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An Honest Approach to Plea Bargaining

Steven P. Grossman[†]

Abstract

In this Article, the author argues that differential sentencing of criminal defendants who plead guilty and those who go to trial is, primarily, a punishment for the defendant exercising the right to trial. The proposed solution requires an analysis of the differential sentencing motivation in light of the benefit to society and the drawbacks inherent in the plea bargaining system.

I. Introduction

The process by which criminal convictions come about through guilty pleas in exchange for sentencing considerations carries with it the almost inevitable result that those who refuse a plea bargain are punished for exercising the right to trial.¹ This punishment for exercising the right to trial, and the deterrent impact that such a punishment creates for criminal defendants considering whether to go to trial, take place not in rare instances but in the overwhelming number of cases disposed of in federal and state criminal court systems.² That this punishment for exercising the right to trial exists and takes place in most cases is hardly a surprise to judges, prosecutors, defense attorneys, or criminal defendants with any experience in the criminal justice system. In fact, the system feeds upon the existence of punishment for exercising the right to trial as well as on

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¹ See *infra* Section III.

² An estimated ninety percent of cases result in a guilty plea. THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967) [hereinafter PRESIDENT'S COMM'N]; GEORGE F. COLE, THE AMERICAN SYSTEM OF CRIMINAL JUSTICE 417 (6th ed. 1986); see also *United States v. Booker*, 125 S. Ct. 738, 772 (2005) (stating that "over 95% of all federal criminal prosecutions are terminated by a plea bargain").

the requirement that all the players in the system are aware that this occurs.³

Those who deny that exchanging pleas of guilt for sentence reductions is punishment for exercising the right to trial rely on a number of explanations and justifications. The one most frequently heard, especially from judges who understandably wish to deny they would punish anyone for exercising such a fundamental constitutional right, is largely semantic in nature. No one gets “punished” for going to trial it is said, but those who plead guilty get a “benefit” for doing so.⁴ People who opt to exercise their right to trial are not receiving a longer sentence because of their choice. Instead, those who plead guilty are being rewarded with reduced sentences for surrendering their right to trial. Supporters of this distinction would have you believe the result is a satisfying win-win proposition.⁵

An analysis of this win-win claim and the necessarily accompanying attempt to create a punishment-benefit dichotomy, however, show that these assertions fail both theoretically and pragmatically. The assertions fail whether we compare the sentence the criminal defendant would get if he decides to plead guilty to what that same defendant actually gets after being convicted at trial, or whether we compare the defendant who goes to trial to other similarly situated defendants who plead guilty.⁶ Judicial efforts to maintain this false dichotomy result in opinions that are disingenuous and inconsistent.⁷

Once it is acknowledged that there is a difference in the degree of punishment meted out between a defendant who goes to trial and a similarly situated one who pleads guilty (a virtually undisputed assertion⁸), the reason for this difference should have to conform to one or more of the accepted goals of punishment: retribution, deterrence, incapacitation or rehabilitation.⁹ If it does not, it is hard to understand how differential sentencing can be anything but punishment for exercising the right to trial

³ See *infra* Section VI.

⁴ See *infra* subsection III(A).

⁵ See *infra* subsection III(A).

⁶ See *infra* subsections III(A)(1) and (2).

⁷ See *infra* subsection III(A)(2).

⁸ See *infra* Section III.

⁹ See *infra* Section IV.

(unless one accepts the punishment-benefit dichotomy discussed in detail below). In fact, only one of these punishment goals could account for this difference in sentencing between defendants who plead guilty and those who go to trial. This goal, rehabilitation, may work in theory as an explanation for differential sentencing, but in reality, it explains sentencing differences in only a very few instances.¹⁰

This Article argues that differential sentencing between defendants who plead guilty and those who go to trial is, in large part, punishment for exercising the right to trial. This punishment pervades the criminal justice system and is necessary for the system's continuation in present form.¹¹ The significance of recognizing this is not to end the debate over the wisdom of plea bargaining but to begin it, at least to begin it through an honest dialogue. That plea bargaining punishes defendants for going to trial does not necessarily mean either that it is unconstitutional or that we should do away with it. It means only that there needs to be a compelling reason or reasons to use a system that punishes for the exercise of a constitutional right,¹² and that there must be safeguards for minimizing this punishment and for providing sufficient guarantees of fairness within the system. There are strong arguments both for and against plea bargaining,¹³ but one must get beyond the semantic and unrealistic defenses of plea bargaining in order to get to the arguments.

II. History

The history of plea bargaining in this country is filled with intellectual dishonesty stemming often from the belief that there was something dirty about allowing those accused of crimes to "cop a plea."¹⁴ Common were

¹⁰ See *infra* Section IV.

¹¹ See *infra* Section III.

¹² See *infra* Section VII.

¹³ See *infra* Section VII.

¹⁴ Albert W. Alschuler, *Plea Bargaining and Its History*, 13 LAW & SOC'Y REV. 211, 232 (1979); John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 LAW & SOC'Y REV. 262, 267-68 (1979); Lynn M. Mather, *Comments on the History of Plea Bargaining*, 13 LAW & SOC'Y REV. 281, 281 (1979). In the Seventeenth and Eighteenth Centuries, most criminals who committed felonies punishable by death used pleas to avoid the death penalty. See COLE, *supra* note 2 (discussing the "copping out ceremony").

the images of back door deals between lawyers and judges in which defendants often charged with horrible crimes pled guilty to far less serious crimes.¹⁵ The public perception of plea bargaining was not surprising, given the motivations of those within the system to encourage cases to be disposed of without trials and the manner in which plea bargains were often made and entered.¹⁶

The criminal justice system feeds off plea bargains and the avoidance of trials; prosecutors, judges, and defense attorneys often find it within their best interest to dispose of cases without a trial.¹⁷ Until the last few decades, it was common for defendants to deny that any promises were made as part of the plea bargain, when in fact, clear promises were made.¹⁸ Judges feared that plea bargaining had not been officially sanc-

¹⁵ Mather, *supra* note 14, at 281-82. In one case, a judge described a plea agreement as "essentially immoral" and against public policy. *Wight v. Rindskopf*, 43 Wis. 344, 361-63 (1877). In another case from 1939, a defendant was surprisingly candid about his goal of getting a better deal:

Petitioner and co-defendant made a voluntary statement . . . three days before sentence, which shows clearly that petitioner knew the nature of the charges against him and intended to plead guilty. He and his co-defendant attempted to bargain with the United States Attorney about the sentences they would receive in the event of a plea of guilty. The co-defendant stated in petitioner's presence: "Well, we would like to clear this whole business up and 'cop' a plea to it and take our time, and we don't care to 'cop' a plea and get sentenced on every one. We want to try to fix it up some way to 'cop' a plea on one indictment and throw the rest aside. . . . I am not afraid of that bank job but I am afraid of that kidnapping. They can sock you with life. . . . We realize we are going to be convicted of it anyway.

Logan v. Johnston, 28 F. Supp. 98, 99 (N.D. Cal. 1939).

¹⁶ Stephanos Bibas, *2004 Survey of Books Relating to the Law: Pleas' Progress*, 102 MICH. L. REV. 1024, 1040 (2004); Michael J. Lightfoot, *Symposium: Responsibilities of the Criminal Defense Attorney: On a Level Playing Field*, 30 LOY. L.A. L. REV. 69, 72 (1996).

¹⁷ For prosecutors, the goal is to dispose of cases and reduce the backlog while maintaining their conviction rate. Likewise, defense attorneys suffer from a shortage of staff and heavy caseloads—a pressure that is even greater on a private attorney who earns more money by ending cases in pleas rather than going to trial. Finally, the judge is under the same pressure to keep cases moving and to reduce backlogs so that justice is not delayed. MILTON HEUMANN, *PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS* 25-26 (1978).

¹⁸ See Kenneth Kipnis, *Criminal Justice and the Negotiated Plea*, in *CONTROVERSIES IN CRIMINAL LAW* 250 (Michael Gorr & Sterling Harward eds., 1992) ("Not too long ago plea bargaining was an officially prohibited practice. Court procedures were followed to ensure that no concessions had been given to defendants in exchange for guilty

tioned by the Supreme Court,¹⁹ and there was something that sounded nefarious about defendants acknowledging during the plea allocution that promises were made to induce guilty pleas. Defendants were lying when they denied that any such promises were made to them, and the defense attorney, prosecutor, and judge all knew this was a lie because they had just negotiated the promises.²⁰ Occasionally, a defendant would lapse and tell the truth, forgetting he was not supposed to reveal that his guilty plea was made in exchange for the promise to cut his potential sentence in half.

In a number of cases, the Supreme Court has sanctioned the practice of differential sentencing and plea bargaining.²¹ Because of this and the discomfort that grew among lawyers and judges from the dishonesty of denying that promises were made, the common practice now (often statutorily required) is that all promises made during the plea negotiations be put on the record when the defendant's plea is made and accepted by the court.²²

pleas. But gradually it became widely known that these procedures had become charades of perjury, shysterism, and bad faith involving judges, prosecutors, defense attorneys and defendants.”); Lawrence M. Friedman, *Plea Bargaining in Historical Perspective*, 13 LAW & SOC'Y REV. 248, 253-56 (1979) (Traditionally, plea bargaining was “implicit” because there may be no actual bargaining but defendants realized that a guilty plea would benefit them. Starting in the 1950s, “plea bargaining took center stage. Defendants, with lawyers at their sides, relied less on ‘understandings,’ more on outright negotiation.”).

¹⁹ LEWIS KATZ, JUSTICE IS THE CRIME: PRETRIAL DELAY IN FELONY CASES 210 (1972); see also *Shelton v. United States*, 246 F.2d 571 (5th Cir. 1957) (discussing whether a plea bargain is a free and voluntary plea), *rev'd*, 356 U.S. 26 (1958).

²⁰ WILLIAM F. McDONALD, PLEA BARGAINING: CRITICAL ISSUES AND COMMON PRACTICES 110 (1985) (referring to the “‘pious fraud’ of denying for the record that any promises, threats or inducements had influenced the plea”).

²¹ See, e.g., *United States v. Mezzanatto*, 513 U.S. 196, *on remand at* 54 F.3d 613 (9th Cir. 1995); *Bordenkircher v. Hayes*, 434 U.S. 357, *reh'g denied*, 435 U.S. 918 (1978); *Corbitt v. New Jersey*, 439 U.S. 212 (1978); *Santobello v. New York*, 404 U.S. 257 (1971), *remanded to* 39 A.D.2d 654 (N.Y. App. Div. 1972); *Brady v. United States*, 397 U.S. 742, *later proceeding at* 433 F.2d 742 (10th Cir. 1970); *McMann v. Richardson*, 397 U.S. 759, *on remand at* 453 F.2d 745 (2d Cir. 1970), *appeal after remand at* 340 F. Supp. 136 (S.D.N.Y. 1971), *aff'd without opinion by* 458 F.2d 1406 (2d Cir. 1972); see also Malvina Halberstam, *Criminal Law: Towards Neutral Principles in the Administration of Criminal Justice: A Critique of Supreme Court Decisions Sanctioning the Plea Bargaining Process*, 73 J. CRIM. L. & CRIMINOLOGY 1 (1982).

²² See, e.g., FED. R. CRIM. P. 11(c)(2); ARIZ. ST. R.C.R.P. R. 17.4(c), (f); FLA. R. CRIM. P. 3.172(c)(7); MD. Rule 4-246(b); S.D. CODIFIED LAWS § 23A-7-2 (Michie 2004).

Still, among the public, there is a perception that there is something unseemly about plea bargaining.²³ The feeling still exists that backroom promises are made for the benefit of those players in the criminal justice system, often to the detriment of the average citizen, because horrific criminals do not receive the sentences they should.²⁴ To some extent, such perceptions are unavoidable, but the increasing openness of the process should minimize these concerns significantly.²⁵

Unfortunately, the discussion of plea bargaining as an institution has not benefited from a similar increase in frankness about what the system actually entails. The most glaring example of this lack of frankness is the attempt to rationalize plea bargaining by claiming that it does not punish those who reject bargains but only benefits those who accept them.

III. Punishment

A defendant is charged with burglary in a state for which the punishment can be as severe as seven years in prison or as lenient as a sentence of probation. The prosecutor offers the defendant a promise that, if he pleads guilty, the prosecutor will recommend a maximum of three years in prison. This offer is made despite the fact that the defendant has prior convictions for burglary and a misdemeanor larceny in the state, because the prosecutor wants to save the State the time, effort, and expense of trying the case, and because her case is relatively weak. The judge, wishing to avoid a trial in part so other more pressing cases can be tried in his court, agrees that he will sentence the defendant to no more than the three years recommended by the prosecutor, should the defendant take the plea. The defendant rejects the plea, most likely because he thinks he can

²³ Craig M. Bradley & Joseph L. Hoffmann, *People v. Simpson: Perspectives on the Implications for the Criminal Justice System: Public Perception, Justice, and the "Search for Truth" in Criminal Cases*, 69 S. CAL. L. REV. 1267, 1292 (1996) (stating that "[p]erhaps the least popular facet of the criminal justice system in the eyes of the American public is the widespread practice of plea-bargaining").

²⁴ See, e.g., Richard Cockle, *Father's Objections Delay Killer's Sentencing*, THE OREGONIAN, Oct. 29, 2004, at C07; Steven J. Stark, *Plea Bargain in Killing Angers Victim's Family; Lake Bluff Woman Shot in 1996 Double Slaying*, CHI. TRIB., May 12, 1998, at Metro Lake L1.

²⁵ See *supra* note 23 and accompanying text.

prevail at trial. Unfortunately for him, his belief proves wrong, and he is convicted of burglary by the jury. The judge, noting his prior felony conviction, speaks of how it is clear that the defendant has not learned his lesson and that he must be deterred from committing more burglaries. He then sentences the defendant to five years in prison for the burglary conviction.

Two men are charged with robbery for having pointed guns at a woman and stealing her bag. The statute under which they are charged allows for sentences of imprisonment up to fifteen years in length. The two men are similar in age, background, and in all other factors that could play a role in determining how harshly a judge would sentence them. Each has a similar criminal record involving drug possessions and burglary. Defendant A pleads guilty after his attorney negotiates with the prosecutor and receives five years in prison. Defendant B goes to trial, is convicted, and receives eight years in prison.

Such scenarios are not only common but are the regular course of business for most criminal courts in this country.²⁶ There are, of course, many instances when the difference in the sentence the defendant was offered before trial and the one he actually received after conviction are far larger than in the above scenarios.²⁷ In one case, for instance, a

²⁶ Robert E. Scott, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1909-13 (1992); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1037 (1984). According to a 1970 report by the Administrative Office of United States Courts, defendants who chose to plead guilty at their arraignment received average sentences of probation or less than one year of jail time, while those who elected jury trials received average sentences of three to four years in prison. Kipnis, *supra* note 18, at 244. In another study, courts in Cuyahoga County, New York, found that half of the defendants who pleaded guilty received suspended prison sentences or fines, but those who went to trial received suspended sentences or fines in fewer than one out of four cases. KATZ, *supra* note 19, at 207. Yet another study in Minneapolis noted that judges "look critically upon attorneys 'wasting the state's time with trials.' Moreover, they directly discourage not-guilty pleas by making their views known to attorneys and by tending to penalize defendants who go to trial with more severe sentences." MARTIN A. LEVIN, *URBAN POLITICS AND THE CRIMINAL COURTS* 72 (1977); *see also* COLE, *supra* note 2, at 423 (stating that courtroom mythology upholds the view that a penalty is extracted from defendants who take up the court's time).

²⁷ *See, e.g.*, Hampton v. Wyrick, 588 F.2d 632 (8th Cir. 1978) (affirming the sentence of fifty years after the defendant rejected a plea bargain with a recommended sentence of twenty-five years); Salazar v. Estelle, 547 F.2d 1226 (5th Cir. 1977) (affirming a sentence of forty-five years after the defendant rejected the State's offer of a ten-year

defendant was offered a sentence of two to four, or six years incarceration if he accepted a plea. He turned it down, was convicted at trial, and sentenced to forty to eighty years in prison.²⁸ The Supreme Court, in *Bordenkircher v. Hayes*,²⁹ affirmed the sentence of a man who was offered five years in prison for a theft crime, rejected the offer, and then was re-indicted for the same charge, this time as a persistent felon. Convicted on the theft charge at trial, he received life imprisonment for a crime that would have resulted in five years in prison had he accepted the plea.³⁰ Although cases involving such gross differentials in sentencing occur, they are fairly rare.³¹ Such cases dramatize the argument that differential sentencing is punishment for exercising the right to trial, but they are not necessary to demonstrate the point. Just the basic every day type of plea bargaining, as in the scenarios above, is sufficient to show punishment for exercising the right to trial.

A. Benefit-Punishment

One of the most facially appealing arguments against the notion that differential sentencing based on the decision to plead guilty or to go to trial is punishment for exercising a constitutional right is the one espousing a benefit-punishment dichotomy. According to this approach, defen-

probated sentence and was found guilty at trial); *State v. Korum*, 86 P.3d 166 (Wash. Ct. App.) (reversing the sentence of a defendant who initially agreed to a plea deal of 135 months in prison, withdrew his sentence, and received 1208 months in prison because the State filed an additional thirty-two counts), *reh'g granted*, 101 P.3d 108 (Wash. 2004); *Davis v. State*, 860 So. 2d 1058 (Fla. Dist. Ct. App. 2003) (reversing a sentence in which the defendant was offered four and a half years in prison but received fifteen years in prison after rejecting the State's offer and going to trial); *State v. Baldwin*, 629 P.2d 222 (Mont. 1981) (remanding for re-sentencing the ten-year post-trial prison sentence of a defendant who was offered and rejected a plea in which the judge indicated the defendant would spend forty-five days in jail).

²⁸ *People v. Dennis*, 328 N.E.2d 135, 136 (Ill. App. Ct. 1975) (reversing a sentence after petitioner rejected a plea bargain of two to four years and received a sentence of forty to eighty years after being found guilty at trial).

²⁹ 434 U.S. 357 (1978).

³⁰ *Bordenkircher*, 434 U.S. at 358-59.

³¹ For example, a mere disparity between the sentence offered during plea negotiations and the harsher sentence imposed after trial will not by itself lead to a re-sentencing. *Dennis*, 328 N.E.2d at 138; *Baldwin*, 629 P.2d at 225.

dants who go to trial and receive a sentence greater than they would have received had they accepted the plea offered, actually received the sentence they deserved based on the crime committed and the defendant's background.³² Had they accepted the plea bargain, they would have received a benefit by getting sentenced to less than they deserved.³³

For example, in the scenarios offered above, the burglar who was sentenced to five years in prison upon conviction at trial, after rejecting a plea bargain offering him two years less time, ultimately received the sentence he deserved based on factors such as the crime committed and his background.³⁴ The three-year sentence offered in exchange for his guilty plea was a discount, a break that he would have received for saving the system the time, effort, and expense of having to prosecute him or whatever other justifications a judge might offer for differential sentencing.³⁵ Similarly,

³² See, e.g., *Jung v. State*, 145 N.W.2d 684 (Wis. 1966). The *Jung* court stated that, even though the defendant received a higher sentence than his co-defendant after he chose to take the case to trial, it could not find that

the trial judge was unreasonable in considering all participants, whether they carried a gun or not, as equally guilty of armed robbery. It was an organized adventure with all participants running the calculated risk that the gun a colleague carried might necessarily be used in the perpetration of the crime. Under this theory Jung, even though he did not have a gun in his possession, was also equally culpable of the attempted murder. On this view, [his co-defendant's] sentence was too lenient, rather than Jung's being too severe.

Jung, 145 N.W.2d at 690; see *State v. Goodale*, 198 N.W.2d 44, 50 (S.D. 1972) ("We find neither error in the disparity of the sentence based upon a denial of a constitutional right nor abuse of discretion based upon the severity of the sentence. In our case as in *Jung*, the defendant Goodale drove the getaway car, in fact was the owner. He was guilty of three criminal offenses when he appeared before the judge for sentencing."); see also *Salazar*, 547 F.2d at 1227; *People v. Moffitt*, 485 N.E.2d 513, 519 (Ill. App. Ct. 1985); *Rogers v. State*, 891 So. 2d 268, 271 (Miss. Ct. App. 2004).

³³ In *United States v. Wiley*, 184 F. Supp. 679, 685 (N.D. Ill. 1960), the defendant was convicted at trial to a harsher sentence than his co-perpetrators, who pled guilty, all of whom were more directly involved in the crime and had worse criminal records than Wiley. They argued, however, that "it is incorrect . . . to say . . . that 'a more severe sentence' is imposed on a defendant who stands trial. Rather, it seems more correct to me to say that the defendant who stands trial is sentenced without leniency according to law." *Id.*; see also *United States v. Portillo-Valenzuela*, 20 F.3d 393, 394 (10th Cir. 1994); *United States v. Jones*, 997 F.2d 1475, 1477 (D.C. Cir. 1993).

³⁴ See *infra* Section IV (addressing the goals of punishment that affect what factors judges consider relevant to crafting an appropriate sentence).

³⁵ McDONALD, *supra* note 20, at 93-94.

in the second scenario above, the robber who went to trial and received more prison time than his similarly situated co-perpetrator was not punished for exercising his right to trial. He received the sentence warranted by the crime and his background, and the co-perpetrator got a reward for pleading guilty.³⁶ The obvious appeal of such an explanation for differential sentencing is that it produces a win-win scenario and negates the assertion that he who decides to exercise his constitutional right to a trial is punished.³⁷ The problem with this explanation is that it is deeply flawed on every level.

1. Theoretical Level

On a theoretical level, although not a practical one, there may be some basis for this justification if there was a given fixed sentence that accompanied each crime, or if the sentencing scheme gave the judge little or no discretion regarding what a sentence would be.³⁸ Arguably, such a situation exists only with respect to specific mandatory minimum sentencing laws³⁹ or to sentencing systems that use mandatory guidelines.⁴⁰ For example, under the Federal Sentencing Guidelines as they existed before the Supreme Court decided that the guidelines were unconstitutional in their current form,⁴¹ a defendant would receive a

³⁶ See, e.g., *United States v. Stevenson*, 573 F.2d 1105, 1107 (9th Cir. 1978); *Wiley*, 184 F. Supp. at 687; *Stanley v. State*, 479 N.E.2d 1315, 1318-19 (Ind. 1985).

³⁷ See *supra* notes 33-34 and accompanying text.

³⁸ See, e.g., OR. REV. STAT. § 475.996 (2003) (setting drug sentences based on the amount of drugs involved); 42 PA. CONS. STAT. ANN. § 9712 (West 1998) (listing minimum sentences for offenses committed with firearm); CAL. PENAL CODE § 1170 (West 2005) (establishing determinate sentencing).

³⁹ 21 U.S.C. § 841 (2002); 21 U.S.C. § 844 (1996); 21 U.S.C. § 860 (1994) (setting minimum penalties for certain drug offenses); 18 U.S.C. § 924(c) (2004) (setting minimum penalties for carrying a firearm during or in relation to any crime of violence or drug trafficking) (recently held unconstitutional by *United States v. Harris*, 397 F.3d 404 (6th Cir. 2005)).

⁴⁰ See, e.g., Sentencing Reform Act of 1984, 18 U.S.C. § 3553(a) (2003) (recently held unconstitutional by *United States v. Booker*, 125 S. Ct. 738 (2005)); WASH. REV. CODE § 9.94A.010 (2003).

⁴¹ See *Booker*, 125 S. Ct. at 759. In *Booker*, the Supreme Court determined that mandatory sentencing guidelines violate the rights to a jury trial and the requirement

sentence based on relatively few factors relating mostly to the seriousness of the crime committed and his criminal record.⁴² A point system was used to tally aggravating and mitigating sentencing factors.⁴³ After totaling up the points, the judge would be required to mete out a sentence within a small range of possibilities.⁴⁴

Under such a system, it could be argued that there was a “regular” sentence that the defendant was to receive—within the range of guideline directed sentences. If he chose to plead guilty, the discount the defendant received would be a reward, and the sentence he received after trial, if he eschewed the plea agreement, would not be punishment for opting to go to trial but merely the sentence he deserved.⁴⁵ Similarly, if a statute called for a mandatory five-year penalty for conviction of a gun related crime, and the accused was offered a plea to the underlying offense without reference to a weapon, it could be argued that he would have received a reward for pleading guilty but would have received the regular sentence for gun related crimes if convicted after a trial.⁴⁶

Even this assertion is open to challenge, however. Critics of mandatory sentencing guidelines and mandatory minimum sentences argue that such approaches do not reduce sentencing discretion as much as they merely transfer it from judges to prosecutors.⁴⁷ Through decisions regard-

of proof beyond a reasonable doubt if they authorize the judge to enhance the defendant’s sentence by making a new finding of fact without the aforementioned constitutional protections. *Id.*; see also *Blakely v. Washington*, 124 S. Ct. 2531, 2538 (2004) (holding in this case that the “State’s sentencing procedure did not comply with the Sixth Amendment”).

⁴² Sentencing Reform Act of 1984, 18 U.S.C. § 3553(a) (2003).

⁴³ *Id.* § 3553(a)(4).

⁴⁴ *Id.* § 3553(a)-(b).

⁴⁵ KATZ, *supra* note 19, at 206-08.

⁴⁶ *Id.*; see also 18 U.S.C. § 924(c) (2004) (providing for a mandatory five-year minimum penalty for using or carrying a firearm during a crime of violence or drug trafficking and a twenty-five-year penalty for recidivists); DEL. CODE ANN. tit. 11, § 1447(b) (2005) (providing that any person convicted of possession of a deadly weapon during commission of a felony may not receive a suspended sentence or be eligible “for good time, parole, or probation during the period of the sentence imposed”); FLA. STAT. ANN. § 775.087 (West 2005) (setting minimum sentences for possession or use of a weapon during a felony).

⁴⁷ See, e.g., Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for*

ing what crimes to charge and at what level to charge them (decisions having much greater impact in mandatory systems where the judge cannot limit the exercise of prosecutorial discretion through the use of ameliorating sentencing factors⁴⁸), as well as determinations of which defendants to allow to get a sentencing benefit for cooperating with criminal investigations, the exercise of prosecutorial discretion can significantly impact what sentence a defendant receives in such a mandatory system.⁴⁹ Therefore, even in such a system, prosecutors can and do exact a price for the defendant's decision to challenge the charges against him by going to trial.⁵⁰

When the discretionary decisions of prosecutors can so affect the ultimate sentence a defendant receives, the claim that there is a regular sentence for the commission of a specific crime is dubious, and the bene-

Less Aggregation, 58 U. CHI. L. REV. 901, 926 (1991); Lightfoot, *supra* note 16, at 75; Laura Sager, *Sentencing Law Symposium: Advocating for Change in Mandatory Minimum Sentencing*, 16 T.M. COOLEY L. REV. 27, 32 (1999); Ian Weinstein, *Fifteen Years After the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing*, 40 AM. CRIM. L. REV. 87, 92 (2003).

⁴⁸ *United States v. Roberts*, 726 F. Supp. 1359, 1363 (D.D.C. 1989) ("The sentencing statute has largely replaced the traditional role of judges in the critical sentencing phase of the criminal process by vesting most sentencing decisions in prosecutors, and that law and the guidelines issued pursuant thereto have thus effected what may be the most fundamental change in the criminal justice system to have occurred within the past generation. Indeed, the de facto transfer of much of the responsibility for sentencing from impartial judges to prosecutors has had the effect of disturbing the due process balance essential to the fairness of criminal litigation."), *rev'd*, *United States v. Mills*, 964 F.2d 1186 (D.C. Cir.1992); Alschuler, *supra* note 47, at 926 ("Indeed, a system of sentencing guidelines that on its face prescribes severe sentences but leaves plea bargaining unconstrained is a prosecutor's paradise."); Lightfoot, *supra* note 16, at 75.

⁴⁹ See, e.g., *Roberts*, 726 F. Supp. at 1373 (discussing the impact of cooperation and the federal sentencing guidelines); Ian Weinstein, *Regulating the Market for Snitches*, 47 BUFF. L. REV. 563, 563-64 (1999) ("These are boom times for the sellers and buyers of cooperation in the federal criminal justice system. While prosecutors have always welcomed the assistance of snitches, tougher federal sentencing laws have led to a significant increase in cooperation as more defendants try to provide 'substantial assistance in the investigation or prosecution of another person,' to have some chance of receiving a significant sentence reduction.").

⁵⁰ In one extreme case, the prosecutor filed an additional thirty-two counts against the defendant after he withdrew his guilty plea and went to trial. As a result, he received a sentence ten times longer than he would have gotten under his earlier guilty plea that was later withdrawn. *State v. Korum*, 86 P.3d 166, 167 (Wash. Ct. App. 2004).

fit without punishment explanation for differential sentencing is unpersuasive. As argued below, even to the extent such mandatory sentencing systems can theoretically claim to offer benefits and eliminate punishment for the decision regarding whether to exercise the right to trial, that claim fails when examined in terms of what actually happens in American penal systems.⁵¹

In sentencing systems in which most sentences are to some degree within the discretion of the trial judge, limited only by the range within the particular statute under which the defendant is being prosecuted, this punishment-benefit dichotomy fails theoretically as well as practically. Yet, the overwhelming number of defendants convicted of crimes in this country are sentenced under just this type of system.⁵² In such cases, there can be no "regular" sentence because judges can factor in whatever sentencing considerations they wish. Different judges use different factors in sentencing, or they weigh the same factors in entirely different ways.⁵³ Even focusing on one judge, it is virtually impossible to say how he or she will sentence every defendant charged with a particular crime.

Therefore, any suggestion that there is a "regular" sentence within such a discretionary sentencing system, even for individual judges, is flawed. Once one accepts the realization that there is no regular sentence for a given defendant who committed a particular crime, it is clear that the

⁵¹ See *infra* subsection III(A)(2).

⁵² THOMAS W. CHURCH, JR., *In Defense of "Bargain Justice,"* in *CONTROVERSIES IN CRIMINAL LAW*, *supra* note 18, at 265.

⁵³ This can be seen from the breadth and subjectivity of the factors typically used by judges in sentencing. One court offered the following sentencing factors:

[A] proper sentence is a composite of many factors, including the nature of the offense, the circumstances (extenuating or aggravating) of the offense, the prior criminal record, if any, of the offender, the age of the offender, the record of the offender as to employment, the background of the offender with reference to education, home life, sobriety and social adjustment, the emotional and mental condition of the offender, the prospects for the rehabilitation of the offender, the possibility of a return of the offender to a normal life in the community, the possibility of treatment or of training of the offender, the possibility that the sentence may serve as a deterrent to crime by this offender, or by others, and the current community need, if any, for such a deterrent in respect to the particular type of offense involved.

United States v. Betancourt, 405 F. Supp. 1063, 1064 (D. P.R. 1975).

different sentences a judge gives to those who plead guilty and to those who go to trial can be viewed equally either as benefits or as punishments.

When discussing this with my students, I tell them that I like when people agree with me. Accordingly, those students who express opinions during class that are similar to mine will be receiving a grade of A or B. Those students who disagree with me can get no higher than a C for the course. I explain to them that, before they go to the Dean to complain, I want to make clear that I am not punishing those students who disagree with me but merely rewarding those who have the wisdom to share my views. There are, of course, reasons for differential sentencing within our plea bargaining based criminal justice system that are far better than my reasons for differential grading outlined above,⁵⁴ but the argument that one is any less punishment than the other is hard to fathom.

The undeniable reality of plea bargaining is that, in the vast majority of cases, everything that could or should impact the severity of a sentence is the same regardless of whether the defendant pleads guilty or goes to trial.⁵⁵ The only variable is the defendant's decision to exercise his constitutional right to trial.⁵⁶ There is no doubt, therefore, that the difference in the sentence he received is the existence of that one variable, the

⁵⁴ The fundamental rationale is the fear that taking too many cases to trial will overwhelm the criminal justice system. MCDONALD, *supra* note 20, at 93. In *Blackledge v. Allison*, the Supreme Court stated:

The defendant avoids extended pretrial incarceration and the anxieties and uncertainties of a trial; he gains a speedy disposition of his case, the chance to acknowledge his guilt, and a prompt start in realizing whatever potential there may be for rehabilitation. Judges and prosecutors conserve vital and scarce resources. The public is protected from the risks posed by those charged with criminal offenses who are at large on bail while awaiting completion of criminal proceedings.

431 U.S. 63, 71 (1977). Other benefits that come from getting defendants to avoid trial and plead guilty through sentencing and charge inducements are: allowing traumatized victims to avoid the further trauma of having to re-live the crime during direct and cross examination at trial, affording defendants a benefit that will induce them to cooperate in other criminal investigations, and providing in certain instances that the disposition of a case reflects the actual seriousness of the crime and the culpability of the criminal rather than the all or nothing of a trial conviction on the top count of an indictment or a complete acquittal.

⁵⁵ See *infra* notes 67-93 and accompanying text.

⁵⁶ *Id.*

decision to go to trial. The attempt to create a dichotomy between benefit and punishment based on the existence or lack of this one variable is unhelpful and without real meaning. Theoretically, it is equally punishment and benefit. What matters is not the label placed upon it, but the fact that a defendant can have his freedom deprived for a longer period of time solely because he exercises his right to trial.

2. Practical Level

If one looks at this issue in a more practical way, the argument for a reward-punishment dichotomy is even weaker in all types of American penal systems. Roughly ninety percent of criminal cases in this country are disposed of without trials.⁵⁷ The vast majority of those are settled through pleas of guilt from criminal defendants, invariably offered in exchange for charge or sentencing reductions.⁵⁸ Seen in this practical light, the argument that the sentence the defendant receives after trial is his “regular” sentence and the one imposed upon him after he pleads guilty is his “reward” sentence is even less convincing. To accept this, one must come to regard the sentence in the ten percent of the cases that go to trial (actually the even fewer than this ten percent that result in convictions) as the regular sentence, and the ones in the almost ninety percent disposed of through guilty pleas as the reward sentences. So, if my class described above has twenty students in it, two will get the “regular” grade of C or below, whereas the other eighteen will be “rewarded” for agreeing with me and receive an A or a B. How foolish of those two students to think that they are being punished.

It is illuminating to see how the Supreme Court dealt with and rejected the logic of benefit without punishment in a situation very similar to differential sentencing in our plea bargaining or trial system. In *Roberts v. United States*,⁵⁹ the issue was whether the defendant’s failure to reveal others who were involved with him in dealing drugs could be used against

⁵⁷ See PRESIDENT’S COMM’N, *supra* note 2, at 9.

⁵⁸ See *United States v. Booker*, 125 S. Ct. 738, 772 (2005) (Stevens, J., dissenting); see also MCDONALD, *supra* note 20, at 93.

⁵⁹ 445 U.S. 552, 555-56 (1980).

him at sentencing. Roberts pleaded guilty to conspiracy and remained incarcerated for two years pending his appeal.⁶⁰ Defense counsel requested that Roberts receive a sentence that would enable him to be released immediately.⁶¹ The Government argued that Roberts should be sentenced to “substantial” prison time in part because of his failure to cooperate with the investigation of related criminal activities.⁶² The district court sentenced Roberts to more prison time, offering his failure to cooperate with the investigation as one of its grounds for doing so.⁶³ Roberts’ appeal made it to the Supreme Court.

In the Supreme Court, Roberts’ attorney argued that, while cooperation by a criminal defendant was a laudable activity that could be rewarded at sentencing, failure to cooperate should not result in punishment such as a longer prison sentence.⁶⁴ In rejecting this reward-punishment dichotomy, the Court wrote,

We doubt that a principled distinction may be drawn between “enhancing” the punishment imposed upon the petitioner and denying him the ‘leniency’ he claims would be appropriate if he had cooperated. The question for decision is simply whether a petitioner’s failure to cooperate is relevant to the currently understood goals of sentencing.⁶⁵

Applying the Supreme Court’s words to differential sentencing based on the decision to exercise one’s right to trial demonstrates how that same logic should prevail. Consider the Supreme Court’s words so applied: We doubt that a principled distinction may be drawn between “enhancing” the punishment imposed upon the petitioner and denying him the “leniency” he claims would be appropriate *if he decided to plead guilty and forego his right to trial*. The question for decision is simply whether petitioner’s *failure to plead guilty and exercise his right to trial* is relevant to the currently understood goals of sentencing.

⁶⁰ *Roberts*, 445 U.S. at 554-55.

⁶¹ *Id.* at 555.

⁶² *Id.*

⁶³ *Id.* at 555-56.

⁶⁴ *See id.* at 557.

⁶⁵ *Id.*

IV. Goals of Punishment

Once it is acknowledged that differential sentencing is a form of punishment for exercising the right to trial, such a practice could still be defended if it was the result of applying one or more of the traditional goals of sentencing. The task then is to determine if there is some reason for plea-based differential sentencing, which is derived from accepted punishment goals, that explains how severely or leniently we sentence those convicted of crimes. These traditional goals of punishment are retribution, deterrence, incapacitation, and rehabilitation.⁶⁶ The first three of these goals offer no support for differential sentencing, and the theoretical support offered by rehabilitation collapses almost entirely when analyzed in terms of what really happens when pleas of guilty are negotiated and accepted.

Retribution, often called “just deserts,”⁶⁷ seeks to create a punishment commensurate with the crime.⁶⁸ That is, the severity of the punishment should be based on the seriousness of the crime. This seriousness to many retributionists is determined by assessing the degree of harm done and the level of moral turpitude of the wrongdoer.⁶⁹ Unlike the other three theories of punishment, retribution is largely non-utilitarian.⁷⁰ That is, its goal is to right a moral wrong, to salve a societal wound caused by the

⁶⁶ NICHOLAS N. KITTRIE & ELYCE H. ZENOFF, SANCTIONS, SENTENCING, AND CORRECTIONS 19-54 (1981); Mary Sigler, *Contradiction, Coherence, and Guided Discretion in the Supreme Court's Capital Sentencing Jurisprudence*, 40 AM. CRIM. L. REV. 1151, 1154 (2003).

⁶⁷ JEFFRIE G. MURPHY, RETRIBUTION RECONSIDERED 21-24 (1992).

⁶⁸ ANDREW VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS 31 (1987).

⁶⁹ *Id.* at 64. von Hirsch defines harm as “the injury done or risked by the criminal act.” *Id.* In assessing wrongfulness, he looks to “the factors of intent, motive and circumstance.” *Id.*; see also Thomas E. Baker & Fletcher N. Baldwin, Jr., *Eighth Amendment Challenges to the Length of a Criminal Sentence: Following the Supreme Court “From Precedent to Precedent”*, 27 ARIZ. L. REV. 25, 69 (1985); Bruce W. Gilchrist, Note, *Disproportionality in Sentences of Imprisonment*, 79 COLUM. L. REV. 1119, 1125 (1979).

⁷⁰ JEFFRIE G. MURPHY, RETRIBUTION, JUSTICE AND THERAPY 151-52 (1979); HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 10-11 (1968); LEON RADZINOWICZ, IDEOLOGY AND CRIME 115 (1966).

defendant when he committed the crime.⁷¹ If in doing so the punishment makes it less likely the defendant will recidivate, that is well and good. The purpose of a retribution-based punishment, however, is independent of this and other utilitarian goals.⁷² Retribution-based punishments, therefore, call for some kind of proportional relationship between the seriousness of the crime and the harshness of the punishment.⁷³ For the most part, retributionists argue against focusing on the criminal and look primarily, if not exclusively, to the crime committed.⁷⁴

There is no retribution-based reason for differential sentencing between those who plead guilty and those who are convicted after trial. In fact, any such difference would be antithetical to retributionist principles.⁷⁵ Obviously, whatever criteria are used to measure the seriousness of the offense remain the same regardless of how the case is ultimately disposed. Put in the simplest of retributionist terms, one who goes to trial does not *deserve* a heavier sentence than one who pleads guilty to the same offense.

⁷¹ MURPHY, *supra* note 70, at 229; C.L. TEN, *CRIME, GUILT AND PUNISHMENT: A PHILOSOPHICAL INTRODUCTION* 52-53 (1987).

⁷² MURPHY, *supra* note 67, at 21. In expressing this view held by the retributionist, another commentator wrote:

Judicial punishment can never be used as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime; for a human being can never be manipulated merely as a means to the purposes of someone else and can never be confused with the objects of the law of things.

IMMANUEL KANT, *METAPHYSICAL ELEMENTS OF JUSTICE: PART I OF THE METAPHYSICS OF MORALS* 138 (John Ladd ed. & trans., 1999) (1797).

⁷³ MURPHY, *supra* note 70, at 232; *see also* C.S. Lewis, *The Humanitarian Theory of Punishment*, in *CONTEMPORARY PUNISHMENT: VIEWS, EXPLANATIONS, AND JUSTIFICATIONS* 195 (Rudolph J. Gerber & Patrick D. McAnany eds., 1972) (arguing that the "concept of Desert is the only connecting link between punishment and justice").

⁷⁴ In his landmark book explaining the classical school of punishment, Italian criminologist Cesare Beccaria argued that punishments should be based not on who the offender was or his status in society, but instead on the particular crime committed. CESARE BECCARIA, *AN ESSAY ON CRIMES AND PUNISHMENTS* 82 (Henry Paulucci trans., 1991) (1764). Some retributionists would allow, however, for consideration of a defendant's prior criminal record.

⁷⁵ Retributionists believe in proportioning the sentence to the seriousness of the crime. *See* Lewis, *supra* note 73.

There are two types of deterrence that are traditionally used as justifications for punishment. The goal of general deterrence is to use this defendant's case and punishment to create a disincentive to others thinking of committing similar crimes.⁷⁶ Proponents of deterrence view crime as a rational act with potential criminals considering whether the reward they will get from their potential crime, be it pecuniary or emotional, outweighs the pain that will ensue if they are caught and punished.⁷⁷ A sentence focused on general deterrence should be stiff enough to serve as a disincentive for others similarly situated to the defendant to commit such a crime, because the severity of the sentence outweighs the benefit of the crime to the potential criminal.⁷⁸ There is nothing in the decision of whether to plead guilty or go to trial that makes any difference as to what sentence the defendant should receive when the sentence is based on principles of general deterrence.⁷⁹

The second type of deterrence is special or specific deterrence. The goal here is to make the sentence harsh enough so that the defendant before the court has a significant disincentive to offend again.⁸⁰ The target with specific deterrence is the defendant himself; again, his punishment should be harsh enough to outweigh the benefits of his engaging in similar criminal activity.⁸¹ Once again, the goals of specific deterrence offer no justification for different sentences to be imposed on those who plead guilty and those who go to trial. That is, unless what society wishes to deter is the defendant's exercise of his right to trial, which would be

⁷⁶ PACKER, *supra* note 70, at 39 & 140; VON HIRSCH, *supra* note 68, at 32; *see also* *United States v. Blarek*, 7 F. Supp. 2d 192, 202 (E.D.N.Y.) (discussing Jeremy Bentham's espousal of general deterrence), *aff'd*, 166 F.3d 1202 (2d Cir. 1998).

⁷⁷ H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 133 (1968); PACKER, *supra* note 70, at 40-41.

⁷⁸ RADZINOWICZ, *supra* note 70, at 10-11. *See generally* Johannes Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949 (1966).

⁷⁹ Andenaes, *supra* note 78, at 970; KITTRIE & ZENOFF, *supra* note 66, at 13 (quoting J.M. Burns & J.S. Mattina, *Sentencing*, in RENO: NAT'L JUDICIAL COLL., ABA AT UNIV. OF NEV. 1-5 (1978)).

⁸⁰ Steven Grossman, *Proportionality in Non-Capital Sentencing: The Supreme Court's Tortured Approach to Cruel and Unusual Punishment*, 84 KY. L.J. 107, 164 n. 361 (1995-96).

⁸¹ KITTRIE & ZENOFF, *supra* note 66, at 12; PACKER, *supra* note 70, at 45.

an entirely different kind of deterrence and one that would constitute punishment for exercising the right to trial.⁸²

Incapacitacionists believe that there are some criminal offenders so dangerous that they need to be kept separated from the public.⁸³ Sentences meted out to achieve the goals of incapacitation are based on the seriousness of the crime and especially on the perceived continuing danger these particular criminals pose.⁸⁴ Such sentences are designed to remove the offender from society until and unless he no longer poses such a grave danger.⁸⁵ Whether a mass murderer or serial pedophile pleads guilty or goes to trial surely bears no relationship to how dangerous he will be when released back into society.

Rehabilitation as a goal or theory of punishment should not be confused with the programs within or outside of prisons that may be designed to help rehabilitate a defendant. Programs that offer vocational or educational training to inmates and those that provide psychological or substance abuse counseling are designed, in one way or another, to help deal with the problems that may be underlying the defendant's criminal behavior. One can believe in the creation and support of such programs without being a rehabilitationist.⁸⁶ This is because rehabilitation as a theory of punishment requires that the severity of the punishment be based primarily on how long it will take and what conditions will be needed for the defendant to be rehabilitated.⁸⁷ Rehabilitationists focus more on the criminal than the crime and try to craft a sentence that is tied to the needs of the individual who committed the crime.⁸⁸ The chief concerns of the

⁸² See *infra* notes 110-22 and accompanying text.

⁸³ TEN, *supra* note 71, at 8.

⁸⁴ Steven Grossman & Stephen Shapiro, *Judicial Modification of Sentences in Maryland*, 33 U. BALT. L. REV. 1, 20 (2003).

⁸⁵ KITTRIE & ZENOFF, *supra* note 66, at 13; TEN, *supra* note 71, at 8.

⁸⁶ See, e.g., *United States v. Bergman*, 416 F. Supp. 496, 499 (S.D.N.Y. 1976) (involving sentencing expert Judge Marvin Frankel, who criticized sending someone to prison to further the goal of rehabilitation, but supported making rehabilitative programs available once someone is imprisoned for another reason).

⁸⁷ AM. FRIENDS SERV. COMM., *STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA* 84 (1971); PACKER, *supra* note 70, at 14.

⁸⁸ See Craig Peyton Gaumer, *Punishment for Prejudice: A Commentary on the Constitutionality and Utility of State Statutory Responses to the Problems of Hate Crimes*, 39 S.D. L. REV. 1, 42 n.239 (1994).

rehabilitationist are (1) what type of help the defendant will need to avoid committing crimes in the future, and (2) how long the defendant will need to be incarcerated in order for that rehabilitation to work.⁸⁹

Some who argue that differential sentencing is not punishment for exercising the right to trial claim to find support in rehabilitation as a justification for determining sentences.⁹⁰ They argue that when a defendant pleads guilty, the acceptance of responsibility said to be embodied in his plea is the first step on the road to rehabilitation.⁹¹ Such an argument is modeled loosely on the approaches of some rehabilitative organizations, such as the Twelve Steps of Alcoholics Anonymous (AA).⁹² The first step in many such rehabilitative programs is to acknowledge the existence of a problem in your life.⁹³ Some argue that the plea of guilty is the criminal justice equivalent of this acknowledgment and demonstrates an acceptance of responsibility.⁹⁴ As the defendant has acknowledged responsibility by pleading guilty, he has taken the first step on the road to rehabilitation and therefore will need less time for his rehabilitation to be completed.⁹⁵ Thus, the defendant who pleads guilty warrants a lighter sentence than the accused who goes to trial.

⁸⁹ AM. FRIENDS SERV. COMM., *supra* note 87, at 84; PACKER, *supra* note 70, at 14.

⁹⁰ HEUMANN, *supra* note 17, at 66; *see also* NORA DEMLEITNER ET AL., SENTENCING LAW AND POLICY: CASES, STATUTES, AND GUIDELINES 314 n.1 (2004).

⁹¹ *See, e.g.,* Brady v. United States, 397 U.S. 742, 753 (1970) (stating that a defendant “demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary”); *see also* Michael M. O’Hear, *Symposium, The Federal Sentencing Guidelines: Ten Years Later—Remorse, Cooperation, and “Acceptance of Responsibility”: The Structure, Implementation, and Reform of Section 3E1.1 of the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1507 (1997). O’Hear notes that the Federal Sentencing Guidelines allow for a reduction in sentence to a defendant who “clearly demonstrates acceptance of responsibility for his offense.” *Id.* at 1508. “Judges grant the acceptance-of-responsibility adjustment in the vast majority of cases.” *Id.* at 1510.

⁹² Alcoholics Anonymous World Services, Inc., *The Twelve Steps of Alcoholics Anonymous*, at http://www.aa.org/default/en_services_aa_sub.cfm?subpageid=44&pageid=34 (revised May 9, 2002).

⁹³ *Id.*

⁹⁴ United States v. Speed Joyeros, 204 F. Supp. 2d 412, 433 (E.D.N.Y. 2002); UNITED STATES SENTENCING GUIDELINES MANUAL § 3E1.1(a) & (b) (2003).

⁹⁵ DEMLEITNER *supra* note 91, at 314 n.1; *see also* State v. Tiernan, 645 A.2d 482, 483 (R.I. 1994).

Accepting this proposition requires accepting the corollary that one who opts to exercise his constitutional right to trial is less likely to be rehabilitated or will take longer time to do so. One primary reason why defendants forego pleading guilty is because they or their attorneys believe they have a substantial chance of being acquitted⁹⁶—perhaps because of perceived weakness in the prosecutor’s case, legal issues surrounding the charges or certain pieces of evidence, or even the defendant’s belief in his innocence.⁹⁷ Does the decision of such a defendant to choose a trial suggest that he will take longer to be rehabilitated, or merely that he was convinced that the decision to go to trial was in his best interest?

The primary reason that “the first step on the road to rehabilitation” argument fails to explain differential sentencing is that the motivation for pleading guilty is different in almost all cases than the motivation necessary for traditional rehabilitative programs like AA. Programs that use approaches such as The Twelve Steps require that the person in need of help really wants to be helped. That person’s primary motivation must be the desire to get better.⁹⁸ In such a case, acknowledging that one has a problem is, arguably, a necessary first step to being able to be treated for that problem.⁹⁹

Undoubtedly there are some defendants who plead guilty because they are genuinely repentant for what they did and wish to acknowledge their wrongdoing.¹⁰⁰ In the real world, however, such defendants are few and far between.¹⁰¹ Stated simply, virtually all defendants who accept guilty

⁹⁶ G. NICHOLAS HERMAN, PLEA BARGAINING § 2:03(1), at 8 (1997).

⁹⁷ *Id.* Additionally, defense attorneys often feel the pressures of heavy caseloads, and sometimes this leads them to want to “turn over” cases quickly. Accordingly they may tend to encourage their clients to accept plea bargains rather than going to trial. HEUMANN, *supra* note 17, at 25.

⁹⁸ Alcoholics Anonymous World Services, Inc., *A Newcomer Asks*, at http://www.aa.org/default/en_about_aa.cfm?pageid=10 (last visited Aug. 12, 2005).

⁹⁹ *See supra* note 92.

¹⁰⁰ McDONALD, *supra* note 20, at 102; *see also Ex parte Fletcher*, 849 So. 2d 900, 903 (Ala. 2001) (explaining that defendant’s repentant attitude contributed significantly in the court’s decision).

¹⁰¹ Note, *The Influence of the Defendant’s Plea on Judicial Determination of Sentencing*, 66 YALE L.J. 204, 210 (1956).

pleas do so because they believe it will be in their best interest to do so.¹⁰² Even the few defendants who do feel some degree of remorse for their actions plead guilty primarily, if not exclusively, because of the sentencing considerations they will receive as a condition of their plea.¹⁰³ It hardly comes as a surprise that so few defendants plead guilty without some form of consideration from the prosecutor or the judge, or at least the belief that such a consideration might be forthcoming. To maintain that the desire to accept responsibility for their misdeeds motivates defendants who plead guilty, one would have to believe that a fairly direct correlation existed between the reduction in charge or prison time that a defendant is offered in exchange for his plea of guilty and the defendant's sudden desire to acknowledge his wrongdoing.

That almost all criminal defendants are acting purely in their own perceived self-interest in deciding whether to accept a plea bargain is hardly newsworthy.¹⁰⁴ Most litigants before a court do so even when the stakes are less than having their liberty taken from them.¹⁰⁵ Were one group of litigants to be disinclined to act in their own self-interest, it is hard to imagine a group less likely to fall into that category than criminal defendants. It comes as no great revelation, therefore, that both prosecutors and criminal defense attorneys recognize the actual reason why almost all defendants choose to plead guilty—to receive some form of sentencing or other consideration from the court.¹⁰⁶ Though it is doubtful

¹⁰² MCDONALD, *supra* note 20, at 101.

¹⁰³ *Id.* at 93-94. In his study, McDonald found that only two defendants mentioned that their guilty pleas were at all attributable to moral guilt, and even these two referred as well to the facts that “the cases against them were strong and that their attorneys had advised them to plead guilty. *Id.* at 102.

¹⁰⁴ As one commentator notes, “[t]he guilty plea therefore is primarily used for reasons of absolute self-interest and expediency rather than principle.” KITTRIE & ZENOFF, *supra* note 66, at 425 (2d ed. 2002) (quoting HEDIEH NASHERI, *BETRAYAL OF DUE PROCESS: A COMPARATIVE ASSESSMENT OF PLEA BARGAINING IN THE UNITED STATES AND CANADA* (1998)).

¹⁰⁵ Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 80-81 (1997) (discussing factors that motivate civil litigants to settle).

¹⁰⁶ KATZ, *supra* note 19, at 197-98 (stating that a reduction in sentence is the primary goal of plea negotiations); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2496-97 (2004) (discussing how the defendant's interests shape his plea bargaining).

that a plea of guilty, even theoretically, can be equated to taking the first step on the road to rehabilitation, it is quite clear that almost all defendants who choose to plead guilty do so for reasons having nothing to do with any such step on any such road.¹⁰⁷

Pleading guilty is not the first step on the road to rehabilitation for virtually any criminal defendant. As with the other three justifications for determining the severity of a sentence, it provides no support for why defendants who are convicted after exercising their right to trial spend longer time in prison than they would have had they accepted the plea bargain that they were offered.

Some have suggested that one justification for differential sentencing is that the judge learns more during a trial about the defendant and the seriousness of the crime committed, information presumably the judge would not learn sufficiently during the allocution that accompanies a plea of guilty.¹⁰⁸ However, as one author of a study of plea bargaining has noted, "the problem with this rationale is that it explains too much. It may fit some crimes of violence where heinous acts were committed but is unlikely to account for the vast majority of differential sentences."¹⁰⁹

V. Risk

Some have sought to justify the punishment defendants receive for choosing to exercise their right to trial by employing some sort of risk-reward analysis. The highly respected Judge David Bazelon offered such a justification in *Scott v. United States*.¹¹⁰

Judge Bazelon conceded that, when a defendant receives a greater sentence for going to trial than he would have gotten had he chosen to plead guilty, at least a component of his increased sentence is punishment for exercising a constitutional right.¹¹¹ It was Judge Bazelon's view, however, that a portion of this difference in sentencing could be attributed

¹⁰⁷ *Scott v. United States*, 419 F.2d 264, 271 n.33 (D.C. Cir. 1969).

¹⁰⁸ *Alabama v. Smith*, 490 U.S. 794, 801 (1989).

¹⁰⁹ MCDONALD, *supra* note 20, at 94.

¹¹⁰ 419 F.2d 264, 276-78 (D.C. Cir. 1969).

¹¹¹ *Scott*, 419 F.2d at 270-71.

to the fact that the defendant took a risk and lost.¹¹² That is, the defendant had a certain offer of a reduced sentence had he accepted the plea offered, but he chose instead to risk a heavier sentence in the hopes of winning a full acquittal at trial. In Judge Bazelon's opinion, though there was no justification in punishing the defendant based on the defendant's refusal to save the criminal justice system the time and money needed for a trial, it is acceptable to make the accused pay the price for taking a risk and losing.¹¹³

In order to put his theory into practice, Judge Bazelon suggested the use of a formula to determine if a plea offer was the equivalent of punishment for exercising the right to trial or merely the price paid by the accused for taking a risk and losing. Bazelon's approach was to assess how much prison time the defendant should receive for his crime based on accepted justifications for punishment, then estimate the likelihood that the prosecutor would win a conviction at trial.¹¹⁴ Under Bazelon's approach, one would presumably multiply the appropriate sentence by the percentage of a likely conviction.¹¹⁵ The defendant could then be sentenced under a plea agreement to *no less* prison time than the result of that multiplication.¹¹⁶ For example, if a defendant should receive ten years in prison based on the crime committed and other sentencing factors and there is a sixty percent likelihood of conviction after trial, then the sentence imposed based on a plea bargain could be six years or greater. Any less of a sentence offered in consideration for the defendant's plea of guilty would constitute punishment for exercising his right to trial.¹¹⁷ To Judge Bazelon, only the risk factor could justify differential sentencing.

Judge Bazelon's approach is interesting because it constitutes judicial acknowledgment that differential sentencing does embody punishment for exercising the right to trial, and it is a creative attempt to devise a plea

¹¹² *Id.* at 276.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 276-77.

¹¹⁷ *See id.*

bargaining method that avoids such punishment. But it too is flawed both theoretically and practically.

Theoretically, Judge Bazelon never makes a convincing case as to why factoring in the risk of conviction negates the fact that differential sentencing is still punishment for exercising the right to trial. It is still true that the only difference between the defendant who receives six years in prison and the one who gets ten in the above scenario is the decision of the latter to seek trial. It is hard to avoid characterizing such a difference as a punishment.¹¹⁸ Judge Bazelon claims that it is not the decision to go to trial that is being punished but merely that the system is exacting a price because, in looking for an acquittal, the defendant took a risk and lost.¹¹⁹ Why is it, though, that a defendant who takes a risk and loses should get more time in prison than one who pleads guilty? Surely taking such a risk in no way argues for more prison time in order to achieve the purposes of retribution, deterrence, incapacitation, or rehabilitation.¹²⁰ Even accepting *arguendo* Judge Bazelon's argument that his approach does not punish for exercising the right to trial, it still punishes for taking a risk and losing. What sentencing justification is there for such a penalty?

On a practical level, Judge Bazelon's theory is unworkable. Even assuming the good faith of whoever is to determine the likelihood of conviction after trial, such a figure cannot be reduced to a flat percentage. Although strong government cases can often be distinguished from weaker ones, too many variables exist and too much remains unknown at the time a plea would be offered to be able to quantify the likelihood of conviction at trial with any degree of accuracy.¹²¹ Additionally, the mechanics of working out a system that addresses the many questions—such as how the likelihood figure would be determined (that is, how to factor in the number of witnesses, their credibility, the reliability of identification testimony, admissions by the defendant, and the availability and strength of physical evidence, not to mention whatever evidence the

¹¹⁸ See *supra* notes 26-31 and accompanying text.

¹¹⁹ *Scott*, 419 F.2d at 270-71.

¹²⁰ See *supra* notes 67-93 and accompanying text.

¹²¹ See MCDONALD, *supra* note 20, at 61-91.

defense would present to counteract the government's case¹²²), should the prosecutor determine this number him or herself, and what the right of the defendant is to appeal from such a determination—would seem insurmountable.

VI. Knowledge of the Parties Involved

In order to make the current system of plea bargaining work, not only must defendants be punished for exercising their right to trial, but also all of the interested parties—the prosecutor, the defense attorney, the defendant, and the judge—must be fully aware that such a result is virtually inevitable in all criminal cases. No competent defense attorney would have her client plead guilty when the client derives no benefit from doing so.¹²³ One never knows what will happen at trial—what witnesses will fail to appear or reveal on the witness stand major credibility problems, what the absence of certain physical evidence will mean to the jury, or what will occur if the jury happens to contain a juror loathe to convict for his own personal reasons.¹²⁴ These and other variables make conviction after

¹²² *Id.*

¹²³ Katz, *supra* note 19, at 202-03. Usually the defendant follows the attorney's advice. *Id.* One author points out that differential sentencing is the "primary force behind plea bargaining Defendants plead guilty because they believe that if they stood trial they would be punished more severely. This incentive underlies almost all plea bargains" MCDONALD, *supra* note 20, at 93.

Moreover, the failure to try to negotiate a plea bargain that would benefit the defendant may constitute ineffective assistance of counsel if the failure leads to a showing of prejudice. HERMAN, *supra* note 96, § 3:03, at 19. In *Cole v. Slayton*, for instance, a Virginia federal district court granted petitioner's writ of habeas corpus because his defense attorney had not done enough to represent his client, including attempting a plea bargain. 378 F. Supp. 364 (D. Va. 1974). The court noted that defense counsel believed he "had nothing to bargain with." *Id.* at 368.

This explanation ignores the fact that all defendants, no matter how overwhelming their guilt, have one bargaining point—the plea itself. Whether a prosecutor will agree to accept a plea of guilty in return for a reduced charge or recommended sentence will, of course, depend upon any of a number of factors, but the point is that this possibility should have been attempted.

Id.

¹²⁴ KATZ, *supra* note 19, at 191; see also *supra* note 121 and accompanying text.

trial less than a certainty. Even where the evidence is overwhelming against the defendant, why should he not take even the smallest chance at an acquittal if there is no benefit to forgoing his right to trial?

In very rare cases, a defendant may wish to plead guilty without so much as the reasonable hope of a reduced sentence for having done so.¹²⁵ For example, a defendant might fear or loathe the trial process, or he might feel genuine contrition and wish to acknowledge his guilt as soon as possible.¹²⁶ Such things undoubtedly occur but are very rare.¹²⁷ Without the promise or reasonable belief that they will receive a sentencing reduction for doing so, very few defendants will plead guilty, and very few attorneys will counsel their clients to do so.

Sentencing considerations given in exchange for the defendant's plea of guilty take many forms, often according to each jurisdiction's law and the practices and policies of individual judges and prosecutors.¹²⁸ At times, the prosecutor will agree to drop the greater charge if the defendant

¹²⁵ See, e.g., *Argot v. State*, 583 S.E.2d 246, 248 (Ga. Ct. App. 2003) (stating that "the record clearly demonstrates that Argot understood that there was no agreement as to sentencing, and that she could receive a maximum sentence of 20 years"); Steve Arney, *Waukegan Man Pleads Guilty to Reckless Homicide*, PANTAGRAPH, Nov. 15, 1996, at A6 (reporting that the defendant "received no promises of leniency in pleading guilty"); Ray Huard, *Man Admits to Guilt in Death of Pedestrian*, SAN DIEGO UNION-TRIB., Feb. 24, 2005, at B-4:7 (reporting that prosecutors made no promises in exchange for the defendant's guilty plea); Brittany Wallman & Ann W. O'Neill, *Mortgage Fraud Investigation Is a Tale of Family Ties*, SUN-SENTINEL, Apr. 2, 2005, at 1B (stating that the defendants will plead guilty but prosecutors made "no promises" about the sentence they would receive); cf. COLE, *supra* note 2, at 418 (stating that some defendants plead guilty without entering into negotiations before making the plea).

¹²⁶ See, e.g., *State v. Paris*, 578 S.E.2d 751, 752 (S.C. Ct. App. 2003) (noting that "[the defendant] said he knew the crime had not happened but was not going to contest the charge because he did not feel like putting his child through a trial"); Arney, *supra* note 125, at A6 (reporting that the defendant chose to plead guilty because he has "deep sorrow for the deaths of these two young women and believed it was in both his best interest and their family's that he plead guilty to the charges"); Barton Gellman, *Murder Defendant Now Says He's Guilty: 3 Days Into Trial, Maryland Man Drops Defense*, WASH. POST, Jan. 24, 1989, at B1 (When the judge asked why the defendant wanted to plead guilty, the defendant said, "I don't wish to put anybody through any more than they have already been through," referring to his victims and his own family.).

¹²⁷ KATZ, *supra* note 19, at 197-98 (creating an inference that a reduction in sentence is the primary goal of plea negotiations); see *supra* note 106 and accompanying text.

¹²⁸ 25 AM. JUR. *Trials* § 9, at 69 (2004).

pleads guilty to a lesser charge.¹²⁹ At other times, the defendant bargains to have the prosecutor make a specific recommendation to the sentencing judge or a recommendation that the sentence not exceed a certain maximum.¹³⁰ It is fair to say that, although exceptions do occur, it is the general practice of most judges not to exceed the prosecutor's recommendation.¹³¹ For a judge to do otherwise, on a routine basis, would significantly diminish the likelihood of guilty pleas in her courtroom. Sometimes the prosecutor's agreement merely to remain silent or make no recommendations as to sentence is enough to induce the defendant to plead guilty.¹³²

Judges may agree to a certain sentence as part of the plea agreement or commit themselves to a sentence only if some condition that they impose is fulfilled.¹³³ The judge may solely commit to not go beyond a certain maximum in her sentence.¹³⁴ Often times, a judge will make no commitment, but the defendant is induced to plead guilty because the judge's sentence either must be lower or is likely to be lower due to the

¹²⁹ HERMAN, *supra* note 96, § 6:10(1)-(3), at 68; KITTRIE & ZENOFF, *supra* note 66, at 167.

¹³⁰ FED. R. CRIM. P. 11(c); HERMAN, *supra* note 96, § 6:10(6) & (11), at 68-69; KITTRIE & ZENOFF, *supra* note 66, at 167.

¹³¹ PRESIDENT'S COMM'N, *supra* note 2, at 11; KATZ, *supra* note 19, at 208. Judges may also go along with the plea "in order to maintain future exchange relationships." COLE, *supra* note 2, at 422; HUEMANN, *supra* note 16, at 152.

¹³² HERMAN, *supra* note 96, § 6:10(6), at 68-69; KITTRIE & ZENOFF, *supra* note 66, at 167; *see, e.g.,* Santobello v. New York, 404 U.S. 257, 262 (1971).

¹³³ FED. R. CRIM. P. 11(c); 25 AM. JUR. *Trials* § 9, at 69 (2004); *see also, e.g.,* United States v. Phaneuf, 91 F.3d 255, 263 (1st Cir. 1996) ("A sentencing judge has broad discretion to impose special conditions of release that are 'reasonably related' to (1) the defendant's offense, history and characteristics; (2) the need for adequate deterrence; and (3) the need to protect the public from further crimes of the defendant."); People v. Buttram, 69 P.3d 420, 430 (Cal. 2003) ("[B]y negotiating only a *maximum* term, the parties leave to judicial discretion the proper sentencing choice within the agreed limit. Unless the agreement itself specifies otherwise, appellate issues relating to this reserved discretion are therefore outside the plea bargain and cannot constitute an attack upon its validity.").

¹³⁴ *See, e.g.,* FED. R. CRIM. P. 11(c); State v. Howard, 842 So. 2d 1233, 1238, (La. App. 2003) ("Where a defendant has pled guilty to an offense which does not adequately describe his conduct or has received a significant reduction in potential exposure to confinement through a plea bargain, the trial court has great discretion in imposing even the maximum sentence possible for the pled offense.").

defendant's plea to a lesser charge.¹³⁵ Regardless of the form the inducement takes, the defendant will invariably get some tangible sentencing benefit or at least the reasonable hope that he will benefit in exchange for his plea of guilty.

A defendant who fails to accept a plea bargain and is convicted at trial will inevitably receive a heavier sentence than he would likely have gotten with the plea.¹³⁶ This is almost implicit in the plea bargaining process. Whether one calls this a punishment for going to trial¹³⁷ or the failure to receive a benefit for pleading guilty,¹³⁸ the fact that differential sentencing occurs is indisputable.¹³⁹ Sometimes the threat of the heavier sentence is overt, more often it is implicit. In places where it is the policy of the prosecutor to make a sentencing recommendation after trial, prosecutors will invariably recommend a sentence heavier than they would have suggested had the defendant plead guilty.¹⁴⁰ There would be no credibility

¹³⁵ But when a defendant pleads guilty, there is no guarantee of a lower sentence than the statutory maximum without a judicial commitment of such. *See, e.g.,* *People v. McCann*, 303 A.D.2d 780, 780 (App. Div. 2003) ("Although defense counsel and the People jointly recommended that defendant be sentenced to 1½ to 3 years in prison, County Court made clear to defendant during the plea proceeding that, 'in spite of the agreement that the District Attorney . . . made with [his] attorney, [the court] was not promising [him] anything' in terms of sentencing."); *State v. Tappa*, 655 N.W.2d 223, 227 (Wis. Ct. App. 2002) (rejecting defendant's argument that he should have gotten a lighter sentence because his co-defendants had all received lighter sentences); *Robinson v. State*, 836 So. 2d 747, 751 (Miss. 2002) ("Despite Robinson's contention that he was somehow lured into pleading guilty, the record indicates that his plea was free and voluntary without threat or coercion The trial judge is . . . solely responsible for determining the appropriate sentence.").

¹³⁶ KATZ, *supra* note 19, at 206 (noting that defendants who already have experience with the criminal justice system know they are more likely to get a lenient sentence if they plead guilty than if they go to trial).

¹³⁷ *See United States v. Wiley*, 184 F. Supp. 679, 687 (N.D. Ill. 1960).

¹³⁸ *See supra* subsection III(A).

¹³⁹ *See supra* note 27 and accompanying text.

¹⁴⁰ James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1535 (1981) ("Whatever the strength of the defendant's case, prosecutors have enormous leverage to ensure concessions for defendants who make deals and harsher treatment for those who do not."). One prosecutor described this practice explicitly. "If we can avoid a trial, we may not suggest jail. If we do have to go through trial, you can expect that we will speak for a tough sentence, and we seem to be having some effect on the judges." John Hagan & Ilene Nagel Bernstein, *The Sentence Bargaining of Upperworld and Underworld Crime in Ten Federal District Courts*, 13 LAW & SOC'Y REV. 467, 475 (1979).

to the original plea offer, no stick to make the carrot a carrot if the prosecutor made the same recommendation on sentence after the defendant rejected his plea offer and was convicted at trial.

The judge, too, must play her role in the differential sentencing scheme. If sentences after trial and conviction were the same as would be imposed after a plea bargain, very few defendants would be likely to plead guilty before this judge.¹⁴¹ Sometimes judicial participation in differential sentencing based on the decision to exercise or forego the right to trial is particularly obvious, such as when a judge commits herself to a certain sentence as part of the plea bargain and then sentences the defendant more harshly after he is convicted at trial.¹⁴² If the defendant rejects the plea offer and goes to trial, what value will her commitment to a reduced sentence during the plea negotiations have in future cases if her sentence after trial is no greater than that offered as part of the plea?

The only way plea bargaining works is if everyone knows the judge is highly likely to impose a heavier sentence after trial than she would have imposed had the defendant pled guilty. At times, the difference in sentence between what was offered as part of the plea negotiations and what the defendant receives at trial is extreme,¹⁴³ sometimes so extreme

¹⁴¹ See Craig Haney & Michael J. Lowy, *Bargain Justice in an Unjust World: Good Deals in the Criminal Courts?*, 13 LAW & SOC'Y REV. 632, 645 (1979) (noting that, for plea bargaining to function, judges must do their part by sentencing more harshly those defendants who reject plea offers and are convicted at trial).

¹⁴² *Hampton v. Wyrick*, 588 F.2d 632, 633 (8th Cir. 1978) (affirming the post-trial sentence of fifty years after defendant rejected a plea bargain with a recommended sentence of twenty-five years that had been accepted by the judge); *State v. Korum*, 86 P.3d 166, 167 (Wash. Ct. App.) (reversing the sentence of a defendant who initially agreed to a plea deal of 135 months in prison, withdrew his sentence and received 1208 months in prison because the State filed an additional thirty-two counts), *reh'g granted*, 101 P.3d 108 (Wash. 2004); *State v. Young*, 602 S.E.2d 374, 380 (N.C. Ct. App. 2004) (remanding a case for re-sentencing after the trial court warned the defendant that he would receive a higher sentence if he chose to go to trial); *People v. Dennis*, 328 N.E.2d 135, 138 (Ill. App. Ct. 1975) (reversing a sentence after petitioner rejected a plea bargain of two to four years that was accepted by the judge and getting a sentence of forty to eighty years after being found guilty at trial); *State v. Baldwin*, 629 P.2d. 222, 226 (Mont. 1981) (remanding for re-sentencing the ten-year post-trial prison sentence of a defendant who was offered and rejected a plea in which the judge indicated the defendant would spend forty-five days in jail).

¹⁴³ See *supra* notes 27-31 and accompanying text.

that an appellate court invalidates the sentence.¹⁴⁴ But, even when the sentence is only somewhat greater after trial than offered after a plea, it is unjustified by any theory of punishment, save the highly unrealistic use of the notion that the plea is the first step on the road to rehabilitation, discussed above.¹⁴⁵ In any event, all the parties understand that the judge's sentence after trial will be harsher, and they understand why.

Of course, knowing something and being able to openly acknowledge it are two entirely different things in a system built on the fiction that plea bargaining imposes no penalty on those who go to trial. Judges who openly acknowledge what virtually all judges actually do are often rewarded for their honesty by having their sentences invalidated.¹⁴⁶ Sentencing a defendant who goes to trial more harshly than he would have been sentenced had he pled guilty (or the analogous situation of sentencing two defendants of similar backgrounds and culpability to different sentences based solely on which one pled guilty) is something a judge can do but not something a judge can admit she is doing.¹⁴⁷ This hypocrisy fostered by the plea bargaining system is evident.

Imagine a situation in which the prosecutor and defendant arrive at a plea bargain that includes the prosecutor's recommendation of a certain sentence in exchange for the defendant's guilty plea. Assume that the judge agrees to the plea bargain and commits him or herself to impose the agreed upon sentence. The defendant, wishing to make a fully informed decision before deciding to plead guilty or go to trial, has the temerity to ask the judge what sentence he will receive from the judge should he be convicted after a trial with nothing else affecting sentencing. The judge may respond correctly and safely only that she is not bound by the sentence that was agreed to as part of the proposed plea bargain. But what if the defendant asks whether the judge will sentence him to more time after trial? The answer to that question is almost certainly yes,

¹⁴⁴ See, e.g., *State v. Morris*, 825 N.E.2d 637, 640-42 (Ohio Ct. App. 2005); *Korum*, 86 P.3d at 167; *Davis v. State*, 860 So. 2d 1058, 1060-61 (Fla. Dist. Ct. App. 2003); *Dennis*, 328 N.E.2d at 138.

¹⁴⁵ See *supra* notes 86-107.

¹⁴⁶ See, e.g., *Morris*, 825 N.E.2d at 640-42; *Davis*, 860 So. 2d at 1060; *Wiley*, 184 F. Supp. at 681-85; *Johnson v. State*, 336 A.2d 113, 117-18 (Md. 1975).

¹⁴⁷ See *supra* notes 86-107.

but should the judge tell that to the defendant so as to allow him to make an intelligent decision about whether to plead guilty? An appellate court would likely invalidate the judge's sentence, declaring it to be punishment for exercising the right to trial.¹⁴⁸ Basically, judges can proceed in this manner with regard to plea bargaining; they just cannot openly acknowledge what they are doing.

VII. The Truth Will Set You Free

There is a way to avoid the insincerity and hypocrisy caused by a system that denies that differential sentencing embodies punishment for exercising the right to trial. Put simply, the way out is to acknowledge reality and deal with it in a manner that is consistent with constitutional law. The Supreme Court hinted at a way out as long ago as 1968 in *United States v. Jackson*.¹⁴⁹

Jackson was charged with violating the Federal Kidnapping Act then in existence. A provision of that statute provided for the death sentence but only "if the verdict of the jury shall so recommend."¹⁵⁰ There was no manner within the statute for imposing a death sentence upon a person who either pled guilty or was convicted after electing a bench rather than a jury trial.¹⁵¹ The Court held that such an approach "discourage[s] assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial."¹⁵² However, what is interesting is that the Court made clear that governmental activity that discourages or chills the exercise of a constitutional right is not in and of itself unconstitutional.

At one point, the Court observed, "If the provision had *no other purpose or effect* than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently

¹⁴⁸ *Id.*

¹⁴⁹ 390 U.S. 570 (1968).

¹⁵⁰ *Jackson*, 390 U.S. at 570-71 (quoting Federal Kidnapping Act, 18 U.S.C. § 1201(a) (2003)).

¹⁵¹ *Id.* at 571.

¹⁵² *Id.* at 581.

unconstitutional.”¹⁵³ The Court then examined the “other purpose” offered by the government for chilling the exercise of the right to trial and found the purpose wanting because it could be accomplished in ways that do not penalize the right to trial.¹⁵⁴ The Court then noted, “whatever might be said of the Congress’ objectives, they cannot be pursued by means that *needlessly* chill the exercise of basic constitutional rights.”¹⁵⁵ Although the strong implication from this statement is that needful chilling of a basic constitutional right would therefore be permissible, the Court’s subsequent words allow for more than just an implication. In responding to the Government’s assertion that the chilling of the right to a jury trial in the Federal Kidnapping Act was incidental rather than intentional, the Court wrote, “The question is not whether the chilling effect is ‘incidental’ rather than intentional; the question is whether that effect is unnecessary and therefore excessive.”¹⁵⁶ Lest there be any doubt, the Court later maintains that the “evil” in the Act is that it “needlessly encourages” jury waivers and guilty pleas.¹⁵⁷

The *Jackson* Court found the Federal Kidnapping Act unconstitutional because it chilled the exercise of the right to trial without good reason. Unlike the Federal Kidnapping Act provision invalidated in *Jackson*, the differential sentencing that is embodied in every day plea bargaining is not contained in writing. As discussed above, however, such chilling or punishing occurs in the vast majority of criminal cases in this country.¹⁵⁸ Since its decision in *Jackson*, the Supreme Court has made clear that “not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid.”¹⁵⁹

¹⁵³ *Id.* (emphasis added).

¹⁵⁴ *Id.* at 582.

¹⁵⁵ *Id.* (emphasis added).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 583.

¹⁵⁸ See *supra* notes 2 & 27 and accompanying text.

¹⁵⁹ *Corbitt v. New Jersey*, 439 U.S. 212, 218 (1978). Expressing a similar sentiment in *McGautha v. California*, the Supreme Court wrote that, “[t]he criminal process, like the rest of the legal system, is replete with situations requiring ‘the making of difficult judgments’ as to which course to follow. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution

The real question to be answered is twofold: first, whether the way in which we chill the exercise of the right to trial through differential sentences for those who plead guilty and those who go to trial is done for good reason; and second, whether there is no other means to accomplish the same ends.¹⁶⁰ This discussion would require an analysis of the benefits that society derives from getting most defendants charged with crimes to avoid going to trial. Such an analysis would start, but certainly not end, with the significant savings of time and resources that result from disposing of cases without full trials.¹⁶¹ The discussion would also involve consideration of some of the drawbacks of plea bargaining.¹⁶² If the benefits were found to be significant and to outweigh the drawbacks, then, applying the approach used by the Supreme Court in *Jackson*, the next step would be to see if the benefits attributed to plea bargaining could be achieved in some other way.¹⁶³ If they could not, it would then be acceptable to chill the exercise of the right to trial by offering lower sentences to defendants who plead guilty and more severe sentences for those who go to trial.

This is, of course, what already occurs, but now there would be a genuine constitutional legitimacy based on an honest realization of what plea bargaining actually entails. Furthermore, such an approach would

does not by that token always forbid requiring him to choose.” 402 U.S. 183, 213 (1971).

¹⁶⁰ Reasons why differential sentencing practices stemming from plea bargaining benefit both the prosecution and defense can be found in *Brady v. United States*, 397 U.S. 742, 750-53 (1970). See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (holding that the appellant’s First Amendment rights could be substantially infringed if there was a “compelling state interest”), *overruled by N.Y. State Empl. Rels. Bd. v. Christ the King Reg’l High School*, 682 N.E.2d 960 (N.Y. 1997).

¹⁶¹ McDONALD, *supra* note 20, at 93; HEUMANN, *supra* note 17, at 25-26; see *supra* note 55.

¹⁶² See, e.g., Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387 (1970).

¹⁶³ After Alaska curtailed its use of plea bargains, the state’s courts saw an increase of attorneys, police, and court efficiency. Also, the disposition times for felony cases dropped drastically. The attorney general’s goals were to return the sentencing functions to judges and improve the quality of justice. PLEA BARGAINING 51-52 (William F. McDonald & James A. Cramer eds., 1980). Of course it very well may be that what worked in Alaska would not work in jurisdictions with heavier caseloads.

obviate the need for courts to create fictitious distinctions between reward and punishment and allow them to emerge from the disingenuousness that has dominated their discussion of plea bargaining for far too long.¹⁶⁴

¹⁶⁴ See, e.g., *United States v. Jones*, 997 F.2d 1475, 1480 (D.C. Cir. 1993). *Jones* was a case that dealt with the amount of reduction in sentence the defendant would receive for “accepting responsibility” *after* he was convicted at trial. The trial judge chose not to give Jones the same level of reduction he would have received for pleading guilty, commenting that, “[b]ecause . . . the case did go to trial, I am going to add an additional six months to the Guideline sentence that I intend to impose, and will impose a sentence of 127 months.” *Id.* at 1477. In response to the appellate court majority’s characterization of the trial judge’s actions as withholding leniency rather than administering punishment, Chief Judge Mikva wrote in dissent:

For reasons that I do not understand, my colleagues in the majority insist on mischaracterizing what the district judge actually did. They insist that the district judge did not *increase* Mr. Jones’ sentence because of his failure to plead guilty, but rather gave him *less of the benefit allowable* for acceptance of responsibility. As I discuss below, this may be a distinction without a difference when it comes to the constitutional obligations of a sentencing judge. But in any case, that is not what the trial judge did. He said he was punishing Mr. Jones for going to trial; he did not claim he was withholding leniency. It is as if the majority wants to deny the trial judge the opportunity to get the very guidance that he sought.

Id. at 1480 (Mikva, J., dissenting).