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# REGULATING SETTLEMENT: WHAT IS LEFT OF THE RULE OF LAW IN THE CRIMINAL PROCESS?

*Nancy J. King\**

## INTRODUCTION

Consider what plea bargains would be like if legal rules were taken more seriously than they currently are. A court would recognize a defendant's willingness to be convicted of an offense only when certain conditions were met: (1) the defendant actually committed the crime; (2) the defendant was punished with the penalty authorized by law for that crime; (3) all government actors involved in the investigation, prosecution, defense, and adjudication of the case had complied with the law governing the criminal process; and (4) the settlement agreement did not relieve any of them of the duty to comply with the law in the future. This ideal agreement has been replaced in many cases by a bargain in which the government trades sentencing and charging concessions for a defendant's promise not to seek a remedy for past and future violations of legal rules. Put simply, the law is for sale in criminal cases—and there are plenty of buyers.

Part II describes the spectrum of legal rights that parties are allowed to exchange in the settlement of criminal cases. Part III summarizes justifications for limiting this exchange. Part IV discusses why judicially enforced attempts to regulate bargains in criminal cases may instead only add to what is traded. It uses as an example recent proposals to increase accuracy in negotiated criminal judgments. Part V concludes by suggesting that meaningful changes in bargaining patterns, including improvements in the accuracy of criminal settlements, will require structural changes that are not subject to trading by parties in any case.

## II. BARGAINING AROUND THE LAW

### *A. Trading Procedural Law*

Even though much of the law regulating criminal process is based on constitutional protections, practically all of these protections may

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be traded for charging or sentencing concessions.<sup>1</sup> Professor William Stuntz, one of the nation's leading scholars on this topic, put it succinctly: "In criminal trials, the Constitution is omnipresent. In guilty pleas, it is nearly invisible."<sup>2</sup> Defendants agree to plead guilty to charges that would otherwise be barred by the Double Jeopardy Clause<sup>3</sup> or the Ex Post Facto Clause.<sup>4</sup> They waive the right to be free from illegal detention, biased judges or grand juries, police overreaching, involuntary confessions, and unconstitutional searches.<sup>5</sup> They trade away their access to exculpatory evidence, their right to enforce evidentiary rules barring the use of statements made during bargaining,<sup>6</sup> and even claims of ineffective assistance of counsel leading up to the plea.<sup>7</sup>

Plea agreements not only insulate past illegality from review; they increasingly include promises by defendants to waive the right to challenge error that has yet to occur. In federal cases, for example, it is routine in many districts for a defendant, as part of a plea, to waive the right to direct and collateral review of the legality of the upcoming sentencing proceeding<sup>8</sup> or the actual sentence imposed.<sup>9</sup> A defendant can prospectively waive the right to an impartial judge, competent

1. Joseph A. Colquitt, *Ad Hoc Plea Bargaining*, 75 TUL. L. REV. 695, 697–99 (2001); Nancy Jean King, *Priceless Process: Nonnegotiable Features of Criminal Litigation*, 47 UCLA L. REV. 113, 114–15 (1999).

2. William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 791 (2006) [hereinafter Stuntz, *Political Constitution*]; accord William J. Stuntz, *Bordenkircher v. Hayes: Plea Bargaining and the Decline of the Rule of Law*, in CRIMINAL PROCEDURE STORIES 351 (Carol S. Steiker ed., 2006); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004) [hereinafter Stuntz, *Criminal Law's Disappearing Shadow*]. The literature evaluating plea bargaining is enormous, and much of it is critical. For collections of some of the more influential works, see GEORGE FISHER, *PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* (2003); WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, 5 CRIMINAL PROCEDURE ch. 21 (2d ed. 1999 & Supp. 2007); Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1368–69 nn.34–39 (2003).

3. LAFAVE, ISRAEL & KING, *supra* note 2, § 21.6(a) nn.35–38 (collecting cases).

4. *Id.* § 21.2(e) n.242 (collecting conflicting authority).

5. *See* United States v. Mezzanatto, 513 U.S. 196 (1995); *see also* United States v. Ruiz, 536 U.S. 622, 630–31 (2002) (collecting cases); LAFAVE, ISRAEL & KING, *supra* note 2, § 21.6(a) (collecting cases).

6. *See, e.g., Ruiz*, 536 U.S. 622.

7. *See, e.g., United States v. Price*, 113 F. App'x 374, 376 (10th Cir. 2004) (refusing to consider a claim of ineffective assistance after the defendant terminated the trial by pleading guilty: "[N]one of the alleged errors Defendant cites pertain to plea negotiations. Rather, Defendant argues that Counsel's poor previous trial performance put him in a position in which a plea was simply the best option. . . . [T]his is not the sort of argument which survives a waiver of post-conviction rights.").

8. *See, e.g., United States v. Yeje-Cabrera*, 430 F.3d 1, 24 (1st Cir. 2005) (finding that "the prosecutor may insist, as a condition of a plea, that the defendant waive all appellate rights").

9. *See, e.g., United States v. Aguilar-Muniz*, 156 F.3d 974, 976–77 (9th Cir. 1998).

counsel at sentencing,<sup>10</sup> or the right to have every element of the offense proven.<sup>11</sup> As part of the only empirical study of appeal waivers to date, Professor Michael O'Neill and I found that in a random sample of 971 written plea agreements submitted to the United States Sentencing Commission between October 2003 and June 2004, 63% contained express waivers of the right to review past and future error; in some districts virtually every plea agreement contained such a waiver.<sup>12</sup> Anecdotal reports suggest that the use of appeal waivers has risen in federal cases since 2004. These waivers have been recognized in state cases as well.<sup>13</sup> Bargaining away procedural protections has become so prevalent in criminal adjudications that the Supreme Court now considers how competing interpretations would be traded at the bargaining table when it decides the appropriate scope of a constitutional entitlement.<sup>14</sup>

A negotiated waiver will not bar appellate review of an allegation that the waiver itself was coerced.<sup>15</sup> Still, there is no mandatory review of criminal judgments. Someone must draw attention to the illegality of a bargain. If the parties do not, it is highly unlikely that anyone else will.

### *B. Trading Substantive Law: Offense Definitions and Authorized Penalties*

Procedural protections are considered the defendant's to use or lose. So long as defendants receive sentences authorized by the legislature for the crimes they have committed, we let them trade procedu-

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10. See, e.g., *Williams v. United States*, 396 F.3d 1340, 1342 (11th Cir. 2005) (collecting authority from the Second, Fifth, Sixth, Seventh, and Tenth Circuits that holds a waiver of the right to challenge a sentence collaterally includes a waiver of the right to raise a claim of ineffective assistance at sentencing, and noting that "a contrary result would permit a defendant to circumvent the terms of the sentence-appeal waiver simply by recasting a challenge to his sentence as a claim of ineffective assistance, thus rendering the waiver meaningless"); Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 246-48 (2005) (discussing appellate enforcement of waivers of ineffective assistance at sentencing).

11. Cf. King & O'Neill, *supra* note 10, at 249-50 (noting decisions upholding waiver of *Apprendi* challenges).

12. *Id.* at 243.

13. See, e.g., *Spann v. State*, 704 N.W.2d 486 (Minn. 2005) (concluding that a post-trial agreement between the state and a convicted defendant that requires the defendant to waive all rights to appellate review in exchange for a reduced sentence was invalid as a matter of public policy and a violation of due process, but that the same considerations were not present for an appeal waiver included in a plea bargain).

14. See *United States v. Booker*, 543 U.S. 220, 255-57 (2005).

15. Some prosecutors and judges have proposed to me that a defendant should be able to waive even this sort of claim.

ral rights for reductions in punishment and charges. Indeed, several scholars have urged federal courts to place more constitutional limits on penalties and crimes in the hope that judges will restrict the vast discretion that prosecutors wield in negotiations and sentencing.<sup>16</sup> But even these *substantive* limits on punishment—the definitions of crimes and defenses and the sentences authorized for each offense—can be waived in plea agreements along with procedural protections.

When expedient, courts have tolerated entirely unauthorized punishments such as banishment,<sup>17</sup> castration,<sup>18</sup> sterilization,<sup>19</sup> and fines and forfeitures beyond what the law allows.<sup>20</sup> Even Eighth Amend-

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16. Stuntz, *Political Constitution*, *supra* note 2, at 838 (arguing that “[f]or all crimes with a sentence of incarceration, prosecutors should be required to show that some number of other defendants in factually similar cases within the same state have been convicted of the same crime” and that for all significant sentences, prosecutors should be required to show that sentences at least as severe have been imposed some minimum number of times for the same crime on similar facts); *see also* Donald A. Dripps, *Overcriminalization, Discretion, Waiver: A Survey of Possible Exit Strategies*, 109 PENN. ST. L. REV. 1155 (2005); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 591–94 (2001) (advocating constitutionalizing desuetude).

17. Colquitt, *supra* note 1, at 735–37 & nn.245–53; *Bringing Back Banishment as a Sentencing Option?*, [http://www.sentencing.typepad.com/sentencing\\_law\\_and\\_policy](http://www.sentencing.typepad.com/sentencing_law_and_policy) (Mar. 19, 2006, 10:11 EST) (noting, in a state where appellate case law clearly does not allow banishment orders, a case where a judge ordered the defendant to “leave Alabama and [the] USA,” and admitted he has imposed similar orders for years). The judge said, “If I can’t, somebody could appeal it.” *Id.* He also noted that “[n]either lawyers nor defendants have questioned such orders.” *Id.*

18. *Bruno v. State*, 837 So. 2d 521 (Fla. Dist. Ct. App. 2003); *ACLU v. State*, 5 S.W.3d 418, 421 (Ark. 1999) (discussing a defendant’s agreement to surgical castration in return for a lighter sentence); *cf.* Bill Rankin, *Castration May Await Convicted Molester*, ATLANTA J.-CONST., Jan. 13, 2000, at C1 (reporting that a judge conditioned a defendant’s release from sentence of life without parole plus thirty years upon the defendant first undergoing surgical castration). *But see* *People v. Gauntlett*, 352 N.W.2d 310 (Mich. Ct. App.), *modified*, 353 N.W.2d 463 (Mich. 1984) (holding that chemical castration condition exceeded judicial authority under probation statute); *State v. Brown*, 326 S.E.2d 410, 411–12 (S.C. 1985) (striking down an agreed-upon condition of surgical castration as a form of mutilation prohibited by state law).

19. *State v. Pasicznyk*, No. 14897-1-III, 1997 WL 79501 (Wash. Ct. App. Feb. 25, 1997) (allowing the defendant to exchange voluntary sterilization for the recommendation of a lighter sentence); *cf.* Harold J. Krent, *Conditioning the President’s Conditional Pardon Power*, 89 CAL. L. REV. 1665, 1694 n.174 (2001) (collecting authority). *But see* *People v. Zaring*, 10 Cal. Rptr. 2d 263, 271 (Ct. App. 1992) (rejecting stipulated probation condition that a defendant not become pregnant).

20. *See* *Libretti v. United States*, 516 U.S. 29, 55–58 (1995) (Stevens, J., dissenting) (noting that the Court’s opinion could have authorized forfeiture of the small bank account that petitioner opened while a young boy, which had not been augmented since 1975, and arguing that “[a] court is not free to exceed those [legal] boundaries solely because a defendant has agreed to permit it to do so”); *United States v. McAninch*, 109 F. App’x 885, 886 (9th Cir. 2004) (declining because of waiver to address the defendant’s argument that a fine was not authorized); *United States v. Gomez-Perez*, 215 F.3d 315, 319 (2d Cir. 2000) (holding that appeal may be barred by a waiver even “where the sentence was conceivably imposed in an illegal fashion or in violation of the Guidelines, but . . . within the range contemplated in the plea agreement”); Colquitt, *supra* note 1, at 723 n.158, 740, 746 n.290 (discussing forfeiture of property).

ment rights are subject to barter.<sup>21</sup> The definition of the offense itself can be discarded. Defendants may choose to plead guilty to crimes they did not commit; they may even plead guilty to a crime that does not technically exist.<sup>22</sup> Very little is known about how often these illegal punishments are imposed; for every agreement which a defendant seeks to undo, there are similar bargains that no one has contested.

Even if judges decide to forbid parties from skirting legislative limits, bargaining will remain “lawless” in another sense. Because offense definitions overlap, and no judge can force a prosecutor to charge any particular offense,<sup>23</sup> “mandatory” sentences are routinely avoided by negotiation.<sup>24</sup> In criminal cases, “the settlement price is determined by prosecutors’ preferences, not by the law.”<sup>25</sup> With such a broad range of offenses and penalties to choose from, parties may first agree upon a sentence and then find the offense that fits—not the other way around.<sup>26</sup>

### III. WHY RESTRICT SETTLEMENT?

Given the undeniable benefits that bargaining affords defendants and the justice system, it is not clear that more regulation of the settlement process is warranted. For example, courts need not interfere with the consensual abandonment of *statutory* rights absent legislative intent that such rights should be impervious to waiver. A legislature is capable of requiring mandatory review or per se reversal for violations of the commands it holds most dear.<sup>27</sup> By allowing unfettered bartering of its own legal rules, a legislature acquiesces in the uneven application of those rules from case to case and location to location. As for constitutional protections, counseled defendants generally should be able to assess the value of their own rights. Judicial pater-

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21. See King, *supra* note 1, at 172–76; Christy Chandler, Note, *Voluntary Executions*, 50 STAN. L. REV. 1897 (1998).

22. LAFAVE, ISRAEL & KING, *supra* note 2, § 21.4(f) nn.160–61; Albert W. Alschuler, *The Trial Judge’s Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1142–43 (1976) (collecting cases); Colquitt, *supra* note 1, at 740–41 (collecting cases).

23. See *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); *Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375 (2d Cir. 1973).

24. Nancy J. King et al., *When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States*, 105 COLUM. L. REV. 959 (2005).

25. Stuntz, *Criminal Law’s Disappearing Shadow*, *supra* note 2, at 2550.

26. King et al., *supra* note 24, at 986 n.97; see also David Bjerk, *Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion Under Mandatory Minimum Sentencing*, 48 J.L. & ECON. 591 (2005).

27. King, *supra* note 1, at 141 (“[C]ourts should presume that the responsibility for policing the evasion of *statutory* requirements rests initially with the legislature, not the courts.”); see also *Zedner v. United States*, 126 S. Ct. 976 (2006) (finding that Congress made it clear that a certain provision of the Speedy Trial Act was not subject to waiver by the defendant).

nalism is no justification for upending a bargain in which the defendant knowingly and voluntarily trades individual entitlements under the Constitution for greater certainty or lesser punishment.

Interference would, however, be justified for at least two reasons. First, judges should not allow a defendant to waive judicial review of the validity of the waiver itself. This review would determine whether a defendant's waiver was made with knowledge and without coercion, while competent, and with the effective assistance of counsel. So far, judges have refused to interpret blanket appeal waivers as barring such scrutiny, and they should continue to do so.

Second, judges should reject agreements that undercut important public interests that are supposed to be safeguarded by the enforcement of constitutional commands, but that are undervalued by the parties. In other words, defendants should not be permitted to barter away that which is not entirely theirs to trade. I have discussed a few such interests elsewhere: the preservation of the balance of power between federal and state governments, the separation of power between the branches of government, and the public's interest in prohibiting cruel and unusual or excessive punishments.<sup>28</sup> The consent of an individual prosecutor and defendant is not an adequate reason to disregard these important constitutional values.

#### IV. THE LIMITS OF CASE-BY-CASE JUDICIAL REGULATION OF BARGAINING

While the societal costs of free-for-all bargaining in criminal cases may justify additional regulation, delegating to judges the entire responsibility for policing party behavior is a mistake.<sup>29</sup> Assume lawmakers in a given jurisdiction are persuaded by the rising scholarly chorus that unregulated bargaining in criminal cases is threatening the accuracy of criminal judgments. Plea agreements can produce two types of fictitious judgments. Most troublesome are cases in which

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28. King, *supra* note 1, at 154–60, 172–76.

29. Scholarly commentary urging that more steps be taken to increase the accuracy of plea-bargained adjudications is growing. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004); Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CAL. L. REV. 1585, 1611 & nn.93–95 (2005) (“What replaces jury trials as the check on the executive branch is not judicial scrutiny of evidence, but defendants’ consent.”); Colquitt, *supra* note 1; Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123 (2005); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979 (1992); Stuntz, *Criminal Law’s Disappearing Shadow*, *supra* note 2; Stuntz, *Political Constitution*, *supra* note 2, at 832–39; Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 213–14 (2006); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79 (2005).

defendants enter guilty pleas when they are actually innocent, leaving the real offender unprosecuted.<sup>30</sup> As demonstrated by DNA exonerations of plea-convicted defendants, these entirely false pleas do occur.<sup>31</sup> A second sort of inaccuracy results when defendants who have committed serious crimes plead guilty to less serious crimes they did *not* commit; these defendants receive sentences less severe than what the law would require for what really happened. In this scenario, the defendant does not suffer undeserved punishment.<sup>32</sup> What does suffer, however, is the credibility of criminal judgments<sup>33</sup> and the consistent application of substantive criminal law, two values unlikely to be of concern to either party to a negotiated settlement.

One way for a legislature or appellate court to address concerns about inaccuracy in negotiated criminal cases is to demand that trial judges reject agreements that include fictitious convictions or sentences based on inaccurate facts.<sup>34</sup> But to oversee the accuracy of representations in plea agreements effectively, trial judges need more

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30. Defendants may also enter what are known as *Alford* pleas, protesting their innocence, but securing the benefits of a guilty plea. See *North Carolina v. Alford*, 400 U.S. 25, 26–27 (1970) (upholding such a plea given “strong evidence of guilt”); *Bibas*, *supra* note 2. Pleas of *nolo contendere* do not even require a factual basis. See *Leipold*, *supra* note 29, at 1154–58, 1164 (criticizing both *nolo* and *Alford* pleas); see also Albert W. Alschuler, *Straining at Gnats and Swallowing Camels: The Selective Morality of Professor Bibas*, 88 CORNELL L. REV. 1412 (2003).

31. But DNA exonerations of plea-convicted defendants are much less frequent than exonerations of defendants convicted after trial. See Alex Leary, *Exonerations Stir Bids to Expand DNA Testing*, ST. PETERSBURG TIMES ONLINE, Jan. 30, 2006, [http://www.sptimes.com/2006/01/30/State/Exonerations\\_stir\\_bid.shtml](http://www.sptimes.com/2006/01/30/State/Exonerations_stir_bid.shtml) (reporting that “of the 174 exonerations nationwide, seven have involved guilty pleas”); see also Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523 (2005). Professor Gross explained these findings:

Only twelve of the exonerees in our database pled guilty, less than six percent of the total: fifteen innocent murder defendants and four innocent rape defendants who took deals that included long prison terms in order to avoid the risk of life imprisonment or the death penalty, and one innocent defendant pled guilty to gun possession to avoid life imprisonment as a habitual criminal. By contrast, thirty-one of the thirty-nine Tulia defendants pled guilty to drug offenses they did not commit, as did the majority of the 100 or more exonerated defendants in the Rampart scandal in Los Angeles. . . . They were exonerated because the false convictions in their cases were produced by systematic programs of police perjury that were uncovered as part of large scale investigations.

*Id.* at 536–37.

32. See, e.g., *United States v. Yeje-Cabrera*, 430 F.3d 1, 24 n.17 (1st Cir. 2005) (“Commentators have raised as a possible infirmity of fact bargaining that a defendant would receive an *unduly lenient* sentence because the government did not fully disclose the facts. Such circumstances, of course, benefit defendants, so there is no concern about intrusion on a defendant’s constitutional rights.”).

33. See generally E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990).

34. See, e.g., *Bibas*, *supra* note 29, at 2542–43 (advocating more thorough judicial review).



information than they currently receive. They require independent pre-sentence reports, prepared from adequately funded investigations and available to the judge prior to the approval of plea agreements.<sup>35</sup> Because many judges consider oversight of the plea-bargaining process as improper judicial participation in plea negotiations,<sup>36</sup> rules against judicial participation in negotiations would have to be modified to encourage judges to question unusual or unlawful terms and to insist on a strong factual basis.<sup>37</sup>

The more fundamental problem with relying on heightened vigilance by judges is that judges are under more pressure to facilitate deals than to scrutinize them. Settlements move their dockets along. Judges may be hesitant to create more work for themselves by rejecting agreements that are acceptable to both parties. In short, many attorneys, judges, and defendants will tolerate fictitious agreements so long as they efficiently resolve their cases.<sup>38</sup> Appellate judges, too, have actively encouraged appeal waivers.<sup>39</sup> It is entirely rational for judges to welcome waivers in cases where defendants have admitted guilt so that more appellate resources can be devoted to cases in which defendants have claimed innocence all along. Consequently, a strategy of judicially enforced regulation of bargaining will fail without better tools for oversight and an entirely different set of incentives.<sup>40</sup>

More importantly, without effective judicial enforcement, adding procedural rights designed to prevent inaccurate convictions may ac-

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35. Alschuler, *supra* note 22, at 1146–47; Brown, *supra* note 29, at 1628–30 (advocating judicial access to the prosecutor’s investigative file and independent investigation); Turner, *supra* note 29, at 259 (urging “judges to inquire more thoroughly into the facts of the case early, before the parties have agreed on a version of the facts” and advocating disclosure to the judge of the same evidence that the parties would receive under liberal discovery rules).

36. See, e.g., LAFAYE, ISRAEL & KING, *supra* note 2, § 21.3(d) (collecting authority); Alschuler, *supra* note 22, at 1092–95. For a collection of authority supporting the contrary view, see LAFAYE, ISRAEL & KING, *supra* note 2, § 21.3(d) nn.176.1–2.

37. Turner, *supra* note 29 (comparing American and German systems and arguing that more involvement and information for judges in bargaining can improve accuracy). Rules limiting judicial participation in plea negotiations have been based on the risk that for the trial judges to threaten a higher sentence if the defendant does not plead guilty would be too coercive, and would actually increase inaccuracy and lawlessness. See Colquitt, *supra* note 1, at 743–45 (advocating that judges should refrain from participating). Several thoughtful alternatives have been advanced for minimizing this risk, such as providing a separate judge for sentencing after trial, appellate review for vindictive sentencing, and recording negotiation sessions. Alschuler, *supra* note 22, at 1148.

38. Nancy J. King, *Judicial Oversight of Negotiated Sentences in a World of Bargained Punishment*, 58 STAN. L. REV. 293 (2005).

39. King & O’Neill, *supra* note 10, at 221.

40. Brown, *supra* note 29, at 1641 (noting that rewarding judges who enforce law against party collusion may require “restructuring the incentives that construct the judicial role”).

tually exacerbate the accuracy problem. For example, broadening the discovery due to a defendant prior to a plea may not achieve the desired objective of providing more information to the defense.<sup>41</sup> As Professor Darryl Brown has recognized, enlarging discovery rights before the plea would lead to greater information exchange only if those rights were enforced rather than traded as part of the bargain.<sup>42</sup> In cases where discovery will be costly to the government, a prosecutor will be willing to give, and a defendant willing to receive, lesser punishment in exchange for dispensing with what would otherwise be a costly requirement. Without judges willing to block settlements that include the waiver of new legal rules, those rules will just add to the pile of chips already on the table.<sup>43</sup> Providing new rights for the accused may actually risk deepening the differential between punishment after trial and punishment by plea—one of the potential contributors to wrongful convictions.<sup>44</sup>

#### V. BEYOND JUDICIAL OVERSIGHT: SYSTEMATIC REGULATION OF THE BARGAINING ENVIRONMENT

Because of the inherent limits of case-by-case judicial enforcement, and the likelihood that new regulations on bargaining will themselves be traded away, legislators interested in regulating bargaining should consider a different approach. The most effective regulation of criminal adjudication and settlement will come from legislative initiatives and policies that the parties are unable to modify by agreement.<sup>45</sup>

Consider again the example of a legislature interested in taking steps to reduce the incidence of guilty pleas by defendants who are innocent. The first step should be to learn more about false pleas and the conditions that lead defendants to plead guilty to crimes they did not commit. Several hypotheses have been advanced to explain why an innocent person may plead guilty; all of them are difficult to test. A defendant may believe that although he is innocent, he would be convicted at trial, and should accept the sentence offered rather than

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41. Bibas, *supra* note 29, at 2531–40; Brown, *supra* note 29, at 1622–25.

42. Brown, *supra* note 29, at 1626–27 & n.154.

43. There is another reason to look beyond judicial review of individual settlements for regulatory solutions: the details of an agreement may never be disclosed to the judge if these departures from the law appear expedient to both parties. Indeed, the only legal rules in the criminal process that are truly mandatory are those rules that will always require relief, no matter when, or by whom, a violation is discovered. In some states, such errors may be limited to “subject matter jurisdiction.” See LAFAYE, ISRAEL & KING, *supra* note 2, § 21.6(a) n.22 (collecting authority). *But see* King, *supra* note 1, at 144–47 (noting the indeterminacy of that term).

44. Brown, *supra* note 29, at 1612.

45. See generally Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276 (2005).

suffer the more severe consequences he would face if convicted.<sup>46</sup> A defendant might make this choice because that's what his attorney tells him,<sup>47</sup> because he distrusts the system or the jury or judge, because he is risk averse,<sup>48</sup> or because he has already falsely confessed<sup>49</sup> and believes this confession makes acquittal impossible. Or a defendant may conclude that other benefits of the plea bargain (e.g., dismissal of charges against a relative) are worth the sacrifice. Studies that systematically diagnose what went wrong in cases where defendants pled guilty but were later exonerated by DNA testing have begun to shed light on why false pleas occur. Laws that ease restrictions on postconviction DNA testing for guilty plea cases could add to our understanding.<sup>50</sup> Although postconviction DNA exonerations have been necessarily limited to very serious crimes where biological evidence is available on the issue of identity, there is reason to believe that innocent defendants charged with lesser crimes may also plead falsely when the jail time for a guilty plea is significantly less than what they would face after trial.<sup>51</sup> Indeed, the weaker the evidence of guilt, the deeper the discount offered by prosecutors.<sup>52</sup>

After diagnosing the likely causes of false pleas, the second step for a legislature interested in improving the accuracy of criminal judgments would be to tailor reforms to address those conditions directly. For example, if false confessions significantly raise the probability that an innocent defendant will waive trial and plead guilty, steps should be taken to prevent false confessions. Potential reforms might include the following: (1) changing those features of interrogations that have

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46. See Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 *YALE L.J.* 1179, 1296 (1975); Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 *J. LEGAL STUD.* 289, 309-12 (1983); Eunyung Theresa Oh, Note, *Innocence After "Guilt": Postconviction DNA Relief for Innocents Who Pled Guilty*, 55 *SYRACUSE L. REV.* 161, 166-70 (2004).

47. Bibas, *supra* note 2, at 1383-84.

48. Leipold, *supra* note 29, at 1154; see also Brown, *supra* note 29, at 1612 (arguing that "[d]efendants who are risk-averse, or who plausibly distrust adjudication's capacity to vindicate false charges, can sensibly accede to inaccurate pleas to avoid the risk of graver consequences"); Abbe Smith, *Defending the Innocent*, 32 *CONN. L. REV.* 485, 494 & nn.56-58 (2000) (discussing accounts of innocent defendants who pled guilty and their reasons for doing so).

49. Brown, *supra* note 29, at 1593-97.

50. See Stuntz, *Political Constitution*, *supra* note 2, at 836 ("In place of current procedure-heavy review, appellate courts should test outcomes for accuracy—using DNA or other reliable forensic evidence where possible—and keep good records of where and how mistakes happen. Institutions that regularly convict innocents should be enjoined to follow more stringent procedures.").

51. Bibas, *supra* note 29 (discussing the need for capping plea discounts to reduce risk that innocent defendants will plead guilty); Wright, *supra* note 29 (suggesting that very significant plea discounts are leading defendants to forego defenses that would have succeeded at trial); see also Bibas, *supra* note 2, at 1378 n.81 (noting practitioner report).

52. Bibas, *supra* note 29, at 2535-36.

been demonstrated to lead to false confessions;<sup>53</sup> (2) using identification procedures that increase accuracy in order to prevent faulty eyewitness identifications; (3) providing financial and political rewards to prosecutors' offices for reforms that improve screening;<sup>54</sup> and (4) adopting statewide standards for training, quality, and auditing of forensic labs.<sup>55</sup> To assure such standards are enforced despite the willingness of parties and judges to overlook them in particular cases, a legislature must include sanctions for violations other than relief for those defendants who protest. Finally, if inaccurate convictions are traced to poor representation, revisions in the resources allocated to public defenders' offices—changes that are not subject to waiver by the parties—may have a greater impact than tinkering with the post-conviction rules governing ineffective assistance claims.<sup>56</sup> This is the sort of law that stands a chance of making a difference in criminal settlements because it is impervious to dealing by defendants, prosecutors, and judges.

## VI. CONCLUSION

Criminal law is a natural stronghold for legal formalism because it vindicates public, not private, interests. After all, criminal justice is about law *enforcement*. But much of criminal law and procedure now belongs to the parties—not the public. And if parties find it advantageous to bargain around the law, few judges will stand in their way. Legislators hoping to regulate bargaining should look to innovative proposals that have an impact regardless of the parties' decision to negotiate.

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53. Many believe, for example, that videotaping interrogations may prevent, or reveal, situations presenting higher probabilities of false confessions. See, e.g., Jeremy W. Peters, *Wrongful Conviction Prompts Detroit Police to Videotape Certain Interrogations*, N.Y. TIMES, Apr. 11, 2006, at A14.

54. See Brown, *supra* note 29, at 1600; Stuntz, *Political Constitution*, *supra* note 2, at 824–25 (arguing that “civil injunctions should be the primary remedy for constitutional wrongs, in order to reward criminal justice institutions that perform well and punish those that do badly”); Ronald F. Wright, *Prosecutorial Guidelines and the New Terrain in New Jersey*, 109 PENN. ST. L. REV. 1087 (2005) (describing features of New Jersey law that promote uniform and accountable decisions by prosecutors); Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 58 (2002).

55. Brown, *supra* note 29, at 1643.

56. Bibas, *supra* note 29, at 2540 (arguing public defenders may make the best use of limited funds because of economies of scale); see also Daniel S. Medwed, *Anatomy of a Wrongful Conviction: Theoretical Implications and Practical Solutions*, 51 VILL. L. REV. 337, 371–74 (2006) (collecting authority calling for increased funding for the defense of indigents as a means of protecting against wrongful convictions); Stuntz, *Political Constitution*, *supra* note 2, at 836–37.

