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In Defense of Plea-Bargaining's Possible Morality

MICHAEL YOUNG*

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I. INTRODUCTION

Plea-bargaining is widely criticized within the legal academy. It has been characterized variously as “hypocrisy” of the right to a jury trial,¹ as “condemnation without adjudication,”² as moral “disaster,”³ and as a corruption of law.⁴ Plea-bargaining especially stands accused of being a snare for the innocent,⁵ an invitation to prosecutorial abuse and coercion of the criminal defendant,⁶ and an institution that exists mainly to make the

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1. Markus Dirk Dubber, *American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure*, 49 STAN. L. REV. 547, 553 (1997) (characterizing plea-bargaining as a procedure which makes a “hypocrisy of the Sixth Amendment” right to a jury trial).

2. John H. Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204, 204 (1979) (resisting plea-bargaining as “condemnation without adjudication”).

3. Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1979 (1992).

4. Ken Chasse, *Plea Bargaining is Sentencing*, 14 CAN. CRIM. L. REV. 55, 69 (2009).

5. See, e.g., Albert W. Alschuler, *Straining at Gnats and Swallowing Camels: The Selective Morality of Professor Bibas*, 88 CORNELL L. REV. 1412, 1417 (2003) (worrying that innocents are coerced into pleading guilty).

6. See *id.* (comparing plea-bargaining to confessions ““forced from the mind.”” (quoting *The King v. Warickshall*, 1 Leach 263, 263-64, 168 Eng. Rep. 234, 235 (K.B. 1783))); see also Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 50 CRIM. L.Q. 67, 91 (2005) (calling plea-bargaining “institutionalized coercion”); Chasse, *supra* note 4, at 56 (quoting and echoing these sentiments).

prosecutor's job easier, with hardly a thought or care for justice.⁷ Critics claim that plea-bargaining enacts an unfair "trial penalty" on criminal defendants since plea-bargaining defendants typically receive lighter sentences than they would receive if convicted at trial.⁸ Critics further charge that plea-bargaining provides cover for shoddy lawyering,⁹ and impairs accuracy in adjudicating guilt.¹⁰

In short, plea-bargaining is a favored critical target for many theorists of American criminal procedure.¹¹ Yet, plea-bargaining persists as strongly as ever,¹² and occasional programs to limit the practice tend to end in failure.¹³ The protests of the academy notwithstanding, the professionals inhabiting the institution of plea-bargaining—the defense lawyers, the prosecutors, and

7. *But cf.* GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 23 (2003) (characterizing plea bargains as "an almost primordial instinct of the prosecutorial soul"). On Fisher's telling, plea-bargaining today "has so fast a grip on the mechanism of justice that antagonistic institutions cannot survive." *Id.* at 3.

8. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2468 (2004) (expressing a concern for "substantial sentencing inequities" between defendants in our plea-bargaining system); Note, *Plea Bargaining and the Transformation of the Criminal Process*, 90 HARV. L. REV. 564, 580 (1977) (worrying that plea bargaining leads to sentencing disparities "by introducing factors extrinsic to the purposes of the criminal sanction into the sentencing calculation, plea bargaining creates sentencing disparities of its own [P]lea bargaining creates sentencing inequalities between those defendants who plead guilty and those convicted after trial."). The Note author further worries that "[i]nequitably distributed punishment strikes at the moral underpinnings of the criminal justice system." *Id.* at 571 n.46; McCoy, *supra* note 6, at 91 (identifying the "trial penalty" with differential sentencing of pleading and non-pleading defendants).

9. *Plea Bargaining and the Transformation of the Criminal Process*, *supra* note 8, at 581-82.

10. Stephanos Bibas, *Bringing Moral Values Into a Flawed Plea-Bargaining System*, 88 CORNELL L. REV. 1425, 1428 (2003) [hereinafter Bibas 2] ("More trials means more safeguards, more scrutiny of those cases most in dispute, and therefore more accuracy.").

11. See *supra* notes 2-10 and accompanying text.

12. Precise numbers are difficult to come by, especially where plea-bargaining rates cannot just be read off of guilty-plea rates, except by assuming, perhaps improbably, that all guilty pleas reflect bargains. See UNITED STATES SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM xii (2004) ("Because fewer statistical data are available to investigate decisions made at presentencing stages, their effects are difficult for the Commission to monitor and precisely quantify."). Guilty pleas might reflect merely the strength of the prosecutor's case and the futility of mounting a defense which always carries some cost of some kind to a defendant (time, if nothing else) or the guilty plea might represent the unbargained-for hope of leniency that often comes with such a plea, or it might even reflect a straightforward attempt to take responsibility for an appropriately charged crime with no hope of reward at all. Nevertheless, much of the existing literature on plea-bargaining does conflate guilty-plea rates with rates of plea-bargaining, perhaps on the intuitive sense that plea-bargaining must have something to do with guilty pleas in most cases, at least. See, e.g., *id.* at 30 ("It is clear from the data that plea bargaining has continued, and even expanded, in the guidelines era. Guilty plea rates steadily increased from 87 percent in the years preceding the guidelines to 96.6 percent in 2001."); see also Ellen Yaroshesky, *Ethics and Plea-Bargaining: What's Discovery Got to Do With It?*, 23 CRIM. JUST. 28, 29 (2008) ("[P]lea bargaining is here to stay and is the essence of the criminal justice system. More than 90 percent of cases nationwide result in guilty pleas."). In any event, there seems to be little reason to doubt that plea-bargaining is a widespread practice of American criminal procedure.

13. See Scott W. Howe, *The Value of Plea Bargaining*, 58 OKLA. L. REV. 599, 611-13 (2005) (cataloging failed efforts to eliminate plea-bargaining).

the judges—seem largely content to continue plea-bargaining.¹⁴ And, for their part, happily or not, the criminal defendants certainly continue to accept the bargains their lawyers negotiate.¹⁵

All of this is cause for serious moral worry. Where the dignity and rights of the accused are at stake, we should hope that plea-bargaining could develop as some kind of distinctly *ethical* professional practice.¹⁶ But if the critics are correct that plea-bargaining is essentially unjust, essentially corrupt, and essentially a moral “disaster,”¹⁷ then this hope must be abandoned. Apart from tinkering at the periphery,¹⁸ the central message would be clear: always strive to do less plea-bargaining on pain of committing injustice.¹⁹ The hope and idea of a distinct professional ethics of plea-bargaining would have to be abandoned, as would any sense of a distinction between faithful and unfaithful institutional practice. How could a prosecutor act faithfully or ethically within a practice that could only ever be, of its nature, bad and unjust? There is an ethical danger here. The critic may hope to corrode the institutionalization of plea-bargaining, but he seems at least as likely to corrode the characters of the professional actors in whom he encourages moral cynicism about the practices in which they are bound to engage.²⁰

These are the considerations motivating this project and its sense that there ought to be a credible defense of plea-bargaining that squarely addresses the critics in their own terms. The present paper aims to provide this defense by showing that, in the main, the best critical case fairly stated against plea-bargaining fails.²¹ This paper aims to defend plea-bargaining against accusations that it incentivizes prosecutors to act in morally problematic ways, that it has intrinsic features that express some wrong

14. *Id.* at 611-13. Of course, it is slightly artificial to reference “the” academy. Critics are numerous, but plea bargaining does have defenders, especially by those who tend toward economically-oriented analyses of law. See *infra* Part III. For reasons explained below, however, these economic-oriented defenses often miss the moral point of the critic’s case against plea-bargaining. They are for that reason largely unconvincing.

15. See UNITED STATES SENTENCING COMM’N, *supra* note 12, at xii, 30; Yaroshefsky, *supra* note 12, at 29; Howe, *supra* note 13, at 611-13.

16. See Erica Hashimoto, *Toward Ethical Plea Bargaining*, 30 CARDOZO L. REV. 949, 957 (2008).

17. See Schulhofer, *supra* note 3, at 1979.

18. See, e.g., *id.* at 1985-86, 2009 (calling plea-bargaining a “disaster” but ultimately arguing only to limit plea-bargaining in certain narrow cases). See also *infra* Part II (discussing Schulhofer’s specific proposal).

19. Chasse, *supra* note 4, at 69.

20. See *id.*

21. See *infra* Part III.

principle, and that it leads, as a matter of practical necessity, to the wrongful conviction of too many accused innocents.²²

In making this defense, this paper does not argue that plea-bargaining is a positive moral good that we are bound to embrace. This paper certainly does not argue that every instance of plea-bargaining is something worth celebrating. This paper is not generally concerned with the problems of institutional choice. Instead, this paper addresses the narrow question of whether plea-bargaining practically *must* be an abuse or mistreatment of criminal defendants.²³ This paper argues for a negative answer to this question.²⁴ If successful, this narrow defense of plea-bargaining should be sufficient to clear some needed conceptual space about its subject.²⁵ If, as argued here, plea-bargaining is not the essentially unjust institution its critics claim it is,²⁶ then plea-bargaining may be an ethical practice inhabited by practitioners with some positive sense of faithfulness to whatever is, or could be, just about the institution.²⁷ We should want to secure these theoretical and practical possibilities because, being morally serious, we must be discontent to resign ourselves to the cynicism and moral disaster that plea-bargaining's critics paint as our fate.²⁸

A. *Other Defenses*

The present paper is necessary notwithstanding the existence of other defenses of plea-bargaining. Specifically, plea-bargaining has been defended by those inclined to economic analyses of law (“economic defenders”).²⁹ Law-and-economics-style defenses place a premium on

22. See Schulhofer, *supra* note 3, at 1984; Alschuler, *supra* note 5, at 1417. Cf. Sally Haslanger, Address at New York University Department of Philosophy: Social Structure and Social Injustice (Mar. 4, 2011) (attended by author) (articulating the idea that institutional incentive to wrongful action could be a general form of institutional injustice). I think that much of the criticism of plea-bargaining can be recognized as a criticism of this type.

23. See *infra* Parts III-V.

24. See *infra* Parts III-V.

25. See *infra* Parts III-V.

26. See *infra* Parts II-V.

27. See Andrew Shaver, *Ethical Lapses in Criminal Plea Bargaining: What Can Be Done About Them?*, 36 J. LEGAL PROF. 559, 566 (2012).

28. See *supra* notes 2-4 and accompanying text.

29. See Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1975, 1978 (1992) (defending plea-bargaining in part on the ground that it maximizes the effectiveness of prosecutorial resources, and in part on the ground that it reflects the value of autonomy); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1914 (1992) (arguing that plea-bargaining is justified because both parties to the plea bargain will be expected to gain from their own perspective in the exchange). Plea-bargaining is also sometimes explicitly defended on the grounds of maximizing the autonomy and choice of individual defendants, a rationale which bears some affinity to the values motivating the more explicitly economic-oriented defenders. See, e.g., Joseph Goldstein, *For Harold Lasswell: Some Reflections on Human Dignity, Entrapment, Informed Consent, and the Plea Bargain*, 84 YALE L.J. 683, 685 (1975) (defending plea-bargaining on the ground that it maximizes

values like systemic efficiency and rational preference-maximization.³⁰ But, while illuminating, defenses in these economic terms largely fail to address the specific moral concerns of the plea-bargaining critic.³¹ For that reason, a fresh defense really is needed.

For example, the critic charges that plea-bargaining enforces a “trial penalty” by failing to treat like cases alike.³² Simply pointing out that the opportunity to bargain could be aligned with a defendant’s rational interest in minimizing punishment leaves this charge unanswered.³³ The economic defender is undoubtedly correct that, given a bare choice to bargain or not, rational defendants should obviously prefer the opportunity to bargain since bargaining is a chance to manage the risks of punishment.³⁴ But it is not clear why the critic must be wrong to discount or disregard the defendant’s interests in this respect. In general, we do not demand that our institutions should satisfy the preferences of every person they might affect, nor do we generally treat interest-satisfaction as a criterion of institutional justice. Consider the institution of criminal punishment itself, for example: if, as we generally seem inclined to think, criminal punishment may sometimes be morally appropriate,³⁵ it will almost certainly be in spite of the preferences of criminal defendants. This just shows, then, that we do not think that defendants’ interests give the measure of justice. But if not, the critic may well protest that the defendant’s interests will not always make a moral difference to the special justice or injustice of plea-bargaining.

Or, the law-and-economics defender might point out, plea-bargaining is predictably superior to jury trials with respect to a measure roughly characterizable (for convenience) as deterrence-achieved-for-resources-expended.³⁶ That is to say, plea-bargains are relatively more cost effective than trials at producing a certain goal of criminal law—namely, deterrence.³⁷ But, the critic might reply, efficiency does not make for

defendant choice and autonomy); Recent Cases, *Sixth Amendment - Ineffective Assistance of Counsel: Tenth Circuit Holds that a Defendant is Prejudiced when His Lawyer's Deficient Performance Leads Him to Forego a Plea Bargain and Face a Fair Trial*, Williams v. Jones, 571 F.3d 1086 (10th Cir. 2009)(per curiam), 123 HARV. L. REV. 1795, 1795 (2010) (articulating a rationale for the case that sees “the right to make autonomous choice” as the central value of plea-bargaining).

30. See, e.g., Easterbrook, *supra* note 29, at 1978; Scott & Stuntz, *supra* note 29, at 1914.

31. See Jeff Palmer, Note, *Abolishing Plea Bargaining: An End to the Same Old Song and Dance*, 26 AM. J. CRIM. L. 505, 514-20 (1999).

32. See, e.g., Bibas, *supra* note 8, at 2468; *Plea Bargaining and the Transformation of the Criminal Process*, *supra* note 8, 571 n.46 (“Inequitably distributed punishment strikes at the moral underpinnings of the criminal justice system.”).

33. See Scott & Stuntz, *supra* note 29, at 1914.

34. See *id.*

35. See *Furman v. Georgia*, 408 U.S. 238, 342 (1972) (Marshall, J., concurring).

36. See Easterbrook, *supra* note 29, at 1977 (defending plea-bargaining in part on this ground); Howe, *supra* note 13, at 605 (offering a similar argument).

37. Easterbrook, *supra* note 29, at 1977-78; Howe, *supra* note 13, at 605.

justice.³⁸ No matter how efficient it might perhaps be, summary execution of the accused would not be a process worth recommending. For a critic concerned that plea-bargaining convicts too many innocents or that it is characterized by wrongful prosecutorial coercion of the defendant, the economic appeal to efficiency radically misses the mark.³⁹

Law and economics defenses of plea-bargaining certainly contribute something to our understanding of the institution, but they cannot be the complete moral answer that is needed to address the critics.⁴⁰ For that, we need a defense that addresses the critical case in its own terms, even when those terms cannot be reduced to the usual idiom and conceptual apparatus of the law-and-economics paradigm.

This paper attempts to give the needed better defense of plea-bargaining by addressing three main categories of moral concern.⁴¹ The following text addresses the “innocence problem,”⁴² the coercion worry,⁴³ and, as a distinct worry related to the equity of differential sentencing, the “trial penalty.”⁴⁴ These categories of concern seem to cover most of the critical field.⁴⁵ The first step in the defensive strategy is to state the criticism as fairly and strongly as possible, which includes addressing the shortcomings in prior expositions as well as the defenses to those criticisms, and then offering an answer.⁴⁶ The goal is that the offered answer will satisfy the critic in the terms of his original moral concern. Failing that, it will at least demonstrate

38. Chasse, *supra* note 4, at 69. This point is put with more color by one plea-bargaining opponent:

It is said that the rate of guilty pleas must be kept high so that, “the criminal court system will not collapse.” It is unproven that there is a valid link between the guilty plea rate and criminal court system collapse. And even if true, the proper answer of judges and lawyers is, “We are not the cause; the problem of inadequate resources is not our problem, it is the government’s problem. I will not corrupt the application and practice of law, in particular, constitutional rights and freedoms, so that the government does not have to provide adequate resources.”

Id. Obviously, I do not share Chasse’s view that plea-bargaining is necessarily a corruption of the “application and practice of law.” *Id.* Nevertheless, I think that this excerpt highlights some of what is wrong with the appeal to efficiency as against those, like Chasse, inclined to regard plea-bargaining unfavorably. See generally *id.* at 69. The appeal to efficiency fundamentally fails to speak to the real moral concerns of the critic. See generally *id.*

39. See Chasse, *supra* note 4, at 70.

40. See Schulhofer, *supra* note 3, at 1982.

41. See Scott & Stuntz, *supra* note 29, at 1949; see also Bibas, *supra* note 8, at 2468; *Plea Bargaining and the Transformation of the Criminal Process*, *supra* note 8, at 580, 571 n.46; McCoy, *supra* note 6, at 91; Alschuler, *supra* note 5, at 1415.

42. See *infra* Part II.

43. See *infra* Part III.

44. See *infra* Part IV.

45. See *supra* notes 2-8 and accompanying text (these criticisms are also the most developed).

46. See *infra* Parts II-IV.

an incompleteness in the critical case as it stands at present, so that, minimally, we are not rationally compelled to become critics ourselves.

II. THE "INNOCENCE PROBLEM"

The so-called "innocence problem"⁴⁷ reflects the worry that plea-bargaining leads to the conviction of too many wrongfully-accused innocents, either overall or with respect to some identifiable subset of prosecutions.⁴⁸ The idea of "too many" here poses some difficulty: where *some* wrongful convictions are inevitable in any merely human system of justice, what rate of wrongful conviction is sufficient to constitute per se systemic injustice?⁴⁹ Taken in the abstract, almost any answer to this question will seem arbitrary.⁵⁰ Certainly, for any process of adjudicating criminal guilt, there is always a standing, prima facie reason to prefer lower rates of wrongful conviction.⁵¹ But this truism does not illuminate just how far we are morally obligated to go—or spend—in pursuit of the ideal of perfect accuracy.⁵²

Substantiating the "innocence problem" depends upon having some grip on the difficult question of how many wrongful convictions would be too many for justice to bear.⁵³ In the context of the debate over plea-bargaining's justice, this question does not appear to have received much explicit attention.⁵⁴ Still, most critics seem implicitly committed to the following: plea-bargaining will not convict too many innocents if plea-bargaining convicts proportionally fewer innocents than jury trials.⁵⁵ The critics must be committed to at least this much when recommending jury

47. See Scott & Stuntz, *supra* note 29, at 1949. The precise phrase was apparently coined by Scott and Stuntz to designate another kind of perceived problem in plea-bargaining. The phrase was then (openly) re-appropriated by Stephen J. Schulhofer as the label for the criticism discussed here. See Schulhofer, *supra* note 3, at 1984 ("I argue for an old-fashioned conception of what the "innocence problem" is, and for an old-fashioned kind of remedy—abolition of bargaining—to solve it."). However, whether expressed with that particular label or not, the thought that there is generally a problem of innocent people pleading guilty finds expression by others as well. See, e.g., Alschuler, *supra* note 5, at 1417 (worrying that innocents are coerced into pleading guilty).

48. See *infra* Part II (addressing the case Schulhofer makes against plea-bargaining, although Schulhofer also seems to think that plea-bargaining has a general innocence problem as well).

49. Compare problems surrounding the so-called "Blackstone ratio." See Alexander Volokh, *N Guilty Men*, 146 U. PA. L. REV. 173, 174-76 (1997).

50. See *id.* at 187-90. Highlighting the seeming arbitrariness of the ratio is, I take it, really the point of Volokh's piece.

51. See generally *id.* at 174-77.

52. Presumably, we would not spend our last dollar improving on a wrongful conviction rate of one out of a billion, say. There is surely some morally acceptable stopping point before reaching that extreme. But where?

53. See generally Volokh, *supra* note 49, at 187-90.

54. See generally Schulhofer, *supra* note 3; see also generally Alschuler, *supra* note 5. Neither appears to have addressed the question in this context.

55. See, e.g., Schulhofer, *supra* note 3, at 1983-84 (recommending jury trials instead of plea-bargaining).

trials as an alternative to plea-bargaining on the basis of a concern for innocent conviction.⁵⁶ Such a recommendation only makes sense on the assumption that jury trials deliver morally acceptable results vis-à-vis the problem of wrongful conviction in a way that plea-bargains do not.⁵⁷

If, as it appears, the critic does mean to approach the idea of “too many” innocent convictions via a relative comparison to the performance of jury trials, then we can draw conclusions about the empirical grounds needed to substantiate the accusation of an “innocence problem” from the perspective of the critic himself.⁵⁸ The critic must show that, for a given or equivalent class of accused innocents, the rate of conviction resulting from plea-bargaining would exceed the rate of innocent conviction from jury trials.⁵⁹ (It is important to remember here that the defendant’s decision to decline a plea-bargain, when plea-bargaining was an option, needs to be counted in calculating plea-bargaining’s rate of (non)conviction. In that case, the institution of plea-bargaining will have failed to achieve a conviction, although it might have.) The question is whether more accused innocents would escape conviction via plea-bargaining than would escape conviction via the jury trial.⁶⁰ If, as the critic seems implicitly committed to affirming, jury trial rates of innocent conviction are acceptable, then plea-bargaining’s rate of innocent conviction must also be morally acceptable if it is no worse.

Obtaining the relevant empirical data, or building an adequate empirical model, in order to comprehensively compare jury trials and plea-bargains with respect to their global rates of innocent conviction is a difficult matter.⁶¹ Nevertheless, there is some empirical evidence that most convicted innocents are convicted at trial, not via plea-bargain.⁶² Among 250 people exonerated from DNA evidence via the *Innocence Project*, only

56. *See id.*

57. *See id.* at 2006-08.

58. *See generally id.* *See also* Howe, *supra* note 13, at 613-14.

59. *See* Schulhofer, *supra* note 3, at 2007.

60. *See id.* Put differently and more abstractly, the problem of comparing any two modes of adjudicating guilt with respect to their treatment of accused innocents is the problem of predicting whether any given (randomly selected) accused innocent would be more likely to be convicted one way or the other. Of course, treatment of accused innocents is one but not the only relevant standard for evaluating a mode of adjudicating guilt overall. A process which never convicted anyone ever would obviously do very well with respect to its treatment of innocents but would not be preferable overall. *See id.*

61. Howe, *supra* note 13, at 631-32. There are some obvious difficulties to the systematic collection of data on the rate at which innocents are convicted. For one thing, any method for counting the number of convicted innocents would have to be more reliable than any criminal justice system which we meant to evaluate in comparison to that count. DNA exoneration may be such a method, but it is possible in only a limited number of cases.

62. *See* INNOCENCE PROJECT, 250 EXONERATED: TOO MANY WRONGFULLY CONVICTED 36 (2010).

7.6%, or nineteen, had pled guilty.⁶³ Assuming plausibly that all or most of the accused could have plea-bargained, then it is evident that wrongfully accused defendants in these cases had better chances of escaping conviction via plea-bargains than via trials.⁶⁴ In this real-world data set, at least, jury trials convicted accused innocents at a comparatively higher rate than plea-bargaining. Unless the *Innocence Project* data is wildly out of line with conviction outcomes for accused innocents more generally, plea-bargaining evidently does not have an “innocence problem” when compared to jury trials.⁶⁵ But then if, per the critical recommendation to abolish plea-bargaining in favor of a jury-trial-only system, jury trials deliver morally acceptable results vis-à-vis wrongful conviction, then so do plea-bargains.⁶⁶ The *Innocence Project* data is not the conclusive final word but it illustrates the basic issue.⁶⁷ So long as the critic is committed to the comparative moral acceptability of the jury trial, sustaining the critical case of an “innocence problem” could not simply be a matter of the rates at which accused innocents plea-bargain, since jury trials could still be worse.⁶⁸

This remains true even if the rate of innocents plea-bargaining is much higher than that suggested by the *Innocence Project* data. A recent psychological study suggests that rates of innocent plea-bargaining may be

63. Compare *id.* with R. GROSS ET AL., EXONERATIONS IN THE UNITED STATES 1989 THROUGH 2003 12 (2004) (showing that of three hundred and twenty-eight people exonerated from serious crimes, less than six percent pled guilty). These studies, and the difficulties of assessing rates of innocent conviction, are discussed in Howe, *supra* note 13, at 631-32.

64. See INNOCENCE PROJECT, *supra* note 62, at 36; see also GROSS ET AL., *supra* note 63, at 12; Howe, *supra* note 13, at 631-32.

65. See generally INNOCENCE PROJECT, *supra* note 62. DNA exonerations typically involve specific classes of cases rapes and murders. Social scientists warn that global rates of wrongful conviction cannot simply be read off this data. See, e.g., D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 785 (2007) (rejecting any inference from the rates of innocent conviction in the specific cases he discusses to any “global rate of wrongful conviction”). By the same token, however, the more limited availability of data in other classes of cases is not itself a reason to suppose that rates of wrongful conviction via plea-bargaining exceed rates of wrongful conviction for jury trials. *But cf.* 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, 20-21 (2013). Dervan and Edkins offer three reasons for thinking that most exoneration data is or will be incomplete and misleading with respect to less serious classes of crimes: first, because exoneration data focuses on DNA data which is limited outside of rape and murder cases; second, because where sentences are light, “it is highly likely that innocent defendants who plead guilty have little incentive or insufficient time to pursue exoneration,” and third, because a guilty plea often creates a procedural obstacle to official exoneration. *Id.* at 21.

The *Innocence Project* data fails to account for accused innocents who elected trial and were subsequently exonerated. If *that* number was large enough, then the difference between trial and plea-bargaining regarding their respective rates of innocent conviction could be negligible. Still, so long as all (or enough) of that group of tried-but-acquitted innocents could have (but declined to) plead, plea-bargaining's rate of innocent conviction would still be no worse than jury trials.

66. See Schulhofer, *supra* note 3, at 2006-08.

67. Dervan & Edkins, *supra* note 65, at 20-22.

68. For rates of wrongful conviction less than 100%, anyway.

as high as 56.4%.⁶⁹ Such results, of course, are a substantial deviation from the empirical data surrounding actual convictions collected by the *Innocence Project*, where only 7.6% of the wrongfully accused pled.⁷⁰ This disparity is, at least, curious; perhaps actual plea negotiations do not result in as much pressure on the accused innocent to plea-bargain as the researchers simulated, or perhaps actual accused innocents think that their alternative is comparatively less risky.⁷¹ Still, assume that the 56.4% of real-world innocents will plead guilty.⁷² Even so, plea-bargains could be an improvement over jury trials with respect to the conviction of innocents because jury trials could be worse still. If enough of the plea-bargaining innocents would have been convicted anyway, and/or if enough of the non-plea-bargaining innocents go on to be convicted at trial, then plea-bargaining may not actually be worse than jury trials with respect to the treatment of accused innocents.

All of this is to say that there is no sufficient reason to think that plea-bargaining overall will lead to the conviction of “too many” innocents, where the measure of “too many” is given relative to some picture of how a jury-trial-only system would operate in the absence of plea-bargains. In the absence of decisive evidence showing that plea-bargains perform worse than jury trials with respect to innocents, there is an empirical gap between claim and fact that is yet to be made up by the critic.

The critical case appears similarly weak when applied more narrowly. Stephen Schulhofer suggests that the class of criminal cases that prosecutors deem the weakest for jury trial is also the class of cases most likely to involve factually innocent defendants.⁷³ For these cases, Schulhofer proposes limiting the prosecutor’s discretion in bargaining so that more cases will go to trial.⁷⁴

Suppose that Schulhofer is correct that weak cases are more likely to involve wrongfully accused innocents.⁷⁵ Still, this supposition is not

69. Dervan & Edkins, *supra* note 65, at 34.

70. INNOCENCE PROJECT, *supra* note 62, at 36.

71. To be fair, given the gaps in our present knowledge, the critic could also claim that it is the Innocence Project data that is incomplete and unrepresentative: perhaps most of those innocents who plea-bargain are significantly less likely to *be* exonerated (and thus potentially show up in *Innocence Project* data) for reasons having nothing to do with factual innocence.

72. *See* Dervan & Edkins, *supra* note 65, at 34. I am not aware that Dervan and Edkins actually claim that the rate within their study will straightforwardly match the real-world rate, although clearly they think it is some real-world insight. *See generally id.* at 34-37.

73. *See id.*

74. *See id.*

75. *See id.* Certainly, the Innocence Project data undermines any idea that innocents are only convicted on seemingly weak cases. *See generally* INNOCENCE PROJECT, *supra* note 62, at 1. This report reveals that many of the wrongfully convicted defendants confessed to crimes they did not commit, or were identified based on eyewitnesses certain in their identification. *See id.* If we imagine prosecutors

sufficient to make out any case for the special injustice of plea-bargaining to the extent of its handling of weak cases: we also need a reason for thinking that innocents with weak cases are more likely to escape the reach of trial than they are to escape the reach of plea-bargains (assuming that it is the comparison to jury trials that matters).⁷⁶ But Schulhofer has offered little reason to predict that innocents with weak cases will be convicted more frequently via plea-bargain than those same defendants at jury trial.⁷⁷ Perhaps even in weak cases juries are likely to repeat the mistakes of practiced prosecutors in judging the defendants in question as guilty.

And so we are left with an empirical gap in the contemporary critical case that makes plea-bargaining out to have a special “innocence problem.” Imperfect as it may be, what evidence we *do* have regarding counts of actual wrongful conviction suggests that plea-bargaining is no worse than jury trials with respect to the treatment of accused innocents.⁷⁸

Perhaps the “innocence problem” critic is more generally concerned with the wide range of discretion that prosecutors have in charging, such that they are able to make it rational for innocents to plead guilty at all.⁷⁹ After all, it is this discretionary charging power that the critics regard as the power essential for ensnaring innocents.⁸⁰ But this concern does not delineate anything special to plea-bargaining as distinct from broader background conditions of the criminal justice system. Wide prosecutorial discretion is not a function of plea-bargaining, although some plea-bargains

at the time being asked to judge the strength of their case in these instances, it is not at all clear that most would have regarded their cases as weak.

76. See Schulhofer, *supra* note 3, at 2004. Schulhofer seems fairly committed to this assumption: after all, he recommends jury trials in place of plea-bargains for the class of weak cases.

77. See *id.* Schulhofer somewhat loosely supposes that trials will generally result in meaningfully more factual scrutiny of individual cases, resulting in more accuracy and less innocents convicted. See *id.* at 2008. As far as it goes, the facts at play in the *Innocence Project* report would not seem to bear this out as a general proposition—the vast majority of exonerated defendants there were convicted via trial, and it would appear that more defendants escaped the reach of plea-bargains than escaped the reach of jury trials. Making a point that cuts against the perception of litigated trials as the gold standard for accuracy, William Stuntz argues that “more process may actually mean less accuracy,” given that procedural—rather than factual—issues dominate most litigated cases. William Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 *Yale L.J.* 1, 44 (1997). There may be other reasons to be skeptical about any casual insistence that plea-bargaining (considered as a process of adjudicating factual guilt or innocence) will tend to inaccuracy. First, defendants typically have every incentive in any case to present their lawyers—and through their lawyers, the prosecution—with whatever exculpatory evidence they may have, and to do so sooner rather than later. Second, it is intuitively likely that experienced defense attorneys and prosecutors will have *some* roughly reliable instincts for when protestations of factual innocence are likely to be credible. (And where they don't, it's not clear why juries would.) These factors are alive in plea-bargaining as much as in jury trials.

78. See INNOCENCE PROJECT, *supra* note 62.

79. See, e.g., William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 *HARV. L. REV.* 2548, 2548-49 (2004) (presenting this sort of thought presented as an independent criticism of plea-bargaining).

80. See Schulhofer, *supra* note 3, at 1996-97.

are functions of wide prosecutorial discretion.⁸¹ If we think that prosecutors generally have too much discretion, the measured response is to limit or supervise that discretion, not to declare one mode in which that discretion has life—plea-bargaining—as especially unjust.⁸²

III. COERCIVENESS

Critics also accuse plea negotiations of incentivizing or providing cover for the wrongful official coercion of the criminal defendant.⁸³ The critic worries that plea-bargaining defendants are improperly pressured to plea-bargain instead of exercising their right to proceed to trial.⁸⁴ Here there can be little doubt that plea-bargaining stands uniquely apart from jury trials.⁸⁵ At trial, the prosecutor's path to conviction must proceed through a jury or a judge.⁸⁶ Plea-bargaining removes those procedural obstacles and, the critic fears, replaces those obstacles with a regime of illicit prosecutorial pressure.⁸⁷ The critic who advances the charge of coerciveness cannot avoid having some view, explicit or (usually) implicit, of what constitutes coercion, and clarifying the critical case means clarifying the critic's operative theory of coercion. Three normative approaches to coercion in particular are worth distinguishing at the outset. It is important to reject the identification of coercion with (1) the bare restriction on rational, utility-maximizing choice or with (2) the existence of weighty reasons bearing on

81. See *infra* Part III (discussing special problems related to the specter of prosecutorial coercion).

82. See Oren Bar-Gill & Omri Ben-Shahar, *Credible Coercion*, 83 TEX. L. REV. 717, 763 (2005). I do not raise a third defense to the accusation that plea-bargaining has an innocence problem, an objection which might be raised by those inclined to an economics-oriented approach, namely, the objection that any jury-trial-only system would, in at least one respect, be harsher on innocent defendants than would the plea-bargaining system, even for a restricted domain of weak cases. Where it is assumed that the choice is either to plead or go to trial it must be considered that forcing a defendant to go to trial may amount to forcing such defendants to choose an option with less expected utility from their own point of view; indeed, this would predictably be so if cases are tried to the jury under the conditions which the utilitarian defendants otherwise would have aimed to avoid with his plea. See *generally id.* at 763 (arguing that defendants “would not necessarily be better off” if plea-bargaining were eliminated). It is hard to discount this point entirely, but, here, I am initially inclined to agree with what I take to be the position of those pressing the “innocence problem,” namely, that it is permissible to arrange policy which is against the interest or perceived self-interest of defendants, given that the evil of a wrongful conviction cannot be understood merely in terms of the defendant's preferences to bargain. The societal judgment of plea-bargaining's justice need not reduce to the preference of the particular criminal defendant in the particular case.

83. See, e.g., Alschuler, *supra* note 5, at 1417 (comparing plea-bargaining to confessions “‘forced from the mind.’” (quoting *Warickshall*, 1 Leach at 263-64, 168 Eng. Rep. at 235)); McCoy, *supra* note 6, at 91 (calling plea-bargaining “institutionalized coercion”); Chasse, *supra* note 4, at 56 (quoting and echoing these sentiments).

84. See Alschuler, *supra* note 5, at 1414-15.

85. See Howe, *supra* note 13, at 604-05.

86. See *id.*

87. See Alschuler, *supra* note 5, at 1416-17.

choice.⁸⁸ Coercion should be understood in terms of a better, third view, which takes wrongful volitional coercion to consist in overriding a will through the means of wrongful influencers on choice.⁸⁹ This third view of coercion demands a prior, independent view of what choices or options a person ought in general to have available to him, the denial or determination of which could then be understood as being wrongfully coercive. If this general view of coercion is correct, then unless the critic can show that plea-bargaining leads to denying the defendant an option of that sort, he does not show “coercion” in any morally meaningful or worrying sense.

The idea of coercion as interference with individual utility-maximization is implicit in the work of law-and-economics oriented scholars who defend plea-bargaining against charges of coercion by pointing out that defendants are better off for having the option to bargain and plead guilty.⁹⁰ The economic defender correctly points out that having the opportunity to bargain and plead potentially enables a defendant to reduce his expected punishment relative to trial, or at least to manage his risks, and to thereby improve his expected utility overall.⁹¹ Faced with a

88. See Bar-Gill & Ben-Shahar, *supra* note 82, at 763.

89. See *infra* Part III.

90. See Bar-Gill & Ben-Shahar, *supra* note 82, at 763-64 (arguing that a bargain is not coercive if it makes the defendant better off from his own viewpoint, better, that is, relative to the expected utility of the relevant alternate option (i.e., trial)). Bar-Gill and Ben-Shahar are explicit that, within their proposed framework for understanding coercion, “the wellbeing of the *threatened* party is regarded as the sole yardstick by which outcomes ought to be evaluated.” *Id.* at 779 (emphasis in original).

It is not entirely clear why the interests of the threatened party should be treated as *the* measure for how our legal institutions ought to be arranged. Bar-Gill and Ben-Shahar appreciate that they are committed to a certain “normative premise” (namely, that the threatened party’s wellbeing is the decisive factor which determines how things ought to go), but they do not seem, in my view, to adequately appreciate their burden to independently justify that normative premise, a premise which is itself in some ways deeply counterintuitive. See *id.* To their credit, this counter-intuitiveness is something that Bar-Gill and Ben-Shahar also seem to recognize: the “reader might wonder why this criterion, with its potential to validate morally-reprehensible coercion, should be endorsed.” *Id.* at 779. Such justification as they ultimately offer is deeply unsatisfying: they maintain that their account and its normative premise should be endorsed because “there is no other choice,” because “the implications of the morally-neutral credibility perspective . . . will not . . . go away,” and because “[w]hen coercion arises from credible threats, advocating a normatively appealing, yet nonfeasible, solution is pointless.” *Id.* at 779-80. This is unconvincing. We may indeed be more interested in what is “feasible” than in what is “normatively appealing,” but that interest simply does not make a justificatory ground for the controversial normative claim which Bar-Gill and Ben-Shahar are actually advancing. See *id.* In which case, their controversial normative claim still needs such grounding and justification, and their normative prescriptions stands uncertainly without that ground. See *id.*

91. See Bar-Gill & Ben-Shahar, *supra* note 82, at 763. They write:

[T]he assessment of a plea bargain ought to begin by asking whether the prosecutor’s threat to proceed with the case all the way through a jury trial if the defendant rejects the plea bargain is credible. If the threat is credible, then the plea bargain itself is the only effective way for the accused to avoid an even worse alternative—trial. If courts were to strike down this plea bargain as coercive, or if society were to eliminate the practice . . . altogether, as

prosecutor who credibly threatens to take him to trial, the defendant will be put in a worse position if he is then denied any opportunity to bargain and manage his risks.⁹² But if these points—undoubtedly true as far as they go in themselves—are taken as an answer to the critical charge of coerciveness and stated as a normative principle,⁹³ then the idea must be that a person cannot be coerced to do X if X is better for him, from his own perspective, than what would happen otherwise.⁹⁴ Stated alternately, the principle offered is: if a choice is rational from some particular person's perspective (e.g., the choice to plea-bargain), then that person cannot be or must not have been coerced into accepting that choice.⁹⁵

Unfortunately, the normative principle on offer simply is not plausible in its own terms. If a mugger pulls a gun and credibly threatens “your money or your life,” the victim does not fail to be coerced because he chooses to do the utility-maximizing, rational thing by handing over his wallet.⁹⁶ Coercion and rational choice are not mutually exclusive possibilities, as the mugging example shows. But then one cannot sensibly point to the existence of rational choice in answer to a charge of coerciveness. Some given choice may have been rational. It could still, for all that, also have been coerced.

Moreover, in the context of the debate over plea-bargaining, this economics-oriented response effectively ignores the content of the critic's complaint.⁹⁷ The critic surely meant to suggest that it is the prosecutorial threat *itself* that might be understood as coercive.⁹⁸ So it does not answer the critic to treat those prosecutorial threats, credible or not, as a given

some commentators concerned with the problem of coercion have proposed, defendants . . . would not necessarily be better off.

Id.

92. *See id.* at 763-64.

93. *But see* Bar-Gill & Ben-Shahar, *supra* note 82, at 763-764. On one reading, at least, Bar-Gill and Ben-Shahar are more interested in offering “feasible” solutions for a set of legal problems than in offering any normative account of coercion as such. *See id.* I use the scare quotes around “feasible” because I do not think that we should view as “feasible” any option which is normatively unappealing, or, less euphemistically, immoral. Morality ought to be a necessary condition of political feasibility if anything is. Assuming that they are not simply immoralists, I do not think that Bar-Gill and Ben-Shahar have really got a way of escaping normative considerations in considerations of “feasibility.” *See id.*

94. *See id.*

95. *See id.* Thus, Bar-Gill and Ben-Shahar argue that in the case of credible threats, and particularly because such threats make a certain disfavored outcome likely, the choice to avoid that disfavored outcome is rational and should be allowed. *See id.*

96. *See generally* Japa Pallikkathayil, *The Possibility of Choice: Three Accounts of the Problem with Coercion*, PHILOSOPHER'S IMPRINT (Nov. 5, 2011), <http://quod.lib.umich.edu/cgi/p/pod/dod-idx/possibility-of-choice-three-accounts-of-the-problem-with.pdf?c=phimp;idno=3521354.0011.016> (discussing the mugging example at length).

97. *See* Bar-Gill & Ben-Shahar, *supra* note 82, at 767 (explaining the problem of plea bargaining as being non-credible prosecutorial threats).

98. *See* Alschuler, *supra* note 5, at 1417.

beyond the reach of moral criticism.⁹⁹ Doing so beg the critical questions, assuming that the prosecutor permissibly may threaten as he does. It is just that proposition that the critic meant to challenge in the first place.¹⁰⁰

Perhaps with some modifications the supposed normative principle—that a person is not coerced to do X if X is better for him from his own perspective than what would happen otherwise—could be made to seem plausible. In particular, the economic defender might add a condition that limits the idea of *what would happen otherwise* to circumstances or events of some morally permissible kind.¹⁰¹ Adding a condition of this kind would avoid the mugging counterexample: the circumstance of being murdered for the failure to tender one's wallet to a mugger is not a morally permissible circumstance. But the addition of such a condition—indeed, any tinkering with the supposed normative principle on offer—would have to ignore a deeper problem with the attempt to understand coercion in terms of the “wellbeing of the threatened party,”¹⁰² namely, the failure to treat properly a moral distinction between harms and wrongs.¹⁰³ A person is wronged when his or her rights are violated; a person is harmed when his or her interests are thwarted or his or her welfare is diminished.¹⁰⁴ The two ideas are distinct and can come apart: for example, a person may be harmed as a consequence of freely making a certain gamble, but he is not wronged by making that same gamble where it is his own (uncoerced) rightful choice.¹⁰⁵ Fundamentally, coercion is the idea of a type of *wrong*, not the idea of a type of *harm*. Because of this, in general, any attempted account of coercion in terms of benefits or harms, or of harm-making or harm-

99. See Bar-Gill & Ben-Shahar, *supra* note 82, at 767.

100. See Alschuler, *supra* note 5, at 1412-14 (arguing that prosecutorial threats are coercive).

101. See Bar-Gill & Ben-Shahar, *supra* note 82, at 763. There is a case to be made that Bar-Gill and Ben-Shahar had some condition like this in mind. See *id.* In the actual examples they use to explain their analytic approach, it is arguable that the threatener's proposed action in case of noncompliance with the threat indeed is independently morally permissible. One such example is proceeding to trial in case of a prosecutor. *Id.* Another example is withholding delivery of goods on a supply contract. *Id.* at 754, 760. (Breaching a contract is widely regarded by many lawyers – especially the law-and-economics types—as morally permissible under the doctrine of efficient breach, at least so long as the party suffering the breach is adequately compensated.) Still another example is disclosing information which one properly acquired and which one might lawfully disclose in any case. *Id.* at 774-776 (discussing the criminalization of blackmail). But if, as largely seems to be the case, Bar-Gill and Ben-Shahar indeed are mostly concerned with understanding coercion in cases where the threatened action is anyway morally permissible, then this assumption of moral permissibility should probably be reflected in a fair statement of the principle they ultimately mean to offer, especially if doing so would make the principle seem more plausible. See generally *id.* at 754, 760, 763, 774-76.

102. *Id.* at 779.

103. See Heidi M. Hurd, *Harm v. Culpability: Which Should Be the Organizing Principle of the Criminal Law?*, 1994 J. CONTEMP. LEGAL ISSUES 157, 211-12 (1994).

104. See *id.* at 214 (distinguishing harms from wrongs and associating the latter with rights-violations and the former with “being worse off than we were before”).

105. Cf. *id.* at 211-12 (discussing the gambling case as one of harm but not wrong).

defeating stuff, will simply be an account in the wrong terms.¹⁰⁶ So, as against the law-and-economics-oriented defender of plea-bargaining, coercion cannot generally be understood as interference with individual utility-maximization, or some similar concept. Utility-maximization is just the wrong sort of concept by which to illuminate or understand coercion.

Consider an alternate—but also ultimately deficient—view of coercion advanced instead by some of plea-bargaining’s critics. In many cases, it may seem that accepting an offered plea is the only rational choice left for a defendant.¹⁰⁷ Reflecting on this, a critic may try to understand coercion as consisting in an overwhelming amount of rational pressure in favor of a particular choice, namely, the choice to plea.¹⁰⁸ But this approach also generally fails, on reflection, to provide an adequate account of coercion. Consider the example of a person faced with a choice between continuing a lackluster career and accepting his dream job.¹⁰⁹ We do not think that that person is “coerced” into accepting the dream job offer just because that option has so many more reasons recommending it.¹¹⁰ But then coercion cannot be generally identified with the bare existence of disproportionately weighted reasons favoring some particular choice. A choice is not coerced simply because there were no better options, or simply because all other options were much worse from the chooser’s perspective.¹¹¹

This leads to a third, more credible, view of coercion. Fundamentally, coercion is not about the amount or quantity of influence on a choice, but rather about the *kind* of influence on choice.¹¹² On this view, even subtle influence could be coercive if it were an influence of a particular wrongful kind.¹¹³ As one plausible idea with support in the law and philosophy, an influence is of a wrongful kind if it interferes with the sort of positive

106. *See id.* at 211-12. Unless, perhaps, one could offer a theoretical bridge between the distinct ideas of harms and wrongs. (Candidate principle: “harms become wrongs after quantity x of harm.”) But I do not think any such principle will be plausible on reflection.

107. *See generally* Ursula Odiaga, *The Ethics of Judicial Discretion in Plea-Bargaining*, 2 GEO. J. LEGAL ETHICS 695, 697 (1989) (“Opponents of the process have argued that . . . plea bargaining is coercive, i.e., defendants plead guilty because they are led to believe that they will receive longer sentences if they insist on going to trial and are subsequently found guilty.”). *See also* Alschuler, *supra* note 5, at 1417; McCoy, *supra* note 6, at 91 (writing that sentencing differentials between pleading and non-pleading defendants are “so severe that the legal profession must start to ask whether it amounts to institutionalized coercion”).

108. *See* Odiaga, *supra* note 107, at 703-05.

109. *See* Pallikkathayil, *supra* note 96 (offering this example to show that coercion cannot have essentially to do with the existence of compelling reasons for choice).

110. *See id.*

111. *See id.*

112. *See id.*

113. *Cf.* Lee v. Weisman, 505 U.S. 577, 592 (1992) (recognizing the existence of “subtle coercive pressure” against non-participating students in case of public school prayer).

freedom we think a person generally ought to have.¹¹⁴ So, for example, influencers that make a choice something less than an exercise of autonomous agency are suspect.¹¹⁵ Similarly, we might view as coercive any arrangement or situation that denies a person options that he ought to have, given an independently plausible view of his proper rights and dignity.¹¹⁶

The critic of plea-bargaining typically has a rough-and-ready story that fits with this more plausible general conception of coercion. Especially, critics fear the supposed coercive pressure that results when defendants “are led to believe that they will receive longer sentences if they insist on going to trial and are subsequently found guilty.”¹¹⁷ The critics worry over the case where prosecutors succeed in inducing guilty pleas by threatening defendants with extra charges and (likely) extra punishment so that the defendants feel pressure to accept whatever plea is offered.¹¹⁸ In such cases, the critic might say, the defendant is confronted with a choice he should not have to face, and that alone makes the choice coerced.

On this view, coercive pressure exists based solely on a large enough gap between (1) the prosecutor’s threat of punishment at trial, and (2) the likely punishment given the defendant’s acceptance of the prosecutor’s offer and a plea.¹¹⁹ For convenience—and because the critic likely will not protest—let us label as “hard dealing” any and all cases marked by sufficiently large differences in punishment between threat and offer. (We will let the critic quantify “sufficiently large” however she likes.) Cast in this vocabulary, the critics’ claim: “hard dealing” is intrinsically objectionable, constitutes the source of wrongful coercion in plea-bargaining, and, consequently, makes the institution of plea-bargaining morally suspect.¹²⁰

It seems probable that some particular cases of hard dealing will, in fact, strike us as coercive. The question is whether this moral sense generally goes as deep as the critic needs in order to substantiate the view that “hard

114. See Pallikkathayil, *supra* note 96, at 4 (discussing the case of volitional coercion particularly).

115. The law of plea-bargaining is explicitly concerned that the plea be the defendant’s own voluntary, free choice. See, e.g., *Machibroda v. United States*, 368 U.S. 487, 493 (1962) (“A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void.”); see also *Brady v. United States*, 397 U.S. 742, 750 (1970) (“[T]he agents of the State may not produce a plea by actual or threatened physical harm or by mental coercion overbearing the will of the defendant.”); FED. R. CRIM. PROC. 11(b)(2) (requiring courts to determine that the plea entered is voluntary). Of course, a critic would likely protest that these requirements do not prevent de facto coerced pleas.

116. See Pallikkathayil, *supra* note 96, at 3.

117. Odiaga, *supra* note 107, at 697.

118. See *Bordenkircher v. Hayes*, 434 U.S. 357, 364-65 (1978) (reversing the lower court by holding that prosecutorial threats to increase charges if a deal is not taken is constitutional).

119. Odiaga, *supra* note 107, at 697.

120. Cf. *Scott & Stuntz*, *supra* note 29, at 1912.

dealing” itself constitutes coercion. It is important to know that the critic does not mistake an objection to particular cases of “hard dealing” for a general objection cutting across all such cases.

To test this possibility, suppose that neither the prosecutor’s threat nor his offer was unfair to the defendant, even where the gap between threat and offer was wide enough to be “hard dealing.” In that case—supposing for the moment that we can imagine such a case—would we think that the defendant was wrongfully coerced? If not, then it is not “hard dealing” as such that worries the critic, but rather the fear that “hard dealing” stands proxy for treatment of the defendant that is unjust on other grounds.

In fact, we sometimes think that there may be a range of sentencing options that are not coercive to the particular criminal defendant. Cases of prosecutorial leniency form the easiest example. Imagine an appropriately charged defendant facing a stiff sentence who is then offered, and accepts, a lenient slap-on-the-wrist plea deal.¹²¹ Whatever we want to say about this case, we presumably will not want to say that the defendant was coerced into accepting the deal. (What could be the source of the illicit coercive pressure in this scenario?) Yet, unless we are constructing the category of “hard dealing” to beg the question—simply as an alternate form of words for the ultimate conclusion that plea-bargaining is coercive—the sentencing gap between the appropriate stiff sentence and the wrist-slap could be large enough to meet any parameters that the critic may set for “hard dealing.” If so, then there may be a case of “hard dealing” that is not coercive. But then it follows that “hard dealing” is not necessarily coercive and so it cannot be “hard dealing” as such that constitutes coercive pressure.

Further, the example *offering* case, in which the prosecutor charges stiffly and then offers a sentencing reduction, is equivalent to a *threatening* case in which the prosecutor charges leniently and then threatens a sentencing increase. Whether the prosecutor threatens or offers, the defendant could ultimately be in the same position from his own rational viewpoint. That is, for some equivalent sets of offers or threats, the prosecutorial posture of threatening or offering ought not to change the defendant’s sense of the options available to him, or his assessment of those options given some stable set of goals or preferences. But if we are not willing to say that some “hard dealing” *offering* cases are coercive, we ought to be similarly unwilling to ascribe coercion to the equivalent *threatening* case where the pressure on the defendant is the same. The cases are equivalent. We should not fetishize the prosecutorial posture of

121. In addition to being criticized for being too harsh, plea deals are also sometimes—outside the legal academy, anyway—criticized for being too lenient. See, e.g., Thane Rosenbaum, *Eye for an Eye: The Case for Revenge*, THE CHRONICLE OF HIGHER EDUC., Mar. 26, 2013, <http://chronicle.com/article/The-Case-for-Revenge/138155/>.

threatening or *offering* over and above the prosecutorial ability to influence defendant choice or impair defendant autonomy.

There may be independent reasons to dislike any arrangement that allows for a range of sentencing options for criminal defendants that are, in some respect, similarly situated.¹²² But, without assuming such further reasons and by itself, a prosecutorial threat-offer gap, however wide, is not a sufficient condition for coercion. The critic must look elsewhere to ground his objection if he means to object to the generality of cases. Otherwise, he confuses particularly objectionable cases for special, essential injustice in the institution itself.

IV. THE “TRIAL PENALTY”

Few criminal defendants would plead guilty absent a credible chance of reducing their expected sentences.¹²³ Plea-bargaining thus depends on the possibility of a range of sentencing options, and on differential treatment for plea-bargaining and non-plea-bargaining defendants.¹²⁴ This effectively means that not all criminal defendants will be treated alike, and that non-plea-bargaining defendants will be (or, if declining a plea-bargain, can reasonably expect to be) sentenced relatively more harshly. Distinct from the coercion worry,¹²⁵ the critic thinks that this differential treatment betrays a troubling lack of concern for equality among similarly situated criminal defendants,¹²⁶ and is a violation of the ancient and venerable maxim of justice to treat like cases alike.¹²⁷ The critic charges that plea-bargaining exacts a “trial penalty.”¹²⁸

122. See *infra* Part IV.

123. See Donald J. Newman, *Pleading Guilty for Considerations: A Study of Bargain Justice*, 46 J. CRIM. L. & CRIMINOLOGY 780, 783-84 (1956) (giving the reasons for plea bargaining as a chance at a lower sentence).

124. See *id.*

125. See *supra* Part III.

126. See Bibas, *supra* note 8, at 2468 (avoiding using the phrase “trial penalty” but nevertheless expressing a concern for “substantial sentencing inequities” between defendants in our plea-bargaining system); *Plea Bargaining and the Transformation of the Criminal Process*, *supra* note 8, at 571 n.46 (“Inequitably distributed punishment strikes at the moral underpinnings of the criminal justice system”). The author further worries that plea bargaining leads to sentencing disparities “by introducing factors extrinsic to the purposes of the criminal sanction into the sentencing calculation, plea bargaining creates sentencing disparities of its own. . . . [P]lea bargaining creates sentencing inequalities between those defendants who plead guilty and those convicted after trial.” *Id.* at 580. See also McCoy, *supra* note 6, at 91 (identifying the “trial penalty” with differential sentencing of pleading and non-pleading defendants).

127. *But cf.* Judge John Gleeson, *Sentence Bargaining Under the Guidelines*, 8 FED. SENT’G REP. 314, 314 (1996). Judge Gleeson writes, “Prosecutors have never been required to treat similarly situated criminals the same way. Indeed, absent an unconstitutional motive, prosecutors confronted with two identically situated defendants may prosecute one to the fullest extent of the law and the other not at all.” *Id.*

128. See McCoy, *supra* note 6, at 91. Strictly speaking, the “trial penalty” objection would seem to apply to any scheme wherein defendants receive consideration for pleading guilty—as they do under

Attempting to answer this criticism, plea-bargaining's economic defenders might suggest that the sentencing difference between plea-bargaining and non-plea-bargaining defendants reflects a mere benefit for electing to plea-bargain, as opposed to a penalty for electing trial.¹²⁹ Such a response, if offered, would really fail to answer the critic: the critical judgment that the harsher, non-plea-bargained sentence is an objectionable "penalty" just depends (the critic will say) on the plausible demand of fairness or equality to treat like cases alike and the sense that, in the case of plea-bargaining, this moral demand is being ignored. In fact, the critics' use of the word "penalty" is a label that could be wholly avoided in expressing the claim that plea-bargaining involves unfairness in sentencing; the point is meant to go deeper than the label. In any case, it is the critics' underlying claim of unfairness that must be answered. Characterizing the plea-bargaining defendant's sentence as a "benefit" would not really answer the charge.

In answer to the critics' concern stated in this (stronger) way—that is, as a concern to treat like cases alike with respect to sentencing—a defender of plea-bargaining might instead suggest that plea-bargaining defendants typically deserve a downward departure in sentencing by reason of contributing to the public good in saving public resources on an expensive prosecution.¹³⁰ This response suggests that the two cases (plea-bargaining and non-plea-bargaining) are relevantly *dissimilar*: one case presents a defendant morally deserving a downward sentencing departure and the other

the federal Sentencing Guidelines, for example—whether or not the plea was the product of a bargain. After all, such schemes also sanction formally unequal treatment between those who plead and those who do not, and who are otherwise similarly situated. See Gleeson, *supra* note 127, at 314.

129. See Easterbrook, *supra* note 29, at 1977 (arguing that, at least with respect to some federal prosecutions under the Sentencing Guidelines, the "trial penalty" ought instead to be regarded as the proper presumptive baseline sentence).

130. Gerard V. Bradley, *Plea Bargaining and the Criminal Defendants Obligation to Plead Guilty*, 40 S. TEX. L. REV. 65, 65 (1999). Bradley does not specifically argue against the "trial penalty" as such; he argues against the view that the pleading defendant given a lighter punishment for reason of his plea is getting "bargain justice,"—i.e., less than his just desserts. *Id.* at 65. Bradley's first response to the "bargain justice" criticism is to suggest that the critic cannot have any proper idea of what the defendant does justly deserve in any case where the reduced sentence is according to law. *See id.* Specifically, Bradley argues that there is nothing in the idea of natural justice which demands any particular, precise penalty, so that, as the critics might say, deviations must therefore be regarded as against justice. *See id.* at 70. And if the critic cannot have a grip on the punishment that the pleading defendant "really" deserves, then the critic cannot have a proper complaint that the defendant is given a discount from that punishment; in other words, the critic's case fails for lack of a relevant contrast. Nevertheless, granting *arguendo* that judges *could* get an independent grip on the "correct" sentence in the relevant moral sense, Bradley next argues that a defendant who pleads guilty morally deserves a downward departure from what would otherwise be that "correct" sentence. *Id.* at 71. It is this latter idea and argument which I focus on. The question here, as in Bradley's piece, is whether there is something about the plea of guilty which could morally license a downward departure from a sentence presumptively regarded (if only for the sake of argument) as "the" just sentence.

does not. And surely, the defense goes, moral desert is a consideration in the balance of justice—and criminal sentencing—if anything is.

This defense raises some puzzles. Do we think we have an in-principle way of measuring the appropriate amount of downward sentencing departure given a plea-bargaining defendant? Are the quantities in question—prosecutorial resources and prison time—even commensurable? Would we say, for example, that prosecutorial effort at trial on the order of hundreds (or even thousands) of hours could be worth many years off of a sentence for a felony conviction?¹³¹

Perhaps, though, it is premature to assume that these questions could not be answered. Still, there seems to be something fundamentally objectionable about strongly tying the idea of deserved punishment to the idea of contributing to the common good, whether by saving public resources on a prosecution or in any other way.¹³² Simply stated, the one should not have anything to do with the other.¹³³ It would be perverse, for example, to think that a rich criminal who donated money to the prosecutor's office—thus advancing the common good by providing resources for prosecutions—would even presumptively deserve a sentencing reduction for that reason alone. Or, suppose that through some lucky causal accident the commission of some crime also brings about collateral social effects contributing positively to the common good: we would not think that this fortunate fact properly weighed as a sentencing consideration. So it cannot be the case that, in general, contributing to the public good constitutes a reason for a reduction in sentence. We should reject the idea that the plea-bargaining criminal deserves a lesser sentence merely for having contributed to the public good by saving public prosecutorial resources.

A better answer to the “trial penalty” critic focuses on the criticism's implicit account of equality. As formulated so far, the “trial penalty” criticism depends on the thought that there is something merely in the differential sentencing treatment of plea-bargaining and non-plea-bargaining defendants that is, in a morally relevant sense, presumptively unfair.¹³⁴ The implicit view of equality on offer seems to take differential treatment to be itself a reason for some moral worry, thus framing the moral problem for plea-bargaining's defender as one of finding some sufficient

131. If not, then perhaps this defense of plea-bargaining actually provides a reason for reforming sentencing practices so that, in practice, plea-bargaining would become an irrational choice for many defendants.

132. See Bradley, *supra* note 130, at 73.

133. *But see id.*

134. See Bibas, *supra* note 8, at 2467-68. I am using the terms “unfair” and “unequal” interchangeably in this section.

justification for that differential treatment—a reason that could somehow assuage our supposed presumptive worry.¹³⁵ In other words, the view of equality on offer in the “trial penalty” criticism depends on regarding equality to be fundamentally about avoiding differences in the distributions of stuff—in this case, punishments.¹³⁶ If this equality-as-non-difference view can be seen as a philosophically suspect view of the value of equality, however, then perhaps the criticism will simply dissolve.

In fact, this view of equality *is* philosophically suspect. The distributional account of the value of equality does a poor job of revealing, in any intuitive way, what is at stake in the idea of equality, or of explaining why we would naturally recognize it as a value. (What about difference as such could really worry us?) For this reason and others,¹³⁷ the distributional view of equality should generally be rejected in favor of a relational view of equality which takes equality’s primary concern to be one of avoiding relationships of domination or subordination between people. On this alternative, protesting inequality means claiming that someone or some group is subordinated or dominated,¹³⁸ or in some similar way treated without proper respect or concern.¹³⁹ This conception of equality immediately reveals what is at stake and, appropriately, allows us to understand our own intuitive concern for equality as a reflection of our nature as social creatures who generally demand more from our social existence than subordination and domination. It may be that differences—especially differences in institutional treatment of individuals—are sometimes evidence of subordination and unfairness. But we should not mistake our concern as one for difference itself; the fundamental concern is to avoid social subordination and domination.

135. *See id.* at 2468.

136. On this general view, what distinguishes one from another theory of equality is the stuff with respect to which non-differential distribution is thought especially to matter (that is, theories differ with respect to their identification of an “*equilisandum*”). *See* G. A. Cohen, *On the Currency of Egalitarian Justice*, 99 *ETHICS* 906, 906 (1989).

137. The distributional view of equality also does a poor job of explaining various aspects of our lived ethical experience in which equality figures as a value (or not), such as cases where differences in the distribution of goods between people seem utterly *unconcerning*, whether or not we think that the person at the luckier end of the distribution of goods deserves their fortune. (The distribution of natural goods is a prime example: the value of equality does not give us a *prima facie* reason to disfigure unusually beautiful people notwithstanding that their beauty may be a matter of undeserved dumb luck.) *See, e.g.*, Michael Young, *The Value, Scope & Limits of Equality* 6-10 (May 8, 2011) (unpublished manuscript) (on file with author) [hereinafter Young].

138. *See* Elizabeth S. Anderson, *What is the Point of Equality?*, 109 *ETHICS* 287, 313 (1999) (“[D]emocratic equality is what I shall call a relational theory of equality: it views equality as a social relationship.”). I do not here endorse or defend all of what Anderson means by “democratic equality,” but I do agree that equality itself is most fundamentally about achieving a certain sort of social being. *See also*, Samuel Scheffler, *What is Egalitarianism?*, 31 *PHILOSOPHY & PUB. AFFAIRS* 5, 22 (2003) (endorsing the view that equality “is opposed not to luck but to oppression”).

139. *See* RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 227 (1978).

One implication of the proper equality-as-non-subordination view is that, in general, a person is not treated unfairly by differences for which he himself is responsible.¹⁴⁰ In such a case, there is no person or institution to accuse of doing the dominating except one's own self; but such self-accusation is an absurdity.¹⁴¹

This implication presents a burden for the "trial penalty" critic who is committed to saying that the differential sentencing of defendants in a system that allows plea-bargaining always or necessarily reflects the inequitable subordination of the (more harshly sentenced) convicted, non-plea-bargaining defendant. To credibly maintain this position, the "trial penalty" critic must be strongly committed to denying that the defendant who declines to plea-bargain, is convicted, and faces a harsher sentence could be responsible for that sentencing outcome, even under ideal conditions. That is, the "trial penalty" critic must be strongly committed to denying that the sentencing outcome could reflect a choice for which the defendant is properly responsible. If, pace the critic, the defendant could be responsible for his choice to elect trial instead of a plea-bargain, then his choice could be free of a concern for inequality or "penalty." But this necessary critical commitment seems too strong. Without some independent reason for doing so, we should not want to insist in advance that there are no conditions under which a defendant could be responsible for the choice whether or not to plea-bargain and that choice's predictable sentencing consequences.

Moreover, it seems that we *can* imagine that a defendant might be responsible for his choices about plea-bargaining. The following hypothetical suggests, in a slightly more vivid way, that a defendant in fact might be responsible for such a choice and its consequences: (1) suppose that, apart from the concern for equality, we have no reason to view a system that presents defendants with a choice between bargain and trial as

140. See Bradley, *supra* note 130, at 65.

141. See IMMANUEL KANT, THE METAPHYSICS OF MORALS 91 § 6:314 (trans. Mary Gregor 1996). Kant suggests the same idea: "Now when someone makes arrangements about *another*, it is always possible for him to do the other wrong; but he can never do wrong in what he decides upon with regard to himself (for *volenti non fit iniuria*)." The Latin means "no wrong is done to someone who consents." *Id.*

Incidentally, all of this suggests something about the moral power of *consent* in general. (There are general philosophical puzzles about consent. Usually, you permissibly may perform acts which affect me if I consent to those acts, but there are nevertheless *some* acts beyond my power of consent—for example, we do not think it possible that I could consent to my own enslavement, at least not in any way that would morally license such enslavement. But this is puzzling: why should the moral power of consent be limited in these ways? Or, conversely, why should consent have the power it does in the cases where it does? What gives the moral measure of consent?) As the sort of philosophical trial-balloon suitable for a footnote, the thesis roughly stated would be: consent has the moral power it does (and is the moral power it is) in virtue of and just to the extent of its being an assurance that equitable relations of non-subordination are or will be maintained between persons.

necessarily unjust (and, after all, the critic cannot just assume plea-bargaining's injustice in an independent argument meant to show its special injustice); (2) suppose that the choice whether or not to plea-bargain is free—uncoerced—and that its consequences are reasonably predictable; (3) suppose that similarly situated defendants are given similar offers;¹⁴² and (4) suppose that natural justice is not offended by any sentence that will be imposed on either plea-bargaining or convicted non-plea-bargaining defendants, so that no sentence for any given defendant will strike us as either too harsh or too lenient given the demands of justice as understood apart from whatever it is that the positive law prescribes or allows. Under conditions such as these, I think it is tempting to say that the defendant who rejects a plea-bargain, is convicted, and receives a stiffer punishment cannot justly complain that he was subordinated or dominated by a system that failed to respect the value of equality.¹⁴³

It is worth clarifying that the above hypothetical scenario is not offered as a criterion or my own fully-considered theory for how plea-bargaining should go, although I may incidentally think that it gestures in the right direction. It is merely offered in the hopes of revealing an intuition that the “trial penalty” critic must, at some cost, be strongly committed to opposing, namely, the intuition that a system incorporating plea-bargaining could in principle be free of unfairness notwithstanding sentencing differences.

If that conclusion is correct, then it may be best to interpret the “trial penalty” critic as concerned for whatever it is that, in the critic's view,

142. I do think that, if similarly-situated defendants were given disparate offers from prosecutors, they would feel themselves to be treated unfairly unequally, in the relevant sense of being subordinated. If anecdotes and my own (limited) experience is any guide, generally, defendants and their lawyers suppose this as well, as they will often demand to be given the same (good) offer that the last defendant received. A prosecutor who refuses these demands typically feels himself to have something to justify or explain. The demand for this kind of fairness and equality in the giving of offers cannot be explained merely as rhetorical posturing, unless some account can be given of the evident felt *force* of such rhetoric. But the most obvious account is simply that this sort of practice reflects, on all sides, an implicit recognition of a real reason sounding in equality, and which sees equality itself as making certain demands in plea offering.

143. See *Frank v. Blackburn*, 646 F.2d 873, 883 (5th Cir.1980). For the critic who may reject the offered view of equality in favor of a fundamentally distributional view, there is a further issue lurking, noted by Judge Easterbrook: “[T]he greatest disparity in sentencing is between those convicted at trial and those not prosecuted. A reduction in the number of convictions attributable to a decline in the number of pleas would dramatically increase the effective disparity in the treatment of persons suspected of crime.” Easterbrook, *supra* note 29, at 1978. This is only a second-best answer to the critic because it does not deny that plea-bargaining reflects unfair inequality in defendant treatment; nevertheless, the suggestion is one which the critic will need to take seriously from his own point of view. If it is the case that, at least under conditions of limited prosecutorial resources, the plea-bargaining system will lead to *less* unfair inequality overall with respect to the *entire* class of criminal suspects, both prosecuted and not, then that is some reason to prefer the plea-bargaining system even if it *is* unfairly unequal (under the relevant conditions and assumptions, it is at least *less* unfairly unequal than the alternative). But that may not be to say more than that plea-bargaining is a lesser evil, not that it is not some kind of evil.

prevents defendants who elect trial from being responsible for the proximate results of their choices.¹⁴⁴ And we may agree that any supposed choice to plea-bargain or not is worse to any extent it does not involve this kind of defendant responsibility. But, as things stand, it at least appears that there is nothing intrinsic to the institution of plea-bargaining—or the practice of differential sentencing for identical crimes—that involves unfair inequality toward criminal defendants.

V. CONCLUSION

With respect to the “innocence problem,” I argued that the critical case is only incompletely made out at present.¹⁴⁵ Without an absolute measure defining *the* morally unacceptable threshold rate of innocent conviction, the critic is left arguing that plea-bargaining is worse than the relevant alternative—jury trials.¹⁴⁶ But the present empirical evidence does not bear this comparison out.¹⁴⁷ There is little reason to think that juries will not generally repeat the mistakes of prosecutors in convicting the wrongfully charged.¹⁴⁸

With respect to the charge of coerciveness, I argued that coercion cannot consist simply in having reasons to choose one as opposed to another option, nor can it consist just in the practice of prosecutors to ensure—to the degree that they can—that defendants are punished more harshly if they do not plea-bargain.¹⁴⁹ Specifically, if that harsher punishment is not unjustly harsh in any case, it cannot be a source of coercive pressure.¹⁵⁰ Prosecutors may sometimes threaten unjust punishment in the course of plea-bargaining, and such practices could make the bargain in question coercive; they certainly make it morally worse.¹⁵¹ But this does not generally show that plea bargaining itself is intrinsically coercive or that bargaining must tend in the direction of excess.¹⁵² The critic perhaps confuses his objection to particular cases with an objection to the practice and institution as a whole, or with an idea of what the institution practically *must* be.¹⁵³

Addressing the charge that sentencing differences between plea-bargaining and non-plea-bargaining defendants are an unfair inequality, I argued against any view that sees equality as primarily concerned about

144. *See Frank*, 646 F.2d at 883.

145. *See supra* Part II.

146. *See supra* Part II.

147. *See supra* Part II.

148. *See supra* Part II.

149. *See supra* Part III.

150. *See supra* Part III.

151. *See supra* Part III.

152. *See supra* Part III.

153. *See supra* Part III.

differential distributions of some stuff.¹⁵⁴ Instead, equality expresses the concern to avoid subordination in social relations.¹⁵⁵ So, plea-bargaining does not fail morally just because it fails to distribute quantities of punishment according to some preferred pattern.¹⁵⁶ Given this, we need not think that differential sentencing is morally problematic; what matters for the critic's case is being able to show that differential sentencing subordinates or dominates the more harshly treated non-plea-bargaining defendants.¹⁵⁷ Moreover, the only way a critic can maintain that the convicted non-plea-bargaining defendant is subordinated by his differential sentencing treatment is by denying that the defendant is responsible for his choice and its proximate consequences.¹⁵⁸ But there is no obvious reason for accepting this in the abstract or in advance.¹⁵⁹ It seems that cases can be constructed in which we have the contrary intuition that the defendant who opts against a plea-bargain *is* responsible for that choice.¹⁶⁰ If the critic means to press the "trial penalty" objection as an in-principle objection to the institution of plea-bargaining itself, he must give some independent reason for discounting this intuition and for thinking that defendants generally will not be, or cannot be, responsible for their choices in a plea-bargaining system.¹⁶¹ But he cannot just rely on the idea that differential sentencing is itself a matter of essential concern.

Nothing here argues that plea-bargaining, as actually practiced, is necessarily just, or that it cannot go wrong or be corrupted. Rather, the argument is that we need not think that plea-bargaining practically *must* be unjust. There is nothing in the idea of plea-bargaining itself that demands the mistreatment of criminal defendants. This is an important consequence because it means that the practice of plea-bargaining might, perhaps, be an ethical practice inhabited by practitioners who are not encouraged by the legal academy to become moral cynics about their work.

154. *See supra* Part IV.

155. *See supra* Part IV.

156. *See supra* Part IV.

157. *See supra* Part IV.

158. *See supra* Part IV.

159. *See supra* Part IV.

160. *See supra* Part IV.

161. *See supra* Part IV.