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Thinking Outside the Jury Box: Deploying the Grand Jury in the Guilty Plea Process

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THINKING OUTSIDE THE JURY BOX: DEPLOYING THE
GRAND JURY IN THE GUILTY PLEA PROCESS

ROGER A. FAIRFAX, JR.*

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INTRODUCTION

There is near-universal agreement that the engine of the modern American criminal justice system is plea bargaining.¹ Given the ubiquity of plea bargaining, the Supreme Court and the rest of the legal community have begun setting their sights on how the practice might be better regulated.² At the same time, many hold the view that the grand jury has outlived its usefulness in the administration of criminal justice and is a relic of a time gone by.³ Even before recent calls for the abolition of the grand jury in the wake of high-profile cases that seemed to cast the institution in a bad light,⁴ serious questions arose regarding the necessity of a body that seemed superfluous in an era in which most criminal cases end in guilty pleas.⁵

This Article, written for the *William & Mary Law Review* Symposium, “Plea Bargaining Regulation: The Next Criminal Procedure Frontier,” considers how plea bargaining might be better regulated and whether the grand jury could play a role in the regulation of plea bargaining—namely, in the determination of the factual basis for pre-indictment guilty pleas and the reasonableness, fairness,

1. See, e.g., *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012); George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 859 (2000).

2. See, e.g., *Lafler*, 132 S. Ct. at 1388; *Missouri v. Frye*, 132 S. Ct. 1399, 1407-08 (2012); Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 YALE L.J. 2650, 2665-69 (2013).

3. See Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 261, 263 (1995).

4. See, e.g., LaDoris Hazzard Cordell, *Grand Juries Should Be Abolished*, SLATE (Dec. 9, 2014, 8:13 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/12/abolish_grand_juries_justice_for_eric_garner_and_michael_brown.html [<https://perma.cc/Z48Y-JK6K>]; George E. Curry, *U.S. Should Abolish Grand Jury System*, PHILA. TRIB. (Dec. 10, 2014, 4:42 PM), http://www.phillytrib.com/commentary/u-s-should-abolish-grand-jury-system/article_f5fe10e1-ca23-5adb-a9cc-4d0cdeee4423.html [<https://perma.cc/WAF5-DKUL>]; James C. Harrington, *Abolish Grand Jury System*, SAN ANTONIO EXPRESS-NEWS (Dec. 21, 2014, 12:00 AM), <http://www.mysanantonio.com/opinion/commentary/article/Abolish-grand-jury-system-5969702.php> [<https://perma.cc/2X2U-J4BZ>]; Caleb Pilgrim, *Let's Abolish the Grand Jury System*, NEW HAVEN REG. (Dec. 9, 2014, 2:17 PM), <http://www.nhregister.com/opinion/20141209/caleb-pilgrim-lets-abolish-the-grand-jury-system> [<https://perma.cc/SU9R-XTUC>].

5. See, e.g., William J. Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & CRIMINOLOGY 174, 174 (1973); Phyllis L. Crocker, *Appointed but (Nearly) Prevented from Serving: My Experiences as a Grand Jury Foreperson*, 2 OHIO ST. J. CRIM. L. 289, 290 (2004); Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 AM. CRIM. L. REV. 1, 2 (2004); Leipold, *supra* note 3, at 261, 263.

and propriety of plea bargains and plea agreements. In this way, the Article evaluates whether the grand jury may serve as a popular accountability mechanism for defense counsel, prosecutors, and judges in the guilty plea process.

Part I of this Article examines the recent recognition of the influence and ubiquity of plea bargaining in modern criminal justice and the procedural and substantive safeguards courts have begun to impose in order to regulate the guilty plea process. This Part highlights the lack of popular participation in this “world of guilty pleas,” and calls for ways to maintain the lay role in the disposition of criminal cases.⁶

Part II of this Article proposes a thought experiment. What if we deployed the grand jury in the guilty plea process? Could the supposedly underutilized grand jury provide the vehicle desired for regulation of the plea bargaining regime and inject the popular participation missing in today’s criminal justice system? In particular, might the grand jury have a role to play when the court determines whether there is a factual basis for the guilty plea and reviews the terms of the plea agreement? Part III recognizes the significant practical challenges to the use of the grand jury for these purposes and considers practical and philosophical objections to this proposal—particularly those raised by a number of thoughtful and prominent trial judges interviewed by the author. The Article concludes with thoughts on what these judges believe are the most pressing needs for reform in the plea bargaining regime and which solutions are most compelling.

I. THE WORLD OF GUILTY PLEAS AND THE CALL FOR RESTORING POPULAR PARTICIPATION IN THE CRIMINAL JUSTICE SYSTEM

Today, nearly all convictions come after the defendant pleads guilty to the charges alleged against him.⁷ Indeed, in *Lafler v.*

6. See Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancement in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1100 (2001).

7. See, e.g., SEAN ROSENMERKEL ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE [DOJ], NCJ 226846, FELONY SENTENCES IN STATE COURTS, 2006—STATISTICAL TABLES 24, 25 tbl.4.1 (2010), <http://www.bjs.gov/content/pub/pdf/fssc06st.pdf> [<https://perma.cc/7R4Y-2ZLD>]; U.S. SENTENCING COMM’N, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.C (2012), <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual->

Cooper, the Supreme Court recently recognized the centrality and ubiquity of plea bargaining in the modern criminal justice system:

[C]riminal justice today is for the most part a system of pleas, not a system of trials. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.... [T]he right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences.⁸

This means that there is little, if any, popular participation in the modern criminal justice system. Of course, democratically elected representatives are responsible for passing the criminal laws, and prosecutors—most of whom are elected and thus presumably accountable to the electorate—are charged with enforcing the laws.⁹ However, the sort of direct lay involvement in the adjudication of criminal cases contemplated by the founding generation has given way to administrative efficiency in this world of guilty pleas.¹⁰

The fact that nearly all criminal convictions are derived from guilty pleas rather than trials has fueled the sentiment that the community needs more involvement in the determination of criminal cases.¹¹ One thoughtful proposal, advanced by Professor Laura Appleman, would create a “plea jury” to help guide the guilty plea process and provide the court with lay perspective in the consideration and processing of guilty pleas.¹² As Professor Appleman explains:

[T]he current configuration of the criminal guilty plea leaves no room for the community’s voice. Guilty pleas, although indispensable to the smooth processing of criminal justice, have become hasty and rote, allowing little to no expression of the community’s voice. Moreover, the chronic imbalance of prosecutorial power over the last thirty years has shrunk the roles of the

reports-and-sourcebooks/2012/FigureC.pdf [https://perma.cc/92QP-T457].

8. 132 S. Ct. 1376, 1388 (2012) (citations omitted).

9. See Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1268 (2011).

10. See, e.g., *Santobello v. New York*, 404 U.S. 257, 260 (1971); Bibas, *supra* note 6, at 1150.

11. See Laura I. Appleman, *The Plea Jury*, 85 IND. L.J. 731, 732 (2010).

12. *Id.* at 733-34.

defendant, the defense attorney, and even the court to small ones that are easily pushed aside.

Incorporating a plea jury into the guilty-plea process provides the solution to many of these problems.¹³

Therefore, Professor Appleman proposes the creation of a jury expressly for the purpose of reviewing plea bargains and the plea process.¹⁴ This plea jury, which Professor Appleman describes “as a cross between a grand jury and a petit jury,”¹⁵ would supplement or usurp the judge in the core functions the court performs in the plea process, determining that: (1) the plea is knowing, voluntary, and intelligent; (2) a factual basis exists for the plea; and (3) the sentence is appropriate.¹⁶

II. THOUGHT EXPERIMENT: USING THE GRAND JURY IN THE GUILTY PLEA PROCESS

In addition to enhancing the guilty plea process that animates the bulk of criminal justice today, Professor Appleman’s proposal promotes lay participation in the criminal justice system. However, the creation of such a plea jury might, in fact, be unnecessary. As the author of this Article has posited elsewhere, a new entity or mechanism for popular participation in the plea process may be superfluous.¹⁷ The grand jury might be in a position to play the role contemplated by the proposed plea jury.¹⁸

However, the suggestion that the grand jury is already equipped to perform this function has not been adequately fleshed out—until now. Although the grand jury may not be the best arbiter of whether a plea is knowing, voluntary, and intelligent,¹⁹ the grand jury could

13. *Id.* (footnote omitted).

14. *Id.* at 734.

15. *Id.* at 748.

16. *Id.*

17. See Roger A. Fairfax, Jr., *Grand Jury Innovation: Toward a Functional Makeover of the Ancient Bulwark of Liberty*, 19 WM. & MARY BILL RTS. J. 339, 357 (2010).

18. See *id.*

19. The legal determination of plea voluntariness safeguards different Sixth Amendment interests of the defendant and is properly allocated to the court. See *United States v. Vonn*, 535 U.S. 55, 62 (2002); *Boykin v. Alabama*, 395 U.S. 238, 242-44 (1969); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 92-93 (2005).

play a key role in determining whether there is a factual basis for a guilty plea and whether the plea agreement is fair and proper. What follows is an “outside of the box” idea that considers whether the grand jury could have a role to play in the regulation of plea bargaining—namely, in the determination of the factual basis for pre-indictment guilty pleas and the reasonableness, fairness, and propriety of plea agreements.

A. *Factual Basis*

Under the Federal Rules of Criminal Procedure, the judge presiding over a guilty plea must determine that there is a factual basis for the plea.²⁰ Given the grand jury’s unique features, it might be an excellent organ for the review of the factual basis. First, this is what the grand jury *does*. One of its core functions is to determine whether there is a sufficient factual basis—probable cause—to believe that the target of the grand jury’s inquiry committed the alleged offense.²¹ In doing so, the grand jurors have the opportunity to engage in a full and frank discussion of the facts placed before them, and they can deliberate to reach a conclusion as to whether there is, in fact, probable cause to support the indictment.²² This process can be easily adapted for determining whether there is a factual basis for the guilty plea.

Second, this function can be performed because of what the grand jury *is*. Because of its typically larger size, the grand jury represents a greater cross-section of the community than the petit jury.²³ It is therefore uniquely equipped to bring to bear the diverse views and experiences of the grand jurors as they assess whether the facts alleged by the government and admitted by the defendant are indeed substantiated.²⁴

Although it may seem odd to require a third party to approve facts stipulated by both the government and the defendant, this is

20. See FED. R. CRIM. P. 11(b)(3).

21. See Niki Kuckes, *The Democratic Prosecutor: Explaining the Constitutional Function of the Federal Grand Jury*, 94 GEO. L.J. 1265, 1268-69 (2006).

22. See Roger A. Fairfax, Jr., *Grand Jury Discretion and Constitutional Design*, 93 CORNELL L. REV. 703, 744-45 (2008).

23. See *id.* at 745.

24. See *id.*

exactly what federal courts now are tasked with doing under Rule 11.²⁵ Particularly in light of the debate over whether it is proper for a court to accept—or for defense counsel to acquiesce in—a guilty plea made by an individual who is factually innocent,²⁶ the grand jury could provide a useful community perspective on the important question of whether someone who is not clearly culpable should be permitted to plead guilty to an offense.

B. Approval of the Plea Agreement

Federal judges presiding over guilty pleas must also decide whether to accept the plea bargain itself.²⁷ Although federal judges are prohibited from becoming involved in plea discussions,²⁸ the reviewing court must consider the terms of the plea bargain.²⁹ Given the need to assess plea agreements and the general lack of popular involvement in criminal cases involving guilty pleas, the grand jury could play an important role. If one of the central concerns is whether the plea bargain is in the public interest, who better than a cross-section of the public to weigh in on the matter? Grand jurors could highlight aspects of the bargain that do not comport with community values.

Furthermore, having the grand jury play this role could do more than ferret out improper plea bargains that already have been struck; the knowledge that a grand jury might review the terms of a plea agreement might discourage prosecutorial unfairness. First, prosecutors would have an additional incentive to treat similarly-situated defendants similarly, thus promoting fairness for individual defendants. Second, grand jury review might help ensure that the terms of a plea agreement are not too lenient or too harsh relative to community preferences and norms.

25. See FED. R. CRIM. P. 11(b)(3).

26. See, e.g., Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1119 (2008); 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, 17-18 (2013).

27. See FED. R. CRIM. P. 11(c)(3).

28. See *id.* 11(c)(1); *United States v. Davila*, 133 S. Ct. 2139, 2146 (2013).

29. See FED. R. CRIM. P. 11(c)(3)-(5).

C. Challenges and Objections

1. The Grand Jury's Usefulness

Ultimately, deploying the grand jury in the plea process has the potential not only to improve the main avenue for the disposition of criminal cases but also to help restore popular participation in criminal justice. Nevertheless, a proposal such as this presents a number of challenges. First, it must account for the tremendous force of history working against the grand jury. Critics have been pessimistic at best about the grand jury's potential to perform any meaningful role in criminal justice.³⁰ Indeed, many critics have called for the grand jury's abolition altogether.³¹ Much of this criticism, however, fails to take into account what role the grand jury has played throughout history. As the author of this Article has written elsewhere:

[T]he grand jury has demonstrated its tremendous potential to contribute beyond the traditional roles assigned to it today. Even within the American experience, the grand jury has served as a pivotal institution in the civic life of communities. For example, grand juries in colonial America levied taxes, allocated public works spending, appointed government officials, and helped to manage other affairs of local government. Only later did the grand jury begin to be limited to the circumscribed roles it performs today.³²

Perhaps the best way to rebut critics' condemnation of the grand jury's usefulness is to put the grand jury to good use, and deploying the grand jury in the guilty plea process would do just that.

30. See Kuckes, *supra* note 5, at 2-3.

31. In addition to the longstanding general criticism of the grand jury, recent events in the United States have caused many to question whether the grand jury should be abolished. See Roger A. Fairfax, Jr., *Should the American Grand Jury Survive Ferguson?*, 58 HOW. L.J. 201, 203 (2015).

32. Fairfax, *supra* note 17, at 353-54 (footnotes omitted).

2. *Impact on Efficiency of Criminal Justice*

Administrative efficiency is necessary in the modern criminal justice system; without plea bargaining, the system likely would grind to a halt.³³ Thus, any attempt to alter the process and inject popular participation must prompt consideration of the practical effect on the administration of criminal justice.

Obviously, such popular participation in the process can frustrate efficiency—a very real concern given the volume of matters on a typical court's docket.³⁴ However, the requirement of lay participation represented by the grand jury, and petit jury rights enshrined in the Fifth and Sixth Amendments as well as in many state constitutions, not only necessarily frustrate efficiency but also vindicate both the individual rights of the defendant and the institutional interests of the jury.³⁵

3. *Other Concerns*

Beyond these two primary concerns, there are other questions to be answered. Even if these functions can transfer from the judge to the grand jury and thereby restore popular input, how do lay grand jurors gain the perspective needed to perform this role? How many cases must they encounter in order for them to obtain the kind of perspective we expect judges to have when reviewing plea agreements for fairness or compliance with prevailing norms in a jurisdiction? There are no good answers to these questions other than to say that, over a broad run of cases, and with their collective wisdom and experience, grand jurors will hopefully exhibit the kind of perspective and judgment we would expect, and their participation will hopefully be an improvement over a regime in which there is no popular participation.

Practical considerations remain. If grand jury secrecy is to be maintained, having the grand jurors participate in the process may

33. See Michelle Alexander, Opinion, *Go to Trial: Crash the Justice System*, N.Y. TIMES, Mar. 11, 2012, at SR5.

34. See *As Workloads Rise in Federal Courts, Judge Counts Remain Flat*, TRAC REP. (Oct. 14, 2014), <http://trac.syr.edu/tracreports/judge/364/> [<https://perma.cc/Y8L8-95AB>].

35. See Roger A. Fairfax, Jr., *Harmless Constitutional Error and the Institutional Significance of the Jury*, 76 FORDHAM L. REV. 2027, 2060 (2008).

pose a challenge. For example, the factual basis for a plea is typically considered in open court with the government representing the facts that it could prove beyond a reasonable doubt at trial. If the grand jury were to assess the factual basis for a plea, that assessment would have to take place within the closed confines of the grand jury in order to protect the identities of the grand jurors.

Furthermore, if grand jurors reject a plea agreement because the grand jurors are not satisfied that there is a factual basis for the plea (rather than disapproval of the substantive terms of the plea agreement), only the prosecutor would know the actual reason why the plea was rejected. An unscrupulous prosecutor could be less than forthright with defense counsel about the reason for the grand jury's rejection of the plea, leading the latter to believe that the grand jurors are unwilling to approve the plea because the terms of the agreement were too lenient.

However, these concerns could be addressed in several ways, including a requirement that the specific basis for the grand jury's rejection of the guilty plea or plea agreement be communicated in writing, either to the parties directly or through a judge. Additionally, maintaining the grand jurors' secrecy need not drive the entire plea process from the public courtroom. The court entertaining the guilty plea can simply note the grand jury's prior approval of the factual basis as part of the typical open-court plea colloquy. This approach would make prior grand jury approval of the factual basis (and the plea agreement itself) a feature of the existing plea process.

Finally, bringing the grand jury into the process would inject greater scrutiny into the existing plea bargaining regime. As a general matter, judges entertaining plea agreements are not encouraged to delve into the details of the plea agreements.³⁶ To be sure, judges help to ensure that the plea is knowing, intelligent, and voluntary,³⁷ that counsel provided adequate assistance,³⁸ and that the terms of the agreement comport with the judge's intended

36. See Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1059 (1976) ("The general consensus seems to be that trial judges should not participate in the pretrial negotiations that currently lead the overwhelming majority of American criminal defendants to plead guilty rather than exercise the right to trial.")

37. See FED. R. CRIM. P. 11(b)(2).

38. See, e.g., *Padilla v. Kentucky*, 559 U.S. 356, 364, 374 (2010).

disposition.³⁹ However, having the grand jury review the plea agreement would send the message that the fairness of the resulting guilty plea is being regulated by representatives of the community.

III. JUDGES' REACTIONS TO THE PROPOSAL⁴⁰

I often share my scholarship with criminal law practitioners—prosecutors and defense attorneys, criminal justice administrators, and reform advocates—upon whom I rely to give me a real-world perspective. I decided to run this proposal by judges because, ultimately, it would wrest certain responsibilities from the court itself. Therefore, I conducted informal conversations with a handful of judges.

These discussions were limited and did not reach the level of a formal survey. First, there was no methodologically sound survey or set of questions; I merely presented the proposal to the judges and had conversations with them, each lasting about thirty minutes. Second, my sample size was quite small. I engaged with three federal district court judges and four state judges from six different jurisdictions across the country. These judges had diverse practice backgrounds prior to assuming the bench: there was one former civil litigator, one former criminal defense attorney, one former state prosecutor and former state judge, and four former federal prosecutors. Although two had been judges for twenty years or more, most were relatively junior, having served for under ten years. One had served on the United States Sentencing Commission. What I learned from these judges may have changed my thinking not just about my proposal, but also about what we need to do more broadly to regulate plea bargaining.

The judges were almost uniformly skeptical of the ability of the grand jury (or any type of popular, representative body) to improve the plea process in any meaningful way. In fact, one judge described the proposal as an “interesting idea” but thought that “as a practical matter, grand jury approval of plea agreements in every case would

39. See FED. R. CRIM. P. 11(c).

40. This Part draws from a series of interviews with state, federal, and District of Columbia trial judges concerning the strengths and weaknesses of my proposal. I would like to thank the judges for their thoughtful and helpful opinions. To preserve the judges' anonymity, I refer to them by pseudonyms in citations.

be disastrous, given the crushing volume of criminal cases that state courts currently face.”⁴¹ The others were not quite as emphatic about the shortcomings of the proposal, but they did have specific observations about its likelihood of improving the plea bargaining process.

A. *Factual Basis*

With regard to the idea of using the grand jury to determine the factual basis of guilty pleas, several judges emphasized the negotiated nature of the statement of facts.⁴² As one judge explained, many times the plea bargain depends upon, for example, the quantity of contraband or the absence of gun possession.⁴³ Therefore, the statement of facts can drive not only the counts of conviction but also sentencing issues and available alternatives to incarceration. One of these judges expressed uncertainty about what the grand jury would add to the process, particularly given that they are lay people without an understanding of the legal issues driving “fact bargaining.”⁴⁴ Nevertheless, as discussed above, the grand jury could regulate this “fact bargaining” to ensure that these stipulated facts are substantiated in some way and that a plea bargain does not rest completely upon a fiction.⁴⁵

Another theme that emerged during the interviews was the concern that the prosecutor would be able to influence the grand jury to endorse whatever factual scenario the government desired to facilitate the plea. Many of the judges made the familiar argument that the grand jury is the captive of the prosecutor, and the prosecutor would be able to manipulate its review of any factual inquiry, including the factual basis for a guilty plea.⁴⁶

The judges were split regarding the grand jury’s role vis-à-vis the court’s responsibility to approve the factual basis for the guilty

41. Telephone Interview with Judge A (Feb. 19, 2015) [hereinafter Interview with Judge A].

42. *See, e.g.*, Telephone Interview with Judge B (Feb. 17, 2015) [hereinafter Interview with Judge B].

43. *Id.*

44. *Id.*

45. *See supra* Part II.A.

46. *See, e.g.*, Interview with Judge B, *supra* note 42; Telephone Interview with Judge C (Feb. 17, 2015) [hereinafter Interview with Judge C].

plea. One judge was of the view that the factual basis needs little oversight in the first place.⁴⁷ Under this view, neither the court nor the grand jury need to review the factual basis for the plea because the parties reach agreement independently.⁴⁸ At the other end of the spectrum, one judge emphasized the court's primacy in the process of approving guilty pleas, noting that "ultimately, it would be the court's decision to accept the factual basis, regardless of what the grand jury does, so the grand jury would be superfluous."⁴⁹ Of course, the proposal could prompt a change in the typical rules requiring the court to accept the factual basis by transferring that responsibility to the grand jury.⁵⁰ Even if the court were left the ultimate responsibility to approve the factual basis for a plea, the grand jury could still play an advisory role.

Finally, and importantly, one judge noted that she was largely seeing pleas to charges in the indictment, as opposed to pre-indictment pleas. As this judge noted, "[a]lthough probable cause is not the standard applied in the factual basis determination, [the grand jury's decision to indict] is probably enough popular participation. The judge can take it from there."⁵¹ This observation underscores a key rationale for involving the grand jury in the approval of the factual basis. Although a plea to an indictment necessarily involves the grand jury that found probable cause for the allegations in the charging document, a pre-indictment plea involves the waiver of the indictment and, thus, the removal of the grand jury's participation.⁵² Using the grand jury to approve the factual basis for a plea would ensure that the community would participate to some degree in the disposition of all cases.

47. See Interview with Judge B, *supra* note 42.

48. See *id.* ("The defendant and the government have to sign off anyway, and if they both sign off, it is good enough for me.").

49. Interview with Judge C, *supra* note 46.

50. See FED. R. CRIM. P. 11(b)(3); see also *supra* Part II.B.

51. Telephone Interview with Judge D (Feb. 11, 2015) [hereinafter Interview with Judge D].

52. See DOJ, GRAND JURY MANUAL ch. 9, at IX-26 (1st ed. 1991), http://federalevidence.com/pdf/LitPro/GrandJury/Grand_Jury_Manual.pdf [<https://perma.cc/D5KC-3KZ9>] ("The first paragraph(s) of a pre-indictment plea agreement ordinarily recites the defendant's agreement to waive indictment.").

B. Review of the Terms of the Plea Agreement

The judges' skepticism of the proposal extended to the ability of the grand jury to play a meaningful role in reviewing the terms of the plea agreement. Although some of the judges did acknowledge that, as argued above, making plea agreements subject to grand jury review "might alter prosecutorial behavior, encouraging them to be more even-handed in the pleas they offer,"⁵³ most expressed serious reservations regarding the grand jury's proposed oversight of the terms of plea agreements.

One of the more damning critiques of the proposal is that the grand jury simply would be out of its depth in reviewing the terms of plea agreements. A few of the judges emphasized that reviewing plea agreements for reasonableness does not involve an evidentiary standard, such as probable cause or proof beyond a reasonable doubt. One judge was unconvinced that "the grand jurors have the perspective necessary to evaluate the reasonableness or fairness of plea agreements," concluding that "[t]here is no compelling reason to take this from the judge."⁵⁴ However, at least one judge saw a role for the grand jury, noting that the "trial judge can't engage in plea negotiations, it could influence sentencing; but perhaps the grand jury ... could play a role in mediating plea bargaining."⁵⁵

One judge worried that the proposal impedes not only the discretion of the judge but also the discretion of the parties.⁵⁶ As with the factual basis review, the judge thought that giving the grand jury the power to veto plea agreements would frustrate the considered preferences of the parties.⁵⁷ Another judge observed that "[p]leas are entered into for a variety of reasons."⁵⁸ On the government side, there might be a problem with witnesses or a lack of resources to devote to a given case.⁵⁹ For the defendant, it might simply boil down to a "desire to cut losses"⁶⁰ and avoid both conviction for a much more serious offense and exposure to a more substantial

53. Interview with Judge D, *supra* note 51.

54. *Id.*

55. Interview with Judge C, *supra* note 46.

56. *See* Interview with Judge A, *supra* note 41.

57. *See id.*

58. Telephone Interview with Judge E (Feb. 18, 2015).

59. *See id.*

60. *Id.*

punishment.⁶¹ This judge argued that injecting the grand jury into this process could frustrate this delicate cost-benefit analysis.⁶² For instance, one judge queried: “Could a grand jury force a capital defendant to go to trial?”⁶³

C. Practical Concerns

The judges interviewed also raised some practical concerns with the proposal more generally. One judge was concerned that the proposal would have a disproportionately negative impact on defendants and suggested that the proposal would necessitate opening up the grand jury process to the participation of defense counsel for the purpose of avoiding the one-sided presentation of the prosecutor.⁶⁴

One judge noted that grand jury secrecy might be a problem, as only the prosecutor would know why the plea agreement was rejected by the grand jury.⁶⁵ Unless defense counsel were given a role, or the grand jury made a statement available to both sides, the grand jury secrecy rules would need to be changed to ensure fairness to the parties.⁶⁶ Another judge encouraged consideration of the impact this proposal would have on the grand jurors themselves. This judge believed that it was already difficult to get grand jurors to serve, and to use the grand jury in this way would thus represent a tremendous increase in workload, which would necessitate many more grand juries.⁶⁷

The judges uniformly expressed concern that the proposal does not adequately account for the challenges facing courts in “a world of austerity.”⁶⁸ Judges cited high caseloads and scarce resources as key rationales for the ubiquity of plea bargaining.⁶⁹ The last thing the proposals for reform should do is “impede resolution of cases.”⁷⁰

61. *See id.*

62. *See id.* (“[Grand jury review] can stop both the defendant and prosecutor from achieving [their] aims. Grand jurors might actually be more punitive (or lenient) than parties expect, and can upset settled expectations.”).

63. Interview with Judge A, *supra* note 41.

64. *See id.*

65. *See* Interview with Judge D, *supra* note 51.

66. *See id.*

67. *See* Interview with Judge A, *supra* note 41.

68. *Id.*

69. *See, e.g., id.*; Interview with Judge B, *supra* note 42.

70. Interview with Judge A, *supra* note 41.

When asked why judges might be opposed to reforms of the plea bargaining process, one judge responded that a “judge’s job is to move cases, consistent with due process, toward a just resolution,” expressing the sentiment that any potential reform would have to accommodate the realities that not every case can proceed to trial and that scarce trial resources must be devoted to the resolution of cases in which the facts are actually in dispute.⁷¹ One judge offered a compromise approach, suggesting that the proposal could be limited to certain types of cases with heightened public interest in having lay oversight of plea bargains, such as in civil rights or police misconduct criminal cases.⁷²

D. The Judges’ Suggestions for Better Regulating Plea Bargaining

The judges, although generally open to reform of the plea process, held sincere doubts about the ability of the grand jury to play a role. One judge’s question seemed to summarize this commonly-held view: “How do you increase transparency [in the plea process] without adding procedural hurdles and workload and without limiting the defendant’s right to bargain?”⁷³ Despite crediting the value of brainstorming and thinking “outside the box,” many of the judges expressed the need for tools that make the process even more efficient, not less efficient. They emphasized that they do not have the time or bandwidth in the context of busy dockets to adopt proposals that would harm efficiency in case processing.⁷⁴

Therefore, I asked each of the judges to tell me what changes *they* would make to the plea process if they could wave a magic wand and have courts, Congress, and state legislatures do their bidding. One issue a judge raised related to defendants’ waivers of appeal rights and FOIA rights under many plea agreements.⁷⁵ As a result, very few bargained cases go up on appeal.⁷⁶ When defendants cede

71. *Id.*

72. *See id.*

73. *Id.*

74. *See* Telephone Interview with Judge F (Feb. 18, 2015) [hereinafter Interview with Judge F]. *But see* Darryl K. Brown, *The Perverse Effects of Efficiency in Criminal Process*, 100 VA. L. REV. 183, 183 (2014) (arguing that increased efficiency in the criminal justice system may do “more harm than good”).

75. *See* Interview with Judge D, *supra* note 51.

76. *See* Nancy J. King & Michael E. O’Neill, *Appeal Waivers and the Future of Sentencing*

these rights at the plea bargaining stage, they do not yet know what errors will take place in the application of the sentencing guidelines or calculations, but they are powerless to withdraw the plea if an error occurs.⁷⁷ The judge opined that the court should have much greater involvement in regulating these blanket waivers of appellate rights.⁷⁸

On a related note, one judge noted that she “has seen an increase in ‘C’ pleas as a result of the greater sentencing discretion judges have in the new regime.”⁷⁹ The judge suggested that perhaps “more of a middle-ground [may be] built into the rules whereby the court can help shape the plea legitimately, as opposed to in the informal ways it sometimes happens.”⁸⁰

Another judge stressed the need to address the racial disparities in plea agreements, citing recent data from a Vera Institute of Justice study of the New York County District Attorney’s Office at the invitation of District Attorney Cyrus Vance.⁸¹ The judge explained that “[j]udges don’t have any idea of the terms of plea offers until very late, if at all,” and sometimes have to address injustices through sentencing, noting a case where two equally culpable defendants were poised to receive disparate sentences because one was charged with, and tried for, distribution of narcotics while the other was permitted to plead to possession of paraphernalia.⁸² The judge was adamant that “[t]here must be a way to rein in prosecutorial abuses and excesses earlier in the process,”⁸³ a sentiment shared by many of the judges.⁸⁴

Policy, 55 DUKE L.J. 209, 212 (2005) (noting that in two-thirds of the sample, the defendant waived the right to appeal, and the government seemed more generous to those who waived). See generally Nancy J. King, *Plea Bargains that Waive Claims of Ineffective Assistance—Waiving Padilla and Frye*, 51 DUQ. L. REV. 647 (2013).

77. See Interview with Judge D, *supra* note 51.

78. See *id.*

79. Telephone Interview with Judge G (Feb. 17, 2015) [hereinafter Interview with Judge G]; see FED. R. CRIM. P. 11(c)(1)(C).

80. Interview with Judge G, *supra* note 79.

81. See Interview with Judge C, *supra* note 46 (referring to BESIKI KUTATELADZE ET AL., VERA INST. OF JUSTICE, RACE & PROSECUTION IN MANHATTAN (2014), <http://www.vera.org/sites/default/files/resources/downloads/race-and-prosecution-manhattan-summary.pdf> [https://perma.cc/JFJ7-5T62]).

82. Interview with Judge C, *supra* note 46.

83. *Id.*

84. See, e.g., Interview with Judge B, *supra* note 42.

One judge suggested that courts should “require [the] government to give full disclosure of evidence prior to the plea,” including pre-plea discovery depositions of government witnesses in federal criminal cases.⁸⁵ Furthermore, with regard to the value of transparency that might be served by enhancing popular participation in the plea process, a number of the judges offered alternatives. One judge stated that “[i]f you want more transparency, the grand jury is not the way to go; perhaps require ‘plea reports’ containing aggregate data regarding negotiated dispositions” to be made available to the public by prosecuting agencies.⁸⁶ Another judge suggested a “clearinghouse” for plea agreements, stating that “some neutral party needs to oversee and guide the negotiations, just not twenty-three lay people!”⁸⁷

CONCLUSION

Although the proposal generally was not embraced by the experienced judges who provided feedback, the thought experiment was worthwhile for a number of reasons. First, it highlighted the fact that the grand jury might be worthy of serious consideration for utilization in criminal justice reform. Although there are obstacles, the grand jury represents a rich source of popular engagement in the criminal justice system at a time when greater transparency and public confidence are sorely needed.

Furthermore, notwithstanding doubts that the grand jury is properly equipped to participate in the guilty plea process, the thought experiment highlighted areas where plea bargaining—now a permanent feature of the modern criminal justice system—is in need of attention. Greater scrutiny is required of the negotiated factual agreements that drive sentencing exposure and collateral consequences of conviction and that can ensnare the factually innocent in guilty pleas of convenience. Another area of concern is the process by which we ensure that plea agreements are both fair to the parties and in the public interest.

85. Interview with Judge B, *supra* note 42.

86. Interview with Judge A, *supra* note 41.

87. Interview with Judge F, *supra* note 74.

Additionally, the judges provided insight on what plea bargaining reforms they feel are most needed, including regulation of defendant waivers of rights, greater pre-plea disclosure of evidence, and enhanced transparency around the role of plea bargaining in our system. All of these and other suggested reforms are proposed in the shadow of the awesome caseload burdens under which these judges and their courts labor. In the end, we may be hoping that efficiency and the desire for popular participation in the criminal justice system are not mutually exclusive, and that both might flourish.

