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## Sentencing Roulette: How Virginia's Criminal Sentencing System is Imposing an Unconstitutional Trial Penalty That Suppresses the Rights of Criminal Defendants to a Jury Trial

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**SENTENCING ROULETTE: HOW VIRGINIA'S  
CRIMINAL SENTENCING SYSTEM IS IMPOSING AN  
UNCONSTITUTIONAL TRIAL PENALTY THAT  
SUPPRESSES THE RIGHTS OF CRIMINAL  
DEFENDANTS TO A JURY TRIAL**

Caleb R. Stone\*

You don't gamble to win. You gamble so you can gamble the next  
day.

—Bert Ambrose<sup>1</sup>

INTRODUCTION

The imposition by juries of unusually harsh sentences upon criminal defendants in Virginia is a serious problem. Hardly a month goes by where there is not a story about a jury that has run amok. In 2011, Robert Via, Jr., along with two co-defendants, forced his way into a home, held four people at gunpoint, and stole some money.<sup>2</sup> Via was found guilty of conspiracy, robbery, burglary, and four counts of abduction (resulting from holding people at gunpoint).<sup>3</sup> A jury recommended that Via, convicted of this armed home invasion, should spend 128 years and a day in prison.<sup>4</sup> Via, for his part, had rejected a plea deal that would have trapped him in prison for fifteen years.<sup>5</sup> Afterward, a juror wrote a letter to the judge, stating that because they were forced under the law to render the sentence without guidelines, the jury may have

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\* J.D., William & Mary Law School, 2015; B.S., Kennesaw State University, 2011. I am indebted to the talented attorneys at the Newport News Public Defender's Office for their insightful input. Special thanks goes to Andrew Gordon, whose guidance helped me choose this particular topic. Further, I owe a debt of thanks to Brad Tobias for his thoughtful commentary throughout the writing process, and to the staff at the *William & Mary Bill of Rights Journal* for diligently editing this Note. Finally, I am most grateful to my parents and the rest of my family for their constant love and support.

<sup>1</sup> GRAHAM SHARPE, *THE ESSENTIAL GAMBLER* 26 (1995).

<sup>2</sup> Ashley Kelly & Peter Dujardin, *Virginia Judges Rarely Question Juries' Sentencing Recommendations*, DAILY PRESS (Apr. 1, 2012), [http://articles.dailypress.com/2012-04-01/news/dp-nws-crime-notebook-0401-20120331\\_1\\_home-invasion-case-gun-possession-charge-sentencing-recommendations](http://articles.dailypress.com/2012-04-01/news/dp-nws-crime-notebook-0401-20120331_1_home-invasion-case-gun-possession-charge-sentencing-recommendations).

<sup>3</sup> *Id.*

<sup>4</sup> Ashley Kelly, *Hampton Juror Asks Judge to Lower 128-Year Sentence*, DAILY PRESS (Newport News, Virginia), Sept. 19, 2012, at A1 [hereinafter Kelly, *Hampton Juror*].

<sup>5</sup> Ashley Kelly, *Appeal Expected for Poquoson Man Sentenced to 128 Years for Hampton Home Invasion*, DAILY PRESS (Dec. 26, 2012), [http://articles.dailypress.com/2012-12-26/news/dp-nws-evg-via-20121226\\_1\\_home-invasion-poquoson-man-hampton-judge](http://articles.dailypress.com/2012-12-26/news/dp-nws-evg-via-20121226_1_home-invasion-poquoson-man-hampton-judge).

reached a much harsher verdict than they would have otherwise recommended.<sup>6</sup> The letter begged the judge to shorten the majority of Via's time behind bars.<sup>7</sup> Via appealed his sentence to the Virginia Supreme Court, alleging that it was "unjust and a denial of due process and equal protection to deprive his jury of relevant sentencing information that is routinely made available to judges in cases where the defendant is sentenced by the judge."<sup>8</sup> Via's co-defendants, Samuel Sanchez and Reginald Jones, opted to avoid trial entirely by pleading guilty.<sup>9</sup> They received sentences of thirteen and eleven-and-a-half years, respectively.<sup>10</sup>

A cursory internet search can easily turn up more instances of this sort of injustice. In another home invasion case, Quincy Delaigle, who kicked down the door of a mobile home, was convicted by a jury in 2004 to serve ninety-three years in prison.<sup>11</sup> Delaigle's sentence far exceeded many of those imposed upon convicted rapists and murders, even though he took no money and injured no one.<sup>12</sup> The judge at his trial, in a rare occurrence of a judge reducing a jury's recommended sentence, limited Delaigle's time in prison to thirty-five years.<sup>13</sup>

Via and Delaigle are hardly alone in their ordeals. Thousands of defendants accused of felonies in Virginia have to make decisions on whether to plead guilty, and if they plead not guilty, on whether they should take their cases before judges or juries.<sup>14</sup> Traditionally, empirical evidence has shown that juries are somewhat more likely to acquit criminal defendants than judges.<sup>15</sup> When juries do convict, however, they impose harsher sentences than judges on average.<sup>16</sup> Virginia intentionally makes this gamble far more dangerous through its sentencing policies. It is akin to playing

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<sup>6</sup> Kelly, *Hampton Juror*, *supra* note 4.

<sup>7</sup> *Id.*

<sup>8</sup> Ashley K. Speed, *Man Appeals 128-Year Sentence to State Supreme Court*, DAILY PRESS (Oct. 20, 2013), [http://articles.dailypress.com/2013-10-20/news/dp-nws-via-case-20131020\\_1\\_arlinton-terrace-road-jurors-new-trial](http://articles.dailypress.com/2013-10-20/news/dp-nws-via-case-20131020_1_arlinton-terrace-road-jurors-new-trial). On June 27, 2014, the Virginia Supreme Court vacated Via's sentence, holding that the "trial court abused its discretion" when it rejected one of Via's proffered jury instructions. *Via v. Commonwealth*, No. 131574, slip op. at 3 (Va. June 27, 2014). It ignored the issue of giving the jury sentencing guidelines entirely. *See id.*

<sup>9</sup> Speed, *supra* note 8.

<sup>10</sup> *Id.*

<sup>11</sup> Monique Angle, *Home Invasion Nets 35 Years*, DAILY PRESS (Nov. 13, 2004), [http://articles.dailypress.com/2004-11-13/news/0411130060\\_1\\_home-invasions-invader-sentence](http://articles.dailypress.com/2004-11-13/news/0411130060_1_home-invasions-invader-sentence).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *See* VA. STATE CRIME COMM'N, ANNUAL REPORT (2011), *available at* [http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/RD1532012/\\$file/RD153.pdf](http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/RD1532012/$file/RD153.pdf) (discussing the thousands of felonies that are processed through Virginia's criminal justice system).

<sup>15</sup> A classic study showed that, when presented with the same cases, juries and judges agreed about seventy-five percent of the time. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 56 (1966). In seventeen percent of these cases, however, a jury would have acquitted that a defendant a judge would have convicted. *Id.*

<sup>16</sup> *See infra* notes 67–69 and accompanying discussion.

Russian roulette with a loaded gun: in Virginia, escaping the criminal system with an acquittal, or at least a sentence that falls within the recommended guidelines, is like walking away unscathed after having pulled the trigger. Occasionally, however, criminal defendants gamble and lose in horrific fashion: in cases like Via's or Delaigle's, receiving a sentence from a jury far higher than what a judge would have imposed is like "drawing" the bullet.<sup>17</sup> The message that Virginia sends through this twisted game is that the only way to win is not to play. In the criminal justice system, this means pleading guilty and avoiding the possibility of the unknown, unpredictable sentence completely.

This Note focuses on the constitutionality of Virginia's current approach to sentencing. Specifically, it will argue that Virginia's criminal sentencing structure violates the unconstitutional conditions doctrine because it coerces a defendant to give up his or her Sixth Amendment right to a jury trial through the imposition of a harsh "trial penalty."<sup>18</sup> This Note will give some background explanation on Virginia and its sentencing practices.<sup>19</sup> It will then explore the history of the unconstitutional conditions doctrine, and to what extent it applies to plea bargaining and Virginia's criminal sentencing system in particular.<sup>20</sup> Finally, it will suggest specific actions to rectify the constitutional and policy problems presented by current Virginia law.<sup>21</sup>

## I. BACKGROUND

### A. *The Concept of the Trial Penalty*

Before proceeding, it is important that this Note gives some necessary information and history about plea bargaining and the trial penalty. To start, plea bargaining in the United States has been defined as "the process by which the defendant [in a criminal case] relinquishes [the] right to go to trial in exchange for a reduction in charge and/or sentence."<sup>22</sup> It should be noted that a plea bargain is a confession of

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<sup>17</sup> It is worth noting that it is impossible to state with certainty the severity with which a judge would have sentenced Via, as the judge in his case only stated that the jury sentence was "appropriate" when declining to overturn it. Kelly, *supra* note 5.

<sup>18</sup> *Plea Bargaining*, THE FREE DICTIONARY, <http://legal-dictionary.thefreedictionary.com/p/Plea%20Bargaining> (last visited Dec. 1, 2014) ("In many cases, where a plea bargain is withdrawn or rejected and the case goes to trial, the defendant, if found guilty, receives punishment more severe than that offered by the prosecution in the plea bargain. This has been called the 'trial penalty' and it is another source of criticism . . .").

<sup>19</sup> See *infra* Part I.

<sup>20</sup> See *infra* Parts II.A, II.B.

<sup>21</sup> See *infra* Part II.C.

<sup>22</sup> CANDACE MCCOY, POLITICS AND PLEA BARGAINING: VICTIMS' RIGHTS IN CALIFORNIA 50 (1993). This American definition differs from the view that some countries take on plea bargaining. According to the Law Reform Commission of Canada, a plea bargain is "any agreement by the accused to plead guilty in return for the promise of some benefit." *Plea Discussions and Agreements* 3 (Law Reform Comm'n Can., Working Paper No. 60, 1989),

guilt that stops the trial from proceeding.<sup>23</sup> While plea bargaining<sup>24</sup> has become an omnipresent concern in the modern American criminal justice system, the Constitution does not seem to contemplate the issue.<sup>25</sup> Indeed, it is highly questionable that our current practices for meting out justice is anything like the Framers of the United States Constitution envisioned.<sup>26</sup>

Many scholars have written accounts of the history of the plea bargaining practice, coming to somewhat different conclusions as to its origins, but most agree that the practice started in the early nineteenth century.<sup>27</sup> Whatever its origins, plea bargaining

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available at <http://www.lareau-law.ca/LRCWP60.pdf>. The American definition assumes that plea bargains trade the right to trial for lesser punishment, while the Canadian definition says that a defendant confesses (pleads guilty) in return for any “benefit.” Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 50 CRIM. L.Q. 67, 70 (2005) [hereinafter McCoy, *Plea Bargaining as Coercion*].

<sup>23</sup> McCoy, *Plea Bargaining as Coercion*, *supra* note 22, at 76. This is important for two reasons. First, the fact that agreeing to a plea bargain is a confession means that all parties involved should be extremely concerned that the plea is made freely and voluntarily. Second, the confession is given in a direct trade for a sentencing consideration. This is a critical point, as it is difficult to believe that even the strongest proponents of plea bargaining would be as adamant about the inherent efficiency and desirability of the system if the defendant were allowed to “sell” other constitutional rights. For instance, a defendant could agree to a reduction of his or her possible sentence for a waiver of his or her Confrontation Clause or Speedy Trial rights, or for agreeing not to hire the best legal counsel. See Tim Lynch, *The Case Against Plea Bargaining*, REGULATION, Fall 2003, at 27 (discussing hypothetical concessions by criminal defendants and concluding that “[t]he courtroom just does not seem to be the proper place for an auction and haggling”).

<sup>24</sup> Some legal analysts, particularly prosecutors and government agencies, quibble with the term “plea bargain.” See *Plea Discussion and Agreements*, *supra* note 22, at 3 (“In our view, the process with which we are concerned (though unquestionably flawed) may better be described as that of ‘plea negotiation,’ or the holding of ‘plea discussions.’ The object of that process is to reach a satisfactory *agreement*, not to give the accused a ‘bargain.’ Accordingly, our recommendations eschew the expression ‘plea bargain’ and replace it with ‘plea agreement.’” (footnotes omitted)); see also U.S. DEP’T OF JUSTICE ANTITRUST DIV., GRAND JURY MANUAL (1991), available at [http://federalevidence.com/pdf/LitPro/GrandJury/Grand\\_Jury\\_Manual.pdf](http://federalevidence.com/pdf/LitPro/GrandJury/Grand_Jury_Manual.pdf) (referring almost exclusively to “plea agreements”).

<sup>25</sup> Lynch, *supra* note 23, at 27 (“It is true that plea bargaining speeds caseload disposition, but it does so in an unconstitutional manner. The Framers of the Constitution were aware of less time-consuming trial procedures when they wrote the Bill of Rights, but chose not to adopt them.”).

<sup>26</sup> See, e.g., Jeffrey Bellin, *Modern Justice and the Bill of Rights*, DAILY PRESS (Aug. 3, 2013), [http://articles.dailypress.com/2013-08-03/news/dp-edt-pvoicesoped-bellin-20130803\\_1\\_jury-trial-plea-bargain-modern-justice](http://articles.dailypress.com/2013-08-03/news/dp-edt-pvoicesoped-bellin-20130803_1_jury-trial-plea-bargain-modern-justice) (“[I]t is difficult to believe that James Madison and his colleagues would have gone through all the trouble of placing the trial rights at the heart of the Bill of Rights if they knew that the invocation of those rights would be the (rare) exception rather than the rule.”).

<sup>27</sup> See McCoy, *Plea Bargaining as Coercion*, *supra* note 22, at 69 n.3; see also GEORGE FISHER, *PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* (2003). Fisher’s thorough account traces the plea bargaining practice back to liquor offenses

has long dominated criminal proceedings. The plea bargain became the most common method of adjudication in the 1920s,<sup>28</sup> and the prevalence of the practice increased steadily until about ninety percent of all felony cases concluded through guilty pleas by the 1970s.<sup>29</sup> Today, the rate of guilty pleas in the seventy-five largest United States counties is about ninety-five percent,<sup>30</sup> with jury trials accounting for two percent and bench trials accounting for three percent of all convictions.<sup>31</sup> While Virginia's sentencing guidelines are a staple of plea negotiations statewide, plea bargaining does not require delineated sentencing guidelines to function.<sup>32</sup>

The justifications for plea bargaining generally fit into two major categories: efficiency concerns and deontological (or morality) concerns.<sup>33</sup> Proponents of efficiency argue that guilty pleas made before trial are inexpensive and efficient because they avoid the financial costs of trials while preserving the societal benefits of criminal punishment, and that the dockets faced in courts nationwide preclude all defendants from getting trials.<sup>34</sup> Prosecutors, for their part, defend plea bargaining because they still "get a bite on the offender, even though it is not as sharp as the one [they] could have gotten from the unbargained charge."<sup>35</sup> Proponents of the morality justification, however, advocate for plea bargaining because it allows a defendant who truly is guilty to accept responsibility for his or her immoral actions,<sup>36</sup> and it allows all sides to benefit from the practice.<sup>37</sup>

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in Massachusetts in the first decade of the nineteenth century, and notes that the Massachusetts legislature adopted what was then common practice into law in the late 1840s. *Id.* at 19–33. He also found plea bargains in Massachusetts murder cases started in the early 1840s. *Id.* at 34. Even back in the nineteenth century, the plea bargain apparently became a popular mechanism quickly: Fisher notes that only ten percent of murder cases before the Supreme Judicial Court of Massachusetts avoided adjudication via agreement in the 1840s, but that percentage had risen all the way to sixty-one percent in the 1890s. *Id.* at 35.

<sup>28</sup> See Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 6 (1979).

<sup>29</sup> See McCoy, *Plea Bargaining as Coercion*, *supra* note 22, at 74.

<sup>30</sup> BUREAU OF JUSTICE STATISTICS, U.S. DEP'T. OF JUSTICE, BJS BULL. NCJ 228944, FELONY DEFENDANTS IN LARGE URBAN COUNTIES (2010) at 1.

<sup>31</sup> See McCoy, *Plea Bargaining as Coercion*, *supra* note 22, at 74 & n.13.

<sup>32</sup> See Joseph Di Luca, *Expedient McJustice or Principled Alternative Dispute Resolution? A Review of Plea Bargaining in Canada*, 50 CRIM. L.Q. 14, 21, 31 (2005) ("[I]n busy jurisdictions, minor criminal [offenses] may often be 'processed' according to an unwritten or informal sentence tariff that develops over time and becomes commonly known among the principal actors in the system . . . an accepted, yet unwritten, understanding that certain [offenses] 'are worth' a particular sentence.").

<sup>33</sup> McCoy, *Plea Bargaining as Coercion*, *supra* note 22, at 73.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* (internal quotation marks omitted).

<sup>36</sup> See, e.g., *id.* ("[F]rom the deontological perspective . . . a defendant pleads guilty because he is blameworthy. If he understands that he deserves punishment, he pleads guilty out of remorse . . . ." (footnote omitted)).

<sup>37</sup> See, e.g., David Lynch, *The Impropriety of Plea Agreements: A Tale of Two Counties*, 19 L. & SOC. INQUIRY 115, 115 (1994) ("[P]lea bargaining is . . . morally legitimate [because] both sides voluntarily engage in and benefit from the practice."). Under this view, prosecutors

There are several problems with these justifications. Many legal scholars argue that the efficiency concerns stated by proponents of plea bargains mask the underlying causes of the practice. Some scholars have stated that the main reason plea bargains exist is for the benefit of the lawyers negotiating them.<sup>38</sup> One school of thought holds that plea bargaining started with the professionalization of public prosecutors and police,<sup>39</sup> while others argue that practice really started to increase with the advent of mandatory sentencing laws.<sup>40</sup> With mandatory sentencing laws, the prosecutor could effectively set the defendant's sentence without the trial court's intervention<sup>41</sup> by orchestrating a guilty plea to a lesser-included offense that avoided the highest sentences for the most serious charge.<sup>42</sup> Even though plea bargaining developed through mandatory sentencing laws, it thrived in less determinate sentencing schemes as well,<sup>43</sup> especially with the invention of probation.<sup>44</sup>

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can “tailor the punishment to the crime,” while defendants can avoid the “anxieties and uncertainties of a trial” by admitting guilt and accepting responsibility for their actions. Tina Wan, Note, *The Unnecessary Evil of Plea Bargaining: An Unconstitutional Conditions Problem and A Not-So-Least Restrictive Alternative*, 17 S. CAL. REV. L. & SOC. JUST. 33, 39–40 (2007).

<sup>38</sup> See McCoy, *Plea Bargaining as Coercion*, *supra* note 22, at 68–69 (“Plea bargaining does not spring from the need to rescue courts from . . . a high caseload, but from professionals’ impulse to negotiate and agree—and, lately, from prosecutors’ capacity to process higher . . . numbers of cases because the norm of pleading guilty produces net-widening and an expansion of state power.”); Celesta A. Albonetti, *Criminality, Prosecutorial Screening, and Uncertainty: Toward a Theory of Discretionary Decision Making in Felony Case Processings*, 24 CRIMINOLOGY 623, 625 (1986) (outlining the primacy of lawyers’ desire to ensure certainty through the plea bargaining process). For literature exploring the often collusive nature of these agreements between prosecutors and defense lawyers, see generally Abraham S. Blumberg, *The Practice of Law as Confidence Game: Organizational Cooptation of a Profession*, 1 LAW & SOC’Y REV. 15 (1967).

<sup>39</sup> See Malcolm M. Feeley, *Legal Complexity and the Transformation of the Criminal Process: The Origins of Plea Bargaining*, 31 ISR. L. REV. 183, 192 (1997) (“But as the criminal process professionalized . . . the nature and significance of the trial was radically transformed . . . . In short, as the criminal process professionalized, as opportunities for the defense—and prosecution—expanded, reliance on the jury declined.”); McCoy, *Plea Bargaining as Coercion*, *supra* note 22, at 74 (citing HEIDI NASHERI, *BETRAYAL OF DUE PROCESS: A COMPARATIVE ASSESSMENT OF PLEA BARGAINING IN THE UNITED STATES AND CANADA* (1998)).

<sup>40</sup> McCoy, *Plea Bargaining as Coercion*, *supra* note 22, at 75 (citing GEORGE FISHER, *PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* (2003) [hereinafter FISHER, *PLEA BARGAINING’S TRIUMPH*]).

<sup>41</sup> See *id.* (citing FISHER, *PLEA BARGAINING’S TRIUMPH*, *supra* note 40) (“Since the sentence was mandatory, the judge had no discretion to intervene in the agreement; if there was a conviction, either by confession or after trial, the sentence was pre-determined. Although the bench at first resisted this arrangement and the legislature investigated the prosecutor who invented it, they concluded that the practice was not unethical because it was limited to offences in which the legislative intent in enacting mandatory penalties had been to obtain certain and swift punishment.”).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 75–76.

<sup>44</sup> *Id.* at 76 (citing FISHER, *PLEA BARGAINING’S TRIUMPH*, *supra* note 40. McCoy notes

*B. The Trial Penalty in Virginia*

To understand how the trial penalty functions in Virginia, it is first necessary to understand the state's criminal sentencing guidelines. Virginia's sentencing guidelines come from the Virginia Criminal Sentencing Commission, and their genesis can be traced back to a 1983 Governor's Task Force on unwarranted sentencing disparities.<sup>45</sup> Eventually, the Commission was formed in 1994 to "promulgate and oversee a voluntary sentencing guidelines system."<sup>46</sup> The purpose of this system was to "achieve the goals of certainty, consistency, and adequacy of punishment with due regard to the seriousness of the offense, the dangerousness of the offender, deterrence of individuals from committing criminal offenses and the use of alternative sanctions."<sup>47</sup>

The guidelines give a range of recommended sentences, which is calculated by "computing the actual time-served distribution for similarly situated offenders, in terms of their conviction offense and prior criminal history, released from incarceration . . . [from] 1988 through 1992."<sup>48</sup> The midpoint of each defendant's sentencing range is calculated by taking the median time served for the middle two quartiles of similarly situated offenders and is subject to a wide variety of factors.<sup>49</sup> Virginia's guidelines, in contrast to other states, use a list-style scoring system to determine the appropriate sentencing range.<sup>50</sup> Whether the highly detailed<sup>51</sup> guidelines recommend that a defendant receives a prison sentence is determined by scoring a numerical range of characteristics about the defendant and the offense, totaling the points, and comparing the result against an established threshold value.<sup>52</sup> If the defendant's score exceeds a certain amount, the guidelines will suggest a prison sentence.<sup>53</sup> In other words, a higher

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that, while trial judges are now the ones empowered to offer probation, it was originally conceived as a "social work" program administered by prosecutors. *See id.* ("In crimes of low seriousness, prosecutors would charge defendants with indictable crimes, extract from them admissions of guilt, then promise not to proceed further with the cases if the defendants would promise to 'go forth and sin no more.'").

<sup>45</sup> RICHARD P. KERN, OVERVIEW OF VIRGINIA'S TRUTH-IN-SENTENCING SYSTEM 3, *available at* <http://www.lhc.ca.gov/lhc/sentencing/KernAug06.pdf> (last visited Dec. 1, 2014).

<sup>46</sup> *Id.* at 20.

<sup>47</sup> VA. CODE ANN. § 17.1-801 (2011).

<sup>48</sup> *Id.* § 17.1-805 (2011).

<sup>49</sup> *Id.*

<sup>50</sup> BRIAN J. OSTROM ET AL., ASSESSING CONSISTENCY AND FAIRNESS IN SENTENCING: A COMPARATIVE STUDY IN THREE STATES 7, *available at* <http://www.ncsc.org/~media/files/pdf/services%20and%20experts/assessing%20consistency%20-%20ostrom.ashx> (last visited Dec. 1, 2014).

<sup>51</sup> "Virginia's more detailed system allows for greater flexibility in how the guidelines are to be applied (i.e., more voluntary), thus building in more opportunities for the exercise of appropriate discretion." *Id.* at 17.

<sup>52</sup> *Id.* at 13–14.

<sup>53</sup> *Id.*

score corresponds with a more severe sentence.<sup>54</sup> While compliance with the guideline recommendations is explicitly voluntary, completion of guideline worksheets is mandated by law.<sup>55</sup> Judges have to review the guidelines and sign the related worksheets.<sup>56</sup>

Unlike the policy in many states,<sup>57</sup> Virginia juries are tasked with sentencing after they have convicted a defendant.<sup>58</sup> The other states that employ jury sentencing are Arkansas,<sup>59</sup> Kentucky,<sup>60</sup> Missouri,<sup>61</sup> Oklahoma,<sup>62</sup> and Texas.<sup>63</sup> They are prohibited by statute from having access to the aforementioned sentencing guidelines, which the judge receives.<sup>64</sup> While the judge is not required to accept the jury's recommendation of a sentence, the judge usually accepts whatever the jury decides.<sup>65</sup> In fact, the judge

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 6.

<sup>56</sup> *Id.*

<sup>57</sup> See Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 314–15 (2003) (“Only six states currently employ jury sentencing in non-capital cases, down from thirteen in 1960. For decades, legal scholarship has been overwhelmingly skeptical toward the practice. Many commentators have cited jurors’ lack of experience and expertise as the source of unwarranted sentencing disparities and irrational verdicts.”).

<sup>58</sup> See VA. CODE ANN. § 19.2-295 (2011) (“[T]he term of confinement in the state correctional facility or in jail and the amount of fine, if any, of a person convicted of a criminal offense, shall be ascertained by the jury, or by the court in cases tried without a jury.”).

<sup>59</sup> ARK. CODE ANN. § 5-4-103 (2010) (“If a defendant is charged with a felony and is found guilty of an offense by a jury, the jury shall fix punishment . . .”).

<sup>60</sup> KY. REV. STAT. ANN. § 532.055 (West 2010) (“Upon return of a verdict of guilty . . . the court shall conduct a sentencing hearing before the jury, if such case was tried before a jury. In the hearing the jury will determine the punishment to be imposed within the range provided elsewhere by law.”).

<sup>61</sup> MO. REV. STAT. § 557.036(3) (2013) (“If the jury at the first stage of a trial finds the defendant guilty of the submitted offense . . . The jury shall assess and declare the punishment as authorized by statute.”).

<sup>62</sup> OKLA. STAT. ANN. tit. 22, § 926.1 (West 2010) (“In all cases of a verdict of conviction for any offense against any of the laws of the State of Oklahoma, the jury may, and shall upon the request of the defendant assess and declare the punishment in their verdict within the limitations fixed by law . . .”).

<sup>63</sup> TEX. CODE CRIM. PROC. ANN. art. 37.07(b) (West 2009) (“[I]n other cases where the defendant so elects in writing before the commencement of the voir dire examination of the jury panel, the punishment shall be assessed by the same jury . . . . If a finding of guilty is returned, the defendant may, with the consent of the attorney for the state, change his election of one who assesses the punishment.”).

<sup>64</sup> In all felony cases, other than Class 1 felonies, the court shall (i) have presented to it the appropriate discretionary sentencing guidelines worksheets and (ii) review and consider the suitability of the applicable discretionary sentencing guidelines established . . . In cases tried by a jury, the jury shall not be presented any information regarding sentencing guidelines.

VA. CODE ANN. § 19.2-298.01(A) (2011).

<sup>65</sup> See Nancy J. King, *How Different Is Death? Jury Sentencing in Capital and Non-Capital Cases Compared*, 2 OHIO ST. J. CRIM. L. 195, 197 (2004) (“In our study of three jury-sentencing

must justify any departure from what the jury has decided in writing to the Virginia Criminal Sentencing Commission.<sup>66</sup>

This steadfast refusal to allow jurors access to the sentencing guidelines is a conscious choice made by Virginia lawmakers.<sup>67</sup> Because juries are often wildly unpredictable and can impose absurd sentences, many defendants are scared to take their cases before a jury.<sup>68</sup> The statistics on jury sentences prove defendants are right to be worried: in drug cases, sentences by juries in Virginia are on average four to fourteen years higher than those imposed by judges.<sup>69</sup> While judges have the ability to modify a sentence that the jury has recommended, they are usually hesitant to do so, only modifying less than one-quarter of recommended jury sentences.<sup>70</sup>

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states, trial judges did occasionally correct some of the worst jury excesses by reducing the jury's sentence. But this was reportedly rare in Arkansas and Kentucky, and in Virginia, reduction to the range recommended by the judicial sentencing guidelines was unusual.”).

<sup>66</sup> VA. CODE ANN. § 19.2-295(B) (2011) (“In any case in which a jury has fixed a sentence as provided in this chapter and the sentence is modified by the court pursuant to the authority contained within this chapter, the court shall file with the record of the case a written explanation of such modification including the cause therefor.”) This is in stark contrast to the other states that use jury sentencing, as the fact that Virginia judges must justify to the legislature that controls their appointments and reappointments any deviation from the sentencing guidelines has the effect of making those guidelines much more binding upon the sentencing judge. *Cf.* ARK. CODE ANN. § 16-90-804(a) (West 2010) (“The trial court may deviate from the presumptive sentence without providing a written justification.”).

<sup>67</sup> Nancy J. King & Rosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 VAND. L. REV. 885, 910 (2004) (“According to those interviewed, the gap between sentences after jury trial and sentences that judges impose after the defendant waives jury trial is the product of deliberate policy choices by [Virginia] lawmakers.”). King and Noble’s analysis in this article also covers Kentucky and Arkansas, two of the other states besides Virginia to employ jury sentencing. *See generally id.* Their research finds that jury sentencing is also employed as a trial penalty in those states, as lawyers in Kentucky and Arkansas indicated that the sentence imposed by juries was generally much higher than that imposed by a prosecutor via plea bargain or a judge. *Id.* at 912–13. The focus on Virginia by this Note should not be taken to mean that the trial penalties in those states are somehow ethical or constitutional. Unlike in those states, however, Virginia explicitly states in its statute that juries may absolutely not see the same sentencing guidelines that judges receive. VA. CODE ANN. § 19.2-298.01(A) (2011).

<sup>68</sup> *See* King & Noble, *supra* note 67, at 910 (“[T]he prospect of jury sentencing was commonly described by interviewees in Virginia as providing an incentive for defendants to avoid jury trial. One prosecutor summed it up: ‘Defense counsel will plead guilty rather than run the risk of being sentenced by the jury, it tends to force a plea.’” (footnotes omitted)).

<sup>69</sup> *Id.* at 923–24.

<sup>70</sup> VA. CRIMINAL SENTENCING COMM’N, 2012 ANNUAL REPORT 24 (2012), available at <http://www.vcsc.virginia.gov/2012VCSCAnnualReport.pdf> (“In cases of adults adjudicated by a jury, judges are permitted by law to lower a jury sentence. Typically, however, judges have chosen not to amend sanctions imposed by juries. In FY2012, judges modified 22% of jury sentences.”).

Sadly, it seems clear that the trial penalty is achieving its intended purpose.<sup>71</sup> According to the 2012 Virginia Criminal Sentencing Report, just over one percent of sentences are imposed by a jury, while about ten percent are imposed by a judge.<sup>72</sup>

## II. ANALYSIS

### *A. Overview of the Supreme Court Jurisprudence in Sentencing and Plea Bargaining Related to the Unconstitutional Conditions Doctrine*

According to the Supreme Court, the unconstitutional conditions doctrine “vindicates the Constitution’s enumerated rights by preventing the government from coercing people into giving them up.”<sup>73</sup> Professor Richard Epstein states that the doctrine of unconstitutional conditions provides that “even if a state has absolute discretion to grant or deny a privilege or benefit, it cannot grant the privilege subject to conditions that improperly ‘coerce,’ ‘pressure,’ or ‘induce’ the waiver of constitutional rights.”<sup>74</sup> Stated another way, “[the] government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether.”<sup>75</sup> In other words, it holds the proverbial carrot and stick in equal regard—the government may not do indirectly through incentive what it cannot do directly through force or punishment.

In the past, the Supreme Court has struck down unconstitutional conditions on government benefits,<sup>76</sup> unemployment compensation,<sup>77</sup> tax exemptions,<sup>78</sup> public

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<sup>71</sup> See *supra* note 67 and accompanying text.

<sup>72</sup> VA. CRIMINAL SENTENCING COMM’N, *supra* note 70, at 22.

<sup>73</sup> *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013).

<sup>74</sup> Richard A. Epstein, Foreword, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 5, 6–7 (1988).

<sup>75</sup> Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989).

<sup>76</sup> See, e.g., *Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321, 2324–25, 2332 (2013) (holding that Congress could not force non-governmental organizations to have policies that explicitly oppose prostitution and sex trafficking as a condition of receiving funding to combat HIV); *Shapiro v. Thompson*, 394 U.S. 618, 621–22 (1969) (striking down a Connecticut statute that imposed a one-year waiting period on new residents before they could receive welfare because it infringed on the constitutional right to travel).

<sup>77</sup> See *Sherbert v. Verner*, 374 U.S. 398 (1963) (holding that South Carolina could not constitutionally apply eligibility provisions of unemployment compensation statute so as to deny benefits to claimant who had refused employment because her religious beliefs would not allow her to work on Saturday).

<sup>78</sup> See *Speiser v. Randall*, 357 U.S. 513 (1958) (holding that California could not force the potential recipients of a tax exemption to swear that they do not advocate the overthrow of the United States government by force, violence, or other unlawful means as a condition of obtaining the exemption).

employment,<sup>79</sup> bar admissions,<sup>80</sup> and mailing privileges.<sup>81</sup> It has also applied the doctrine liberally in the eminent domain field,<sup>82</sup> limiting the government's power of coercion in that area.<sup>83</sup>

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<sup>79</sup> See, e.g., *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cty.*, 391 U.S. 563, 565 (1968) (holding that a public school could not force a schoolteacher to relinquish his First Amendment right to speak critically about school funding policy as a condition of continued employment); *Keyishian v. Bd. of Regents of Univ. of N.Y.*, 385 U.S. 589, 609–10 (1967) (holding that New York educational officials could not force teachers to disavow the Communist party as a condition of acquiring and maintaining employment in the public school systems); *Elfbrandt v. Russell*, 384 U.S. 11, 19 (1966) (holding that Arizona could not condition public employment on the disavowing of the Communist party); *Baggett v. Bullitt*, 377 U.S. 360, 379–80 (1964) (holding that Washington could not force teachers to take an oath of loyalty to the United States and disavow the Communist party as a condition of employment).

<sup>80</sup> See, e.g., *Baird v. State Bar of Ariz.*, 401 U.S. 1, 8 (1971) (holding that Arizona could not force a potential lawyer to state she had never been a member of the Communist party as a condition of receiving a license to practice law); *Konigsberg v. State Bar of Cal.*, 353 U.S. 252, 273–74 (1957) (holding that California could not refuse to certify a potential lawyer to practice law based on the inference that he was not of good moral character simply because of his past membership in the Communist Party).

<sup>81</sup> See, e.g., *Blount v. Rizzi*, 400 U.S. 410, 421–22 (1971) (holding that the Postmaster General could not halt use of mail for commerce on the basis of alleged obscenity); *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 158–59 (1946) (holding that the Postmaster General could not deny a magazine a subsidized second-class license to send mail solely on the basis that the Postmaster did not believe that the magazine contributed to the public good).

<sup>82</sup> See *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2591 (2013) (holding that a Florida zoning district could not evade limitations of the unconstitutional conditions doctrine by conditioning approval of a land use permit on landowner's funding of offsite mitigation projects on public lands); *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) (“Under the well-settled doctrine of ‘unconstitutional conditions,’ the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government [with] little or no relationship to the property.” (citing *Perry v. Sindermann*, 408 U.S. 593 (1972); *Pickering*, 391 U.S. at 568)); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 841–42 (1987) (holding that the California Coastal Commission could not condition a grant of permission to rebuild a house on the property owners' consent to allow the public an easement across the beachfront property without just compensation).

<sup>83</sup> The Supreme Court has also made it clear that, when considering eminent domain cases, it makes no distinction between conditions precedent and conditions subsequent to the taking. In other words, it seems fair to state the timeline of coercion is not all that relevant to deciding its constitutionality. See *Koontz*, 133 S. Ct. at 2596 (“[I]nvalidating regulation that required the petitioner to give up a constitutional right ‘as a condition precedent to the enjoyment of a privilege’” (citing *Frost & Frost Trucking Co. v. R.R. Comm’n of Cal.*, 271 U.S. 583, 592–93 (1926))); *id.* (“[I]nvalidating statute ‘requiring the corporation, as a condition precedent to obtaining a permit to do business within the State, to surrender a right and privilege secured to it by the Constitution’” (citing *S. Pac. Co. v. Denton*, 146 U.S. 202, 207 (1892))); *id.* (“The government cannot sidestep constitutional protections merely by rephrasing its decision from ‘only if’ to ‘not unless.’” (quoting *Flower Mound v. Stafford Estates Ltd. P’ship*, 135 S.W.3d 620, 639 (Tex. 2004)) (internal quotation marks omitted)).

To apply the constitutional conditions doctrine in this area, this Note must identify which right the government is violating and how they are violating it. First and foremost, the obvious right in question is the right to a trial by jury found in the Sixth Amendment of the United States Constitution.<sup>84</sup> The Sixth Amendment states: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.”<sup>85</sup> Of course, there is waiver of nearly all of the Sixth Amendment guarantees if the defendant pleads guilty instead of opting for a bench trial.<sup>86</sup> This Note, however, focuses specifically on the suppression of the constitutional right to a jury trial, not on the constitutionality of the plea bargaining system as a whole.

On its face, it seems obvious that the unconstitutional conditions problem applies to plea bargaining.<sup>87</sup> After all, the government is clearly attempting to coerce the criminal defendant into surrendering his or her right to a trial by jury by implementing a system that ensures defendants who go to trial run the risk of receiving a severely inflated sentence.<sup>88</sup> However, citing concerns about judicial economy, the Supreme Court has been hesitant to explicitly apply the unconstitutional conditions doctrine to plea bargaining.<sup>89</sup> With this being said, however, the Supreme Court has expressed concerns about the coercing of certain criminal defendants into making a guilty plea.<sup>90</sup>

On one level, the Court recognizes that an obviously (and physically) coerced guilty plea is never valid.<sup>91</sup> Even without physical coercion, the Court has struck

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<sup>84</sup> U.S. CONST. amend. VI.

<sup>85</sup> *Id.*; see also *Duncan v. Louisiana*, 391 U.S. 145, 161–62 (incorporating the Sixth Amendment’s guarantee to a jury trial against the states through the Fourteenth Amendment’s Due Process Clause).

<sup>86</sup> By pleading guilty, a defendant waives the right to a speedy and public trial, the right to confront the witnesses against him or her, the right to have compulsory process for obtaining witnesses in his or her favor, and the right to have the assistance of legal counsel for his defense. See U.S. CONST. amend. VI. It is also possible that he or she is waiving his or her Fourth Amendment protection against illegal searches and seizures. See U.S. CONST. amend. IV.

<sup>87</sup> See Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 98 (2001) (“Plea bargains present a classic unconstitutional conditions problem. Roughly formalized, the proposal looks something like this: If you waive your right to trial, then you will receive a punishment of no more than  $y$ ; if you exercise your right to trial, then it is not the case that you will receive a punishment of no more than  $y$ . (If you exercise your right and are acquitted, then you will, of course, receive no punishment; if you exercise your right and are convicted, then you will receive punishment of  $y+n$ .) The question is whether the proposal constitutes coercion. Many commentators think it may.”)

<sup>88</sup> *Id.* at 98–99.

<sup>89</sup> See Thomas R. McCoy & Michael J. Mirra, *Plea Bargaining as Due Process in Determining Guilt*, 32 STAN. L. REV. 887, 888 (1980).

<sup>90</sup> See *infra* notes 109–10 and accompanying text.

<sup>91</sup> See, e.g., *Pennsylvania ex rel. Herman v. Claudy*, 350 U.S. 116, 119–22 (1956) (holding that a guilty plea coerced by state trooper grabbing defendant’s neck and threatening to choke

down sentencing schemes that unconstitutionally suppress defendants' constitutional rights.<sup>92</sup> In the 1960s, the Court condemned practices that needlessly imposed a trial penalty upon criminal defendants.<sup>93</sup> In *Griffin v. California*, the Court struck down California's "comment rule," which held that, "in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury."<sup>94</sup> The majority struck down the constitutional provision, stating that the "comment rule" was "a penalty imposed by courts for exercising a constitutional privilege."<sup>95</sup> In supporting this assertion, the Court noted that the "comment rule" discouraged the invocation of the Fifth Amendment privilege against self-incrimination by "making its assertion costly."<sup>96</sup> The conclusion was based in part upon the Court's observations that the inference of guilt gleaned from a defendant's refusal to testify "is not always so natural or irresistible,"<sup>97</sup> and that California's practice was a "remnant of the 'inquisitorial system of criminal justice.'"<sup>98</sup>

In another 1960s case, *United States v. Jackson*,<sup>99</sup> the Court heard a challenge to the Federal Kidnapping Act, which allowed juries, but not judges, to sentence a kidnapping defendant to death if a jury found that the defendant did not release the victim unharmed.<sup>100</sup> Indeed, the Court acknowledged that "the defendant's assertion of the right to jury trial may cost him his life, for the federal statute authorizes the jury—and only the jury—to return a verdict of death."<sup>101</sup> The Court questioned "whether the Constitution permits the establishment of such a death penalty, applicable only to those defendants who assert the right to contest their guilt before a jury."<sup>102</sup> The Court also acknowledged that the "inevitable effect of any such provision, is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial."<sup>103</sup> The Court rejected the government's argument that, "because the Act thus operates 'to mitigate the severity of punishment,' it is irrelevant that it 'may have the incidental effect of inducing defendants not to contest in full measure.'"<sup>104</sup> The Court then stated that, no matter

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him and harm the safety of defendant's family if he did not confess violated defendant's Due Process rights).

<sup>92</sup> See *Griffin v. California*, 380 U.S. 609, 615 (1965).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 609–10 (quoting CAL. CONST. art. I, § 13, para. 7 (1934) (repealed 1974)).

<sup>95</sup> *Id.* at 614.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 614–15.

<sup>98</sup> *Id.* at 614 (citing *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964)).

<sup>99</sup> 390 U.S. 570 (1968).

<sup>100</sup> *Id.* (citing 18 U.S.C. § 1201(a) (1966), amended by Pub. L. No. 92-539, 86 Stat. 1072 (1972)).

<sup>101</sup> *Id.* at 572.

<sup>102</sup> *Id.* at 581.

<sup>103</sup> *Id.* (footnote omitted).

<sup>104</sup> *Id.* at 582.

what the objectives of Congress were in creating the statute, they could not “be pursued by means that needlessly chill the exercise of basic constitutional rights.”<sup>105</sup>

With the start of the 1970s, however, the Supreme Court seemed to begin a more hands-off approach to plea bargaining. In *Brady v. United States*,<sup>106</sup> the Supreme Court took up a case from a defendant that claimed he was coerced into pleading guilty in order to avoid a possible death sentence from a jury.<sup>107</sup> Looking at the bare requirements of the Fifth Amendment’s Due Process Clause, the *Brady* Court concluded that Brady’s waiver of a jury trial was valid because it was made knowingly and intelligently, “with sufficient awareness of the relevant circumstances and likely consequences.”<sup>108</sup>

Although the Court worried that “if the encouragement of guilty pleas by offers of leniency substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves,”<sup>109</sup> the Court seemed to ignore the unconstitutional conditions doctrine entirely.<sup>110</sup> With that said, however, the Court

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<sup>105</sup> *Id.*

<sup>106</sup> 397 U.S. 742 (1970).

<sup>107</sup> *Id.* at 744. Without a jury conviction, Brady could do no worse than serving life in prison. *Id.* at 749.

<sup>108</sup> *Id.* at 748.

<sup>109</sup> *Id.* at 758.

<sup>110</sup> The real difficulty striking down a criminal sentencing system because it encourages innocent people to plead guilty is proving that it actually happens, as relevant evidence will at most times be anecdotal, rather than statistical in nature. *See, e.g., Know the Cases: John Dixon*, INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/John\\_Dixon.php](http://www.innocenceproject.org/Content/John_Dixon.php) (last visited Dec. 1, 2014) (describing the story of a defendant who pleaded guilty to rape for fear of receiving a harsher sentence at trial and was later exonerated by DNA evidence after a decade in prison). That fact, however, has not stopped some social scientists from conducting research in this area. In a 2005 study, a psychology professor created a scenario in which students were accused of working together to solve logic problems after being forbidden from doing so. Melissa B. Russano, et al., *Investigating True and False Confessions Within a Novel Experimental Paradigm*, 16 PSYCHOL. SCI. 481, 483 (2005). Some students accused were actually guilty, as confederates in the experiment had convinced them to break this cardinal rule, but some students were not. *Id.* The professor told the students that they would merely be required to return to retake the test at a later date, if they confessed, but that those who refused would be subjected to unknown consequences to be decided at a later date. *Id.* Faced with these facts, eighty-seven percent of the students who cheated confessed, but a remarkable forty-three percent of the innocent students falsely confessed. *Id.* at 484. In 2011, another professor conducted a similar study, but made it clear that students that did not admit to cheating would go before a review board of ten to twelve people where “the majority of students, like 80–90%, are usually found guilty.” Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant’s Dilemma: An Innovative Empirical Study of Plea Bargaining’s Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1, 28, 32 (2012). Students who admitted to cheating would merely lose their promised compensation for participating in the study, while those who maintained their innocence and were “convicted” of cheating would have to undergo a mandatory semester-long ethics course meeting for three hours per week. *Id.* at 31–32. The study found that sixty-one percent of the innocent students confessed to an infraction they did not commit. *Id.* at 38.

distinguished Brady's case from the situation in *Jackson*, and did not overrule that case.<sup>111</sup> As the Court stated:

*Jackson* prohibits the imposition of the death penalty under § 1201(a), but that decision neither fashioned a new standard for judging the validity of guilty pleas nor mandated a new application of the test theretofore fashioned by courts and since reiterated that guilty pleas are valid if both “voluntary” and “intelligent.”<sup>112</sup>

The Court further rejected the notion “that guilty plea convictions hold no hazards for the innocent or that the methods of taking guilty pleas presently employed in this country are necessarily valid in all respects,”<sup>113</sup> and warned that “[plea bargains are] no more foolproof than full trials to the court or to the jury.”<sup>114</sup> The Court in *Santobello v. New York*<sup>115</sup> again affirmed the practice of plea bargaining a year later.<sup>116</sup>

In the past decade, the Court has been more willing to get itself involved in plea bargaining cases. In the 2011 companion cases of *Missouri v. Frye*<sup>117</sup> and *Lafler v. Cooper*,<sup>118</sup> the Supreme Court explicitly accepted the plea bargaining system as a reality of modern criminal justice,<sup>119</sup> while extending constitutional protections for defendants during negotiations. It could be said that the Supreme Court has indicated an increasing willingness to get involved in the process of plea negotiations, if not the actual results of those negotiations.<sup>120</sup> Some, including Justice Scalia, have been critical of this approach.<sup>121</sup> In *Lafler*, the Supreme Court stated that the defendant's

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<sup>111</sup> *Brady*, 397 U.S. at 747 (“Plainly, it seems to us, *Jackson* ruled neither that all pleas of guilty encouraged by the fear of a possible death sentence are involuntary pleas nor that such encouraged pleas are invalid . . .”).

<sup>112</sup> *Id.* (citing *Boykin v. Alabama*, 395 U.S. 238, 242 (1969)).

<sup>113</sup> *Id.* at 757–58.

<sup>114</sup> *Id.* at 758.

<sup>115</sup> 404 U.S. 257 (1971).

<sup>116</sup> *See id.* at 260 (“The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called ‘plea bargaining,’ is an essential component of the administration of justice. Properly administered, it 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.”).

<sup>117</sup> 132 S. Ct. 1399 (2012).

<sup>118</sup> 132 S. Ct. 1376 (2012).

<sup>119</sup> *Frye*, 132 S. Ct. at 1407 (“[Plea bargaining] is not some adjunct to the criminal justice system; it is the criminal justice system.” (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992))).

<sup>120</sup> *See id.* (“Because our [ ] [criminal justice system] ‘is for the most part a system of pleas, not a system of trials,’ it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process.” (emphasis added) (internal citations omitted) (citing *Lafler*, 132 S. Ct. at 1388)).

<sup>121</sup> *See Lafler*, 132 S. Ct. at 1391–92 (Scalia, J., dissenting) (“With [this case and the *Missouri v. Frye* decision], the Court today opens a whole new field of constitutionalized

“counsel was deficient when he advised respondent to reject the plea offer on the grounds he could not be convicted at trial.”<sup>122</sup> Applying *McMann v. Richardson*,<sup>123</sup> *Hill v. Lockhart*,<sup>124</sup> and *Strickland v. Washington*,<sup>125</sup> the Court ordered that the case be remanded so that the prosecution could offer the defendant the plea bargain again,<sup>126</sup> vacating a Sixth Circuit remedy that merely imposed upon the defendant the sentence to which he would have agreed to take in the deal.<sup>127</sup>

### *B. The Case for Fixing Virginia’s Criminal Sentencing System*

The obvious query, then, is whether Virginia is doing something differently from the other cases in which plea bargaining issues have come before the Supreme Court. This Note holds that Virginia’s system is distinguishable from those cases for two major reasons: one obvious, and one subtle.

Unusually among the states, Virginia’s criminal sentencing practices do not impose the trial penalty solely upon the ability of defendants to invoke their trial rights; rather, it specifically targets the defendant’s incentive to invoke his or her *jury* trial rights.<sup>128</sup> Indeed, while Virginia judges can be unpredictable, and sometimes do sentence defendants quite harshly,<sup>129</sup> the advent of the sentencing guidelines has made sentencing somewhat predictable, and a sentence from a judge at trial is often comparable to what a defendant’s lawyer could negotiate for his or her client.<sup>130</sup> In other words, the current system does not dissuade defendants from *all* trials as much as it discourages *jury* trials.

At first glance, this makes Virginia’s criminal sentencing system seem less problematic than that of other states. If the state is specifically only targeting jury trials,

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criminal procedure: plea-bargaining law . . . . The Court now moves to bring perfection to the alternative in which prosecutors and defendants have sought relief.”).

<sup>122</sup> *Id.* at 1384.

<sup>123</sup> 397 U.S. 759 (1970).

<sup>124</sup> 474 U.S. 52 (1985).

<sup>125</sup> 466 U.S. 668 (1984).

<sup>126</sup> *Lafler*, 132 S. Ct. at 1391.

<sup>127</sup> *Id.*

<sup>128</sup> See King & Noble, *supra* note 67, at 889 (“[A]pprehension about a severe sentence by a jury deters defendants from insisting on trial by jury, funneling defendants to guilty pleas, or, in Virginia, to pleas and bench trials.”).

<sup>129</sup> See, e.g., Louis Hansen, *Life Times Six*, PILOTONLINE.COM (Nov. 3, 2013), <http://hamptonroads.com/blount>. In 2006, a Norfolk Circuit Court judge sentenced fifteen-year-old Travion Blount to 118 years in prison after Blount and two older co-defendants robbed three juveniles at a house party at gunpoint. *Id.* No shots were fired, and no one was injured. *Id.* Blount’s co-defendants received sentences of ten and thirteen years after pleading guilty. *Id.* Some experts think Blount is currently serving the harshest sentence ever imposed upon an American teenager for a crime not involving murder. *Id.*

<sup>130</sup> Logically, the judge, prosecutors, and defense attorneys see the same set of guidelines, and the attorneys know from experience what each offense is “worth.” See Di Luca, *supra* note 32, at 21.

however, as opposed to both bench and jury trials, many of the necessity arguments the Supreme Court has relied upon in upholding the constitutionality of plea bargaining<sup>131</sup> are either partially mitigated or eliminated entirely. Simply put, the needless punishment of Virginia citizens who exercise their constitutional rights can *never* be the basis for enacting a statute or practice.<sup>132</sup> As such, another objective must be behind the practice in order for it to be permissible.<sup>133</sup> If the objective of Virginia's sentencing practices is to ensure the efficient resolution of justice, it does not make sense to make *only* jury trials unappealing to criminal defendants, if there were no constitutional issues with the trial penalty imposed. Because of this discrepancy, the necessity of the practice is called into question.<sup>134</sup>

It makes little sense for the Court to decline to apply the unconstitutional conditions doctrine to plea bargaining simply because it likes the efficiency of the system,<sup>135</sup> especially when the way Virginia has implemented its system does not necessarily deter all trials.<sup>136</sup> Also, the practice of jury sentencing combined with an intentional lack of information exacerbates the tendency for juries to return shocking verdicts for relatively minor crimes.<sup>137</sup> While statistical evidence is difficult to collect,<sup>138</sup> it is eminently possible that Virginia's particular perfect storm of practices could implicate the Court's concern articulated in *Brady*: that innocent defendants will plead guilty.<sup>139</sup> If the Virginia legislature fails to take steps to eliminate this particularly severe instance

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<sup>131</sup> See, e.g., *Santobello v. New York*, 404 U.S. 257, 260 (1971) (“‘[P]lea bargaining’ is an essential component of the administration of justice . . . . 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.”).

<sup>132</sup> See *United States v. Jackson*, 390 U.S. 570, 583 (1968) (“Whatever the power of Congress to impose a death penalty for violation of the Federal Kidnaping Act, Congress cannot impose such a penalty in a manner that needlessly penalizes the assertion of a constitutional right.” (citing *Griffin v. California*, 380 U.S. 609 (1965))).

<sup>133</sup> For example, the government in *Jackson* argued that the purpose of the kidnapping statute was limiting the imposition of “mandatory capital punishment in every case.” *Id.* at 581–82.

<sup>134</sup> See *id.* at 583 (“For the evil in the federal statute is not that it necessarily *coerces* guilty pleas and jury waivers but simply that it needlessly *encourages* them. A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right.”).

<sup>135</sup> As the Court stated, “[W]ith the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant’s guilt or in which there is substantial doubt that the State can sustain its burden of proof.” *Brady v. United States*, 397 U.S. 742, 752 (1970).

<sup>136</sup> See *supra* notes 127–29 and accompanying text.

<sup>137</sup> See Melissa Carrington, Note, *Applying Apprendi to Jury Sentencing: Why State Felony Jury Sentencing Threatens the Right to a Jury Trial*, 2011 U. ILL. L. REV. 1359, 1370–72 (explaining how an intentional lack of information given to a jury leads to wildly unpredictable results).

<sup>138</sup> Unfortunately research in this area is generally limited to social science experiments. See *supra* note 109 and accompanying discussion.

<sup>139</sup> *Brady*, 397 U.S. at 757–58.

of the classic constitutional conditions problem,<sup>140</sup> the Court should intervene.<sup>141</sup> While it seems that the Court will never apply the unconstitutional conditions doctrine in all plea bargaining cases, perhaps it can draw a line in cases where the process<sup>142</sup> is most likely to lead to particularly offensive results, and is not as justifiable on efficiency grounds.

### *C. Possible Solutions to Rectify the Unconstitutionality of the Virginia System*

#### 1. Eliminating the Plea Bargaining System

One possible solution for fixing Virginia's sentencing system is to eliminate the plea bargaining system entirely. Some hardliners might state that this would be a good result. After all, there is some merit in sentencing convicted defendants in the public eye, and the truly guilty should not be able to bargain for a lesser punishment.<sup>143</sup> While this would almost certainly solve any unconstitutional conditions problem, the drawbacks would be severe. First, completely eliminating the ability of prosecutors and defendants to bargain would almost certainly force our criminal justice system to grind to a complete halt.<sup>144</sup> Second, the system would probably become even less fair to criminal defendants because a judge, in an attempt to rush proceedings through a hopelessly overwhelmed docket, would possibly do everything within his or her power to suppress the defendant's opportunity to be heard.<sup>145</sup> Finally, while the Supreme Court has

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<sup>140</sup> See *supra* note 87.

<sup>141</sup> For further discussion see *infra* Part II.C.

<sup>142</sup> See *supra* notes 120–26 and accompanying text.

<sup>143</sup> Some legal scholars take complete issue with the plea bargaining system. See, e.g., Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387, 1400 (1970) (“[P]lea bargaining should be held unconstitutional because it places the accused in the dilemma of having to forfeit either his privilege against self-incrimination (by acknowledging his guilt through a plea of guilty) or his chance for a shorter sentence or reduced charge.”); Jeffrey Bellin, *Modern Justice and the Bill of Rights*, DAILY PRESS (Aug. 3, 2013), [http://articles.dailypress.com/2013-08-03/news/dp-edt-pvoicesoped-bellin-20130803\\_1\\_jury-trial-plea-bargain-modern-justice](http://articles.dailypress.com/2013-08-03/news/dp-edt-pvoicesoped-bellin-20130803_1_jury-trial-plea-bargain-modern-justice) (“[If alive today,] Madison and his compatriots might be impressed with the efficiency of our assembly-line justice system, but they would certainly recoil at the fact that an essential ingredient of that system is the waiver of the very constitutional rights that were intended to define us as a nation.”).

<sup>144</sup> See *Lafler v. Cooper*, 132 S. Ct. 1376, 1397 (2012) (Scalia, J., dissenting) (“[W]e accept plea bargaining because many believe that without it our long and expensive process of criminal trial could not sustain the burden imposed on it, and our system of criminal justice would grind to a halt.” (citing Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 38 (1979))).

<sup>145</sup> For a recent high-profile instance of a judge attempting to rush a defendant through a court proceeding, see *United States v. Davila*, 133 S. Ct. 2139 (2013). In *Davila*, a magistrate judge held an in camera hearing to deal with Davila's request for new counsel on the basis that he was receiving ineffective counsel. *Id.* at 2143–44. Addressing a complaint that Davila's attorney had advised him to plead guilty, the judge told Davila that “‘oftentimes . . . that is the

expressed reservations about the modern-day plea bargaining system,<sup>146</sup> it has explicitly refused to hold it entirely unconstitutional.<sup>147</sup> Even most of those legal analysts who believe plea bargaining imposes an unconstitutional trial penalty are resigned to reforming the practice, not abolishing it entirely.<sup>148</sup>

## 2. Requiring that Judges Keep Overzealous Juries in Check

Another possible solution for fixing Virginia's sentencing system is requiring judges to reduce (or suspend significant portions of) jury sentences that deviate substantially from what the guidelines suggest.<sup>149</sup> This could take any number of forms. The Virginia legislature could mandate, for example, that judges<sup>150</sup> reduce any jury

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best advice a lawyer can give his client.” *Id.* at 2144. ““In view of whatever the Government’s evidence in a case might be,” the judge stated, ““it might be a good idea for the Defendant . . . to plead guilty and go to sentencing with the best arguments . . . still available [without] . . . causing the Government to have to spend a bunch of money empanelling a jury to try an open and shut case.”” *Id.* The judge then urged Davila to plead guilty based on an extremely lengthy and thorough explanation of the sentencing guidelines and that a person with Davila’s criminal history could expect a harsh sentence. *Id.*

<sup>146</sup> See *Brady v. United States*, 397 U.S. 742, 752–53 (1970) (“Of course, that the prevalence of guilty pleas is explainable does not necessarily validate those pleas or the system which produces them.”).

<sup>147</sup> The issue we deal with is inherent in the criminal law and its administration because guilty pleas are not constitutionally forbidden, because the criminal law characteristically extends to judge or jury a range of choice in setting the sentence in individual cases, and because both the State and the defendant often find it advantageous to preclude the possibility of the maximum penalty authorized by law. . . . A contrary holding would require the States and Federal Government to forbid guilty pleas altogether, to provide a single invariable penalty for each crime defined by the statutes, or to place the sentencing function in a separate authority having no knowledge of the manner in which the conviction in each case was obtained. In any event, it would be necessary to forbid prosecutors and judges to accept guilty pleas to selected counts, to lesser included offenses, or to reduced charges. The Fifth Amendment does not reach so far.

See *id.* at 751–53.

<sup>148</sup> See, e.g., McCoy, *Plea Bargaining as Coercion*, *supra* note 22, at 79 (“[N]or is it realistic or necessary to abolish guilty pleas entirely. But the worst examples of the practice can be eliminated, and alternatives to it for a significant proportion of the caseload can be devised if the change is incremental and does not require a wholesale abandonment of the guilty plea system.”).

<sup>149</sup> This suggestion seems to be directly in conflict with judges’ natural tendencies to uphold jury sentences. See King, *supra* note 65, at 201 (explaining a “systematic effort by judges and prosecutors to exercise discretion in a way that preserves a sentence discount by encouraging defendants to waive a jury”).

<sup>150</sup> Again, juries do not have the power to suspend time served subject to conditions like judges do. In many cases, jurors cannot sentence a defendant within the Virginia sentencing guidelines because of statutory sentence minimums. See King & Noble, *supra* note 67, at 911.

sentences that deviate substantially from the sentencing guidelines.<sup>151</sup> A substantial deviation could mean any sentence that is higher than the maximum, or it could mean anything that is a certain time period or percentage higher than the maximum range.<sup>152</sup>

The major problem with this plan is that it has the effect of making the guidelines mandatory.<sup>153</sup> Virginia has intentionally avoided the practice of some other states by making it clear that Virginia's guidelines are voluntary.<sup>154</sup> Technically, judges currently have the discretion to do what they please,<sup>155</sup> even if they usually refrain only because the legislature allegedly holds them to the guidelines during the reappointment process.<sup>156</sup> Also, there is something inherently strange about forcing judges to take a far more active role in overruling jury decisions. It seems as if this method would be a convoluted way of instituting a *de facto* abolition of jury sentencing without actually getting rid of the practice. At some point, this proposal would render a jury superfluous, and the practice of jury sentencing might as well be abolished.<sup>157</sup>

### 3. Reinstating the Parole System

Yet another possible way to repair Virginia's sentencing system is to reinstitute the parole board. Virginia abolished parole in 1995.<sup>158</sup> Then-candidate George Allen made eliminating the parole system a priority in his 1993 campaign for Virginia governor,<sup>159</sup> and the Virginia General Assembly abolished the system through legislation a year later.<sup>160</sup> While letting some criminal defendants who have been convicted for absurd sentences out early on parole would certainly help, this plan fails to rectify the unconstitutional conditions problem for two major reasons.

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<sup>151</sup> And if not an actual reduction in sentence, a suspension of the excessive time mandated by the jury. *Id.*

<sup>152</sup> For instance, the legislature could mandate that no defendant is to be sentenced at a rate higher than 110% of the sentencing guidelines maximum.

<sup>153</sup> Some states do make their guidelines mandatory, or virtually mandatory. *See OSTROM ET AL.*, *supra* note 50, at 5 (“Some states have put in place more mandatory guidelines that more tightly control judicial discretion by using close monitoring, requiring reasons for departures from recommended sentences, and allowing vigorous appellate review.”).

<sup>154</sup> *Id.* at 6.

<sup>155</sup> *See supra* note 51 and accompanying text.

<sup>156</sup> *See OSTROM ET AL.*, *supra* note 50, at 30 (“For example, in Virginia where there is no appellate review [of judicial departures from the sentencing guidelines], other incentives are thought to play a role in furthering judicial compliance. Specifically, judges are said to believe that legislators (who are responsible for renewing judicial terms) consider guideline departure rates when reviewing individual judges for reappointment.”).

<sup>157</sup> *See infra* Part II.C.4.

<sup>158</sup> Tom Jackman, *Long-Held Inmates Sue Virginia Parole Board for Release*, WASH. POST (Feb. 9, 2010), [http://washingtonpost.com/wp-dyn/content/article/2010/02/08/AR2010020803546\\_pf.html](http://washingtonpost.com/wp-dyn/content/article/2010/02/08/AR2010020803546_pf.html).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

First, parole after conviction is not a certainty.<sup>161</sup> Because parole is not guaranteed to save a defendant who has been convicted to serve time well above what the sentencing guidelines suggest, the coercive specter of an egregiously harsh sentence still looms over the defendant as he or she decides whether to exercise his or her constitutional right to a jury trial. As such, the trial penalty is merely softened, not eliminated. Second, the reinstatement of the parole board is politically unpalatable.<sup>162</sup> A politician has little to gain and much to lose by supporting the parole system.<sup>163</sup> Third, the reinstatement of parole may actually increase the trial penalty if the jury knows that parole is a possibility for whomever it sentences.<sup>164</sup> While there may well be excellent policy reasons for reinstating parole,<sup>165</sup> fixing Virginia's trial penalty problem is not one of them.

#### 4. Abolishing or Partially Abolishing the Jury Sentencing System

Another fix would involve removing some or all sentencing decisions from Virginia juries. This could come in the form of allowing defendants to waive the jury

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<sup>161</sup> In 1989, only forty-two percent of inmates considered for parole actually received it. *Id.*

<sup>162</sup> See, e.g., Sam Isaacs, *For Virginia Inmates, Little Hope of Parole*, VA. COMMONWEALTH U. CAPITAL NEWS SERVICE (May 15, 2013), <http://capitalnews.vcu.edu/2013/05/15/for-virginia-inmates-little-hope-of-parole/> (discussing some of the problems faced by Virginia legislators attempting to reform the parole system).

<sup>163</sup> A 1993 study found that violent offenders in Virginia were serving only thirty-eight percent of the imposed lengths of their sentences. See Jackman, *supra* note 158. While it is possible that the reinstated parole system could force inmates to serve more of their sentences, a politician that supports any meaningful reduction in time served for offenders will almost certainly be branded as “soft on crime” for no real gain. See, e.g., Editorial, *Writing Off Lives*, N.Y. TIMES, Sept. 30, 2013, at A24 (“States restricted the use of parole and governors who feared being portrayed as soft on crime began to deny virtually all clemency requests.”).

<sup>164</sup> Of course, some may question how much attention jurors would pay to the particulars of the criminal justice system. In this nightmare scenario, however, jurors would be informed of the possibility of parole for a particular defendant right before they sentence him or her. In Kentucky, for instance, the prosecution often presents information during sentencing that allows jurors to calculate when the defendant would become eligible for parole as well as evidence of good-time credits, thus giving the jury reasons to impose a longer sentence; however, the defense may not introduce statistical evidence explaining how many offenders are actually released after they have become parole-eligible. See King & Noble, *supra* note 67, at 893 & n.19 (citing *Young v. Commonwealth*, 129 S.W.2d 343 (Ky. 2004); *Cornelison v. Commonwealth*, 990 S.W.2d 570 (Ky. 1999); *Abbott v. Commonwealth*, 822 S.W.2d 417 (Ky. 1992)).

<sup>165</sup> See, e.g., *Parole Release Decisionmaking and the Sentencing Process*, 84 YALE L.J. 810, 814–15 (1975) (“Release on parole has come to be essential to the administration of post-conviction justice. American prison sentences are, comparatively speaking, quite long [and i]ncreasingly indeterminate. . . . These factors, combined with the limited resources devoted to building and staffing prisons, require that pre-expiration release be institutionalized.”).

sentencing process and be sentenced by a judge.<sup>166</sup> On the other hand, the legislature could also pursue this policy objective by removing the sentencing power from the jury altogether. These positions are not without their advocates.<sup>167</sup> Virginia is one of only six states that use jury sentencing for non-capital felonies.<sup>168</sup> However, recent Supreme Court precedent has called for more jury involvement in sentencing, not less.<sup>169</sup> Many scholars advocate that jury sentencing should be adopted by more

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<sup>166</sup> For instance, Missouri and Texas allow defendants to opt for a jury trial with a sentencing judge. MO. REV. STAT. § 557.036 (2013); TEX. CODE CRIM. PROC. ANN. art. 37.07 (West 2013).

<sup>167</sup> See, e.g., SOL RUBIN, *THE LAW OF CRIMINAL CORRECTION* 145–51 (2d ed., Student ed. 1973) (arguing that jury sentencing is less equitable and less uniform than judicial sentencing); Erwin Fleet, *Sentencing the Criminal—A Judicial Responsibility*, 9 AM. J. TRIAL ADVOC. 369, 370 (1986) (maintaining that criminal sentencing belongs in the purview of judges); H. M. LaFont, *Assessment of Punishment—A Judge or Jury Function?*, 38 TEX. L. REV. 835, 848 (1960) (arguing that judges are better than juries at assessing appropriate punishment in noncapital cases); Carrington, *supra* note 137, at 1385 (arguing that coupling jury sentencing with jury trials imposes a trial penalty and that the jury sentencing systems in Arkansas, Kentucky, Oklahoma, and Virginia need reform); Note, *Jury Sentencing in Virginia*, 53 VA. L. REV. 968, 1001 (1967) (advocating for the abolition of jury sentencing); Note, *Statutory Structures for Sentencing Felons to Prison*, 60 COLUM. L. REV. 1134, 1154–57 (1960) (arguing that jury sentencing should be abolished).

<sup>168</sup> See ARK. CODE ANN. § 5-4-103 (2010); KY. REV. STAT. ANN. § 532.055 (West 2010); MO. REV. STAT. § 557.036 (2010); OKLA. STAT. tit. 22, § 926.1 (2010); TEX. CODE CRIM. PROC. ANN. art. 37.07 (West 2009); VA. CODE ANN. § 19.2-295 (2011). With the vast majority of states refusing to allow juries to conduct sentencing, it is perhaps unsurprising that many scholars are wary of the idea. See *supra* note 164.

<sup>169</sup> See *Alleyne v. United States*, 133 S. Ct. 2151, 2155 (2013) (holding that “any fact that increases the mandatory minimum is an ‘element’ [of the alleged crime] that must be submitted to the jury.”); *S. Union Co. v. United States*, 132 S. Ct. 2344, 2348–49 (2012) (applying the *Apprendi* rule to the imposition of criminal fines); *Cunningham v. California*, 549 U.S. 270, 274 (2007) (holding California law which authorized judge to find facts exposing defendant to elevated upper term sentence violated defendant’s right to trial by jury); *United States v. Booker*, 543 U.S. 220, 226–27 (2005) (holding that judicial findings which raised the mandatory sentencing range under the Federal Sentencing Guidelines violated the defendant’s Sixth Amendment right to trial by jury); *Blakely v. Washington*, 542 U.S. 296, 313–14 (2004) (holding judicial finding that defendant had committed a crime “with ‘deliberate cruelty’” allowing judge to sentence defendant to beyond statutory maximum violated the Sixth Amendment); *Ring v. Arizona*, 536 U.S. 584, 588–89 (2002) (holding Arizona statute allowing judges to determine the presence or absence of the aggravating factors required by Arizona law for imposition of the death penalty after a jury determination of guilt violated the Sixth Amendment right to a jury trial); *Apprendi v. New Jersey*, 530 U.S. 466, 497 (2000) (holding that any fact that increases penalty for crime beyond prescribed statutory maximum, other than fact of prior conviction, must be submitted to jury and proved beyond reasonable doubt). *But see Harris v. United States*, 536 U.S. 545, 568–69 (2002) (holding that the judge was constitutionally permitted to determine if defendant had previously brandished a firearm because the finding only raised the statutory minimum sentence, not the maximum sentence), *overruled by Alleyne v. United States*, 133 S. Ct. 2151 (2013).

states, not contracted.<sup>170</sup> While this would certainly make jury trials far less dangerous for criminal defendants, it represents a troubling and seismic shift in policy to take this course of action.<sup>171</sup> Juries, for all of their faults, are meant to protect defendants from abuse and corruption in the criminal justice system.<sup>172</sup> Furthermore, jury sentencing has been Virginia's practice for centuries now.<sup>173</sup> It is hard to imagine a scenario in which Virginia would voluntarily abolish plea bargaining, and it is even more unlikely that the Supreme Court would force them to do so.

### 5. Giving Juries the Virginia Sentencing Commission Guidelines

Finally, the easiest, most effective solution is to give juries the exact same guidelines that judges receive at bench trials.<sup>174</sup> Indeed, it would be the height of simplicity to change a couple of words in a single section of the Code of Virginia.<sup>175</sup> Also, because Virginia has already created these sentencing guidelines, the implementation of this system would be almost cost-free.<sup>176</sup> Because the Legislature has already authorized the expenses that come with having the Virginia Criminal Sentencing Commission establish sentencing guidelines, the cost of giving juries sentencing guidelines that already exist would be minimal. Competent prosecutors and defense attorneys already complete the defendant's sentencing guideline recommendations before trial anyway, so it would not be a seismic shift in the system to allow juries to see these prepared guidelines before sentencing the defendant. In this scenario, a judge, upon a finding

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<sup>170</sup> See, e.g., Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 956 (2003); Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 314 (2003); Bertrall L. Ross II, *Reconciling the Booker Conflict: A Substantive Sixth Amendment in a Real Offense Sentencing System*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 725, 728 (2006).

<sup>171</sup> Jury sentencing has been around as an important exercise in democracy for a long time. See generally, Hoffman, *supra* note 170 (giving the historical case for jury sentencing).

<sup>172</sup> Reid Hastie & W. Kip Viscusi, *What Juries Can't Do Well: The Jury's Performance as a Risk Manager*, 40 ARIZ. L. REV. 901, 902 (1998) ("From an even more elevated perspective, the jury is supposed to protect citizens from abuse by corrupt political officials, an overzealous prosecutor, or a prejudiced judge.").

<sup>173</sup> King & Noble, *supra* note 67, at 886 n.1 ("These states[, including Virginia,] have practiced jury sentencing from early in their history, or, as one judge put it, 'since the earth cooled.'").

<sup>174</sup> Many legal scholars have argued that all juries that perform the sentencing function should receive sentencing guidelines. See Iontcheva, *supra* note 57, at 359; King, *supra* note 65, at 197; Paul H. Robinson & Barbara A. Spellman, *Sentencing Decisions: Matching the Decision-maker to the Decision Nature*, 105 COLUM. L. REV. 1124, 1147 (2005) (arguing that "articulated sentencing rules" would fix vast differences between jury sentences and judge sentences).

<sup>175</sup> For example, VA. CODE ANN. § 19.2-298.01(A) could instead read: "In cases tried by a jury, the jury shall be presented information regarding sentencing guidelines."

<sup>176</sup> See Iontcheva, *supra* note 57, at 370 ("Finally, reports covering regional sentencing statistics have already been generated for the purpose of devising sentencing guidelines and are being provided to judges in some states, so it would hardly be more burdensome to make them available to juries.").

of guilt by the jury, would give a standardized jury instruction concerning the nature of the guidelines and what judges can do to make sentences go below mandatory minimums through the suspension of time. The juries would then have a clearer idea of what an offense is “worth” in the criminal sentencing system, and this should lead to more equitable and rational results.

To be clear, this Note is not advocating that juries should receive the guidelines before the penalty phase of a trial.<sup>177</sup> Rather, it is an assertion that it is inherently good for the juries to be fully informed about the consequences and context of their decisions before they have the final say on depriving a criminal defendant of his liberty. Indeed, some jurors would likely be infuriated if they knew what the state was intentionally hiding from them.<sup>178</sup> “Hiding the ball” in this way undermines the very legitimacy of the system Virginia has entrusted to uphold its community values.<sup>179</sup> If it burdens Virginia’s criminal justice system by making jury trials more acceptable to criminal defendants, the difficulty of such an endeavor does not excuse Virginia from undertaking it. A bare desire to accommodate the efficiency of justice through the practice of making a jury trial as unattractive of an option as possible certainly does not

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<sup>177</sup> Because Virginia is one of the few states nationwide that observes jury sentencing, it is less important that the jury receives the guidelines at the outset of the case because it ultimately decides upon a recommended sentence. North Carolina, which does not have jury sentencing, informs the jury of the likely consequences of its decision upon the request of the defendant. See Jeffrey Bellin, *Is Punishment Relevant After All? A Prescription for Informing Juries of the Consequences of Conviction*, 90 B.U. L. REV. 2223, 2247–48 (2010) (“The courts explain that this practice [of informing the jury about the consequences of a guilty verdict] ‘serves the salutary purpose of impressing upon the jury the gravity of its duty’ and permits the ‘defendant to urge upon the jury the possible consequence of imprisonment following conviction to encourage the jury to give the matter its close attention and to decide it only after due and careful consideration.’”). Bellin points out, however, that North Carolina is an anomaly in this regard, noting that similar statutes in four states to the one that allows North Carolina courts to permit this information are interpreted differently. *Id.* at 2247 & n.98. He also notes that Tennessee eliminated the statute allowing juries to hear this information in 1998. *Id.* at 2248; see also *Shannon v. United States*, 512 U.S. 573, 579 (1994) (“Information regarding the consequences of a verdict is therefore irrelevant to the jury’s task. Moreover, providing jurors sentencing information invites them to ponder matters that are not within their province, distracts them from their fact-finding responsibilities, and creates a strong possibility of confusion.”).

<sup>178</sup> See Bellin, *supra* note 177, at 2225–26 (“In an age of proliferating mandatory sentencing laws and severe punishments for relatively minor, but nevertheless criminal, conduct, lay jurors would likely be outraged by the courts’ studied effort to keep them ignorant of the consequences of guilty verdicts.”); see also *United States v. Polizzi*, 549 F. Supp. 2d 308, 320 (E.D.N.Y. 2008) (“Told of the [required] minimum [sentence] after the verdict was received, a number of jurors expressed distress, indicating they would not have voted to convict had they known of the required prison term.”).

<sup>179</sup> See, e.g., *The Unconstitutionality of Plea Bargaining*, *supra* note 143, at 1396 (“The state’s criminal laws are maintained in rough conformity with community morality by requiring a community judgment of the accused by a jury.”).

relieve Virginia of its burden to refrain from trampling on the rights of its citizens—indeed, it cannot do indirectly what it is barred from doing directly.<sup>180</sup> The Constitution requires our society to constantly wrangle with difficult decisions in the name of protecting liberty.<sup>181</sup>

#### CONCLUSION

As it currently stands, Virginia's criminal sentencing structure should be considered in violation of the unconstitutional conditions doctrine because it coerces a defendant to give up his or her Sixth Amendment right to a jury trial through the imposition of a harsh trial penalty.<sup>182</sup> It is distinguishable from other instances of plea bargaining in which the Supreme Court has declined to apply the unconstitutional conditions doctrine because it specifically targets the defendant's incentive to exercise his rights to a jury trial.<sup>183</sup> Furthermore, even if the unconstitutional conditions doctrine cannot be applied in this area, the current Virginia practices in sentencing criminal defendants are bad public policy. If our society truly believes in the ability of individual members of the community to handle that greatest of responsibilities—holding the life or liberty of another human being in his or her hands—then we should have no problems with ensuring that those we have entrusted with this task receive the best possible information available to perform their duties.<sup>184</sup> In the interests of justice and complying with the Constitution, as well as comporting with notions of fundamental fairness, the portion of the Virginia statute that prohibits juries from receiving the same sentencing guidelines that judges receive should be stricken or otherwise abolished. Taking this course of action would enable Virginia to keep the efficiency benefits of plea bargaining while increasing the inherent fairness of the state's jury sentencing. Most importantly, exercising the Constitutional right to a jury trial would no longer be a massive gamble, and perhaps stories like Robert Via's and Quincy Delaigle's<sup>185</sup> would permanently fade into Virginia's long and rich history.

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<sup>180</sup> See, e.g., *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922) (“To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it.”).

<sup>181</sup> See, e.g., *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011) (“Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case.”).

<sup>182</sup> See discussion *supra* Part II.

<sup>183</sup> See discussion *supra* Part II.A.

<sup>184</sup> See discussion *supra* Part II.C.5.

<sup>185</sup> See discussion *supra* Introduction.