competence or good will. See, e.g., STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 93 (4th ed. 1995) (discussing rationales for the no-contact rules); *supra* note 131. Communications such as settlement offers are to be transmitted through counsel, so that counsel can inform the client and explain the offer at the best time and in the best way for the client. See ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 12, at Standard 3-4.1.

156. If counsel is appointed, then the court has a relatively free hand in substituting counsel. See, e.g., *Morris v. Slappy*, 461 U.S. 1, 13-14 (1983) (upholding the trial court's refusal to grant the defendant's request for a continuance after the appointment of substitute counsel on the basis that the Sixth Amendment does not guarantee the "right to a meaningful attorney-client relationship"). Even if the defendant initially retained the lawyer, the court probably has the authority to intervene in the attorney-client relationship when the proper administration of justice is threatened. See *Wheat v. United States*, 486 U.S. 153, 158, 161 (1988) (overriding the defendant's choice of counsel in favor of the goal of proper administration of justice); cf. *United States v. Monsanto*, 491 U.S. 600, 601 (1989) (approving an attorney-fee forfeiture statute despite its potential interference with the defendants' choice of counsel); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624 (1989) (same).

There are significant practical problems associated with seeking the substitution of counsel. Ordinarily, a court will order substitution only if the defendant wishes it or the possibility exists that the defendant is too afraid of counsel to seek a change. When the prosecutor considers initiating substitution, how certain must she be that the defendant is frightened before she enlists the court's help? How can she obtain more information about the defendant's state of mind without violating the no-contact rules? Can she accomplish the interview or substitution of counsel without getting the defendant killed? Most significantly, what should she do if the court declines to intervene?

When the defendant himself approaches the prosecutor, the prosecutor must remain cognizant of the rules forbidding communications with represented persons. See *supra* notes 131 and 155. She may tell him that she may not discuss the matter with him while he is represented by the other lawyer, which, in theory, sometimes may encourage the defendant to terminate the representation on his own.

artificial obstacles to a bargained result, the process cannot achieve its resource-saving goals. Yet, counsel's failure to pass along the offer does not necessarily mean that counsel has neglected the defendant's best interests; he simply has decided to reject the offer in favor of trial. So long as defense counsel is acting solely on the basis of his best assessment of risks and rewards, none of the efficiency rationales requires, or encourages, the prosecutor to intervene.<sup>157</sup>

## 2. *Defense Counsel Agency Costs*

Numerous scholars have raised the problem of agency costs that interfere with the full aggressiveness or client-orientation of defense counsel.<sup>158</sup> For financial reasons, lawyers who are paid a single fee, particularly an advance fee, have incentives to

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157. Under the efficiency rationales, the reasons for defense counsel's interference are particularly significant. Consider another scenario in which the prosecutor may feel that defense counsel is not serving the defendant well:

Prosecutor receives a note from a jointly represented organized crime-connected defendant that the defendant would like to speak to the prosecutor privately about a plea (including cooperation), but that he is afraid of his lawyer and co-defendant.

Like in the original scenario, the defendant's ability to make choices seems to be constrained. Here, however, the defendant may have full information and, in theory, can choose to plead or not—which is all that is required under most of the just result rationales. Yet the defendant potentially is harmed: first, a negotiated plea (e.g., testify against the co-defendant and receive leniency) may benefit the defendant, but he may be too frightened to accept it; second, the negotiated plea might be improved upon with a different defense lawyer who is willing to consider cooperation.

Under a pure resource-saving rationale, the scenario is problematic because it artificially requires a trial that could be settled. Under the Easterbrook theory, counsel's conduct may prevent the prosecutor from securing a plea acceptable to the defendant that optimizes deterrence. *See supra* note 51 and accompanying text. A contract approach assumes that the parties are bargaining based exclusively on their own self interests. *See supra* note 52 and accompanying text. Under all these efficiency models, simply proceeding to trial would not satisfy "justice," because an appropriate bargain definitionally is a preferable result. The prosecutor thus may have an obligation to ensure that the defendant has an opportunity to accept the plea free of duress. That obligation may ultimately require seeking substitution of counsel.

158. In addition to the authorities cited *infra*, see, e.g., Easterbrook, *supra* note 51, at 1973-74 (attributing inadequacies in the system to inadequate pay of appointed defense counsel); Scott & Stuntz, *supra* note 2, at 1928, 1967 (defending plea bargaining, but arguing that the system underprotects against defense counsel error).



avoid trial and accept pleas that may not maximize their clients' interests.<sup>159</sup> Other defense counsel may act upon an institutional preference for plea over trial because of caseload pressures,<sup>160</sup> a desire to build a continuing relationship with prosecutors for other cases,<sup>161</sup> laziness,<sup>162</sup> risk averseness,<sup>163</sup> or a need to maintain a good record of disposing of cases.<sup>164</sup> Alternatively, some defense attorneys may be too ready to go to trial, especially in high-visibility cases, in order to gain personal publicity or trial experience.<sup>165</sup>

In many situations, the defense attorney who capitulates to personal or institutional interests to his client's detriment can be analyzed in the same way as the lazy,<sup>166</sup> ineffective,<sup>167</sup> or inadequate defense counsel.<sup>168</sup> In other situations, the lawyer's failings track those of the lawyer in the imperfect attorney-client relationship.<sup>169</sup> I will not repeat those analyses here.

Occasionally, however, the prosecutor who confronts defense counsel agency costs may need to consider remedies that are not

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159. See, e.g., Alschuler, *supra* note 3, at 1200 (discussing financial incentives of defense counsel); Cox, *supra* note 86, at 428 ("The defense attorney may encourage a plea bargain for reasons unrelated to his client's best interests."); Schulhofer, *supra* note 1, at 54 (analyzing defense counsel's financial incentives); Schulhofer, *supra* note 3, at 1988 (same).

160. See, e.g., Alschuler, *supra* note 3, at 1201, 1248 (discussing incentives arising from caseload pressures); Schulhofer, *supra* note 1, at 54 (same); Schulhofer, *supra* note 3, at 1988 (same).

161. See, e.g., Green et al., *supra* note 1, at 511 n.122 (discussing cases of defense counsel collusion with prosecutor); Schulhofer, *supra* note 3, at 1987 (disputing the notion that defense counsel acts independently from prosecutor on client's behalf).

162. See, e.g., Lynch, *supra* note 3, at 123 (discussing work avoidance by defense counsel).

163. See, e.g., Alschuler, *supra* note 3, at 1205 (discussing risks defense counsel fear); Schulhofer, *supra* note 3, at 1988 (same).

164. See, e.g., Alschuler, *supra* note 3, at 1198 (discussing the importance of disposition rate to defense counsel); Lynch, *supra* note 3, at 123 (illustrating internal workload pressures on defense counsel); Schulhofer, *supra* note 1, at 54 (discussing the importance of "moving cases"); Schulhofer, *supra* note 3, at 1988 (same).

165. See, e.g., Schulhofer, *supra* note 1, at 53 (discussing attorneys' desire for publicity); cf. Kevin Cole & Fred C. Zacharias, *The Agony of Victory and the Ethics of Lawyer Speech*, 69 S. CAL. L. REV. 1627, 1660-63 (1996) (discussing generally a defense attorney's personal motives in obtaining publicity in criminal trials).

166. See *supra* notes 129-31 and accompanying text.

167. See *supra* Parts III.E.1-2.

168. See *supra* Part III.E.3.

169. See *supra* Part III.F.1.

available in the other situations. For example, when a defense attorney overemphasizes pleas in his practice because of a desire to please the prosecution, a prosecutor can make it clear that she is indifferent between plea and trial. More simply, she can inform defense counsel convincingly that she will not hold a decision to try the case against the counsel in the future.<sup>170</sup> Employing this remedy is appropriate for prosecutors who operate under a plea bargaining model that requires them to take defendant's interests into account,<sup>171</sup> to act in the pursuit of some objectively correct result,<sup>172</sup> or to assure that defense counsel acts only in defendant's interests.<sup>173</sup> The remedy makes less sense if the prosecutor's only concern should be to obtain pleas or to maximize the government's resources. Under the empowerment model, the prosecutor should rely on this remedy only if she believes the defendant will not be able to receive and transmit information fully through this defense counsel.

Similarly, when defense counsel is too risk averse or, conversely, is too desirous of going to trial because of the possible publicity, he may still be acting with the defendant's blessing.<sup>174</sup> Under the theories that authorize pleas whenever the defendant is making informed choices, such as the empowerment theory, no remedial measures seem necessary. Under a trial approximation theory, the decision to go to trial too readily should not concern the prosecutor,<sup>175</sup> but she should be unwilling to accept a plea from a lawyer who is afraid to take a well-calculated risk. Those rationales that seek to ensure justice through counsel acting exclusively in the client's interests, such

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170. I say "convincingly" because, as an empirical matter, prosecutors' offices may hold decisions to try cases against defense attorneys. For the prosecutor's communication to be meaningful, she must persuade the defense lawyer to make the plea/trial decision on the substantive merits.

171. For example, the defendant-equalization theory.

172. For example, the trial approximation and equity theories.

173. For example, the Easterbrook and contract theories.

174. The defendant may, for example, also be risk averse, or, he may bend to his lawyer's desire for publicity as a cost of obtaining better counsel than he could otherwise retain.

175. That is because the defendant will receive a trial and therefore is as well off as he could be.

as the contract theory, lead to a similar resolution. The prosecutor may not accept the plea in the risk averseness scenario, but presumably would not be troubled by pursuing whatever results from a trial.<sup>176</sup>

### *G. Protecting the Public Interest in Trials*

One general criticism of plea bargaining is that it eliminates the public aspect of criminal prosecutions.<sup>177</sup> Insofar as criminal trials serve to illuminate wrongdoing by the police, prosecutor, or some other agency of government, accepting plea bargains serves to cover up the misconduct.<sup>178</sup>

When a well-intentioned<sup>179</sup> prosecutor offers and accepts a plea bargain in such a case, she may act for the very purpose of avoiding the exposition of the governmental action:

The prosecutor believes the defendant is guilty, based on

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176. The difficult issues arise under the plea-bargaining justifications that conceptualize pleas not solely as alternatives to trial, but also as socially beneficial results that prosecutors should seek in preference to trial because they save resources, optimize deterrence (e.g., the Easterbrook theory), or achieve a fairer result for the defendant (e.g., the equity and defendant-equalization theories). All of these justifications assume that, in large measure, prosecutors control the pleas. In the scenario involving the overly litigious defense counsel, however, the prosecutor lacks the ability to force the appropriate result. Her remedies are limited to helping defense counsel see the light, through persuasion or information, or bringing legitimate pressure upon defense counsel to reassess his position—including, if necessary, raising the matter with the court.

If the defendant ultimately insists on going to trial, the court's hands, too, are tied. But the court can at least make sure the defendant understands his options. If defense counsel's overlitigiousness comes from a desire to gain trial experience, the threat of judicial admonishment may have an effect. If it is based on counsel's special trial skill, on which the client has reason to rely, the court's intervention may have little effect.

177. See, e.g., Gifford, *supra* note 35, at 71 ("Plea bargaining sacrifices . . . public benefits of the trial process."); Lynch, *supra* note 3, at 116 ("Plea bargaining, by its very nature, is a closed-door affair that is not readily amenable to observation by outsiders.").

178. See generally Gifford, *supra* note 35, at 71 (discussing the public benefits of trials); Kipnis, *supra* note 3, at 556-57 (noting the benefits of a jury trial); cf. Fiss, *supra* note 16, at 1085 (disapproving of civil settlements because of their effect in eliminating the public aspects of litigation that help produce justice).

179. The problem of action by the prosecutor based on a personal agenda is discussed later under the rubric of prosecutor agency costs. See *infra* Part III.H. Here, I consider conduct by the prosecutor based on bona fide policy considerations.

overwhelming evidence. But she knows that the defense counsel will cross-examine the police officers who conducted a search and will be able to show that several members of the police force are racist. She fears that this will undermine public confidence.<sup>180</sup>

Or, she may be seeking to protect against acquittal of a guilty defendant:

In the above scenario, the prosecutor suspects that some of the evidence might be excluded based on an illegal police search (although she does not believe that it should be suppressed).<sup>181</sup>

Finally, she may have municipal interests, other than simply the interest in conviction of guilty defendants, at heart:

The prosecutor knows that the defendant has sued, or plans to sue, the city and arresting police officers for police brutality. The success of the suit is likely to depend, in part, on whether the defendant is acquitted or convicted. To save the taxpayers the expense of the suit and potential liability, the prosecutor is considering offering dismissal or a reduced plea in exchange for the defendant's agreement to drop the lawsuit.

In each of these hypotheticals, the public has an interest in learning of the governmental misconduct. At the same time, the public also has an interest in the completion of a plea. How should the prosecutor determine where plea-bargaining justice lies?<sup>182</sup>

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180. *Cf. Scroggins v. Missouri*, 859 S.W.2d 704, 706 (Mo. Ct. App. 1993) (allowing the prosecutor's acceptance of a guilty plea in lieu of making disclosures about police department corruption).

181. *Cf. Alschuler, supra* note 1, at 81 (discussing a prosecutor's reactions to a similar scenario).

182. Public trials, however, do not universally carry with them significant public benefits. In routine cases, the public's interest is in assuring that the correct person is punished appropriately, a goal that plea bargains may achieve equally well. Ordinarily, the public interest in a visible trial is heightened only when some significant

The hypotheticals share several features. Prosecutor and defense counsel both are fully informed, can bargain aggressively, can make realistic assumptions about the likelihood of conviction, and will make decisions based on their own side's best interests. The presence of external considerations thus should not be relevant to the empowerment or resource preservation models.

Several of the plea-bargaining rationales assume that the prosecutor will base her offer primarily on the defendant's factual or legal innocence.<sup>183</sup> Under an equalization-among-defendants rationale, for example, the external considerations should play a part in the prosecutor's decision only if they would also affect the likelihood of conviction. The possibility that evidence will be excluded is a relevant consideration; the fear that racism will be exposed is relevant only if it may affect the trial; and the possibility of a secondary lawsuit should not play a role in the prosecutor's plea offer.

The equity model precludes prosecutorial reliance on tactical and resource considerations. The sole issues for the prosecutor should be what the defendant has done and what the defendant's situation is. In the hypothetical scenarios, only the fact that the defendant may already have been battered by the police is potentially relevant to that calculus. However, if it is relevant under the prosecutor's standards, it should count only as an equitable consideration that improves the bargain the defendant receives, not as a rationale for an unusual willingness of the prosecutor to offer a plea at all.

Because the participants in the bargaining process can bargain fully and aggressively, any settlement seems legitimate under the Easterbrook and contract models. Easterbrook, however, assumes that the prosecutor will make her decision of what to offer and accept based on the state's interests in optimizing deterrence.<sup>184</sup>

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government misconduct is at issue or when the publicized nature of the event creates the public perception that justice may be dispensed unequally.

183. See *supra* note 57 and accompanying text (discussing the distinction between factual and legal innocence and the importance this consideration holds for prosecutors under a just result theory).

184. See generally Easterbrook, *supra* note 2, at 295-96 (discussing the importance of deterrence to prosecutors). Similar reasoning should govern the prosecutor under the contract model, with one notable difference. The issue for the prosecutor is

In the second scenario, involving the potentially suppressible evidence, the prosecutor clearly acts within bounds in anticipating the possibility that her case will be weakened. In the first and third hypotheticals, the relationship of the external considerations to deterrence is more attenuated, but also exists. The potential deterioration of public confidence or expenditure of funds otherwise available for law enforcement both may affect future prosecutions. The Easterbrook theory thus probably would allow the prosecutor to take those considerations into account.<sup>185</sup>

#### *H. Prosecutorial Agency Costs*

The problem of prosecutorial agency costs need not detain us long. Like defense counsel, prosecutors have institutional incentives to offer overly lenient pleas in some cases and to resist offering fair pleas in others. Unlike the public interest dilemmas discussed above, the reasons for the prosecutor's decision in these cases are personal to the prosecutor or the prosecutor's office. For example, a prosecutor may offer pleas freely out of a desire to maintain her reputation for securing convictions, to ease workload pressures and enhance job satisfaction, or to maintain a good relationship with the private bar to enhance future employment possibilities.<sup>186</sup> Conversely, like defense

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whether the external considerations bear on her "client's interests," so that a plea bargain that covers up the governmental misconduct furthers those interests. Perhaps more than under the other theories discussed thus far, the public-interest argument has force because the nature of the prosecutor's clients is unclear. See Zacharias, *supra* note 7, at 56-57 (discussing prosecutors' constituencies). Simple resort to the underlying rationale for plea bargaining cannot tell the prosecutor how to act, unless the theory also prioritizes what sector of the public she is required to protect.

185. The trial approximation model reduces to a similar quandary. At first glance, the external considerations, like under the equity model, seem relevant only if they would also affect the likelihood of conviction. Arguably, however, no plea bargain would approximate the results at trial in these scenarios, because trial would include public exposure of the misconduct. For the theory to be coherent, each prosecutor cannot be left individually to decide whether the trial approximation notion is limited to predicting conviction or acquittal of the defendant or whether it also encompasses the public benefits of a trial process—including the "public benefits" of avoiding negative effects on particular public agencies if misconduct is exposed. To be workable, the theory must define itself.

186. See, e.g., Alschuler, *supra* note 1, at 111 (discussing prosecutor's interest in pleasing potential employers); Green et al., *supra* note 1, at 507 (discussing prosecutor's personal incentives); Schulhofer, *supra* note 3, at 1987 (discussing

counsel, a prosecutor might want to try high visibility cases for fun, to enhance her reputation within the office, or to obtain publicity.<sup>187</sup>

The Easterbrook and contract models and all the just result models, except the empowerment theory, forbid prosecutors to act on these considerations. Each model requires prosecutors to make their decisions solely on the basis of the government's interests or some other nonpersonal lodestar.<sup>188</sup>

The prosecutor who follows an empowerment model can justify offering overly lenient pleas but would be forbidden to refuse to offer a plea, because a refusal to deal vitiates the assumption that the defendant can have input into the plea process. Similarly, the pure resource/efficiency model might sanction an overly lenient plea, because avoidance of trial is the key,<sup>189</sup> but would forbid the decision to overlitigate.

#### IV. WHAT DOES JUSTICE MEAN?

The paradigm of prosecutorial justice in plea bargaining consists of the prosecutor who voluntarily dismisses a case against an innocent defendant. Yet, as we have seen, a myriad of more complicated scenarios exist in which some observers might expect a prosecutor to depart from her typical regime in offering and accepting pleas. Because the prosecutor represents varying interests and constituencies,<sup>190</sup> it is no easy matter for her to identify just behavior. She cannot do so without some method for ordering priorities among the constituencies and interests.

Of course, sometimes the existence of multiple priori-

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prosecutor's agency costs).

187. See, e.g., Alschuler, *supra* note 3, at 1187 (discussing some prosecutors' tendency to seek trial at all costs against highly visible defense attorneys); Easterbrook, *supra* note 2, at 300-01 (discussing reputational interests of prosecutors); cf. Cole & Zacharias, *supra* note 165, at 1660-63 (discussing self-interested reasons for which lawyers seek publicity).

188. For example, the likelihood of conviction, the fair result, or the optimal deterrence solution.

189. Of course, under a more sophisticated resource model, such as the Easterbrook theory, prosecutors would need to recognize that saving trial resources in the short run might impact negatively on deterrence in the long run.

190. See Zacharias, *supra* note 7, at 56-57 (describing a prosecutor's various constituencies).

ties—such as convicting the guilty and being fair to defendants—may require some balancing of interests. But it is not obvious that one can always weigh or compare the competing interests. For example, an increase in the possibility that a defendant is factually or legally innocent does not necessarily mean justice requires a lower plea offer. Arguably, the prosecutor who still believes in the defendant's guilt should proceed aggressively even against overwhelming odds.<sup>191</sup> Similarly, increasingly compelling equitable arguments concerning a defendant's personal situation may be relevant to sentencing,<sup>192</sup> but do not necessarily mean that a prosecutor should revise the pleadable offense along a sliding scale; society's interest in maximum deterrence might trump the defendant's interests no matter how sad the defendant's tale. It therefore is unsatisfying to conclude simply that prosecutors should recognize the conflicting interests and adjust their relative importance on a case-by-case basis. Yet, the current professional codes do precisely that in requiring prosecutors to do justice.<sup>193</sup>

This Article's analysis has suggested the importance of assigning priorities to the varying interests *ex ante*. One cannot accomplish that simply by listing the goals prosecutors should pursue. Such an approach ultimately would come to parallel the unsatisfying discretionary approach of the current codes.

Prosecutors can best understand their priorities by identifying the model, or theory, of plea bargaining under which they operate. As we have seen, the models carry with them assumptions about the conflicting interests that enable prosecutors to resolve many of the dilemmas they might face. By definition, a form of justice is served when prosecutors follow the model. Not everyone will agree that the best result has occurred in an individual case, because critics might prefer an alternative model that includes a different prioritization of interests.<sup>194</sup> But at least

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191. Whether she should do so depends on whether her primary goal is preserving resources, on the one hand, or pursuing policies of optimization of deterrence or equalization among defendants, on the other hand.

192. See the examples listed *supra* Part III.D.

193. See *supra* notes 4-7 and accompanying text.

194. Some, for example, may prefer an Easterbrook policy that maximizes deterrence. Others focus primarily on the danger of convicting an innocent defendant and,



there can be agreement that the prosecutor has done her job and has pursued a legitimate path. Criticism of the result must focus on the model, or prioritization, rather than on the individual prosecutor's conduct.

Implicit in this conclusion is the notion that individual prosecutors should be constrained in their ability to pick and choose among the models. Individual prosecutorial discretion in selecting the underlying theory for plea bargaining would lead to the same criticisms as the status quo; namely, that prosecutors can justify any result simply by choosing a model that produces the result they desire. Moreover, such discretion shifts, rather than solves, prosecutors' ethical dilemmas. Instead of having to choose among interests and priorities without guidance, individual prosecutors would be left to choose among models that set priorities—again without guidance.

These observations lead to what now seems like an obvious conclusion. Prosecutors' offices should, in their administrative regulations and manuals, identify the model of plea bargaining that they expect individual prosecutors to use.<sup>195</sup> By taking this step, the agencies can offer individual prosecutors guidance in approaching plea-bargaining dilemmas, without needing to anticipate the infinite number of moral dilemmas that may arise in plea bargaining.<sup>196</sup>

At the same time, identifying a governing plea-bargaining theory prevents individual prosecutors from imposing a misguided view of justice upon defendants and the public.<sup>197</sup> It both

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therefore, will prefer an equity theory that may release, or be lenient to, even potentially guilty defendants. Cf. DAVID LUBAN, *LAWYERS AND JUSTICE* 58 (1988) (noting that the proof-beyond-a-reasonable-doubt standard risks allowing 100 guilty persons to go free in order to protect a single innocent defendant).

195. Concomitantly, this proposal assures that individual prosecutors will be informed of the selection and will be provided sufficient training to understand the plea-bargaining theory.

196. Although a few prosecutorial agencies may have adopted internal regulations governing the practice of plea bargaining, this author has not located any current policies that include a substantive elaboration of the bases on which pleas should be offered. See, e.g., 7 *THE DEPT OF JUSTICE MANUAL*, ch. 16 (Supp. 1993-2) (setting forth federal plea-bargaining policies); cf. White, *supra* note 1, at 442 (noting that most prosecutors have not "established any formal rules or procedures governing plea bargaining").

197. For example, the decision to prosecute or to show leniency to animal rights

enables a prosecutorial agency to control its agents and makes the agency responsible for doing so.<sup>198</sup> The very existence of a plea-bargaining policy itself may serve to equalize treatment among defendants.<sup>199</sup>

I do not take a position on whether a prosecutor's office should be required to publish its plea-bargaining policy, for there are good arguments pro and con. The achievement of the above objectives do not depend on the open publication of the guidelines. The conduct of individual prosecutors probably can be constrained sufficiently if the office communicates its guidelines to prosecutors, formally or informally, and imposes supervisory controls that insure the standards are followed. Maintaining secrecy of the guidelines would help avoid distracting litigation over the guidelines' implementation and make it easier for prosecutors' offices to amend their policies over time. Confidentiality also would afford individual prosecutors some flexibility in interpreting the spirit of the rules, without feeling excessive pressure to follow their strict letter.

On the other hand, publishing the guidelines would produce several public benefits. First, it might render prosecutors' offices more accountable. Elected officials who administer prosecutors' offices prefer to insulate themselves from criticism in individual cases by retaining the right to pick and choose among plea-bargaining theories.<sup>200</sup> Requiring prosecutors' offices to "declare" their position exposes agency priorities to public debate, thereby

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activists to the maximum extent possible.

198. For example, once a plea-bargaining theory has been selected and is followed, the agency can no longer blame individual prosecutors for unpopular action. Nor can the chief prosecutor avoid responsibility simply by saying that she stands behind the discretionary decisions of her subordinate. The agency itself will be accountable for the selection of the theory that the prosecutorial conduct followed.

199. Because all prosecutors in a given office will be required to follow the same plea-bargaining principles, there is less likelihood of disparate treatment of similar defendants by different prosecutors.

200. In any individual case, it is easy to justify a particular result by referring to some theory of plea bargaining. When a deterrence or contract model fails to explain a bargain, an equity or equalization theory might. Thus, for "political" purposes, a prosecutor would prefer to have all the rationales available as potential justifications for her conduct. The identification of an office theory is designed to help individual prosecutors determine just conduct in advance, rather than to help them defend their conduct after the fact.

creating the possibility of change if the public truly desires a different approach.<sup>201</sup>

Second, publicly identifying the plea-bargaining policy *ex ante* would facilitate communication between individual prosecutors and defense attorneys.<sup>202</sup> Enabling defense attorneys to understand prosecutor's perspectives toward plea bargaining enhances their ability to communicate information that would be relevant to a prosecutor.<sup>203</sup> Perhaps more important, by helping defense attorneys know whether prosecutors will even consider information they transmit, the identification of a theory will make counsel more willing to take the risk of communicating at all. In the long run, this would facilitate the process and make it easier to achieve appropriate bargains.

One significant question remains: Should prosecutor's offices be able to adopt more than a single plea-bargaining model for use in different situations? Earlier, for example, this Article suggested that a prosecutor who follows an efficiency rationale ordinarily could not take equitable factors into account unless an equity rationale has been built into the model.<sup>204</sup> By and large, adopting multiple models would lead to incoherent plea bargaining because prosecutors would be faced with inconsistent mandates and assumptions—for example, the inconsistent notion that prosecutors should maximize deterrence, but approximate likely trial results. As with any policy, however, there is room for limited exceptions that do not swallow the rule.

Indeed, carried to their logical extent, some of the models would produce nonsensical results if applied in a vacuum. For

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201. Arguably, exposing prosecutorial policies to public debate can have a negative effect as well. The result may be politically motivated attacks upon incumbents that lead to policies based more on electoral issues than on sound prosecutorial practice.

202. As I have discussed elsewhere, the legal system depends on lawyers being able to maintain a discourse in which they can understand the words and actions of their adversaries and fit them into a course of dealing. See Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 231, 269 (1993) (discussing one function of professional codes as facilitating the legal process by establishing norms lawyers can use in dealing with one another).

203. See *id.* at 269-70 (discussing the effect of a vague standard of justice on communications between prosecution and defense).

204. See *supra* note 126 and accompanying text.

example, a resource-saving rationale alone might require prosecutors to drop all charges because that is most efficient.<sup>205</sup> Similarly, a trial approximation theory, separated entirely from resource-saving logic,<sup>206</sup> would require prosecutors always to go to trial; that would produce a universally just result.<sup>207</sup> Most of the models assume some level of interaction with other social policies or plea-bargaining theories.

What is key to this Article's proposal is that a prosecutor's office be specific, because only specific guidelines can force the agency and individual prosecutors to justify plea-bargaining decisions in a coherent way. The offices probably should be able to adopt balanced plea-bargaining models that encompass and prioritize among more than one theory. The above analysis also would accommodate an office that authorizes specific exceptions to the routine of its chosen model for particular situations or an office that adopts procedures for making exceptions in unforeseeable situations. If a balanced model truly is intended to help prosecutors resolve their plea-bargaining dilemmas, however, the model must define its priorities clearly. Its definition of justice ordinarily must prevail.

Does this Article's proposal resolve the question "how can prosecutors do justice" by arbitrarily defining justice as "whatever the agency says?" There are two reasons why the proposal is not simply semantic. First, and most important, it must be remembered that an alternative to a plea exists that, with caveats I have discussed elsewhere,<sup>208</sup> provides a socially accepted form

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205. The meaning of efficiency as used here is simply the savings of judicial and prosecutorial resources. As the Easterbrook theory makes clear, other notions of efficiency would encompass social interests such as deterrence and punishment of wrongdoers. See generally Easterbrook, *supra* note 2, at 308-10 (discussing the importance of deterrence to prosecutors).

206. Of course, most formulations of the trial approximation theory are not so limited. They seek to combine the benefits of achieving trial-like results with the benefits of saving judicial and prosecutorial resources. See *supra* note 64 and accompanying text.

207. In other words, if achieving the precise result of trial is the only goal, the best way of being certain of achieving the result is to complete every trial. The reasons the theory accommodates plea bargaining must either be to save resources or to accommodate other goals of plea bargaining—such as achieving equitable results.

208. See Zacharias, *supra* note 7, at 53-56 (analyzing what constitutes justice in an adversary system).

of justice; namely, trial. A prosecutor's failure to plea bargain in the way critics wish does not deprive defendants of the option of pursuing the alternative. Justice, in some form, is available no matter what the agency decrees.<sup>209</sup>

The second reason is related. The models discussed in this Article reflect justifications for permitting the parties to avoid trial.<sup>210</sup> Under each model, society ends up better off by encouraging some pleas. When a prosecutorial agency chooses a model and satisfies its premises, the agency presumably enhances the total value society derives from the criminal adjudication process. Another model might be better—might further enhance society's benefit—but that still leaves the fact that the choice is an improvement. It is fair to say that adopting some model achieves justice when compared to the status quo.

## V. CONCLUSION

This Article's proposal, in the end, is simple and easy to implement. We should require prosecutors' offices to prescribe a primary theory of plea bargaining to which all of its employees should adhere.

Even if prosecutors' offices refuse,<sup>211</sup> individual prosecutors may find it useful to subscribe to a theory. Individual action does not promote consistency throughout the agency, but it has the two-fold benefit of providing the individual with a standard to follow and of enabling her to deal with concrete dilemmas in a nonarbitrary way. Prosecutors who act in a purely discretionary manner in each case are likely to develop the philosophy that any action they take is equally valid.<sup>212</sup> This attitude

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209. The one exception to this syllogism is when a trial judge, through institutional persuasion, coerces prosecutors and defense counsel into a bargain. See, e.g., CLIFFORD IRVING, *TRIAL: A NOVEL* 49 (Summit ed. 1990) (describing a fictionalized account of judicial coercion); Alschuler, *supra* note 3, at 1237-38 (discussing mechanisms used by trial judges to coerce pleas). Such conduct effectively deprives a defendant of a realistic option through which he may achieve a "just" trial.

210. Conversely, in seeking to justify plea bargaining, the models implicitly assume that there is a societal interest in the alternative; namely, having trials. See generally Gifford, *supra* note 35, at 70-71 (discussing the public benefits of criminal trials); Kipnis, *supra* note 3, at 556-57 (same).

211. In the real world, it would not be surprising to find elected officials, such as chief prosecutors, declining to take a stand or declining to close off future options.

212. Cf. Zacharias, *supra* note 7, at 48 (discussing the effect of prosecutorial discre-

renders them subject to corruption, both in a financial and institutional sense.<sup>213</sup> Alternatively, such prosecutors become more prone to manipulation by defense counsel or other external influences, because any argument that third parties make to them may seem logical in the abstract. In the long run, society is far better off when prosecutors are self-conscious about their decision making—when they reflect and try to act in a consistent way. This Article's analysis attempts to provide them with the means to do so.

Following the procedures this Article proposes will not satisfy all critics. Indeed, the proposal that prosecution offices and individual prosecutors adopt a plea-bargaining theory does not purport to address the larger issue of whether plea bargaining itself should be allowed. Nor can the proposal assure that, in any given case, it will produce the particular result that a majority of observers would prefer. It will, however, produce a justifiable, predictable result that should not vary dramatically from day to day or prosecutor to prosecutor.

Perhaps equally important, the results of plea bargaining in particular cases will be consistent with the rationale for which each community allows plea bargaining. This Article's proposal recognizes the possibility that the chosen plea-bargaining theory can be changed administratively or through the electorate.<sup>214</sup> In a sense, making the choice among the viable plea-bargaining theories itself helps produce some of the theories' goals: It promotes reasonable, efficient, and consistent treatment of defendants. In the complicated world of criminal process, perhaps that is the closest to justice that we can come.

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tion on prosecutors' ability to justify all results); Zacharias, *supra* note 202, at 250 (describing how the prosecutorial "justice" standard allows different prosecutors to "justify diametrically opposite conduct").

213. By institutional corruption, I refer to the possibility that prosecutors will accept less than societally optimal results for reasons, including workload pressures or personal feelings about defense counsel, that reflect their personal interests or those of the bureaucracy of which they are a part.

214. In other words, if an agency's choice of plea-bargaining theory is perceived as misguided, that choice can become a political issue. On the one hand, prosecutorial policy should not be overly subject to the whims of the majority. On the other, to the extent there is a serious theoretical debate concerning the appropriate goals of the criminal law, public input should be welcomed.