ARTICLE: Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure

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SUMMARY:
... These coercive proposals make the defendant's guilty plea involuntary. ... In addition, the Prosecutorial Adjudication System does not provide any of the safeguards that adversarial, inquisitorial, or administrative systems have adopted to achieve the ideal of an impartial adjudicator. ... Eliminating prosecutorial adjudication would mean making guilty pleas truly voluntary, which would make U.S. criminal procedure practices meet this minimum requirement of adversarial due process. ... Rather, the goals are: 1) to identify crucial points in criminal procedure and the criminal justice system that reformers should look at while discussing ways to reduce and improve prosecutorial adjudication; and 2) to make a number of reform proposals that can contribute to achieving this reduction and improvement. ... The prosecution and the defense may then re-discuss the conditions of a plea disposition without the defendant facing a coercive plea proposal. ... Only when the plea proposal is coercive should we consider the prosecutor to be the sole adjudicator of the case, because only in that case is the defendant's guilty plea involuntary. ...

TEXT:
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I. Introduction

This Article draws a distinction between two kinds of plea bargaining. In some instances, the practice of plea bargaining leads to what this Article calls de facto unilateral adjudication by the prosecution. In those cases, the prosecutor unilaterally decides who is innocent and guilty, and for which offense, by using coercive plea proposals. These coercive proposals make the defendant's guilty plea involuntary. In other instances, plea bargaining results in what this Article terms de facto bilateral adjudication by the prosecution and defense. In this second type of plea
bargaining, the prosecutor and the defense de facto adjudicate criminal cases through a voluntary agreement.\(^1\)

Some criminal procedure scholars have argued that prosecutors have become the primary adjudicators of the American criminal justice system.\(^2\) In those scholars' view, prosecutors effectively have the power to decide who is innocent and who is guilty, and for which offenses, because of their control over charging decisions, plea bargaining and sentencing differentials. This Article challenges that critique. It concludes that prosecutors have become some of the main de facto adjudicators of U.S. criminal procedure, but for reasons other than those advanced thus far. American prosecutors' control over charging decisions, plea bargaining, and sentencing differentials have not led them to become de facto adjudicators in all criminal cases. Rather, they have become adjudicators only in those cases in which the prosecutors' plea proposals are coercive.

In distinguishing between unilateral adjudication by the prosecution and bilateral adjudication by prosecution and defense, this Article makes clear why the former violates the requirements of due process, and the latter does not. In other words, the Article illustrates that one of the key shortcomings of the American criminal justice system lies not in the availability of plea bargaining, but rather in the types of plea bargaining permitted. With the adoption of key reforms, the Article further argues, plea bargaining may be practiced in a manner preclusive of unilateral prosecutorial adjudication and consistent with due process.

This Article proceeds in five parts. Relying on insights from moral philosophy, Section II offers a theoretical framework that enables us to draw a distinction between two types of plea bargaining. The two pillars of this framework are the concepts of coercion and of the baseline. The basic premise is that whenever the prosecutor's plea proposal violates certain rights of the defendant - rights that define what the baseline is - the plea proposal is coercive and the defendant's guilty plea is involuntary. In that situation the prosecutor acts as the sole adjudicator of the criminal case.

But if the prosecutor's plea proposal does not violate any of these rights, the plea proposal is not coercive, and the defendant's guilty plea is voluntary - even if encouraged by large sentencing differentials. In this second type of plea bargaining, the prosecutor and the defendant bilaterally adjudicate the case. Thus, it would be a mistake to consider the prosecutor as the sole adjudicator in this kind of situation.

Section II of this Article sets forth the three rights that defendants have vis-a-vis the prosecutor and the criminal justice system. First, prosecutors should not threaten to take cases to trial where no reasonable jury could find the defendant guilty beyond a reasonable doubt. Second, prosecutors and the criminal justice system should not apply disproportionate punishments to guilty defendants at trial. Third, prosecutors should neither charge defendants with offenses that do not accurately characterize their conduct nor charge defendants for relatively innocuous behavior. Those three rights set the baseline for analyzing prosecutors' plea proposals. When a plea proposal would leave a defendant worse off than the baseline, the proposal is coercive, and the defendant's guilty plea is involuntary. This Article refers to that mode of plea bargaining as the Prosecutorial Adjudication System.

Sections III and IV examine prosecutorial adjudication from a comparative perspective. After explaining how prosecutorial adjudication transforms and redefines many of the main features of American criminal procedure, Section III analyzes the nature of adjudication that results when the prosecutor becomes the sole adjudicator. Contrary to Judge and Professor Lynch's leading account in the criminal procedure literature,\(^3\) Section III shows that prosecutorial adjudication does not constitute an inquisitorial system of adjudication. Instead, it functions as a unique hybrid between both adversarial and inquisitorial conceptions of the criminal process, complete with other features that do not fit into either of these two classic models.

To be sure, like with inquisitorial systems, the prosecutor of the Prosecutorial Adjudication System, as a decision-maker, both investigates and adjudicates the case. But prosecutorial adjudication presents substantial differences from inquisitorial systems, among them: 1) prosecutors/adjudicators of the Prosecutorial Adjudication System do not usually see themselves as adjudicators, but rather as interested, adversarial parties to a dispute; 2) the Prosecutorial Adjudication System is an administrative, not judicial, system of adjudication; 3) the primary goal of
adjudication in the Prosecutorial Adjudication System is not to determine the truth, as in the inquisitorial system, but to
give a fair disposition to the case; and 4) the Prosecutorial Adjudication System presents a high degree of flexibility and
informality unheard of in inquisitorial systems.

Section IV continues the normative assessment of prosecutorial adjudication. One argument posits that even if
prosecutorial adjudication does not meet the due process ideal of the adversarial system, it meets that of inquisitorial
systems. n4 Section IV argues that this defense of prosecutorial adjudication fails.

The due process ideal of contemporary inquisitorial systems includes respect for a broad range of basic rights,
including the rights to a hearing, to compulsory process, to know the evidence against oneself, to present evidence
before an impartial adjudicator, to a justification of the adjudicatory decision, to require proof of guilt beyond a
reasonable doubt, and against compelled self-incrimination. The section shows that prosecutorial adjudication does not
respect these rights, or only respects them on an ad-hoc basis. In fact, many of these rights also come within the due
process [*227] ideal of U.S. administrative law, but the Prosecutorial Adjudication System does not meet this ideal,
either.

To make matters worse, not only do the Prosecutorial Adjudication System's plea dispositions not meet these
requirements, but the Prosecutorial Adjudication System's adjudicatory decisions can only try to reach fair outcomes in
plea dispositions by ensuring that subsequent trials would be unfair - i.e., worse than the defendant's baseline
entitlement. In other words, as the sole adjudicator, the prosecutor may attempt to become a fair adjudicator of pleaded
cases only by ensuring that those defendants who do not plead guilty face weak cases, unfair sentences or unfair charges
at trial.

Section IV's analysis of prosecutorial adjudication under the due process ideals of inquisitorial systems and U.S.
administrative law do not resolve the problems of prosecutorial adjudication, but rather show how serious these
problems are. Given the seriousness of these problems, Section V proposes potential reforms to current American
criminal procedure. The first issue is whether we should aim to reduce or eliminate prosecutorial adjudication, or
whether we should keep prosecutorial adjudication but improve the way it adjudicates criminal cases. Given the serious
problems examined in Section IV, this Article suggests that the priority should be the former. Eliminating prosecutorial
adjudication would not mean eliminating plea bargaining, but would make defendants' guilty pleas more meaningful
than they currently are. In order to achieve this goal, Section V sets forth three sets of proposals, one for each of the
factors that make prosecutors' plea proposals coercive.

First, to address the problem of prosecutors' plea proposals in weak cases, Section V argues for adopting the
directed acquittal standard as a condition for prosecutors making plea proposals, establishing broader prosecutorial
discovery duties before guilty pleas are entered, and strengthening judicial control over the factual basis requirement in
the plea colloquy. Second, to address the problem of harsh trial sentences, Section V advocates that the prosecutor take
into consideration the potential trial sentence in his charging decision, that judges' control of the voluntariness of guilty
pleas include an inquiry about the potential trial sentence included in the plea proposal, and that the jury be instructed
about potential sentences before it issues its verdict. Third, to deal with the problem of overcharging, the section argues
against prosecutors always charging the maximum provable offense and all the formally available offenses, for the
revision of certain doctrines such as the Blockburger rule, and for the improvement of the judge's and jury's control over
dubious charges.

Given that it is unlikely policymakers will in the near future adopt all the necessary reforms to make defendants'
guilty pleas truly voluntary, Section VI offers a more modest set of reforms which seek to improve, though not
eliminate, prosecutorial adjudication. These proposals are compatible with those of Section V, because they aim at
improving the Prosecutorial Adjudication System as a system of adjudication without enlarging it. Section VI's
proposals include keeping plea bargaining, but altering the [*228] procedure as a way to implement some of the rights
analyzed in Section IV, strengthening the role and self-image of prosecutors as officers who must seek justice by
changing their system of incentives, and improving trial protections for defendants as a way to increase the checks on
prosecutors' adjudicatory decisions.

In this way, this Article aims to explain in which cases the prosecutor effectively serves as the sole adjudicator, what problems that mode of adjudication presents, and how those problems can be remedied. Thus the Article not only articulates a new framework to analyze the phenomenon of prosecutorial adjudication, but also provides a platform from which we can compare and reform American criminal justice systems. One of the main features of American law is its multiplicity of diverse jurisdictions. Given that these jurisdictions use unilateral prosecutorial adjudication to different degrees, this Article provides a new perspective with which we can examine and improve current federal and state criminal procedures.

Beyond contributing to the literature on prosecutorial adjudication, this Article also provides the means to move beyond the current impasse in policy debates over plea bargaining. Two positions currently dominate scholarly discussions of this practice. On the one hand, critics of plea bargaining emphasize the shortcomings of the practice and call for its elimination. On the other hand, defenders of plea bargaining argue there is nothing deeply wrong with the current state of affairs. The former position suffers from two problems: one in its analysis and another in its prescriptions. It overlooks the potential for acceptable forms of plea bargaining and then argues for a measure - eliminating plea bargaining - that is practically or politically unfeasible in most American jurisdictions. The latter position's shortcoming derives from its failure to sufficiently acknowledge the substantial problems presented by current plea bargaining practices in many American jurisdictions. By identifying the practices of plea bargaining that lead to the unacceptable result of the prosecutor as sole de facto adjudicator, and by proposing a range of reforms to address those practices, this Article advances a more nuanced and pragmatic position in the plea bargaining debate.

II. Two Types of Plea Bargaining

Federal and state criminal justice systems dispose of most criminal cases through guilty pleas and plea bargains. By pleading guilty, defendants waive their rights to a trial by jury, to confront and cross-examine adverse witnesses, to present evidence, to compel the attendance of witnesses, and to require that prosecutors prove guilt beyond a reasonable doubt. All these rights constitute the core of the right to trial that the U.S. Constitution establishes. But the Supreme Court has accepted these right-waivers as long as the defendant's decision to plead guilty is voluntary. The Court has considered the defendant's decision voluntary if the defendant is sufficiently aware of the relevant circumstances and likely consequences of his guilty plea and the guilty plea does not result from force, threats or promises (other than the promises of the plea agreement). Using this voluntariness test, courts find most guilty pleas to be voluntary. In this way, most criminal cases are adjudicated with defendants' consent.

Certain criminal procedure scholars have questioned the voluntariness of these guilty pleas. These scholars have argued that prosecutors have the power to impose their decision in a case on the defendant by offering a sentence substantially lower than the one expected at trial. They argue that this sentence differential leaves defendants with no rational choice but to plead guilty, and this lack of choice makes guilty pleas involuntary.

In fact, there are substantial differences between trial and guilty-plea sentences. For instance, in the federal system, guilty-plea sentences are on average sixty percent lower than sentences after trial. And given that 77 percent of trials end up in convictions, many defendants may conclude that they have no rational choice but to plead guilty. This lack of choice explains why scholars have claimed that plea dispositions are coercive and that the prosecutor unilaterally adjudicates most criminal cases.

Which side is right, the Supreme Court or the commentators? Relying on insights from moral philosophy, this section will show that each of these two positions presents problems. Let's start with the Supreme Court's position. The
core of the position is that guilty pleas are voluntary as long as the defendant has a choice between pleading guilty and going to trial. Unless the prosecutor threatens the defendant with actual physical harm, misrepresents the case, or asks for a bribe, plea proposals will never be coercive.

Bordenkircher v. Hayes presents a classic example of this position. Paul Lewis Hayes was indicted on a charge of uttering a forged instrument in the amount of $88.30, an offense that was then punishable by a term of two to ten years of imprisonment. During plea exchanges, the prosecutor told Hayes that he would recommend a sentence of five years if Hayes pleaded guilty to the indictment. But the prosecutor also added that if Hayes did not plead guilty, he would seek a new indictment under the Kentucky Habitual Criminal Act which would subject Hayes to a mandatory sentence of life imprisonment because Hayes had two prior felony convictions. Hayes decided to plead not guilty, the prosecutor obtained an indictment under the Kentucky Criminal Act, and Hayes was convicted by a jury and sentenced to life imprisonment.

The Supreme Court, in a 5 to 4 decision, decided that Hayes had voluntarily chosen to go to trial and that there had not been any punitive or retaliatory element in the prosecutor's proposal. In fact, the Court added, there cannot be such an element in plea exchanges:

To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort ... But in the "give-and-take" of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer... Indeed, acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process... While confronting a defendant with the risk of more severe punishment clearly may have a "discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable" - and permissible - "attribute of any legitimate system which tolerates and encourages the negotiation of pleas." This is why, according to the Supreme Court, plea dispositions almost always constitute bilateral adjudication by the prosecutor and the defendant. So long as the defendant has a choice, the guilty plea is voluntary, by definition. The problem with this position is that the mere existence of a choice is not a sufficient condition to make a decision voluntary. For instance, according to the classic example of the gunman, if gunman A tells B, "Your money or your life," B has a choice. But if B decides to give A his money, we do not consider B's decision voluntary. We consider this a robbery and not a consensual transfer of property. There are many situations like this in which we have a choice but we do not feel that we are acting voluntarily. As such, the Supreme Court should further explain what distinguishes the prosecutor's proposal from that of the gunman.

On the other hand, criminal procedure scholars have likened plea dispositions to the gunman scenario. Their argument is that the sentence differential leaves defendants with a meaningless choice. Given that prosecutors may manipulate charges and sentences, they have the power to leave defendants with no rational choice but to plead guilty. However, the problem with these commentators' position is that a lack of rational alternatives and involuntariness are not the same thing. There are many situations in which we receive proposals that we cannot rationally refuse, yet we still consider them noncoercive.

For instance, if B has a life-threatening disease, and doctor A proposes to treat him for a fee that is fair, but also equal to B's life savings, B has to choose between two evils: dying or losing all his savings. If B chooses the treatment, he may meaningfully say that A's proposal was a "proposal he couldn't refuse," or that he had no rational choice but to accept A's proposal. But if B accepts the proposal, we would normally not consider B's acceptance involuntary. Thus, if A treats B and B does not want to pay, we would probably find that A has a right to his fee. In other words, there are many situations in which a choice between two bad alternatives does not constitute an involuntary decision. The sentence differential, by itself, does not make defendants' decisions involuntary, either.
Commentators should further explain what distinguishes the prosecutor's plea proposal from the doctor's.

Notice that the proposals by both the gunman and the doctor present a bi-conditional structure in which A tells B:

1. If you do x, then z,
2. If you do not do x, then no z.

In other words, the gunman A tells B that if he gives A his money, A will spare B's life; but if he does not give him his money, A will not. The doctor A tells B that if he agrees to pay a fee, A will treat his disease; but if he does not accept A's proposal, A will not. n28

If both proposals have a similar structure, what distinguishes them? Why is it that in the case of the gunman we think that B's decision is involuntary, while in the case of the doctor we think that B's decision is voluntary, even if in both situations B received a proposal "he could not refuse"? One plausible solution to this puzzle lies in the concept of coercion. n29 In the case of the gunman, B's decision is involuntary because the gunman's proposal is coercive; in the case of the doctor, B's decision is voluntary because it is not coerced. n30

[*233] But what makes a proposal coercive or not coercive? n31 Moral philosophy analyses have found the key to this question in the idea of the baseline. n32 In the case of the gunman, B has a moral right not to be put in the position of choosing between his money and his life. n33 Since the gunman A's proposal is worse than what B is morally entitled to - the moral baseline of keeping both his life and his money - the proposal is coercive and we consider B's decision involuntary. n34 In the case of the doctor, B does not have a moral right to be cured by A for free. n35 Since the proposal is better than what B is entitled to (proposing an improvement in B's situation beyond the moral baseline - i.e., avoiding B's death), the proposal is not coercive, and this is why we consider B's decision voluntary. n36

Let's go back now to plea dispositions. First, notice that the prosecutor's proposal to defendants presents the bi-conditional structure that we already analyzed. n37 The prosecutor tells the defendant that if he pleads guilty, he will get sentence z. But if he does not plead guilty, he will not get that sentence. In addition, notice that we cannot say whether this proposal is coercive until we establish what the baseline is in the case of plea dispositions.

The very few moral philosophers who have analyzed plea bargaining have seen this point. n38 But the Supreme Court and commentators have [*235] assumed that we can establish whether the defendant's guilty plea is voluntary before we know what the baseline is. n39 The Supreme Court has assumed that as long as the defendant has a choice, his decision is voluntary. n40 Commentators have assumed that the sentence differential makes the defendant's guilty plea intrinsically involuntary. n41 Both positions are [*236] mistaken. We need to know first what the defendant is entitled to expect from the prosecutor and the criminal justice system before we can answer this question. n42

Given that the prosecutor is a government officer with a duty to seek justice, not simply to obtain convictions, n43 and that defendants have certain rights vis-a-vis the criminal justice system, there seem to be at least three moral requirements that the baseline must meet regarding plea proposals. n44 First, as an officer with a duty to seek justice, the prosecutor should not make plea proposals in cases where no reasonable jury could find the defendant guilty beyond a reasonable doubt. n45 Potential trial verdicts [*237] set the baseline in this respect because defendants have a right to a trial by jury in the American criminal justice system. n46 Therefore, if a prosecutor does not have, at a minimum, enough evidence to pass the directed acquittal threshold, she has the moral duty not to encourage the defendant to plead guilty through a plea proposal. n47

Prosecutorial ethical standards express this duty by establishing: "In connection with plea negotiations, the prosecuting attorney should not bring or threaten to bring charges against the defendant or another person, or refuse to dismiss such charges, where admissible evidence does not exist to support the charges or the prosecuting attorney has no good faith intention of pursuing those charges." n48
[*238] Notice that the standard makes explicit reference to plea negotiations. Given that the prosecutor may continue her investigation after receiving a case from the police or other agencies, there is nothing wrong with the prosecutor filing charges with only probable cause. The problem appears when the prosecutor makes a plea proposal without having enough elements to prove her case at trial because she is trying to obtain a conviction in a case that is not convictable.

Notice also that the standard - and, more importantly, our first baseline requirement - does not necessarily entail that the prosecutor is hiding the weakness of her case to the defense. Given that trials are imperfect procedures and that the prosecutor is an officer who must seek justice, the prosecutor is morally required not to make a plea proposal where no reasonable jury could issue a conviction, even if the defendant knows about the case's weakness. In this sense, the first baseline requirement that this Article proposes differs from the approach that would simply let the market regulate the right "price" - i.e., sentence - of the guilty plea even in very weak cases.

Second, defendants are entitled to expect that, if convicted at trial, the criminal justice system will apply to them a fair sentence that fits the characteristics of the offense and the offender. The Eighth Amendment captures this moral entitlement by prohibiting cruel and unusual punishments. In this case, the coercive character of an unfair trial sentence may come from prosecutors' or judges' practices or from the penalties that either the legislature or a sentencing commission sets. These different potential sources of unfair post-trial sentences do not change the basic analysis, given that any of them would constitute a violation of what defendants are entitled to expect from the criminal justice system and the main institutional actors that take part in it.

Finally, as officials of justice, prosecutors should only charge a defendant with those offenses that adequately describe the defendant's conduct, based on conduct that is not socially innocuous. They should not charge for all possible offenses into which the defendant's conduct formally fits. To some extent, overcharging is a sub-species of over-sentencing. One of the main problems with overcharging is that, in certain cases, it may lead to trial sentences that are too harsh for the case. And it is through their control of the charges that prosecutors may threaten defendants with trial sentences that are not appropriate to the case.

Bordenkircher presents an example of this phenomenon. There is no question that defendant Hayes's conduct formally fit within the Kentucky Habitual Criminal Act. But even if Hayes had formally committed three felonies, they did not seem serious enough to justify imprisonment for life. In fact, it was probably because of this that the prosecutor did not initially get an indictment under the recidivist statute, and the Kentucky legislature itself later reformed this statute to avoid cases like Bordenkircher.

But the problem with overcharging is not only that it may lead to excessive trial sentences in particular cases. Overcharging can take other forms. For example, it also includes charging multiple offenses when the case clearly fits only one or a few of them - which may increase the chances of an unfair conviction. Overcharging can also involve prosecuting conduct that should not be punished at all - even if it formally fits the description of an offense - because the conduct in question is socially innocuous.

Some readers might initially disagree with this baseline requirement against overcharging. Our traditional conception of the criminal justice system indicates that it is the legislature's responsibility to decide, as citizenry's representative, what type of conduct must be a criminal offense; and it is the prosecutor's responsibility to enforce this decision. In other words, according to this traditional conception, once the legislature clearly expresses a preference for the criminalization of a certain conduct, prosecutors should not second guess whether the conduct in question deserves criminal punishment. Otherwise, the prosecutors would be replacing the legislature's articulated preference for theirs.

There are two responses to this criticism. First of all, recall that coercion is being applied to the defendant even if the unfair plea proposal comes from the legislature's decision instead of the prosecutor's. In either case, the defendant is still being told "plead guilty or face unfair charges at trial" which makes the proposal coercive and the defendant's guilty plea involuntary. In either case, the prosecutor still unilaterally decides who is guilty or innocent for
the commission of the offense with his decision to take or threaten to take the case to trial.

The second problem with this criticism is that this traditional conception does not rely on a realistic account of how the political and institutional incentives of the American criminal justice system operate. As Prof. Stuntz's work has showed, in an environment in which crime has become a very important political issue, it is a safer strategy for legislators to criminalize more conduct than simply that which they and the public would like to see prosecuted. Overcriminalization through the enactment of new offenses and broader definitions of existing ones protects legislators against the accusation that they have not provided enough legal tools to prosecutors to deal with crime. Moreover, broad prosecutorial discretion reassures legislators that prosecutors do not need to prosecute conduct that formally fits into the broadly defined criminal offenses but that neither legislators nor the public would consider worthy of criminal punishment. n66

In this political and institutional context, the assumption that the criminal offenses in the books perfectly express the legislature's preferences is problematic. Rather, we can read the enactment of crimes in the criminal codes as an option that legislators give to prosecutors to be used when a case really deserves it. n67 In this context, prosecutors may not merely rely on the fact that the legislature has passed a crime to justify their charging decisions. They also have to make a normative decision on whether the conduct in question is worth prosecuting and which charges properly capture the defendant's conduct. This is why prosecutors are co-responsible with the legislature when they decide to pursue the charges. The second and third requirements of the baseline set limits on prosecutors' charging decisions in this respect. n68

Defendants' moral entitlement to expect prosecutors and the criminal justice system to honor these three fundamental limits on prosecution sets the baseline to apply in the context of plea dispositions in order to distinguish coercive from noncoercive plea proposals. n69 If the prosecutor's bi-conditional plea proposal - including the trial prong - includes binding over for trial a defendant that no reasonable jury could find guilty beyond a reasonable doubt, a sentence that would not be fair for the particular case, or overcharging, then the prosecutor's proposal is coercive. And if the prosecutor's coercive proposal is part of the reason a defendant pleads guilty, then the defendant's guilty plea is involuntary. n70

[*243] If the prosecutor's proposal does not violate any of these three prosecutorial duties, then the proposal is not coercive and, despite the sentence differential, the defendant's guilty plea would be voluntary. n71 In the first case, the prosecutor is the only de facto adjudicator of the case, despite the defendant's formal guilty plea, because the prosecutor is unilaterally deciding which defendants are innocent or guilty, and of which offenses. n72 In the second case, the prosecutor and the defendant are jointly disposing of the case through a bilateral agreement. n73

It is important to mention two points regarding the baseline as just defined. First, the reader should notice that it is possible to disagree with one or more of the three baseline requirements that this Article just articulated and still agree with the conceptual framework that this Article has proposed to analyze the question of coercion, plea proposals and prosecutorial adjudication. This is why the analysis of this section on the coerciveness of plea proposals and the following sections on prosecutorial adjudication should still be meaningful even for those readers who disagree with one or more of the baseline requirements.

In addition, it is important to mention that, besides the three articulated requirements, there may be other requirements that plea proposals should have to meet that would also be part of the baseline. n74 This Article has concentrated on those three requirements because the criminal procedure literature has identified them as particularly serious problems that the federal and/or state systems face. n75 In fact, the plea bargaining and sentencing literatures have shown that the violation of these three duties may be routine, not unusual, features of criminal justice practice in many jurisdictions. n76 There are reasons to believe that many prosecutors regularly overcharge and regularly use plea proposals in cases where no reasonable jury could find the defendant guilty. Moreover, in many cases, the criminal justice system, prosecutors or judges set sentences that may be considered unfair given the characteristics of the offense. n77
Regarding the first point, Albert W. Alschuler's research showed decades ago that prosecutors view the strengths and weaknesses of their cases as critical factors in bargaining and therefore bring the greatest pressures to plead guilty to bear on defendants whose conviction at trial is highly improbable. Though we need many more empirical studies to determine the extent of this phenomenon, there is no reason to think that these prosecutorial practices have changed since then. This problem is probably more serious in state jurisdictions than in the federal system given that federal prosecutors can be more selective about the cases they pursue and have comparatively greater resources.

Arguing about the unfairness of trial sentences is trickier because reasonable people may disagree about what would be a fair sentence in a particular case, or how harsh or mild criminal sentences generally should be. But many analysts from different theoretical perspectives and different sides of the political spectrum have pointed out that the sentences meted out by the American criminal justice system have become too harsh in the last thirty years. In fact, a substantial number of legal professionals that participate in sentencing systems in the United States also seem to agree with this assessment.

"Three-strikes" laws; high mandatory minimum sentences; prison sentences for non-violent offenses; the more than tripling of the incarcerated population since the early 70s; growing numbers of juveniles and minors being tried and sentenced as adults; the application of penalties one hundred times higher for crack than for cocaine cases; the lengthening of average sentences for all offenses, especially in the federal system; determinate sentencing regimes that do not allow for the consideration of characteristics of the offense or the offender that should be relevant in sentencing; the increasing use of the sentence of life without parole; and the widespread use of the death penalty, among other examples, give strong indications that many sentences in the criminal justice system - especially trial sentences - have become too harsh. In this respect, the federal system presents more problems than most state jurisdictions.

Finally, the plea bargaining literature has shown that many prosecutors regularly charge offenses that are a stretch or which they do not really plan to bring to trial, or charge relatively innocuous conduct, just to make their plea proposals more attractive to defendants. This is probably a more serious problem in state jurisdictions than in the federal system, though the latter is not exempted from it.

It is thus reasonable to say that in a substantial number of cases, the defendant faces a choice that he should not have to face, because the prosecutor's proposal violates the defendant's baseline rights. The prosecutor's proposal is coercive if it includes charges in which the evidence is weak, includes unfair trial sentences, or overcharges. In each of these cases, if the prosecutor's coercive proposal is part of the defendant's reasoning for a guilty plea, the defendant's guilty plea is involuntary and the prosecutor unilaterally adjudicated the case. The analysis of this section has shown that there are reasons to think that this is not an exceptional occurrence, but a common phenomenon in the American criminal justice system.

Given this situation, it is true that in many criminal cases the prosecutor effectively is the sole de facto adjudicator. The prosecutor alone decides who is guilty and for what crime - and even what the sentence is because defendants' guilty pleas are not voluntary in these coercive situations. But it is also true that this system of unilateral adjudication by the prosecutor co-exists with a system of bilateral adjudication in which the prosecution and the defense jointly decide who is guilty and of what offense. One can represent the situation in the following way:

Table 1. Two Types of Plea Bargains in U.S. Criminal Procedure

<table>
<thead>
<tr>
<th>System of Adjudication</th>
<th>De Facto Adjudicator</th>
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<tbody>
<tr>
<td>Unilateral Plea</td>
<td>Prosecutorial Adjudication</td>
</tr>
<tr>
<td>Bargains</td>
<td>System</td>
</tr>
</tbody>
</table>
Bilateral Plea
Adversarial
Prosecutor and
Defense

The latter adjudication model fits within the adversarial system of adjudication. To be sure, bilateral plea agreements circumvent the adversarial trial. But to the extent that the adversarial system conceives procedure as a dispute between two parties and emphasizes party autonomy, it is natural - or at least acceptable - that the prosecution and the defense may reach an agreement on their controversy. In this sense, one can view bilateral plea agreements in which the prosecutor's proposal is not coercive and the defendant's guilty plea is voluntary as a realization of the adversarial system, not a subversion of it.

But we know very little about what type of adjudication system it is that unilateral adjudication by the prosecution fits into. Drawing a distinction between these two types of plea bargaining starts to delineate the contours of this system. But it is necessary to examine this Prosecutorial Adjudication System more closely to get a deeper understanding of its main features.

III. The Prosecutorial Adjudication System

Based on the framework articulated in the previous Section, we can understand the Prosecutorial Adjudication System as an abstract model that describes a particular set of plea dispositions in the United States. These are the plea dispositions that include a coercive plea proposal and in which the prosecutor is thus the sole de facto adjudicator of the criminal case.

Further defining the contours of the Prosecutorial Adjudication System as an abstract model is difficult, because one of the main features of American criminal procedure is its diversity. Even when the Supreme Court has constitutionalized important parts of criminal procedure, federal and state jurisdictions still have room to experiment with different ways to organize the prosecution and adjudication of criminal cases. This richness of diverse regulations makes generalizations difficult and risky. With this caveat in mind, however, there are a number of features that most U.S. criminal jurisdictions currently share and that also characterize the system of unilateral prosecutorial adjudication in the United States:

1) Most criminal cases start with an investigation by the police or another governmental agency.

2) Once the prosecutor's office receives a case, it has broad discretion to decide whether or not the case should be prosecuted and for what charges.

3) In most jurisdictions, the screening mechanisms for the prosecutor's charging decision, such as the grand jury and the preliminary hearing, are relatively weak - ranging from being mere rubber stamps of the prosecutor's decision to dismissing only a small percentage of charges and criminal cases.

4) Once the prosecutor's office receives a case, the prosecutor may continue the investigation - in a substantial number of jurisdictions, with the help of a grand jury.

5) Most pre-trial activity by the prosecution and the defense is very informal and unregulated.

6) In a substantial number of cases, the prosecutor and the defense attorney exchange ideas about what the prosecutor's position will be regarding the charges and the sentence if the defendant pleads guilty.

7) After these exchanges, the prosecutor usually makes a final decision regarding her take on the case.

8) Most of the cases that the prosecutor decides to pursue end up with the defendant pleading guilty.
In most jurisdictions and cases, the judicial hearing to check the voluntariness of the guilty plea is cursory and adopts the narrow conception of voluntariness described in Section II. \textsuperscript{n107}

In most jurisdictions prosecutors have a substantial influence over the sentencing decision that the judge or the jury formally makes. \textsuperscript{n108}

These features of American criminal justice systems characterize the Prosecutorial Adjudication System. To be sure, these features are also perfectly compatible with the adversarial system. \textsuperscript{n109} But besides including all these features, the Prosecutorial Adjudication System - as an abstract model that we infer from a particular set of plea dispositions present in U.S. criminal jurisdictions - also includes coercive plea proposals. The coercive character of the plea proposals makes the prosecutor the unilateral adjudicator of the case and redefines the traditional understanding of the features of the American criminal justice system mentioned above in somewhat unexpected ways.

First, we usually think of dismissals and plea proposals not as adjudicatory decisions, but as decisions that the prosecutor makes as one of the \textsuperscript{*250} contending parties in the adversarial system. But since in the Prosecutorial Adjudication System the prosecutor is the sole de facto adjudicator of the case, dismissals and final plea proposals are the two ways in which the prosecutor acquits or convicts criminal defendants. When the prosecutor decides to dismiss charges against a defendant, the prosecutor effectively acquits the defendant. When the prosecutor makes her final coercive plea proposal, the prosecutor effectively convicts the defendant of a specific charge or charges. \textsuperscript{n110}

Of course, defendants still may decide to go to trial after they receive prosecutors' coercive plea proposals. But, as the previous section has shown, this does not change the adjudicatory character of prosecutors' proposals. Given that the prosecutor has the tools that we examined in the previous section to discourage defendants from going to trial, the prosecutor's de facto adjudicatory decision is final in many cases. In addition, even when the defendant decides to go to trial despite the additional risks that this entails, we can think of the decision to go to trial as a sort of trial-de-novo appeal against the prosecutor's "conviction." \textsuperscript{n111} As with other trial-de-novo appeals, the defendant unsatisfied with the original adjudicatory decision - the prosecutor's coercive plea proposal - may ask for a new proceeding and adjudicatory decision before a different adjudicatory body - a jury or bench trial. \textsuperscript{n112}

However, if we think about the prosecutor as the sole adjudicator of the case, we should not think about plea discussions as exchanges between two equal parties. Rather, in the plea dispositions that compose the Prosecutorial Adjudication System these exchanges are an opportunity for the defense to plead about factual and legal issues before the prosecutor as the sole adjudicator. If the defense convinces the prosecutor that the defendant is innocent, the prosecutor acquits the defendant by dismissing the charges. \textsuperscript{n113} If the defense does not manage to persuade the prosecutor of the defendant's innocence, it still may plead to him about the proper charges or sentence for the case, so that this is included in the prosecutor's final plea proposal.

Furthermore, if we think of the prosecutor as the sole adjudicator, we should think of the evidence that the prosecutor and the police gather not (only) as the prosecutor's evidence, but (also) as the evidence that normally provides the basis for the prosecutor's adjudicatory decision. The defense may still gather its own evidence, but unless the defense presents this evidence to the prosecutor, it will not be factored into the final adjudicatory decision.

What kind of system of adjudication is the Prosecutorial Adjudication System? Putting this system in the context of comparative criminal procedure may help us to understand additional features it contains. Comparative criminal procedure as a discipline provides us with theoretical tools to analyze criminal procedures from around the globe. One of the central dichotomies of this field has been the opposition between adversarial and inquisitorial systems of common law and civil law jurisdictions. \textsuperscript{n114} Analyzed from this perspective, the Prosecutorial Adjudication System is not an inquisitorial system like Judge Lynch stated in his path-breaking article on prosecutorial adjudication, \textsuperscript{n115} but rather a unique hybrid system of criminal \textsuperscript{*252} adjudication that comparative criminal procedure has not properly identified until now. \textsuperscript{n116}
First, in terms of the opposition between criminal procedure conceived as a dispute between two equal parties or as a unitary official inquiry - that respectively characterizes the adversarial and the inquisitorial systems - n117 the plea dispositions that compose the Prosecutorial Adjudication System are closer to a unitary official inquiry in terms of how they actually operate, but closer to a dispute between two equal parties in terms of how the prosecution and the defense perceive the prosecutor's role. The Prosecutorial Adjudication System is closer to an official inquiry in its actual operation in federal and state jurisdictions because the prosecutor is simultaneously the adjudicator and investigator of the case, like adjudicators in inquisitorial systems. n118 Thus, unlike the judge or jury of the adversarial system, the prosecutorial adjudicator has an active role and responsibility in investigating the case. n119 Besides adjudicating the case, the prosecutor may work by herself or together with the police, other investigative agencies like the IRS, the grand jury, or her investigators to determine what happened.

But unlike inquisitorial adjudicators who are socialized and tend to perceive themselves as impartial officials who must seek both inculpatory and exculpatory evidence and should impartially adjudicate the case after finishing their investigation, the adjudicators of the Prosecutorial Adjudication System - i.e., American prosecutors - have a much more ambivalent [*253] self-perception of their role. n120 Since the different legal actors within the American criminal justice system assume that their criminal procedure is adversarial, prosecutors see themselves, and other actors see them, as somewhere in between an officer who must seek justice and a party with an interest in winning the case. n121

Thus, the Prosecutorial Adjudication System not only coexists with an adversary system in the plea dispositions of American criminal justice, as explained in the previous section, but this co-existence also produces a dissonance between the actual operation of the Prosecutorial Adjudication System and the way prosecutorial adjudicators understand their role. This means that the very adjudicators of the Prosecutorial Adjudication System in the United States - i.e., the prosecutors - do not always acknowledge their role as such. n122

The second main set of differences between the adversarial and inquisitorial system that is relevant for our analysis concerns who the main adjudicators of the system are, how they organize their authority and what kind of rules they apply in their decisions. n123 Like inquisitorial adjudicators, those of the Prosecutorial Adjudication System are legal professionals who are part of an official bureaucracy - a local or state district attorney's (DA) office or the U.S. Department of Justice. n124 But given that in most states the DA office has a local character and its head is popularly elected, in these jurisdictions prosecutorial adjudicators present a popular element characteristic of the adversarial system.

In addition, prosecutorial adjudicators are members of an administrative agency. n125 This is a distinctive feature of the Prosecutorial Adjudication System that we do not find in either the adversarial or the inquisitorial system of common and civil law. It relies on an administrative agency like the office of the prosecutor to deal with even the most serious criminal [*254] cases. This administrative character of the Prosecutorial Adjudication System makes the relations between prosecutorial adjudicators even more hierarchical than in the inquisitorial system. n126 Thus, prosecutorial adjudicators may receive direct orders from their superiors about how to handle their cases. But, at the same time, this hierarchical structure also enables the internal review of individual prosecutors' behavior.

Another set of features of the Prosecutorial Adjudication System that deserves analysis is the goal of its adjudicatory process and the role truth determination and non-technical notions of fairness play in its adjudicatory decisions. In one aspect, the plea dispositions that compose the Prosecutorial Adjudication System aim at determining factual rather than legal guilt and in this sense they are closer to the inquisitorial system. n127 Section II has shown that one of the features that characterize a component of the Prosecutorial Adjudication System is that the prosecutor makes a plea proposal without having enough evidence to prove her case at trial. This may be the case, for instance, because the prosecutor is convinced of the defendant's guilt even if some elements of proof may not be admissible at trial or are not available, or if some aspect of the prosecutor's trial case is shaky. In such situations, the Prosecutorial Adjudication System privileges what the prosecutor believes to be the factual guilt of the defendant over the dismissal or acquittal to which the defendant would formally be entitled according to the legal system.
There are other aspects of the Prosecutorial Adjudication System that privilege substantive fairness over factual guilt. For instance, the prosecutor may make the defendant a proposal to plead guilty for a different offense than the one the prosecutor thinks he committed - e.g., assault instead of rape - as long as the prosecutor thinks that the defendant deserves some kind of criminal sanction. Or the prosecutor may take a plea for an offense that the defendant formally committed but that constitutes socially innocuous conduct - e.g., adultery - instead of the one that triggered the prosecutor's investigation. With this emphasis on substantive fairness - in the sense of punishing someone whom the prosecutor thinks deserves some kind of criminal sanction regardless of whether the offense reflects the defendant's conduct - the Prosecutorial Adjudication System is closer to the adversarial system that emphasizes substantive fairness over factual truth.\footnote{128}

The final difference between adversarial and inquisitorial systems that is worth mentioning has to do with the degree of formalization of each of these systems. In a nutshell, the adversarial system tends to have a heavily regulated trial and a quite unregulated pre-trial phase. The rationale is that the trial is the actual adjudication moment and, as such, the point that needs more regulation. And since the adversarial system emphasizes the parties' autonomy and control of the process, lack of pre-trial regulation is not a problem if the parties voluntarily reach an agreement to avoid the trial. Since the inquisitorial system assigns the administration of criminal justice to legal professionals who are part of a hierarchical bureaucracy, their work tends to be more regulated even during the pre-trial phase. This is why, for instance, investigators and decision-makers have to document all their procedural activity. \footnote{129}

The criminal process in the plea dispositions that compose the Prosecutorial Adjudication System is at least as informal and unregulated as the adversarial pre-trial phase. The system gives broad freedom to the prosecutor as the investigator and adjudicator of the case. She has discretion as to how she will interrogate witnesses and what kind of evidence she can evaluate in making her decisions, and she is not required to document her procedural activity. But, since the defendant's guilty plea is not voluntary, the Prosecutorial Adjudication System establishes this high degree of flexibility and deregulation without any of the safeguards of the adversarial model.\footnote{256}

A final note on the Prosecutorial Adjudication System and U.S. jurisdictions is necessary. It is not the claim of this Article that all American jurisdictions present the Prosecutorial Adjudication System to the same extent. As already explained, the Prosecutorial Adjudication System is an abstract model that describes a particular set of plea dispositions and whose main characteristics this Article has inferred from features that we find, to a larger or a lesser extent, in most American criminal procedures. But this does not mean that the Prosecutorial Adjudication System as an abstract model captures all U.S. criminal procedure practices or that all U.S. jurisdictions look alike.

First, recall that, within U.S. plea bargaining practices, the Prosecutorial Adjudication System as a system of unilateral prosecutorial adjudication co-exists with an adversarial system of bilateral adjudication by prosecution and defense. In addition, U.S. jurisdictions vary widely on how thoroughly they screen out weak cases - through different kinds of preliminary hearings, grand juries and judicial plea colloquies; in the length and nature of their criminal sentences; and in their practice and control of overcharging. Thus, the more a particular jurisdiction excludes weak cases, over-sentencing and overcharging, the less it presents the Prosecutorial Adjudication System among its plea bargaining practices and the more it presents bilateral plea agreements.

Given these differences between American jurisdictions, the articulation of the Prosecutorial Adjudication System as an abstract model aims to provide a conceptual tool not only to describe and explain in which sense and in which cases we may consider the prosecutor as the only adjudicator of criminal cases, but also to compare different jurisdictions. In other words, the Prosecutorial Adjudication System describes a particular set of plea bargaining practices in the United States. But, at the same time, it provides a vantage point from which we can compare different U.S. jurisdictions on both a descriptive and a normative level. In this sense, the articulation of the Prosecutorial Adjudication System enables us to place U.S. jurisdictions at different points on the continuum that the Prosecutorial Adjudication System and the adversarial system provide.

IV. A Potential Defense of the Prosecutorial Adjudication System and Why it Fails: The Conceptions of Due
Process in Inquisitorial Systems and U.S. Administrative Law

The analysis of the two previous sections has delineated the Prosecutorial Adjudication System as an adjudication system. Prosecutorial adjudication is an administrative, informal and flexible system of adjudication in which a professional legal actor - the prosecutor, who is part of a hierarchical structure - investigates and adjudicates criminal cases according to substantive fairness.

[*257] In order to study prosecutorial adjudication as an adjudicatory system further, it will be helpful to analyze it from a due process perspective. There is no question that the Prosecutorial Adjudication System does not meet the due process requirements of the adversarial system, since it does not adjudicate cases through either a trial by jury or a defendant's voluntary guilty plea. But one of the potential defenses of the Prosecutorial Adjudication System is that it still may meet the due process requirements of either inquisitorial or administrative proceedings. According to this potential defense, given that the Prosecutorial Adjudication System contains substantial elements of inquisitorial and administrative systems, we should evaluate prosecutorial adjudication according to the due process ideals that come from these procedural models. In fact, most of the world - including well-developed democracies like Switzerland and the Netherlands - uses an inquisitorial system to adjudicate criminal cases. So, according to this defense, even if prosecutorial adjudication may not match the adversarial ideal, it still may meet the due process ideals that other well-developed democracies embrace. If so, there would be nothing exceptional or deeply wrong about prosecutorial adjudication. n130

There are two problems with this defense of prosecutorial adjudication. The first is that regardless of whether the Prosecutorial Adjudication System's proceedings and the prosecutor's adjudicatory decisions are fair or unfair, Section II has shown that prosecutorial adjudication can only achieve its adjudicatory decisions through the guilty plea process by threatening unfair outcomes at trial. It is only by threatening to take weak cases to trial, seeking excessive trial sentences or overcharging that the prosecutor can coerce the defendant to plead guilty. This structural feature of the Prosecutorial Adjudication System provides on its own sufficient reason to have serious concerns about the normative appeal of this system.

But even leaving aside this problem, the rest of this section will show that this potential defense also fails because prosecutorial adjudication internal proceedings do not meet, or meet only on an ad-hoc basis, a number of basic safeguards which inquisitorial and administrative notions of [*258] due process require.

A. Rights to a Hearing, to Know the Evidence against Oneself, to Compulsory Process, and to Present Evidence before the Adjudicator

The Sixth Amendment establishes the right to a trial by jury in which the defendant learns about the evidence against him, confronts the witnesses of the prosecution, presents his own evidence, and tells the adjudicators his position on the case. n131 Contemporary inquisitorial systems establish a right to a public adjudicatory hearing which tends to implement similar rights. n132 At a minimum, this means that, before or during trial, the defendant and his defense attorney may examine the evidence against him, n133 obtain evidence and witnesses and interrogate them, n134 and give a closing statement before the adjudicatory body. n135 U.S. administrative proceedings also establish similar protections. n136

As for the right to know the evidence against oneself, in the plea dispositions that compose the Prosecutorial Adjudication System the prosecutor [*259] has incentives to disclose her evidence to the defense in strong cases. By showing the strength of her case, the prosecutor shows the defendant that his chances of acquittal at trial are minimal, which encourages him to plead guilty. However, neither the Supreme Court, nor most rules of procedure, nor a substantial number of prosecutors’ offices have established such a requirement.

Since the evidence that the prosecution and the defense gather is considered theirs due to adversarial self-perception, the U.S. Supreme Court has held that the prosecutor only has the constitutional duty to disclose
evidence that is material and favorable to the defense. In addition, the Supreme Court has indicated that constitutional discovery rules apply only to trials and not to plea dispositions - at least regarding impeachment evidence. At a statutory level, many rules of procedure take a similar approach by requiring limited discovery from the prosecution to the defense and by making discovery duties mainly applicable at trial. Many cases then get adjudicated under the Prosecutorial Adjudication System without the defense ever having a chance to examine and challenge the elements of proof on which the prosecutor, as an adjudicator, bases her decision.

The plea dispositions that compose the Prosecutorial Adjudication System similarly provide only very limited versions of the other rights on an informal and ad-hoc basis. The very fact of plea exchanges implements the rights to present evidence and one's position before the adjudicator to a certain extent. In plea exchanges, the defense attorney may present to the prosecutor, as the actual adjudicator, any exculpatory elements that the defense has and also give the prosecutor the defense's version of the event. Prosecutors have incentives to get into these exchanges with defense attorneys. If a case presents a serious weakness, it is better for the prosecutor to learn about this weakness before trial.

But if a prosecutor does not want to meet with a defense attorney or only gives the defense attorney a very limited time to present his position, these defects do not provide any cognizable legal ground to challenge the prosecutor's adjudicatory decision. This hearing also lacks any elements of publicity and formality that the right to a hearing includes under the U.S. Constitution, contemporary inquisitorial systems, and various U.S. administrative procedural regimes.

Finally, regarding the rights to compulsory process and to have evidence in one's favor gathered, diligent defense attorneys will try to explore these avenues in the Prosecutorial Adjudication System by running their own investigations. Ultimately, however, the success of such endeavors will depend on the goodwill of witnesses in actually talking to defense investigators, because the Prosecutorial Adjudication System does not formally recognize these rights. In current U.S. criminal procedure, the defense may not request search warrants, does not have subpoena powers or the means that the prosecutor has to generate incentives for testimony - such as dismissal of charges, plea dispositions and conferring immunity - and depositions play a very limited role in most criminal jurisdictions. As a consequence, the Prosecutorial Adjudication System adjudicates many cases in which the defense does not have a meaningful opportunity to gather exculpatory evidence and present it to the decision-maker.

The public hearing during which the judge takes the guilty plea does not provide these safeguards to the defendant, either, since the review that judges normally conduct in these hearings is cursory and for the most part does not include the production of evidence.

B. Proof Beyond a Reasonable Doubt

The Supreme Court has held that, in criminal trials, due process requires that the prosecution have the burden of proof beyond a reasonable doubt. Contemporary inquisitorial systems establish a similar protection for defendants: if the adjudicators do not have certainty that the defendant is guilty, they must acquit. This rule is considered one of the corollaries of the presumption of innocence.

The plea exchanges and dispositions that compose the Prosecutorial Adjudication System do not fully respect this right, either. In most jurisdictions, probable cause is the standard of proof that the prosecution has to issue a formal accusation. It is not necessary, then, for the prosecutor as an adjudicator to be convinced beyond a reasonable doubt of the defendant's guilt in order to issue a coercive plea proposal. In addition, as a practical matter, once the prosecutor has issued formal charges, it is the defense that has the burden of persuading the prosecutor of the defendant's innocence and not the other way around.

C. The Right Against Compulsory Self-Incrimination

The Fifth Amendment establishes a right against compulsory self-incrimination. The Supreme Court has ruled that
this right applies not only at trial but also during the investigation and the pre-trial phases, and that this right is at stake when the defendant pleads guilty. Contrary to a widespread notion in the U.S., contemporary inquisitorial systems establish a similar right. In most of these jurisdictions, this right includes the right not to be subjected to coercive interrogations, the right to remain silent, and the right not to have decision-makers draw negative inferences from a defendant's silence. The right against compulsory self-incrimination also applies, to a certain extent, to U.S. administrative proceedings.

[*262] The Prosecutorial Adjudication System violates this right on a systemic basis. In fact, the violation of this right is a structural feature of this system of adjudication. Section II showed that one of the defining features of the Prosecutorial Adjudication System is that it coercively obtains these admissions of guilt. The Prosecutorial Adjudication System can only adjudicate cases by threatening defendants with unfair trial outcomes unless they plead guilty. And the plea colloquy does not change this picture since the concept of voluntariness that most courts use is based on the narrow conception of voluntariness that Section II refuted.

D. The Right to an Impartial Adjudicator

The Sixth Amendment establishes the right to an impartial jury, and the Supreme Court has held that due process includes the right to an unbiased judge. Inquisitorial systems establish a similar right, as does U.S. administrative law. Impartiality basically means that the adjudicator must not be biased in favor of either guilt or innocence and must keep an open mind while hearing and analyzing the evidence and making her decision.

Adversarial and inquisitorial systems agree on this basic idea but implement it in different ways. In the adversarial system, the ideal decision-maker must have as little information as possible about the case before listening to the evidence, remain passive while the evidence is produced in an adversarial way, and avoid ex-parte contacts. In addition, the diversity of perspectives and backgrounds of the jurors is supposed to bring different perspectives about life which contribute to a more impartial decision.

In inquisitorial systems, the decision-maker is not only an adjudicator but also an investigator. As such, she has to know about the case even before the trial starts and has to be active in deciding what evidence to produce and in interrogating witnesses. But in order to make sure that she is not biased in favor of either side, she has to look for both inculpatory and exculpatory evidence. In addition, since inquisitorial systems are aware that previous knowledge and activism may generate problems of impartiality, they have established two different sets of mechanisms to deal with potential biases by decision-makers.

The first mechanism has been to put different individuals in charge of the pre-trial phase and the trial as a way to avoid a situation where the trial decision-makers have a stake in the results of the pre-trial phase investigation. U.S. administrative law establishes a similar requirement to deal with these problems.

The second mechanism has been the creation of the role of the prosecutor and the division of functions between prosecutors and adjudicators. First, contemporary civil law jurisdictions have established that the prosecutor either investigates the case in the pre-trial phase or delimits the facts that judges, as investigators, may decide upon both in the pre-trial and trial phases. This aims to give the judge some distance from the facts she has to investigate. In addition, prosecutors play the role of formal opponents to the defense to help judges situate themselves as impartial third parties between two contending adversaries, especially at trial. At the same time, prosecutors must seek to ensure that judges act impartially.

The plea discussions and plea dispositions that compose the Prosecutorial Adjudication System do not respect this right, either. As mentioned in Section III, prosecutorial adjudicators do not generally see themselves in that way. Thus, many of them do not have a commitment to the ideal of impartiality. Since they tend to see themselves as an adversarial party, many prosecutors do not think that they have to equally consider both sides of the controversy. In addition, the Prosecutorial Adjudication System does not provide any of the safeguards that adversarial, inquisitorial, or
administrative systems have adopted to achieve the ideal of an impartial adjudicator.

Regarding the adversarial safeguards, prosecutorial adjudicators are simultaneously investigators who may evaluate evidence gathered in a non-adversarial way - e.g., by the prosecutors themselves or the police - and are active in deciding what evidence to gather and in which order. Moreover, in most cases the prosecutor is a solitary, professional decision-maker who, as such, only brings a single, professional perspective on the world.

The plea discussions and plea dispositions that compose the Prosecutorial Adjudication System do not measure up to inquisitorial or administrative safeguards. First, the prosecutor in the United States, as adjudicator, does not have a legal duty to look for inculpatory and exculpatory evidence. Though ethics rules refer to the prosecutor as an officer who must seek justice, the criminal justice system does not require or encourage the prosecutor to look equally for both kinds of evidence. In fact, the criminal justice system tends to give prosecutors incentives to seek convictions as a way to get internal promotions, receive funding and win elections.\(^{168}\)

Furthermore, in the plea dispositions that compose the Prosecutorial Adjudication System there is no requirement that different persons be in charge of the investigation, pre-trial preparation and adjudication of the case. Certainly, in many instances, the prosecutor who adjudicates does not participate in the investigation of the case. In many of those instances, the police or other agencies run the investigation. But investigative agencies and prosecutors many times work together on investigations, and they usually see themselves as part of the same "team" - a perception that the adversarial trial re-enforces.\(^{169}\)

In addition, the protections that inquisitorial systems have designed go beyond establishing a distinction between police and magistrates working with them.\(^{170}\) As in the U.S., the police in civil law countries start most criminal investigations, and a prosecutor or a preliminary investigation judge supervises their work, in many cases formally, in some cases substantially.\(^{171}\) But civil law countries have established a third actor - different from the police and the prosecutor or judge that supervises police work - to actually adjudicate the case at trial.\(^*265\) Finally, the plea discussions and dispositions that compose the Prosecutorial Adjudication System do not present another institutional actor to limit the scope of the factual investigation by the prosecutor as an adjudicator. To be sure, in many cases the prosecutor's investigation does not go beyond the police's. But this does not mean that the prosecutor may not investigate beyond what the police have determined. And since the police and the prosecutors often see themselves as part of the same team, even this practical delimitation of the case does not play the same role as the limitation that inquisitorial systems have designed. In addition, it is not the function of the police to be a formal opponent of the defendant or to ensure that the prosecutor acts impartially.

E. Motivation of the Adjudicatory Decision

The Sixth Amendment establishes that the jury should be the main adjudicator of criminal cases. Since historically juries do not explain their decisions, most safeguards in the adversarial trial establish ex ante controls over what kind of information the jury may receive, how the parties should present the evidence before the jury, and requirements such as jury unanimity to reach a decision. Furthermore, since the jury does not explain its verdict, the review of jury decisions by higher courts has had to be focused on checking that these ex ante safeguards have been respected in the individual case.\(^{172}\)

Since in both inquisitorial and administrative proceedings the main adjudicators are a single or small number of professional judges, these systems have instead developed ex post controls of the adjudicatory decision. One of the main requirements in this direction is that the adjudicators have to explain in writing how they have evaluated the evidence and the different legal arguments raised by the parties, and how they have reached their factual and legal adjudicatory conclusions.\(^{173}\) This written justification of their adjudicatory decision aims at avoiding arbitrary decisions and allows the revision of decisions by higher adjudicatory bodies.\(^{174}\)
As we have seen, the adjudicator in the Prosecutorial Adjudication System is not the jury, but a professional legal actor - the prosecutor. However, the plea dispositions that compose the Prosecutorial Adjudication System have no requirement that the prosecutor explain either in writing or orally how she has reached her adjudicatory decision. In addition, the Prosecutorial Adjudication System does not present any of the ex ante controls that the adversarial system establishes, such as rules of evidence that filter the information that the adjudicator receives.

V. The First Avenue for Reform: Going Back to Bilateral Plea Bargaining by Eliminating the Prosecutorial Adjudication System

Sections II and III have delineated the contours of prosecutorial adjudication as a system of adjudication. The last section has shown that prosecutorial adjudication presents serious problems that call for its reform. The plea dispositions that compose the Prosecutorial Adjudication System fall between two stools. By making guilty pleas involuntary, prosecutorial adjudication does not meet the minimum due process requirements of the adversarial system. Nor does it meet the minimum due process requirements of either inquisitorial or administrative proceedings. Thus, the analysis of the Prosecutorial Adjudication System from the perspective of the due process ideals of contemporary inquisitorial and administrative systems does not resolve prosecutorial adjudication's due process problems. Quite contrarily, it highlights how serious those problems are.

There are two different avenues of reform to address these problems. The first option would be to eliminate prosecutorial adjudication. This would help U.S. criminal procedure conform to the minimum due process requirements of the adversarial system. As explained before, the due process ideal of this system includes a trial by jury during which the prosecution has the burden of proof beyond a reasonable doubt and the defendant has a right to confrontation, cross-examination, and compulsory process. But since the adversarial system emphasizes party autonomy, it is at least acceptable under the adversarial due process ideal that the defendant voluntarily decides to waive all these rights by pleading guilty. Eliminating prosecutorial adjudication would mean making guilty pleas truly voluntary, which would make U.S. criminal procedure practices meet this minimum requirement of adversarial due process.

The second avenue for reform would not entail eliminating prosecutorial adjudication, but improving it. The Prosecutorial Adjudication System is an administrative, informal and flexible system of adjudication in which a professional legal actor - the prosecutor, who is part of a hierarchical structure - investigates and adjudicates criminal cases according to his notion of substantive fairness. This system does not currently meet due process requirements such as the rights to a hearing, to compulsory process, to know the evidence against oneself, to present evidence before the adjudicator, to require proof beyond a reasonable doubt, to an impartial adjudicator, to an explanation of the adjudicatory decision, and to be free from compulsory self-incrimination. The second reform avenue would involve incorporating or strengthening these rights in the plea dispositions that compose the Prosecutorial Adjudication System.

These two avenues of reform are not incompatible, and it is possible to work in both directions at the same time. Since it is highly unlikely that prosecutorial adjudication could be totally eliminated in the near future, one could introduce reforms to reduce the scope of prosecutorial adjudication, while at the same time improving these due process rights in remaining prosecutorial adjudication practices. This Article will suggest reforms in both directions. Section V will propose reforms to eliminate or reduce the extent of the Prosecutorial Adjudication System in American jurisdictions. Section VI will explore reforms to improve due process standards in the plea discussions and dispositions that compose this system of prosecutorial adjudication.

But even though this Article will make proposals in both directions, it is important to make clear that, in the context of U.S. criminal procedure, eliminating or reducing the Prosecutorial Adjudication System should be a priority. First of all, compulsory self-incrimination is a structural problem that cannot be solved without eliminating prosecutorial adjudication, given that producing involuntary guilty pleas is one of the defining features of this system of de facto adjudication.

In addition, even if the Prosecutorial Adjudication System may be improved in its own right, Section VI will show that it is not that easy to strengthen or introduce many of the due process rights that we explored in the previous section.
Adversarial self-perception is very strong in U.S. criminal procedure, and has shaped the distribution of procedural powers and the management of criminal cases in certain ways during the pre-trial phase. It would be almost impossible, then, to copy some of the due process [*268] requirements of inquisitorial and administrative proceedings and the adversarial trial, and simply paste them into the pre-trial phase of federal and state criminal procedure. n178

Finally, the U.S. Constitution establishes an adversarial system. n179 As explained, we may view voluntary guilty pleas as acceptable for that system. But it is hard to see how we could make the Prosecutorial Adjudication System compatible with the adversarial ideal. In this sense, taking the first reform avenue in the U.S. context is not only normatively desirable, but also constitutionally required. n180

Note, however, that the elimination of prosecutorial adjudication would not entail an elimination of plea bargaining and guilty pleas. The Supreme Court has said that "by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty." n181 The elimination of prosecutorial adjudication would not mean that prosecutors and the criminal justice system could not pursue guilty pleas. Rather, it would only mean that they must not encourage guilty pleas through coercive proposals.

Before starting our analysis, four caveats are necessary. First, recall that U.S. jurisdictions are very diverse and present prosecutorial adjudication in very different degrees. In this sense, the proposals that the next two sections explore do not aim at providing a single blueprint for reducing and improving the Prosecutorial Adjudication System in U.S. jurisdictions. Rather, the goals are: 1) to identify crucial points in criminal procedure and the criminal justice system that reformers should look at while discussing ways to reduce and improve prosecutorial adjudication; and 2) to make a number of reform proposals that can contribute to achieving this reduction and improvement.

The second caveat is that any criminal procedure reform involves trade-offs between different values. For instance, a few reforms that we will explore may impose extra costs on criminal justice systems or on law enforcement. Policy-makers may decide that it is not possible or beneficial to pay these extra costs to reduce or improve prosecutorial adjudication. These trade-offs are for individual jurisdictions to analyze. But identifying these reforms will open the range of possibilities that policy-makers have available in case they decide to reduce or improve the plea dispositions that [*269] compose the Prosecutorial Adjudication System in their jurisdiction.

In addition, in making reform proposals, the federal criminal justice system will be our main object of analysis. The main reason for this emphasis on the federal system is that there are more studies and scholarship on this system than on any other. This means that we have more information about the different aspects of the federal criminal system than on any state jurisdiction, information which is important for a more meaningful analysis. But even with the federal criminal justice system as our main object of analysis, the reform proposals that we will explore should also be helpful for state jurisdictions.

Finally, given the length constraints of this Article, the analysis of the next two sections necessarily will be succinct and will concentrate on making new proposals or taking a different perspective on certain issues - and will mention only in passing those issues that the literature has already addressed extensively.

This section will now explore ways in which we could eliminate or reduce the scope of the Prosecutorial Adjudication System in American plea dispositions. The section's analysis will be organized in three subsections, one for each of the potential sources of unfairness in prosecutors’ decisions that make plea proposals coercive and guilty pleas involuntary.

A. The Strength of the Prosecutor's Case

Section II has argued that the prosecutor should not make plea proposals in cases where no reasonable jury could find the defendant guilty beyond a reasonable doubt. As a consequence, if the prosecutor makes a plea proposal without
having those elements, the plea proposal is coercive and the defendant's guilty plea invalid. Plea bargaining literature has shown that a number of prosecutors make such coercive plea proposals. In order to eliminate or reduce the extent of this problem, the criminal procedure literature has suggested important reforms that include strengthening the checks on the charging decision, improving the defense pre-trial investigation, and reducing sentencing differentials for convictions after guilty pleas and trials. This subsection will complement these proposals by addressing three potential areas of reform.

1. Prosecutorial Standards and Rules of Procedure

The first area for reform has to do with the prosecutorial standards that prosecutorial guidelines, rules of ethics, and rules of procedure establish for the charging decision and for making plea proposals. To begin with, there are a number of jurisdictions with procedural rules that directly violate the requirement that the prosecutor must not make a plea proposal unless she has enough admissible evidence to pass the directed acquittal standard. For instance, the California Penal Code, §1192.7, establishes that the prosecutor may make use of plea bargaining for certain offenses if there is insufficient evidence to prove the people's case. In order to reduce or eliminate prosecutorial adjudication, these sorts of provisions should be eliminated.

In addition, a number of ethical and procedural rules establish that the prosecutor only needs probable cause to file charges, but do not establish a different standard for making or accepting plea proposals. A good model for reforms in this area comes from the ABA Standards for Criminal Justice, which requires only probable cause to file charges initially, but expressly establishes that in connection with plea negotiations, the prosecutor has to have enough admissible evidence to support the charges or a good faith intention to pursue those charges. The Standard could establish this requirement more clearly by saying "where admissible evidence does not exist to pass the directed acquittal standard at trial." But the idea of having two different standards for charging and making plea proposals is an attractive model for reforms. It makes clear that the prosecutor may not encourage guilty pleas unless he has enough supporting evidence, and it leaves enough room for the evidentiary evolution of the case from the charging decision to trial.

Finally, both rules of ethics and prosecutorial guidelines on the one hand, and rules of procedure on the other hand, should all require sufficient evidence to pass the directed acquittal standard in order to make a plea proposal, because there are different enforcement mechanisms for each type of rule. While disciplinary proceedings enforce rules of ethics and prosecutorial guidelines, courts enforce the rules of procedure. This issue is particularly important given that prosecutors are rarely subjected to disciplinary proceedings. Therefore, courts must play a more active role in enforcing this requirement. The express inclusion of the requirement in the rules of procedure would be a first step in this direction.

2. Broader Disclosure of Evidence to the Defense

A second way to help ensure that the prosecutor does not make plea proposals in weak cases would be to broaden prosecutorial discovery duties before the guilty plea is entered. Nondisclosure of evidence favorable to the defense hinders a central mechanism to check that prosecutors do not make plea proposals in weak cases.

There are different sources of prosecutorial discovery duties that deserve analysis in this context. The first of these sources is the Constitution. The Brady doctrine requires that the prosecutor disclose evidence that is favorable and material to the defense. This includes both exculpatory and impeachment evidence. In U.S. v. Ruiz, the Supreme Court held that the Brady doctrine does not require the disclosure of impeachment information before a guilty plea is entered. Nevertheless, the Supreme Court has not yet analyzed whether the Brady doctrine applies to material exculpatory evidence. There are elements in Ruiz which suggest that the Brady doctrine may apply in the guilty plea context regarding exculpatory evidence. State and lower federal courts have been divided on this issue. But a substantial number of them have held that the Brady doctrine applies to guilty pleas, at least regarding exculpatory information.
However, it is important to note that even if the Brady doctrine applied to exculpatory evidence in the guilty plea context, this doctrine would still not be the most promising avenue to expand the government's discovery duties to guilty pleas. While the Brady doctrine includes only evidence that is favorable and material to the defense, other evidence is also relevant to prevent plea proposals in weak cases. For instance, the Brady doctrine does not include the disclosure of inculpatory evidence. But this evidence is crucial in order to evaluate whether the government has a strong enough case to pass the directed acquittal standard at trial. In addition, as a constitutional doctrine, Brady may lack the desired flexibility for a context in which different jurisdictions may want to experiment with different regulations and then compare their experiences to see which ones are getting better results.

The most promising avenue to expand the prosecutor's discovery duties in the context of guilty pleas is at the level of statutes, rules of evidence, rules of ethics and prosecutorial guidelines. There are three considerations to keep in mind here. The first is that the drafting of discovery rules should consider not only trials but also plea dispositions. For instance, the Federal Rules of Criminal Procedure have not taken this consideration into account in establishing a mainly trial-centric approach to discovery rules. There are different regimes that can implement this first consideration. At a minimum, discovery rules should include a provision that says that they also apply, to the extent possible, to plea bargains and guilty pleas. But some prosecutors' offices go well beyond this minimum bar and have an open-file policy even for guilty pleas. From the perspective of eliminating prosecutorial adjudication, this last policy is the best option.

The second consideration has to do with the extent of discovery duties. The Federal Rules are, again, very restrictive in this regard. By contrast, the current tendency in state jurisdictions is towards broader discovery that, depending on the jurisdiction, ranges from pre-trial mandatory disclosure of lists of witnesses and their prior statements to an open-file policy. This tendency also shows that the traditional justifications for restrictive discovery - the safety of witnesses and protecting on-going investigations - do not seem to hold much water in a substantial number of cases. It would be more sensible to establish the broadest possible discovery rules as the default standard, then allow the prosecutor to request in camera the court's permission not to disclose evidence or information where there are solid grounds to fear for the safety of witnesses or the success of on-going investigations.

The final consideration has to do with the timing of the disclosure. Guilty pleas may occur shortly after the alleged offense was committed, making it difficult in practice for the prosecution and police to disclose all the available evidence. In addition, assembling all discoverable information and evidence before the defendant enters a guilty plea may also require prosecutors to spend more time and resources than they normally would on pleaded cases. The regulation of the timing of pre-guilty plea discovery has to take these issues seriously.

At a minimum, jurisdictions could follow the ABA Standards Relating to the Administration of Criminal Justice, which state: "The prosecuting attorney should not, because of the pendency of plea negotiations, delay any discovery disclosures required to be made to the defense under applicable law or rules." On the other side of the spectrum, those jurisdictions that work with an open-file policy could implement pre-guilty-plea discovery without substantial additional work for prosecutors. Intermediate solutions include requiring that, before or after making her plea proposal, the prosecutor disclose all evidence and information - perhaps including that on impeachment and affirmative-defenses - that may substantially affect the defendant's calculus on whether or not to plead guilty.

To sum up, from the perspective of eliminating prosecutorial adjudication and the coercive character of plea proposals based on weak evidence, the broader the pre-guilty-plea discovery, the better. This is why an open-file policy at the prosecutor's office would be the best option. This open-file policy would create a strong check to prevent prosecutors from making plea proposals in cases in which a conviction at trial is unlikely. Rules of procedure, ethical rules and prosecutorial guidelines should establish this policy as the default position, while allowing prosecutors to request in camera an exception to the rule whenever there is a risk to the safety of witnesses or to on-going investigations, or when the timing of the guilty plea makes it unfeasible for the prosecutor to have all the potential information and evidence ready. But even though this would be the best discovery regulation to eliminate this aspect of the Prosecutorial Adjudication System, this subsection has shown that there are other intermediate steps that still could
make progress in this direction.

3. The Plea Colloquy and the Judicial Control of Factual Basis

A third way to check that the prosecutor does not make plea proposals in weak cases is by strengthening the judicial role in the plea colloquy. If the Supreme Court accepted the framework articulated in Section II, courts would have to take a more active role in checking the voluntariness of guilty pleas. Though there are important variations between judges and jurisdictions on how thoroughly they currently perform this duty, one limitation that judges usually face is that they have very limited information about the case in the plea colloquy. n210

One way to provide more information to the judge at this stage [*277] would be by requiring that the prosecutor present a sworn affidavit providing a summary of the evidence that would likely prove a defendant’s guilt at trial. In this affidavit, the prosecutor would explicitly state her belief that she has enough elements of proof to meet the directed acquittal standard. This affidavit would provide the judge with more information to make an evaluation of the case and also would force prosecutors to seriously evaluate the evidence they have available before making a plea proposal.

This proposal is novel but the requirement would not be very burdensome because the affidavit would consist of just a short description of the evidence - from one to a few pages - and could be limited to certain offenses - e.g., felonies. In addition, for those jurisdictions that do not want to move in the direction of full or broader discovery from the prosecution to the defense, the court could review the sworn affidavit in camera.

Finally, since the elimination of prosecutorial adjudication requires that defendants do not receive plea proposals in cases where no reasonable jury could find them guilty beyond a reasonable doubt, this should be the standard of proof that the factual basis requirement meets in plea colloquy. Thus, in the evaluation of the sworn affidavit, the judge should consider whether the described evidence would pass the directed acquittal threshold.

B. The Harshness of the Criminal Justice System

The harshness of trial sentences is another factor that makes the prosecutor the sole adjudicator of the case in the Prosecutorial Adjudication System. Prosecutors are not solely or even primarily responsible for this situation. n211 Congress and state legislatures set the range of criminal sentences, and in recent decades, they have adopted increasingly harsh punishments. n212 The result of this process has been that for defendants in many [*278] cases, going to trial entails the risk of being convicted of offenses and receiving sentences that not even legislatures or prosecutors might consider appropriate for their cases. n213 As a consequence, in the last three decades the U.S. has tripled the percentage of incarcerated people. n214 The situation also has led the U.S. to become the Western democracy with the harshest sentences and the highest number of incarcerated people per capita in the world (between approximately five and seven times higher than in other Western democracies), n215 and the only Western democracy where the death penalty is still applied. n216

Regardless of which institutional actor has the most responsibility for the excessive harshness of many trial sentences, these sentences effectively make prosecutors’ plea proposals coercive and the prosecutor the sole adjudicator. n217 This is because defendants have a moral entitlement to fair sentences from not only prosecutors but also from all the other official actors in the criminal justice system. n218 Reducing the harshness of the criminal justice system is then a way to reduce the extent of the Prosecutorial Adjudication System in state and federal plea dispositions.

In order to deal with the question of excessive harshness, commentators, policy-makers and citizens have made important proposals that include setting sentencing commissions and presumptive sentencing guidelines, n219 strengthening the defense function in sentencing determinations, n220 [*279] expanding judicial discretion to depart from harsh sentencing guideline ranges and mandatory minimums, n221 eliminating or reducing the extent of mandatory minimums, three-strikes laws and the death penalty, n222 and revising the cruel-and-unusual-punishment doctrine. n223 This subsection will explore three sets of proposals that can further contribute to reducing the extent of excessive
harshness and the Prosecutorial Adjudication System.

1. The Prosecutor's Responsibility for the Trial Sentence

Even if the legislature and sentencing commissions set the sentencing ranges within which judges may impose criminal sentences, prosecutors have substantial power in sentencing. Because they possess control of the charging decision and, to a lesser extent, of sentencing facts, prosecutors may actually set the range within which judges may impose their sentences. n224 Prosecutors' power to set sentences has been particularly great in [*280] those jurisdictions with mandatory or presumptive sentencing guidelines that possess narrow sentencing ranges and constrain judges' discretion. n225 After Booker, this power of prosecutors has diminished in the federal system, but only to a certain degree, given that district courts still have to consider the guidelines range in determining sentences and that sentencing decisions by district courts are still reviewable by appeals courts. n226 In addition, substantial assistance departures, n227 mandatory minimums, n228 [*281] statutory enhancements and habitual offender laws, n229 and the death penalty n230 also give substantial power to prosecutors over the sentence in many jurisdictions.

Prosecutors may use those powers to make defendants plead guilty and set sentences. n231 Prosecutors' bi-conditional plea proposals give defendants the choice between pleading guilty or facing a potentially harsher penalty at trial. Since a number of these potential trial sentences are clearly disproportionate for the case, the plea proposals that include those sentences are coercive and those guilty pleas involuntary.

The idea that this subsection (V.B.1) will defend is that, given that prosecutors are officials who must seek justice, prosecutors should avoid charging offenses that may lead to clearly unfair trial sentences for the case and the offender. Some ethical rules assume that the prosecutor may refrain from bringing certain charges in those cases. The ABA Standards for Criminal Justice 3-3.9(b) establishes: "The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his or her discretion are: ... (iii) the disproportion of the authorized punishment in relation to the particular offense or the offender ... ." n232 But other prosecutorial standards and guidelines are in direct violation of this idea by establishing that the prosecutor must always charge the maximum provable case and by prohibiting [*282] prosecutors' avoidance of sentencing guidelines' ranges even when the sentence is clearly disproportionate for the case. n233

There are three potential criticisms that deserve analysis regarding this idea that prosecutors should avoid charging offenses that lead to clearly unfair trial sentences. First, a critic can argue that a problem with this idea is that it is the legislature's responsibility, as a representative of the citizenry, not the prosecutor's, to decide what sentences are appropriate for a case. Prosecutors, then, may not second-guess the legislature's decisions in this respect.

The problem with this criticism is that it relies on an unrealistic account on how sentencing regimes work. Legislators - assisted sometimes by sentencing commissions - set sentencing ranges and may regulate in the abstract what sentencing factors are relevant and how much weight to give to these factors. But given that it is not possible to reduce to fixed formulas all the factors that are relevant for sentencing and the weight that these factors deserve in specific circumstances, sentencing decision-makers have a role to play in making sure that the abstract regulations do not produce an unfair sentence in the individual case. n234 In fact, prosecutors already make these corrections in many cases. But they tend to make them much more often regarding guilty plea sentences, than trial sentences. n235

This argument is particularly relevant in a political and institutional environment that, as already explained, encourages legislatures to establish ever harsher punishments, and that make some defendants face potential sentences that not even legislatures would consider appropriate for their cases. n236 Prosecutors then have a role to play in avoiding this kind of situation.

This Article is not suggesting that the sentencing ranges and factors that the legislators set are irrelevant. The
potential sentences set by democratically elected bodies should have a presumption in their favor. But this presumption only means that the sentence set in the abstract by the legislature - and in certain jurisdictions by the sentencing commission \( ^{237} \) should \([*283]\) be the default sentence unless the prosecutor or the judge finds that sentence clearly unfair given the concrete characteristics of the case.

A second criticism to analyze against this subsection's proposal is that, even if the actual decision-makers of the concrete case may need a certain degree of discretion to evaluate the specific characteristics of the case, judges, not prosecutors, should have such discretion because sentencing is essentially a judicial function.

The first problem with this criticism is that in a number of American criminal justice systems, the judges may not legally exercise this type of discretion. \( ^{238} \) In contrast, the broad prosecutorial discretion in the charging decision is both legally and practically unchallenged. \( ^{239} \) The second problem with this argument is that, even if judges had such discretion, defendants should be able to face a fair trial sentence not only if they decide to go to trial, but also at the moment of deciding whether or not to plead guilty. \( ^{240} \)

A final argument against this subsection's proposal is that it may increase unjustified sentencing disparity. \( ^{241} \) This is a real risk given that prosecutors, like judges, may create disparities between cases based on improper grounds such as race, ethnicity and gender. \( ^{242} \) By increasing the discretion of prosecutors in their charging decisions, the risk of increasing disparity \([*284]\) is real. But this is not an insurmountable problem. For instance, prosecutors may have to leave a record of the basis for their decisions and the characteristics of the offense and the offender in order to be accountable to their superiors, the courts and the public.

2. The Plea Colloquy and the Judicial Control of the Potential Trial Sentence

Section II has explained why the trial-prong of the plea proposal may make the defendant's guilty plea involuntary. If the plea proposal includes a potential trial sentence that is clearly unfair, the plea proposal is coercive. This means that in order to check the voluntariness of the guilty plea, the court must know what the potential trial sentence would have been for the case, had the defendant decided to go to trial.

However, neither the Supreme Court's doctrine about the voluntariness of guilty pleas nor the Federal Rules of Criminal Procedure currently establish such a requirement. \( ^{243} \) The Supreme Court has held that an intelligent guilty plea requires awareness of the relevant circumstances and likely consequences of the guilty plea. \( ^{244} \) But if the Supreme Court accepts the framework that this Article has articulated, it should add that an intelligent guilty plea also requires awareness of the likely consequences of not pleading guilty and going to trial. \( ^{245} \) Similarly, the rules of criminal procedure should also include such a requirement in their regulation of the plea colloquy.

In considering the voluntariness of the guilty plea, the court should ask the defendant about the potential trial sentence that the defendant thinks he would be facing if he decides not to plead guilty - including those that the prosecutor included in her plea proposal. If the court finds that the potential trial sentence is clearly disproportionate for the case - because, for instance, the court thinks that a sentencing departure should apply - the court should reject the guilty plea. The prosecution and the defense may then re-discuss the conditions of a plea disposition without the defendant \([*285]\) facing a coercive plea proposal.

If the court did not have all the information necessary to make an assessment about the fairness of the sentence, the court could provisionally take the plea and wait until it received the pre-sentence report in order to make a definitive decision on the guilty plea.

3. Jury's Knowledge of the Potential Sentence

Another possible reform would be for the judge to include in the jury instructions at trial the potential sentence that the defendant would face if convicted. The idea would not be for the jury to sentence the defendant, but only to inform the
jury of the potential sentence before deciding on the defendant's guilt. This would allow the jury to use its nullification power whenever it finds that a sentence would be too harsh for the case.\footnote{246}

Even if a few trial courts have experimented with this idea,\footnote{247} courts of appeals have not been receptive to it because of their general distrust towards jury nullification, and based on the argument that a jury's knowledge of the potential sentence will affect its impartiality and break the basic division of labor between judge and jury.\footnote{248} However, there are good reasons to give this information to the jury.

As we have seen, punishment in the U.S. has become ever harsher over the last three decades, in part due to pressures by the citizenry on the political system. But it is one thing to be in favor of harsher punishments in the abstract, and a very different exercise to consider what the actual sentence should be in a particular case.\footnote{249} Giving the jury knowledge about potential sentences would be a way to create a democratic check on whether the sentence that the legislature (and the sentencing commission) has set for the case and that the prosecutor has triggered with his charging decision is not excessive in a specific case.\footnote{250} This argument is even stronger if we conceive the trial by jury as a trial-de-novo appeal against the prosecutor's coercive plea proposal. This is because the jury may exercise a more meaningful review of the prosecutor's adjudicatory decision if the jury has full information about the potential sentence for the charge.

In order to address the concerns by courts of appeals about excessive use of the jury's nullification power, the proposal could be limited only to those cases in which the trial court determines that the potential sentence may be clearly disproportionate for the case and the trial court does not have any discretion to soften such a harsh sentence (for instance, in the case of mandatory minimums).

An alternative to this proposal that would avoid using a controversial mechanism like jury nullification would be to increase the jury's sentencing powers.\footnote{251} If the charges or sentencing factors have triggered a potential sentence that the judge considers clearly excessive for the case but from which the judge does not have the discretion to depart, the judge could ask the jury, after a conviction has been entered, whether it considers the sentence excessive. If the jury answered in the affirmative, the judge would be allowed to depart from the established sentence.

C. Overcharging

Overcharging is the final factor that makes plea proposals coercive and makes prosecutorial adjudication possible. By bringing charges that are a stretch or charging relatively innocuous conduct, prosecutors put undue pressures on defendants to plead guilty. This has been possible in part because, since U.S. criminal jurisdictions moved from common law, judge-created offenses to legislatively-created statutory offenses, criminal statutes have presented several layers of overlapping criminal offenses incorporated over time, many of which are loosely defined.\footnote{252}

\footnote{287} In fact, in the last three or four decades, the incorporation of layers of criminal offenses, loose definitions of many offenses, and the creation of new offenses have arguably become a more serious concern than ever. The same political and institutional dynamics that explain the tendency towards the ever-increasing harshness of criminal sentences have also encouraged the proliferation of criminal offenses. Both state legislatures and the federal Congress regularly react to public concern over crime, to advocacy groups, and to specific criminal cases by creating new crimes or loosening existing crime definitions.\footnote{253}

The problem is that defendants not willing to plead guilty often have to face multiple overlapping offenses at trial - which may increase the chances of an unfair conviction - and/or have to defend themselves for the commission of relatively socially innocuous behavior that fits a criminal statute's definition of a crime only formally.\footnote{254} How could such coercive prosecutorial misconduct be eliminated or reduced? Commentators and policy-makers have made important proposals to advance these goals that include clarifying definitions and reducing the number and overlap of criminal offenses,\footnote{255} the adoption of legislative techniques that would limit the incorporation of new offenses,\footnote{256} stricter controls over the charging decision,\footnote{257} \footnote{288} requiring systematic enforcement by prosecutors, and
revising the void-for-vagueness doctrine, the rule of lenity, the right to notice, desuetude, and the law of joinder. n259

In addition to these possible reforms, the first two proposals that this Article articulated in the previous subsection regarding prosecutorial standards for the charging decision n260 and stricter judicial review of the voluntariness of guilty pleas should also apply in the context of overcharging. n261 This subsection will also briefly explore two additional sets of reforms that could also contribute to reduce the extent of overcharging and the Prosecutorial Adjudication System among plea dispositions.

1. Revising Doctrines: The Blockburger test

One of the main safeguards of the criminal justice system against multiplying charges for the same factual transaction or incident is the rule that allows the judge to vacate one or more convictions at the end of the trial when the defendant is convicted of several charges that constitute the same offense. One of the problems in this area is that the Blockburger test adopted by the Supreme Court and lower courts to determine the presence of one or multiple offenses is too narrow. n262 The Blockburger test establishes that there are two different offenses when each offense requires proof of a fact that the other offense does not require. n263 In the context of classic common law offenses, a test like this could do a fairly adequate job of determining what constituted different criminal offenses. But in our current context of overlapping but not identical offenses, with criminal offenses newly created and broadly defined, the Blockburger test does an inadequate job of avoiding multiple convictions for the same basic factual transaction. n264

One possibility would be to adopt the broader test that the Model Penal Code proposes to deal with this issue. This test establishes that a defendant may not be convicted of more than one offense if one offense is included in the other; or one offense consists only of a conspiracy or other form of preparation to commit the other; or inconsistent findings of fact are required to establish the commission of the offenses; or the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct; or the offense is defined as a continuing course of conduct and the defendant's course of conduct was uninterrupted, unless the law provides that specific periods of such conduct constitute separate offenses. n265

2. Improving Judicial and Jury Controls over Dubious Charges

Finally, in order to reduce prosecutorial adjudication further, both the jury and the trial judge could play a larger role in discouraging prosecutors from charging offenses that are a stretch or for relatively innocuous behavior. The jury has de facto nullification power. But judges may not instruct juries on the possibility of using their nullification power. n266 One of the justifications for this restriction is that the legislature is more representative of the citizenry than a group of six to twelve jurors randomly selected. n267 As the representative of the citizenry, the legislature defines what should constitute a criminal offense, and a random group of citizens should not have the power to overcome the legislature's will.

But this Article has shown the problem with this justification. As a consequence of complex political and institutional dynamics, the legislature over-criminalizes conduct based on the understanding that the prosecutor will only prosecute harmful conduct or conduct that seriously violates basic social norms. Nevertheless, prosecutors have incentives to also charge other conduct, partly to obtain defendants' guilty pleas. Enlarging jury nullification power would be a way to create a check against such abuse of prosecutorial discretion. If we conceive the trial by jury as the trial-de-novo appeal of the Prosecutorial Adjudication System, enlarging this nullification power would allow a more substantive jury review of the prosecutor's coercive plea proposals.

Of course, jury nullification is a double-edged sword because juries may also be arbitrary or acquit defendants for improper reasons, n268 and it should be used in a careful and restricted way. Policy-makers and judges could diminish
these risks by instructing the jury about its nullification power only in exceptional cases in which the judge thinks that the charges are a stretch or that the defendant's conduct should be beyond the scope of criminal law; and the legal system does not provide the legal tools for the judge to address the issue.

For similar reasons, if it is the prosecutor - not the legislature - who actually decides what conduct is criminalized, judges could also be given the legal power to acquit the defendant whenever they think that the conduct in question should be beyond the scope of criminal law. A possibility within this context would be incorporating the Model Penal Code's de minimis infractions doctrine, according to which the court must dismiss cases in which the alleged conduct formally constitutes an offense but is harmless or socially innocuous.

VI. The Second Avenue for Reforms: Improving Prosecutorial Adjudication

The last section analyzed a number of possible reforms to eliminate or reduce prosecutorial adjudication from the criminal justice system. This section will propose a number of reforms to improve prosecutorial de facto adjudication instead of eliminating it. The reasons for these reform proposals are two-fold. First, it is not realistic to expect that federal and state jurisdictions will adopt all the necessary reforms that we examined in the last section to eliminate prosecutorial adjudication in the near future. In fact, in many jurisdictions - and especially in the federal system - the political and institutional causes for the adoption and expansion of prosecutorial adjudication are so deep-rooted that even if adopted, the reforms suggested in the previous section likely could only contribute to reducing prosecutorial adjudication, rather than eliminating it altogether. Thus it is worth thinking about ways to improve prosecutorial adjudication as a system of adjudication. In addition, the improvements to prosecutorial adjudication that this section will explore do not tend to expand prosecutorial adjudication and are not incompatible with the reform proposals of Section V. In fact, some of these reforms may also help to reduce the preponderance of prosecutorial adjudication in the long run.

In designing proposals to improve prosecutorial adjudication as a system of adjudication in the U.S. context, it is important to keep two issues in mind. The first issue is that, as mentioned in Section II, the Prosecutorial Adjudication System co-exists with an adversarial system in the plea dispositions of American criminal procedure. Since many prosecutors' plea proposals are not coercive, many defendants' guilty pleas are truly voluntary. In these cases, the prosecutor is not the unilateral adjudicator. Rather, the prosecutor and the defense are bilaterally adjudicating the case. But since the two systems co-exist with each other, any reform to prosecutorial adjudication will affect bilateral plea bargains - and vice versa. This fact must be taken into account in analyzing both the desirability and feasibility of any reform proposal regarding prosecutorial adjudication.

Furthermore, reform proposals also must take into account U.S. procedural culture and the way the U.S. criminal justice system has traditionally distributed powers and responsibilities among its main actors and institutions. It is crucial to consider these factors in analyzing the reform proposals' feasibility and chances of success. These factors explain why we cannot simply "copy and paste" legal institutions, rules and ideas from one legal system to another. For instance, even if one of the ways to improve prosecutorial adjudication were to adopt some of the due process requirements of inquisitorial systems, it still might be impossible or unfeasible simply to take the way inquisitorial systems regulate an issue and copy it into the U.S. system. We also might need to translate the legal institution or idea from an inquisitorial culture and institutional arrangement to the U.S. system in which adversarial culture and institutional arrangements are still very dominant. Since prosecutorial adjudication operates in the pre-trial phase of U.S. criminal procedure, we especially have to consider the procedural culture and institutional arrangements of this phase, which is characterized by a high degree of flexibility and informality.

This section will explore a number of potential improvements to prosecutorial adjudication. Since most of the rights explored in Section IV are part of the due process ideals of adversarial or inquisitorial criminal procedures - as well as U.S. administrative law - these rights set an agenda for the improvement of this adjudication system.

A. Rights to a Hearing, to Compulsory Process, to Know the Evidence against Oneself, and to Present Evidence
before the Adjudicator

The Sixth Amendment of the U.S. Constitution and the analogous foundational laws of civil law countries establish these rights. As we have seen, prosecutorial adjudication provides only a very limited version of them, on an informal and ad-hoc basis. But reform proposals should take into account the causes of this informality. U.S. criminal procedure practices assume that there is nothing problematic with the pre-trial phase being informal and flexible, given that the real adjudicatory moment is the trial. In addition, since adversarial self-perception conceives the prosecution and the defense as opposing parties, the prosecution has no duty, or only a limited duty, to meet with the defense, to disclose evidence, and to let the defense present evidence and make arguments.

An initial issue to consider here is whether, at least as long as we have the guilty plea and broad prosecutorial discretion, we should keep plea bargaining rather than eliminate it. Plea bargaining implements most of these rights to some extent. Given that the prosecutor normally wants to encourage the defendant to plead guilty, the prosecutor has an incentive to meet with the defense, disclose certain evidence, and listen to what the defense has to say about the case. Thus, from the perspective of prosecutorial adjudication, eliminating plea bargaining would worsen the situation instead of improving it. This is an important point that many critics of plea bargaining have overlooked. For instance, Marc Miller and Ron Wright have praised the New Orleans DA office's policy of reducing plea exchanges and plea bargains between prosecutors and defendants, while keeping prosecutorial discretion and judges' sentencing discounts as to guilty pleas. n274

But the analysis of this Article has shown why keeping plea bargaining in this context would be normatively better. If one of the main problems of the criminal justice system is that in many cases prosecutors make plea proposals with insufficient evidence, threaten harsh trial sentences in their plea proposals, and overcharge in order to encourage defendants to plead guilty, it does not make a significant difference whether it is the prosecutor or the judge who gives the defendant the actual sentence discount for pleading guilty or who applies the unfair trial charges or sentences. n275 In both cases, defendants are still acting involuntarily and under coercion, and in both cases the prosecutor decides who is guilty and of what offense through her final charging decision. In plea bargaining the defense has, at least, the opportunity to express its opinion about the case to the prosecutor as the actual adjudicator. The elimination of plea bargaining would deprive defendants of such an opportunity.

The implementation of these rights through plea bargaining is, without question, insufficient. The prosecutor may decide not to meet with a defendant, nor disclose "her" evidence, nor listen to the defense. In order to prevent this kind of behavior, prosecutorial guidelines and ethical rules should include a duty for the prosecutor to meet with the defense and listen to it if the defense makes that request. n276 In addition, broadening prosecutorial pre-guilty-plea discovery duties - a reform already explored in Section V. A.2 - also would implement the right to know the evidence against oneself.

Furthermore, in order to incorporate the protection of the right to compulsory process, one could improve defense attorneys' powers to run their own investigations. Unlike prosecutors, defense attorneys do not wield strong incentives or compulsory powers to get to interview witnesses or obtain documents and physical evidence. n277 Jurisdictions could explore giving some minimum powers to defense attorneys in this respect. For instance, in cases in which a potentially crucial witness is not willing to talk with the defense before the defendant pleads guilty, a defense attorney could request that the court allow the defense to take a deposition of the witness, or the court itself could hold a hearing in which the defense and the prosecution could interrogate the witness. n278

But given the co-existence of prosecutorial adjudication with bilateral adjudication and the cultural and institutional constraints present in the pre-trial phase of American criminal procedure, it would be difficult or impossible to implement all these rights in a more formal or systematic fashion. For instance, a right to a hearing usually includes the right to a formal and public hearing. But most U.S. criminal justice actors would consider asking U.S. prosecutors to hold this type of hearing before making every final charging decision to be impractical at best, and at worst to show a deep misunderstanding of U.S. criminal procedure. Similarly, most U.S. criminal justice actors would see giving the
defense the right to compulsory process in every case and regarding any kind of witness as an opportunity for the
defense to delay proceedings and harass witnesses before trial.

The point is not that it would be undesirable to incorporate all these rights more fully into prosecutorial
adjudication if this were possible. The point is that, given the characteristics of prosecutorial adjudication and the
procedural culture and institutional arrangements that predominate in U.S. criminal procedure, it is not possible at this
point in time to simply copy these rights from the adversarial trial or the inquisitorial system and paste them into
prosecutorial adjudication. At best, we can make a translation of some of these rights to the Prosecutorial Adjudication
System and the pre-trial phase of U.S. criminal procedure. n279

B. Strengthening the Impartiality of Prosecutors as Adjudicators

The Prosecutorial Adjudication System conceives procedure as an official investigation that the prosecutor runs in an
informal and flexible way in order to give a fair disposition to the case. As an adjudicator, the prosecutor is supposed to
get convictions only against people that she thinks are actually guilty, and for charges and sentences that reflect their
blameworthiness. In order to be internally fair, then, the Prosecutorial Adjudication System requires that the prosecutor
behave as an official of justice regarding those cases. So one first improvement would be for prosecutors to
acknowledge their role as adjudicators and behave accordingly. An Article like this can hopefully help raise prosecutors'
awareness of this issue.

But even if prosecutors were more aware of their adjudicatory role, there are other potential improvements in this
area. In comparison to civil law countries, the U.S. has a much more ambivalent conception of the [*295] prosecutor.
The prosecutor is, on the one hand, an officer who must seek justice and tries to fairly dispose of the case based on the
available evidence. n280 But on the other hand, the prosecutor is a potential opponent of the defense. For instance, when
there is a trial, U.S. prosecutors are pitted against the defense in a contest. This trial role of prosecutors affects their
self-perception. n281

To some extent, this is a structural problem within U.S. criminal procedure. Adversarial self-perception is very
strong, and there are powerful incentives in the system for prosecutors to behave as adversaries of the defense.
However, there are a number of reforms that one could explore to alleviate the depth of this problem and strengthen the
role of prosecutors as officers who must seek justice and be fair adjudicators. n282

A first set of reforms could try to change prosecutors' incentive system away from seeking to obtain as many
convictions as possible. For instance, at the federal level, U.S. Attorneys' offices compete for funding and other
resources by keeping their conviction statistics up. n283 At the state and local levels, elected prosecutors have incentives
to obtain as many convictions as possible because the number of convictions usually is one of the issues raised in their
electoral campaigns. n284 The Department of Justice could eliminate the number of convictions as a criterion for
assigning resources. Similarly, at the state and local levels, there may be good reasons to eliminate the election of
prosecutors and to move toward a different appointment system.

Another reform would be to establish a division of labor within DA offices that would put different prosecutors in
charge of investigation, adjudication and trials. DA offices can do this by creating three different units within their
organizational structure. In this way, DA offices could differentiate the self-image, training, incentive system, and
organizational ethic of investigating and trial prosecutors - who have the strongest incentives to behave in a partisan
way - from adjudicating prosecutors.

The investigating prosecutors would be those in charge of supervising the work of the police and other agencies.
Their work would conclude with the issuance of formal charges. The adjudicating prosecutors [*296] would be
those who discuss plea dispositions with the defense. n286 Trial prosecutors would handle cases where defendants
decide to go to trial. n287
In each of these different functions, the office should emphasize the role of the prosecutor as an officer who must seek justice. For instance, investigating prosecutors may have to look for both inculpatory and exculpatory evidence, avoid overcharging, and disclose to the defense all the available evidence when they issue formal charges. But the office should also acknowledge that there are inherent tensions between investigating and impartially evaluating the investigation. This is why a different prosecutor should handle the case during the plea disposition.

This proposal is novel but not unrealistic. In fact, a number of DA offices already use horizontal prosecution. And even if there may be cases in which vertical management may be advisable, prosecutors' offices and policymakers could establish horizontal management as the rule and establish vertical management as a tool that prosecutors' offices could adopt only in certain types of cases - e.g., terrorism, serious organized crime, or in other exceptional circumstances.

Another area for reform is personnel selection and management. Some of the psychological phenomena that create or re-enforce impartiality problems tend to be stronger in individuals with certain characteristics and demographic backgrounds. "Across various age groups, men are consistently more overconfident in their own performance than are women. Younger adults are more overconfident than older ones. And there is some evidence that those who are less intelligent, as measured by test scores and grades, are more overconfident than others. Neophytes have plenty of room to be overconfident because they are unfamiliar with the justice system, whereas recidivists' knowledge and experiences may limit their overconfidence." If this is the case, DA office managers should take these factors into account. For instance, adjudicating prosecutor units could be integrated by senior attorneys with demonstrated excellence in their work, and could emphasize gender diversity.

Another area for reform in this direction is prosecutorial ethics. Ethical rules emphasize the role of the prosecutor as an officer who must seek justice. But the enforcement of these rules is highly deficient, among other reasons because of adversarial self-perception. If the U.S. criminal justice system saw itself partly as a hybrid system and took seriously the role of prosecutors as officers who must seek justice, the system would deem more conduct unacceptable and levy disciplinary and professional sanctions. An example of this current lack of enforcement which is especially important for the Prosecutorial Adjudication System is prosecutors frequently disregarding their existing constitutional and statutory discovery duties without any disciplinary consequences for the prosecutors in most such cases.

C. Motivation and Control of the Adjudicatory Decision

As mentioned in Section IV, administrative law and inquisitorial systems establish that adjudicators must provide a written justification of their decision. This written justification allows for broader review by higher courts. Conversely, the U.S. adversarial trial does not require such a justification but emphasizes ex ante controls in the jury selection process, the admission of evidence, and jury instructions. It is hard to imagine how to introduce these adversarial ex ante controls in the Prosecutorial Adjudication System. As explored in Section V. A.3, prosecutors could instead be required to briefly justify their final charging decision by providing a summary of the evidence to the judge at the plea colloquy. Then the judge would make sure that there is enough evidence for a reasonable jury to find the defendant guilty beyond a reasonable doubt.

But the other area for reform here involves trial protections. As we explained in Section III, one can conceive trial by jury as the mechanism that the Prosecutorial Adjudication System gives to defendants to challenge the prosecutor's adjudicatory decision. The generation of scholars that heavily criticized plea dispositions in the 70s and 80s saw a strong link between trial complexity and the extent to which U.S. jurisdictions use plea dispositions. They found a historical connection between the U.S. trial becoming more complex and the rise of plea dispositions in U.S. criminal procedure in the second half of the 19th Century. Their conclusion was that complex trials generate incentives for prosecutors and judges to seek guilty pleas. Thus, as part of their reform agenda, they thought that making trials less complex was crucial to reduce the number of plea agreements.

Recent historical studies have questioned this link between trial complexity and the rise of plea bargaining in the
U.S. during the 19th Century. In addition, recent studies on fluctuations in guilty pleas during the 20th Century have also questioned the link between increases in trial complexity and increases in guilty pleas. For instance, the reforms of the 1950s and 1960s - such as new challenges to illegally obtained evidence and the expansion of the right to counsel - led to more complex trials. However, the rate of guilty pleas went down during that period. 

More trial protections may diminish guilty pleas and plea agreements because defendants have more chances of acquittal at trial and, thus, more incentives to plead not guilty. Thus, if the prosecutor's ability to impose her disposition of the case depends to a certain extent on a high chance of conviction at trial, it may be necessary to create more trial protections, not less. This would not eliminate the coercive character of the prosecutor's plea proposal. But it would decrease the effectiveness of these proposals in generating guilty pleas from defendants. It would also increase the defendants' power to challenge prosecutors' adjudicatory decisions before the jury.

Regarding trial protections, there is room for improvement, especially in the federal system. Discovery rules, federal exclusionary rules, and federal rules of evidence are areas that reformers could analyze and improve.

VII. Conclusion

This Article has provided a theoretical framework to explain when we can consider the prosecutor to be the sole de facto adjudicator of criminal cases. The key is distinguishing between coercive and non-coercive plea bargaining. Only when the plea proposal is coercive should we consider the prosecutor to be the sole adjudicator of the case, because only in that case is the defendant's guilty plea involuntary. The determination of whether a proposal is coercive depends on what defendants are entitled to expect from the prosecutor and the criminal justice system. As this Article has argued, defendants have a moral right, at a minimum, that prosecutors do not make plea proposals in weak cases, that prosecutors' plea proposals do not include unfair trial sentences, and that prosecutors do not overcharge.

To some extent, this Article has replaced one set of difficult questions - what is prosecutorial adjudication - with another set of difficult questions - what should be the baseline and what constitutes a weak case, a harsh sentence, or overcharging, and how extended each of these phenomena are. But it is nevertheless substantial progress to have identified the right questions to ask. This Article has not only identified these questions, and indicated how to approach them: it has also shown that when the prosecutor becomes the sole adjudicator, many of the familiar features of U.S. criminal procedure get transformed. Dismissals become acquittals; final plea proposals turn into convictions; trials are transformed into appeals against the prosecutor's adjudicatory decision; plea negotiations become defense closing statements; and the U.S. adversary system turns into a particular hybrid that conceives procedure as an administrative, informal and flexible system of adjudication in which the prosecutor investigates and adjudicates criminal cases according to substantive fairness.

Our analysis has also proposed a new standpoint from which we can make a normative assessment of prosecutorial adjudication, an assessment that shows the serious problems that prosecutorial adjudication presents. A realistic solution to these problems is not to eliminate plea bargaining, but to make plea bargaining fairer. By proposing a set of reforms to achieve this goal, this Article has moved beyond the unrealistic or unappealing alternatives of either eliminating plea bargaining altogether or keeping plea bargaining without acknowledging the serious problems that it presents.

Legal Topics:

For related research and practice materials, see the following legal topics: Administrative LawAgency AdjudicationGeneral OverviewCriminal Law & ProcedureGuilty PleasCoercionCriminal Law & ProcedureGuilty PleasVoluntariness

FOOTNOTES:
n1. This Article refers to de facto unilateral and bilateral adjudication because, from a legal perspective, after the defendant enters a guilty plea it is still necessary that the court accepts the plea for the case to be formally adjudicated. However, as we will examine later, courts' control of guilty pleas is usually cursory. Thus, the guilty plea de facto disposes of the case on most occasions. For stylistic reasons, this Article will not include the expression "de facto" every time that it refers to unilateral adjudication by the prosecutor or bilateral adjudication by the prosecutor and the defense.


n3. See Lynch, supra note 2, at 2120-21, 2125, 2129, and 2135.

n4. Id. at 2124, 2129, and 2142-43.


n7. Other studies have explored an intermediate position between the elimination of plea bargaining and keeping current plea bargaining practices without substantial changes. See, e.g., Thomas W. Church Jr., In Defense of "Bargain Justice", 13 Law & Soc'y Rev. 509 (1979); John Kaplan, American Merchandising and the Guilty Plea: Replacing the Bazaar with the Department Store, 5 Am. J. Crim. L. 215 (1977). However, these previous studies have received less attention in the plea bargaining debate and have not explored an intermediate position in the way this Article will.
For instance, in 2003, leaving dismissals aside, 95.7% of cases in the federal system were adjudicated through guilty pleas, and 4.3% of cases were adjudicated through trials. See U.S. Sentencing Comm'n, 2003 Sourcebook of Federal Sentencing Statistics, Figure C (2004), available at http://www.ussc.gov/ANNRPT/2003/Fig-c.PDF. If dismissals after the charge is filed are included, the percentage of cases adjudicated through guilty pleas is around 65%.


n12. See, e.g., Brady, 397 U.S. at 755.


n14. See, e.g., John H. Langbein, supra note 2, at 12 (the sentencing differential is what makes plea bargaining coercive); Wright, supra note 2, at 93 (the size of the differential between post-trial and trial sentences creates coercive environments to produce “voluntary” guilty pleas).

n15. This difference refers to incarceration sentences. See Compendium of Federal Justice Statistics, 2001, Table 5.3, Sentences imposed on convicted offenders, by offense of conviction and method of disposition, October 1, 2000-September 30, 2001. Besides plea discounts, other factors may contribute to this difference, such as the higher risks that going to trial entails for defendants. For instance, if the trial judge finds that the defendant commits perjury while testifying at trial, the judge may consider that as an aggravating factor in determining the trial sentence. In addition, in very serious cases, defendants may not have strong enough incentives to plead guilty, contributing to a higher average of trial sentences. But even if other factors may contribute to the differential between guilty pleas and trial sentences, the differential is likely higher than the on-average 35% that the Federal Sentencing Guidelines establish for acceptance of responsibility. In addition, even if the average guilty plea sentence were only 35%, it still would be rational for the average defendant to plead guilty given the high probability of conviction at trial. On the Federal Sentencing Guidelines discounts, see, e.g., Stephanos Bibas, Plea Bargaining Outside the Shadow of Trial, 117 Harv. L. Rev. 2463, 2488-89 (2004).

n17. From a rational actor perspective, defendants will challenge the prosecutor's decision only when the chances of being convicted at trial multiplied by the expected sentence after conviction is lower than the expected sentence that the defendant would receive as a consequence of the plea disposition. In other words, the defendant will go to trial only if: CC x TS < GPS. CC is the chance of being convicted at trial, TS is the sentence the defendant expects to get if convicted at trial, and GPS is the sentence that the defendant expects to get with the plea disposition. Applying this formula to the federal system clarifies why it is rational for the average defendant to plead guilty instead of going to trial: 0.77 (CC) x 1 (TS) > 0.4 (GPS). This Article does not embrace the rational actor model to analyze plea bargains. For a critical analysis of the application of the rational actor model to plea bargaining, see Bibas, supra note 15. In addition, the notion of the "average defendant" presents problems that I cannot analyze here. However, the rational actor model and the notion of the average defendant are helpful to illustrate the strong incentives pressuring defendants to plead guilty instead of going to trial.

n18. Brady, 397 U.S. at 750.

n19. Id. at 755.


n21. The prior convictions were for a charge of detaining a female when he was 17 years old, a lesser included offense of rape for which he had served five years and three months in the state reformatory; and for robbery where he had been sentenced to five years of imprisonment, but had been released on probation immediately.

n22. Bordenkircher, 434 U.S. at 363-64.

n23. Some commentators have basically agreed with the position taken by the Supreme Court. See, e.g., Easterbrook, Criminal Procedure as a Market System, supra note 6.
n24. The minority in McMann and Brady pointed out the narrow conception of voluntariness of the majority of the Court. See McMann v. Richardson, 397 U.S. 759, 777-779 (1970) (Brennan, J., dissenting) (citing Parker v. North Carolina 397 U.S. 790 (1970) and Brady v. United States to maintain that there are considerations that the government cannot properly introduce into the pleading process).

n25. See, e.g., Langbein, supra note 2, at 15; Wright, supra note 2, at 109.

n26. I take this case from Kenneth Kipnis, Criminal Justice and the Negotiated Plea, 86 Ethics 93, 100 (1976).

n27. Scott & Stuntz, supra note 6, at 1921, reach a similar conclusion by analyzing the problem from the perspective of contract theory (a large sentencing differential does not imply coercion a priori).

n28. On the structures that this kind of proposal may present, see Harry G. Frankfurt, Coercion and Moral Responsibility, in The Importance of What We Care About (1988) (describing tri-conditional and other types of structures that such proposals may present).

n29. There is an extensive philosophical literature on this question of coercion and voluntariness. The seminal article is Robert Nozick, Coercion, in Philosophy, Science, and Method 440 (S. Morgenbesser et al. eds., 1969). This article was later republished in Robert Nozick, Socratic Puzzles 15 (1997). The citations in the rest of this piece will refer to this later edition. For the best description of the main positions in this literature, see Alan Wertheimer, Coercion (1987).

n30. Notice that neither the gunman's case, nor the doctor's, nor plea dispositions in general, normally involve compulsion. Whenever there is compulsion, there is no role whatsoever for one's will. For instance, if A pushes B off a cliff or if A tortures B to make him say something when the torture is ongoing, B's will plays no role in the situation. The three cases we are analyzing are different because B's will still plays a role given that B still has a choice to make. Compulsion clearly excludes voluntariness. But it is only one of the ways in which a human action can become involuntary. On the differences between compulsion and coercion and other ways in which one person may force another person to act, see Joel Feinberg, Harm to Self 189 (1986).

n31. Some moral philosophers refer to coercive proposals as threats and to noncoercive proposals as offers. See, e.g., Nozick, supra note 29. But since other scholars have shown that there may be coercive offers (e.g., Feinberg, supra note 30, at 229-69; Vinit Haksar, Coercive Proposals [Rawls and Gandhi], 4 Political Theory 65 (1976); Daniel Lyons, Welcome Threats and Coercive Offers, 50 Philosophy 425 (1975); Peter Westen, 'Freedom' and 'Coercion' - Virtue Words and Vice Words, 1985 Duke L.J. 541 (1985), I use in this Article the more neutral term "proposal" and put the emphasis on whether or not these proposals are coercive, instead of on the "threat" and "offer" terminology.
n32. In his groundbreaking article, Nozick refers to the idea of the baseline as the "expected course of events." If the proposal improves the expected course of events, it is not coercive; if it worsens this course, it is coercive. See Nozick supra note 29, at 23-31. However, the idea is the same in both cases and other scholars have used the baseline terminology that this Article uses. There are different ways to define the baseline or expected course of events. For a summary, see, e.g., Feinberg, supra note 30, at 219-28. But a first basic distinction to make is that the baseline may refer to either the predicted or the morally required course of events. The predicted course of events makes reference to what usually happens in a particular set of social situations or practices. The morally required course of events refers to what can be expected in this situation according to morality. To illustrate this distinction, Nozick proposes the following case: "Suppose that usually a slave owner beats his slave each morning for no reason connected with the slave's behavior. Today he says to his slave, "Tomorrow I will not beat you if and only if you now do A.'" Nozick supra note 29, at 27. According to the predicted course of events, this proposal would not be coercive because it would improve the baseline. But according to the morally expected course of events, this is coercive because it worsens what B is morally entitled to - B is entitled not to be beaten every day in the first place, and thus A has the moral duty not to put a condition on something to which B is entitled unconditionally.

n33. As explained supra note 32, the baseline may be defined as what is predicted or morally expected in a situation. This Article uses a moral baseline because its goal is to make a critical appraisal of current plea bargaining practices. Thus, it cannot take for granted what is normally expected in these practices.

n34. Though all the main positions of the moral philosophy debate on coercion have agreed to use the idea of the baseline to define coercion, there have been different positions on whether we should define the baseline in moral or non-moral terms. David Zimmerman has been the main critic against defining the baseline in moral terms, and he has tried to articulate an exclusively non-moral account of coercive proposals. His main criticism is that moral accounts of coercion do not "yield the right sort of explanation of its prima facie wrongness, one which links up with the underlying idea that coercion is prima facie wrong because it undermines freedom." See David Zimmerman, Coercive Wage Offers, 10 Philosophy and Public Affairs 121, 128 (1981) [hereinafter Zimmerman, Coercive]; David Zimmerman, Taking Liberties: The Perils of "Moralizing" Freedom and Coercion in Social Theory and Practice, 28 Social Theory and Practice 577 (2002). For critical analyses of Zimmerman's proposal, see Lawrence A. Alexander, Zimmerman on Coercive Wage, 12 Philosophy and Public Affairs 160 (1983); Wertheimer, supra note 29, at 244-47. For a response to some of these criticisms, see David Zimmerman, More on Coercive Wage Offers: A Reply to Alexander, 12 Philosophy and Public Affairs 165 (1983). Due to space constraints, I cannot analyze his theory in detail here. But a few comments are on point. First, it is unclear whether Zimmerman's theory would lead to different results that those this Article reaches. At least Zimmerman's one-paragraph analysis of plea bargaining concludes that the prosecutor's plea proposals are not intrinsically coercive, and agrees with this Article's conclusion that the evidentiary strength or weakness of the case makes a difference in determining the coerciveness of plea proposals. See Zimmerman, Coercive, supra at 137-38. In addition, this Article does not argue that only a moral account of coercion is possible. (For exclusively moral accounts of coercion see, e.g., Charles Fried, Contract as Promise (1981).) Actually, as Peter Westen and others have shown, coercion may embody both descriptive and normative forms. See Westen, supra note 31. Thus, even if this Article uses a moral baseline to analyze plea bargaining for the reasons articulated in the previous footnote, it acknowledges that the baseline may also be defined in non-moral terms (e.g., in reference to the predicted course of events) in certain contexts. In this sense, this Article does not claim that the moral conception of coercion is a general theory that can explain all the uses of the term coercion. Rather, it is just part of a broader theory of coercion.

n35. I bracket questions on whether the State has a moral duty to take care of the health of its citizens for free. For those readers who find this bracketing problematic, you can assume that B has a health or physical problem that the State does not have the duty to pay for. For instance, B may have a non-life-threatening facial deformity caused by an accident that the State would not cover but that B would still consider extremely hard to live with.
n36. Another way to explain why we consider the decision in the gunman case involuntary and the decision in the doctor case voluntary - even if in both cases B received a "proposal he could not refuse" - is by distinguishing the pre-proposal and the proposal situations and determining whether the proposal expands or restricts B's choices. If the proposal restricts the choices that B would be entitled to according to the normal course of events or morality, the proposal is coercive within the selected criterion. On the other hand, if it expands B's choices, the proposal is not coercive. In the case of the gunman, the pre-proposal situation does not force B to make the hard choice between giving up his money or his life. A's proposal restricts B's choices by forcing B to choose between them. In the doctor case, B already suffers the life-threatening disease in the pre-proposal situation. A's proposal, then, expands B's choices. This is why we would normally consider the doctor's proposal noncoercive and B's acceptance of it as voluntary.

n37. Strictly speaking, many plea proposals have a double biconditional structure: 1) If you plead guilty, you get sentence z; 2) If you plead not guilty, you will not get sentence z; 3) If you plead not guilty, you will get sentence y; 4) If you plead guilty, you will not get sentence y. But this double biconditional structure does not alter our analysis of plea proposals that still, within this structure, may be coercive or noncoercive. On double biconditional structures, see Feinberg, supra note 30, at 216-19.

n38. Three studies have seen this point and applied the baseline framework to analyze the issue of plea bargaining and voluntariness. But none of them have connected this analysis to the question of prosecutorial adjudication. The first study is Alan Wertheimer, Freedom, Morality, Plea Bargaining, and the Supreme Court, 8 Philosophy and Public Affairs 203 (1979) [hereinafter Wertheimer, Freedom]. (For a shorter version of his analysis, see Plea Bargaining in his Coercion, supra note 29, at 122.) Wertheimer's analysis differs from this section's because his study aims at assessing whether the theory of freedom underlying the Supreme Court's plea-bargaining decisions is sound, not at providing his own theory of the morality of plea proposals. See id. at 234. In contrast, this section will sketch such a theory. The second study is Conrad G. Brunk, The Problem of Voluntariness and Coercion in the Negotiated Plea, 13 Law & Society 527 (1979). Brunk gives content to the baseline in a way that overlaps with the proposals of this section. But Brunk partially defines the baseline through a mental exercise about what system we would have were bargaining eliminated from practice, while this Article will give content to the baseline relying exclusively on what morality requires from plea proposals. In addition, Brunk does not analyze any of the other issues that the rest of this Article's sections will address. The third study is Mitchell N. Berman, Coercion without Baselines: Unconstitutional Conditions in Three Dimensions, 90 Geo. L.J. 1 (2001), which analyzes the question of plea bargains and voluntariness in a subsection that is part of a larger project on unconstitutional conditions. The main differences between Berman's analysis and that of this section are that Berman relies on a constitutional, rather than a moral, framework to determine when a proposal is coercive, and that he tries to avoid relying on the idea of the baseline for his analysis. Other legal literature has used and discussed this moral philosophy framework more widely but without concentrating on the case of plea bargaining. For instance, for a debate in the unconstitutional conditions literature, see, e.g., id.; Seth Kreimer, Allocational Sanctions: The Problem of Negative Rights in a Positive State, 132 U. Pa. L. Rev. 1293 (1984); Louis Michael Seidman, Reflections on Context and the Constitution, 73 Minn. L. Rev. 73 (1988); Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1413 (1989). For a debate in the literature on the paradox of blackmail, see, e.g., Mitchell N. Berman, The Evidentiary Theory of Blackmail: Taking Motives Seriously, 65 U. Chi. L. Rev. 795 (1998); George Fletcher, Blackmail: The Paradigmatic Crime, 141 U. Pa. L. Rev. 1617 (1993); Leo Katz, Blackmail and other Forms of Arm-Twisting, U. Pa. L. Rev. 1567 (1993); James Lindgren, Unraveling the Paradox of Blackmail, 84 Colum. L. Rev. 670 (1984); Robert Nozick, Anarchy, State, and Utopia 84-87 (1974); Richard A. Posner, Blackmail, Privacy, and Freedom of Contract, 141 U. Pa. L. Rev. 1817 (1993); Steven Shavell, An Economic Analysis of Threats and their Illegality: Blackmail, Extortion, and Robbery, 141 U. Pa. L. Rev. 1877 (1993). For an application of this framework to contracts and the duress doctrine, see, e.g., Fried, supra note 34, at 93-99.

n39. Aware of Conrad Brunk's article, Prof. Alschuler still rejects this baseline framework because he considers it unadministrable. Alschuler defines the baseline as the "normal scheme of things" and he considers this framework unadministrable because we can never know how things (e.g., sentences and charges) would be if plea bargaining did not exist. See Albert W. Alschuler, The Changing Plea Bargaining Debate, 69 Cal. L. Rev. 652, 687-88 (1981). Leaving aside whether we can address the problems of administrability that Alschuler mentions, this Article has explained that the baseline may also be defined according to the morally required scheme of things. This way of defining the baseline does not present the administrability problems that Alschuler refers to. It is also important to mention that Alschuler wrongly attributes to Church, supra note 7, the use of the baseline framework applied to the question of coercion and plea bargaining. In fact, Church does not use this framework and does not seem to be aware of the moral philosophy literature that this Article relies on.
n40. Alan Wertheimer has tried to show that the idea of the baseline is in fact implicit in the Supreme Court's decisions on plea bargaining. His main argument to support this point is the Supreme Court's obiter dictum in Brady that a guilty plea "must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes)." See Wertheimer, Freedom, supra note 38, at 227; and Wertheimer, Plea Bargaining, supra note 38, at 139 (quoting Brady v. United States, 397 U.S. 742, 750 (1970)). I have shown in this section why, despite this obiter dictum, one can reasonably read the Supreme Court's doctrine on plea bargaining as saying that as long the defendant has a choice, the defendant's decision is voluntary. But even if it were true that the Supreme Court has implicitly adopted a baseline framework in its plea bargaining cases, this would not challenge any of the arguments of this Article. It would only mean that the Supreme Court has adopted too narrow a baseline in its decisions on plea bargaining, rather than that it has not adopted a baseline framework altogether.

n41. As will be clearer later, this Article's analysis opines that the sentence differential in itself does not make plea proposals coercive and guilty pleas involuntary. This does not mean, though, that a sentence differential may not present other normative problems. For instance, broad sentencing differentials may have a negative distributive effect on innocent defendants and, when the guilty plea prong of the proposal is too lenient, it may be unfair to victims and society. This Article does not analyze these other problems because it is only interested in the question of involuntariness of guilty pleas that makes the prosecutor the sole adjudicator of criminal cases. For an analysis of how sentence differentials may specially affect innocent defendants, see Oren Bar-Gill & Oren Gazal Ayal, Plea Bargains Only for the Guilty, 49 J.L. & Econ. 353 (2006).

n42. Another possible argument that suggests all plea bargains are coercive relies on the inequality that exists in most cases between prosecution and defense. This inequality is real and comes from the facts that: 1) the prosecutor and the defendant exchange very different goods in plea dispositions - while the prosecutor puts at stake only some of her work time and available resources, the defendant has at stake his liberty and even his life; 2) while the prosecutor works with "economies of scale" - in the sense that she deals with many cases and may thus be less worried about whether this particular case goes to trial or is pleaded, the defendant does not have such an advantage; and 3) in most cases, the prosecution has more economic and human resources than the defense, including police assistance. This inequality is undeniable and, for several reasons that cannot be analyzed here, problematic. But inequality does not necessarily mean that the prosecutor's proposal is coercive and the defendant's guilty plea involuntary. It is still possible that the stronger party would not take advantage of its position. On this general point, see Feinberg, supra note 30, at 249-53. Thus, if the prosecutor's proposal does not violate any of the moral entitlements that the defendant has in the situation, we still can say that the prosecution and the defense are bilaterally adjudicating the case. This inequality is undeniable and, for several reasons that cannot be analyzed here, problematic. But inequality does not necessarily mean that the prosecutor's proposal is coercive and the defendant's guilty plea involuntary. It is still possible that the stronger party would not take advantage of its position. On this general point, see Feinberg, supra note 30, at 249-53. Thus, if the prosecutor's proposal does not violate any of the moral entitlements that the defendant has in the situation, we still can say that the prosecution and the defense are bilaterally adjudicating the case. This inequality does not mean that deep inequality may not be problematic for reasons unrelated to coercion. In fact, a minimum level of equality between prosecution and defense may be part of broader due process requirements regarding bilateral adjudication. But given that the goal of this Article is to identify in which cases the prosecutor is the only adjudicator of the case, it is beyond our scope to articulate the due process requirements of bilateral adjudication by prosecution and defense. For an analysis of why plea agreements, considered as contracts, are generally not coercive under the doctrine of unconscionability, see Scott & Stuntz, supra note 6, at 1921-24. For an argument of why they are, see Douglas G. Gifford, Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion, 1983 U. Ill. L. Rev. 37 (1983).

n43. See, e.g., United States v. Berger, 295 U.S. 78 (1935); A.B.A. Criminal Justice Section, Prosecution Function, Standard 3-1.2(c) (1993) (the duty of the prosecutor is to seek justice, not merely to convict).
n44. The identification of the three moral duties that prosecutors and the criminal justice system have towards defendants does not embrace any moral theory in particular. In other words, it is possible to justify these three moral duties from consequentialist and non-consequentialist as well as from relativist and non-relativist moral theories. This Article does not need to take a position on these broader debates in moral philosophy. However, at a minimum, this Article assumes that these three moral propositions are not simply the expression of the author's personal preferences, and that there are better and worse answers to questions of political morality.

n45. In Brady, 397 U.S. at 751, the Supreme Court expressly said that its holding did not make reference to cases in which "the prosecutor threatened prosecution on a charge not justified by the evidence." In this sense, the Supreme Court has not actually ruled out the potential coerciveness of plea proposals based on this first kind of improper prosecutorial conduct. This Article's first requirement establishes that the prosecutor should not make a plea proposal where no reasonable jury could find the defendant guilty beyond a reasonable doubt. But the requirement does not establish that the prosecutor himself must be convinced of the defendant's guilt beyond a reasonable doubt. It is possible to think of convictable cases in which the prosecutor is not convinced of the defendant's guilt beyond a reasonable doubt but where the prosecutor still decides to subject the case to the jury given that the latter is the adjudicator of criminal cases according to the U.S. Constitution. In this kind of situation, the individual prosecutor should have the choice but not the duty to take the case to trial. A.B.A. Standards for Criminal Justice §3-3.9(c) (3d ed. 1993), says that a "prosecutor should not be compelled by his or her supervisor to prosecute a case in which he or she has a reasonable doubt about the guilt of the accused."

n46. U.S. Const. amend. VI. Using his mid-level trial distortion theory, Ronald F. Wright reaches a similar conclusion but based on the higher epistemological reliability of trials over plea dispositions. See Wright, supra note 2, at 106-07.

n47. By using the potential trial verdict to define this first requirement, this Article embraces the notion of legal guilt and assumes that the proper default way to determine guilt in the United States is by following the rules that the legal system establishes to determine guilt at trial (e.g., right to confrontation and cross-examination, rules of evidence, exclusionary rule, the beyond-a-reasonable-doubt standard, and so on). In contrast, the notion of factual guilt only requires that one thinks that the defendant's conduct fits into the substantive criminal law's definition of the offense regardless of whether the defendant could be found guilty were the trial rules followed. So, for instance, according to the notion of factual guilt, it would not be necessary that the prosecutor makes his assessment based on either admissible evidence or the beyond a reasonable doubt standard. On the differences between factual and legal guilt, see Arenella, Reforming, supra note 2, at 476-77; Alschuler, supra note 39, at 703-13. Embracing the notion of legal guilt requires dealing with hard hypotheticals that I cannot analyze in detail here. A first hypothetical involves a case with a very serious offense and in which the prosecutor is convinced beyond a reasonable doubt of the defendant's guilt. But the evidence is insufficient to pass the directed acquittal threshold because certain evidence has been obtained through a relatively minor violation of the Fourth Amendment. May the prosecutor make a plea proposal in this situation? A second hypothetical also involves a very serious offense and the prosecutor is again convinced beyond a reasonable doubt of the defendant's guilt. But the inculpatory witness dies before trial. These two hypotheticals are indeed hard cases and it is possible to think of other hypotheticals that highlight similar questions. However, the way to deal with these types of hypotheticals - when necessary - is by changing the trial rules that regulate these issues rather than creating a subterfuge to avoid the existing trial rules through plea bargaining. In other words, some of these kinds of hypotheticals may show the need to change some of our existing trial rules. For instance, it is precisely because of the problems that the first hypothetical highlights that Canada has a non-automatic exclusionary rule that allows for the consideration of the seriousness of the offense and the seriousness of the constitutional violation in deciding whether evidence obtained in violation of constitutional rights should be excluded. See, e.g., James Stribopoulos, Lessons from the Pupil: A Canadian Solution to the American Exclusionary Rule Debate, 22 B.C. Int'l & Comp. L. Rev. 77 (1999).

n48. A.B.A. Standards Relating to the Administration of Criminal Justice §14-3.1(h) (3d ed. 1999). The commentary of this standard says: "it would be improper for a prosecutor to seek to induce a plea of guilty by charging or threatening to charge the defendant with a crime not supported by facts the prosecutor believes to be provable at trial. Standard 14-3.1(h) implements these principles by barring the prosecutor from bringing or threatening charges "where admissible evidence does not exist to support' those charges or where he or she "has no good
The Principles of Federal Prosecution establish somewhat similar requirements to those of the A.B.A. standards. See The Principles of Federal Prosecution, 9-27.420, in U.S. Dept. of Justice, United States Attorneys' Manual (even if prosecutor may consider the likelihood of conviction in order to enter a plea agreement, it is obviously improper for the prosecutor to attempt to dispose of a case by means of a plea agreement if she is not satisfied that the legal standards for guilt are met). See also id. at 9-27.220 (the attorney for the government should commence or recommend Federal prosecution if she believes that the person's conduct constitutes a Federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction). See also id. at 9-27.220 (the attorney for the government should not include in an information or recommend in an indictment charges that she cannot reasonably expect to prove beyond a reasonable doubt by legally sufficient evidence at trial).

n49. The requirement that the prosecutor have enough evidence before making her plea proposal addresses one of the arguments that critics have articulated to maintain that plea bargaining is always coercive. In the remaining moral philosophical analysis exclusively on plea bargaining, Kipnis said that the prosecutor is like the gunman and not the doctor because the prosecutor, like the gunman, would bring upon the defendant the hard choice between pleading guilty or going to trial. See Kipnis, supra note 26, at 100. But if there is enough evidence to convict the defendant at trial, one can argue that it is the evidence - not the prosecutor - that brought the hard choice upon the defendant. Of course, the evidence does not come out by itself. The police and the prosecutor have to gather the evidence and construct the case. See Nicola Lacey, Introduction: Making Sense of Criminal Justice, in Criminal Justice 1, 13 (Nicola Lacey ed., 1994). But, as long as the police and the prosecutor conduct their jobs properly, the existence of enough evidence to convict at trial still creates a relevant difference between the gunman and the prosecutor and explains why not all plea proposals are coercive. As not all plea proposals are coercive, it is also necessary to assume that the prosecutor has a moral right to prosecute the defendant. On this last point, see Alan Wertheimer, The Prosecutor and the Gunman, 89 Ethics 269 (1979).

n50. If the defendant decides to plead guilty after the prosecutor files the charges with only probable cause but before the prosecutor threatens to or makes the decision to take the case to trial, the defendant's guilty plea is not coerced. Given that the prosecutor may continue her investigation after receiving the case, the decision to file charges is different from the decision to take the case to trial. Thus, with the mere filing of the charges, the defendant has not yet been told "plead guilty or face this unfair trial." This assumes, of course, that the defense attorney has properly informed the defendant about the provisional character of the charging decision.

n51. In order for the plea proposal to be coercive, it is not necessary that the prosecutor be aware that the case is not convictable at trial. This last requirement would be necessary if we were interested in the question of when the prosecutor coerces the defendant. But our question is broader. This Article analyzes under which situations coercion is being applied to the defendant. To show why this situation still would be coercive, assume that in the case of the gunman, A is a sleepwalker and, in his sleep, he tells B "your money or your life." If B then gives his money to A, we would still consider B's decision to give his money away as coerced and involuntary.

n52. Of course, when defendants know about the weakness of the case, prosecutors have less leverage to put pressure on defendants. But this does not make the prosecutor's plea proposal non-coercive and the defendant's guilty plea voluntary. To illustrate this point, let's assume that in the case of the gunman, instead of having a gun, A has a small knife but still tells B "your money or your life." For sure, with a small knife instead of a gun, A's proposal may sound less threatening to B. But if B still decides to turn his money over to A, we would normally consider B's decision involuntary. Notice that the proposal may still be coercive even if A uses his bare hands to threaten B. In addition, we would still consider this proposal coercive, even if A lessened his demands - e.g., by demanding only B's hat instead of his money - because A is aware that he is exercising less pressure on B with a small knife than with a gun. Similarly, a prosecutor making a better proposal to a defendant because a case is weak does not alter the coercive character of the proposal.
n53. If the evidence is so weak that it is not credible that the prosecutor will take the case to trial, the defendant is not being coerced to plead guilty. See Feinberg, supra note 30, at 198. But it is possible to imagine cases in which the evidence is not strong enough to pass the directed acquittal standard but still not weak enough that the trial could not end up - wrongly - in a conviction.

n54. See Easterbrook, Criminal Justice as a Market System, supra note 6, at 320 ("From a market perspective, acceptance of such pleas is no mystery. Sometimes the evidence may point to guilt despite the defendant's factual innocence. It would do defendants no favor to prevent them from striking the best deals they could in such sorry circumstances. And if the probability of the defendant's guilt is indeed low even on the evidence that would be placed before the court - for example, if only one defendant in twenty would be convicted on such evidence - the sentencing differential will be correspondingly steep.").

n55. This Article refers to a "fair sentence" as a concept, without explicitly embracing any conception about it. The concept "fair sentence" means a sentence adequate to the offense and the offender. Embracing a conception would mean embracing a certain theory of punishment to apply such a concept. For instance, from the perspective of deterrence, a sentence adequate to the offense and the offender would mean one that maximizes the disuasive effect of punishment; from the perspective of retribution, it would mean a sentence that would match the offender's wrongdoing. On the distinction between a concept and a conception, see John Rawls, A Theory of Justice 5 (revised ed. 1999); Ronald Dworkin, Taking Rights Seriously 134-35 (1977); Ronald Dworkin, Law's Empire 68-72 (1986). See also H.L. Hart, The Concept of Law 160, 246 (2d ed. with postscript, Penelope A. Bulloch & Joseph Raz eds., 1994) (making a distinction between the meaning of a concept and the criteria for its application that he considers "the same distinction between a concept and different conceptions of a concept which figures so prominently in Dworkin's later work"); Joseph Raz, Two Views of the Nature of the Theory of Law, 4 Legal Theory 249, 269-71 (1998) (analyzing the relative independence of interlinked concepts).

n56. In their contract law analysis on whether plea bargaining may constitute duress, Scott & Stuntz, supra note 6, at 1909, 1914, argue that the prosecutor is entitled to seek the highest sentence. This is why they think, similarly to the courts, that most plea bargains are voluntary. However, they do not explain why the prosecutor, as an officer who must seek justice, would be entitled to seek the highest sentence. Their conclusion might derive from their theoretical framework. Since they analyze the issue from the perspectives of contract theory and law and economics, they seem to assume that the prosecutor is simply a party who seeks to maximize penalties and that the defendant is not morally entitled to expect different conduct from the prosecutor. If we conceive the prosecutor as an officer who must seek justice, as the courts and the rules of ethics do, it becomes clear why defendants are morally entitled to expect that prosecutors seek a fair sentence in the case, not the maximum one.

n57. To see that this would not make any difference in our analysis, consider the following variation of the gunman case. If A had an accomplice C who actually holds the gun, and A tells B "your money or C will shoot you," we would not consider B's decision to give his money to A more voluntary than in the case of a single gunman. In the case of prosecutorial adjudication, if the legislature threatens the defendant with trial sentences that are disproportionate for the case, the defendant's guilty plea would be involuntary, and the prosecutor would still be the de facto adjudicator of the case by deciding that this particular defendant has to face this unfair choice.

n58. Notice that neither the prosecutor nor the defendant needs to believe that the charge is a stretch or that the conduct in question is socially innocuous for the plea proposal to be coercive. In order to show this point, let's assume that in the case of the gunman, neither A nor B believes in private property or that the State and society should have any role in regulating conflicts among individuals. If A tells B "your money or your life", we can still consider this proposal coercive from a neutral perspective. For instance, we can still consider this situation a robbery. This point applies to the three baseline requirements that this Article has articulated (weak case, harsh sentence and overcharging).
n59. See, e.g., Scott & Stuntz, supra note 6, at 1920-21, 1961-66 (only prosecutor's manipulation of post-trial sentences may corrupt the voluntariness of the plea agreement). These authors consider the problem to be very limited because it would stem only from mandatory sentences that attach to overbroad criminal statutes.

n60. See Stuntz, supra note 20.

n61. “I observe, at this point, that five years in prison for the offense charged hardly could be characterized as a generous offer... . It seems to me that the question to be asked under the circumstances is whether the prosecutor reasonably might have charged respondent under the Habitual Criminal Act in the first place... . I think it may be inferred that the prosecutor himself deemed it unreasonable and not in the public interest to put this defendant in jeopardy of a sentence of life imprisonment.” Bordenkircher v. Hayes, 434 U.S. 357, 369-371 (Powell, J., dissenting) (1978).

n62. Bordenkircher, 434 U.S. at 357.

n63. For instance, a brief armed robbery may also formally fit into the offense of kidnapping if the robber points a gun at his victim and tells him to back up. But it is arguably a stretch to charge both armed robbery and kidnapping in this kind of situation. For a description of such a practice by prosecutors in California in the 60s, see Albert W. Alschuler, The Prosecutor's Role in Plea Bargaining, 36 U. Chi. L. Rev. 50, 88 (1968). The Supreme Court has never explicitly sanctioned this practice. See Bordenkircher v. Hayes, 434 U.S. 357, 368 (Blackmun, J., dissenting) (1978).

n64. For instance, a number of state jurisdictions criminalize adultery, or committing any “unnatural and lascivious act with another person,” or taking “the sexual organ of another in the person's mouth.” See, e.g., Fla. Stat. §800.02 (2006); Md. Code Ann., [sodomy] §554 (2006). These offenses are rarely enforced and they are arguably socially innocuous. Another typical example is that federal law defines mail and wire fraud in such a broad way that conduct that should not be criminally prosecuted formally fits into the offense's description. On this issue, see Stuntz, The Pathological Politics, supra note 2; William J. Stuntz, The Political Constitution of Criminal Justice, 119 Harv. L. Rev. 780, 802-07 (2006) [hereinafter Stuntz, The Political Constitution]. Like with “harshness,” there are different conceptions that give content to the concept “socially innocuous conduct.” But, like in the previous case, this Article does not need to advance any conception in particular to develop its argument. For more examples of this problem, see infra Subsection V.C.

n65. See supra note 57 and accompanying text.
n66. See William J. Stuntz, The Pathological Politics, supra note 2, at 549. As we will see in more detail later, a similar argument applies to the question of harshness of punishment and the final charging decision. See infra notes 234-36 and accompanying text.

n67. For a proposal to increase the power of prosecutors in the interpretation of federal criminal law, see Dan M. Kahan, Is Chevron Relevant to Federal Criminal Law?, 110 Harv. L. Rev. 469 (1996).

n68. Some ethical rules assume that the prosecutor has to make such normative assessments. See, e.g., A.B.A. Standards for Criminal Justice, Prosecution Function, Standard 3-3.9(b) (3d ed. 1993): "The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his or her discretion are: ... (ii) the extent of the harm caused by the offense; (iii) the disproportion of the authorized punishment in relation to the particular offense or the offender ... " Standard 3-3.9(f) adds: "The prosecutor should not bring or seek charges greater in number or degree than are necessary to fairly reflect the gravity of the offense."

n69. Notice that I have referred to the moral, not the legal, baseline that defendants are entitled to. The reason for this is that, as I have shown, courts have not approached the question of a plea proposal's coerciveness correctly. It is thus necessary to develop a baseline that is independent from the courts in order to make a better appraisal of the issue. As I have shown, though, some of the components of the moral baseline are already incorporated, in one way or another, by the legal system.

n70. If the coercive proposal does not affect the defendant's decision to plead guilty (e.g., because the defendant wants to plead guilty out of remorse and not because of the proposal), the prosecutor's proposal would still be coercive but the guilty plea would be voluntary. The defendant's guilty plea would also be voluntary if the defendant pled guilty to avoid not the consequence which the prosecutor threatened, but a further consequence for the prosecutor. For instance, unbeknown to the prosecutor, the defendant cares about the prosecutor's well-being; and the defendant thinks that if he does not plead guilty, the prosecutor's colleagues will have a very bad opinion about the prosecutor. If the defendant pleads guilty to avoid not trial but an unfavorable opinion of the prosecutor by her colleagues, the prosecutor's plea proposal would still be coercive, but the defendant's guilty plea would be voluntary. On these points, see Nozick, supra note 29, at 17. Notice, though, that assistance by a defense attorney does not make a guilty plea voluntary as long as a prosecutor's coercive plea proposal is part of the reason the defendant pleads guilty.

n71. Even if the prosecutor's plea proposal does not worsen the baseline, there may still be cases in which a defendant's guilty plea is involuntary because of the intrinsically intimidating nature of criminal proceedings. This kind of argument is stronger in the context of police house interrogations, but it may also apply to other court proceedings, especially regarding vulnerable defendants. For example, defendants with low intelligence or depression, or emotionally disturbed defendants, or young defendants with no experience with the law may be led to a mood of acquiescence and resignation to whatever they are told to do. These kinds of cases are beyond the scope of this Article. But a larger project on the voluntariness of guilty pleas should include them. For an application of the baseline framework to analyze the question of voluntariness of confessions in the context of police house interrogations, see Wertheimer, supra note 29.
n72. This Article uses a factual and minimum notion of adjudication. The adjudicator is the one who de facto decides who is criminally innocent and guilty, and in the case of guilt, which offense applies to the case. Adjudication as used in this Article does not suppose that the adjudicator makes a decision after a hearing or any of the basic rights that we may normatively associate with fair adjudication. For more on this issue, see infra Section IV.

n73. If the prosecutor's plea proposal is not coercive, the prosecutor and the defendant are bilaterally adjudicating the case because we can ascribe responsibility to both of them in the resolution of the case. This does not mean, though, that there are no additional normative issues to analyze regarding this type of adjudication. However, these normative issues are beyond the scope of this Article, which concentrates on unilateral adjudication by the prosecutor.

n74. For instance, if the defendant is in pre-trial detention unfairly, a prosecutor's plea proposal which tells him to either plead guilty or remain in unfair pre-trial detention may be coercive. A larger project should also include these other requirements as part of the moral baseline and present reform proposals to address the problems that these additional requirements highlight.

n75. See infra notes 78-93 and accompanying text.

n76. It is impossible to determine exactly how many plea proposals are currently coercive or noncoercive in the criminal justice system. Part of the difficulty is that we would need many more empirical studies to make such a determination. In addition, it would be necessary for those empirical studies to make explicit what their notions of "weak case," "harsh sentence," and "overcharging" are in a way that makes their results comparable to each other. Finally, in order to determine how many guilty pleas are voluntary, it would also be necessary to empirically study in how many cases defendants plead guilty in part because of the prosecutor's coercive plea proposal.

n77. Cass Sunstein's notion of incompletely theorized agreements explains why this Article may advance formal, not substantive, definitions of harshness and socially innocuous conduct, and yet state that, in fact, many prosecutors frequently threaten with unfair sentences or overcharge. According to the notion of incompletely theorized agreements, people may agree on issues, even when they may disagree on the general theories behind their positions. See Cass R. Sunstein, Incompletely Theorized Agreements, 108 Harv. L. Rev. 1733 (1995). This notion explains, for instance, why different readers may agree with this Article's claim that sentences in the U.S. criminal justice system have become too harsh, even if they do not all agree on general theories about punishment. Similarly, we may agree that there is a problem with overcharging and that this problem is present in U.S. criminal procedure, even if we do not all agree on which theory we should use to apply the concept "socially innocuous conduct."

n78. Alschuler, supra note 63, at 58-64. These cases seem to include those in which no reasonable jury could find the defendant guilty beyond a reasonable doubt, even if Alschuler does not frame the question this way.
In order to have meaningful and comparable results on the extension of this phenomenon, future empirical studies should carry out their investigation with a clear definition of what a "weak case" means. In other words, they should distinguish between weak cases from the perspectives of factual and legal guilt (on this distinction, see supra note 47); and should define what "weak" means in terms of chances of conviction at trial (e.g., 50% or less) or the directed acquittal standard. One way to study the extent of the practice would be to access prosecutorial files and determine what evidence prosecutors have available at the moment they make their plea proposals. Another alternative would be to determine how many cases or charges prosecutors dismiss after receiving a negative answer from defendants to their final plea proposals on the assumption that prosecutors will normally not take to trial cases with a high probability of acquittal. The latter would also require that researchers find a way to discard other hypotheses different from a case's weakness that can explain why the prosecutor dismisses the case or charges after the defendant's rejection of the plea proposal.

See, e.g., Dean J. Champion, Private Counsels and Public Defenders: A Look at Weak Cases, Prior Records, and Leniency in Plea Bargaining, 17 J. Crim. Just. 253, 257 (1989); David Lynch, The Impropriety of Plea Agreements: A Tale of Two Counties, 19 Law & Soc. Inquiry 115, 132 (1994) (describing that many prosecutors offer lenient punishments to assure the entry of guilty pleas in those weak cases that probably would and should be lost at trial and in which the reasonable doubt standard would necessarily come into play); Wright, supra note 2 (showing that guilty pleas have increased at the expense of trial acquittals since the 1980s and showing through statistical analysis that this tendency reflects prosecutors' larger use of plea bargaining to deal with weak cases).


See Frank Bowman, The Year of Jubilee ... or Maybe Not: Some Preliminary Observations about the Operation of the Federal Sentencing System after Booker, 43 Hous. L. Rev. 279, 322-23 (2006) ("It is fair to conclude from the experience of the Clinton years and the post-Booker year of 2005, that, under the existing federal guidelines system, whenever the amount of sentencing discretion available to judges and prosecutors increases, the proportion of sentences below the guideline range increases and the severity of the sentences the system would otherwise generate moderates. What practical lesson flows from this conclusion? The simplest lesson is that we have a federal sentencing system with a severity that, at least for some common offenses, is pegged higher than the day-to-day judgments of the legal professionals who operate it will support.").


Id. at 57-58.
n85. Id. at 45-46. However, Roper v. Simmons, 543 U.S. 551 (2005) goes in the opposite direction.

n86. For a description of the political process that led to the adoption of such harsh penalties for crack cocaine, see David Sklansky, Cocaine, Race, and Equal Protection, 47 Stan. L. Rev. 1283 (1995); Michael H. Tonry, Malign Neglect (1995).

n87. See, e.g., Whitman, supra note 33, at 70-71 (pointing out that while the average time served in France was 8 months in 1999, the average time served in 1996 in U.S. State jurisdictions was 53 months for violent offenses and 28 months for all offenses; and 91 and 67 months respectively in the U.S. federal system). Whitman points out, though, that these statistics are not directly comparable because many nonviolent offenders who serve no time at all in France are routinely imprisoned in the U.S.

n88. Id. at 49-56 (describing the move in sentencing in the U.S. from individualization to formal equality).

n89. During the 1990s, California, George, Indiana, Maryland, New Jersey, Tennessee, Virginia, Washington and Wisconsin passed mandatory minimum statutes requiring life without parole for repeated criminal offenses. See David Bjerk, Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion Under Mandatory Minimum Sentencing, 48 J.L. & Econ. 591 (2005).

n90. For an explanation of why the U.S. has followed a different trajectory than Europe regarding the death penalty in recent years, see Carol S. Steiker, Capital Punishment and American Exceptionalism, 81 Or. L. Rev. 97 (2002).

n91. See supra note 87.

n92. See, e.g., Alschuler, supra note 63, at 85-105; Stuntz, The Pathological Politics, supra note 2; Stuntz, The Political Constitution, supra note 64. We also need more empirical studies to determine the extent of this phenomenon.

n93. See supra note 64 and infra note 253, and accompanying text.
n94. The three requirements of the baseline that this section has explored may be reduced to a single principle: Defendants are entitled to freedom from prosecutorial plea proposals that include unfair sentences. Unfair sentences - including trial sentences - include sentencing a person when there is no evidence to even convict her; sentencing a person to a sentence that is not adequate for her case - even if the person has been properly convicted; sentencing a person after convicting her for relatively innocuous behavior; or sentencing a person after convicting her for an offense that does not adequately describe her behavior - even if it formally fits into the statute.

n95. In many cases, the police force is a co-adjudicator together with the prosecutor given the important role that the police play in building criminal cases. There are also situations in which it is the police who actually adjudicate the case by themselves, as when the police fabricate evidence against a defendant and the prosecutor is unaware of this fact. Given that this Article's goal is to analyze the phenomenon of prosecutorial adjudication, this Article concentrates on the de facto adjudicatory role of the prosecutor. But much of its analysis applies to the phenomenon of the executive branch's adjudication more broadly, including here prosecutors and police.

n96. The reference in this section and in the table to "two types of plea bargains" does not intend to convey the idea that these are the only two types of plea bargaining in U.S. criminal procedure. For instance, this table and the analysis of this section have assumed a passive role for the judge in plea bargains. But if the judge has a coercively active role in plea exchanges, as she may have in a number of U.S. jurisdictions, we are before another type of plea bargaining. Given that the goal of this Article is to explain the features of the Prosecutorial Adjudication System as a system of adjudication, the analysis of these other types of plea bargaining is beyond our scope. For conceptualizations of the different ways in which judges may have an active role in plea bargains, see Maximo Langer, The Rise of Managerial Judging in International Criminal Law, 53 Am. J. Comp. L. 835 (2005) [hereinafter Langer, Managerial Judging]; Jenia Iontcheva Turner, Judicial Participation in Plea Negotiations: A Comparative View, 54 Am. J. Comp. L. 199 (2006).

n97. See Abraham S. Blumberg, Criminal Justice (2d ed. 1979).

n98. See Maximo Langer, From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure, 45 Harv. Int'l L.J. 1 (2004). I use the expression "adversarial system" in a descriptive, not a normative way. In this sense, saying that we can read plea bargaining as a realization of the adversarial system does not involve a normative evaluation - positive or negative - of bilateral plea bargaining.


n102. See, e.g., A.B.A. Criminal Justice Section, Standard 3-3.1(a) (1993): “A prosecutor ordinarily relies on police and other investigative agencies for investigation of alleged criminal acts, but the prosecutor has an affirmative responsibility to investigate suspected illegal activity when it is not adequately dealt with by other agencies.”

n103. See Mirjan Damaska, The Faces of Justice and State Authority 57-65 (1986) (explaining the reasons for this informality and lack of regulation).


n105. Id.

n106. See supra note 8.


n108. On this issue, see infra Subsection V.B.
n109. In fact, the pre-trial phase is informal and unregulated because the adversarial trial is supposed to be the adjudicatory phase that, as such, is subjected to thorough regulation. And if the case gets adjudicated through a guilty plea, informality and lack of regulation are not problematic either. Since the adversarial system emphasizes party autonomy, it is acceptable for the prosecution and the defense to reach an agreement about their dispute and for the defendant to waive his right to more formal and regulated proceedings.

n110. These adjudicatory decisions by prosecutors in the Prosecutorial Adjudication System are less final than formal adjudicatory decisions. Unlike the trial acquittal by a jury or judge, prosecutors’ dismissals may not foreclose the possibility of bringing the same charges again in the future. See, e.g., Crist v. Bretz, 437 U.S. 28 (1978) (in jury trials, jeopardy attaches when the jury is empanelled and sworn); Serfass v. United States, 420 U.S. 377 (1975) (in bench trials, jeopardy attaches when the court begins hearing evidence). Unlike the trial convictions by a jury or judge, the prosecutor's final plea proposal still requires the defendant to plead guilty and the judge to accept the guilty plea before the defendant is formally convicted of the offense. Also, unlike trial verdicts, in the plea exchanges and dispositions that compose the Prosecutorial Adjudication System there is no pre-determined temporal point at which the adjudicator has to make her final decision about the charges. Thus, the prosecutor may decide at any point between receiving the case from the police and the process of the trial. But even if the prosecutor's adjudicatory decisions are less formal and final than formal adjudicatory decisions, the prosecutor is still the de facto adjudicator for these cases. With her dismissal, the prosecutor decides that a defendant is not guilty and gives what it is usually a final disposition to the case. Similarly, given that in the set of plea exchanges and dispositions that compose the Prosecutorial Adjudication System the defendant's guilty plea is involuntary and the judge's review of the guilty plea is usually cursory, the prosecutor's final charging decision unilaterally decides which defendants are guilty and for which offenses. And even if prosecutors may make these decisions at different points in time, prosecutors still decide who is innocent and who is guilty, and of which offense.

n111. On this idea, see Lynch, supra note 2 at 2135 (“In this system, the formal adversarial jury trial serves as a kind of judicial review, in which a defendant who is not content with the administrative adjudication by the prosecutor has a right to de novo review of the decision in another forum.”).

n112. Though there are different definitions of "trial de novo appeal," this article refers to the system in which the defendant may ask for a new trial after having been convicted in the first one. In the new trial, the defendant is presumed innocent, evidence has to be presented from scratch and the defendant may be given a higher sentence than that set in the first trial. Since many defendants do not challenge the verdict of the first trial, one of the justifications for this system is efficiency. The federal system does not allow this kind of appeal for criminal cases. But several state jurisdictions have. For instance, Massachusetts presented such a system until January 1994 for certain offenses. See Peter W. Agnes, Jr., Some Observations and Suggestions regarding the Settlement Activities of Massachusetts Trial Judges, 31 Suffolk U. L. Rev. 263, 301-02 (1997). A person accused of this kind of crime was tried in the first instance without a jury. But if convicted, the defendant could take the case to the second tier in which he had a right to a trial de novo by jury. The Supreme Court upheld such a "two-tier" system in Massachusetts in Ludwig v. Massachusetts, 427 U.S. 618 (1976).

n113. In fact, once a defendant is charged with an offense, he may have a much higher chance of being "acquitted" by a prosecutor's dismissal than after either a bench or jury trial. For instance, in the federal system, 89.3% of charged defendants are convicted through either guilty plea or trial; 9.8% are "acquitted" through a dismissal; and less than 1% are acquitted at trial. See Compendium of Federal Justice Statistics 2002, Table 4.2, Disposition of criminal cases terminating from October 1, 2001-September 30, 2002, by offense, available at http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs0204.pdf.

n114. On this dichotomy and the limits that it presents, see, e.g., John D. Jackson, The Effects of Human Rights on Criminal Evidentiary
n115. Lynch, supra note 2, at 2120 (for most defendants the primary adjudication they receive is, in fact, an administrative decision by a state functionary, the prosecutor, who acts essentially in an inquisitorial mode); 2121 (to most defendants plea bargaining looks far more like what American lawyers would call an inquisitorial system than like the idealized model of adversary justice described in textbooks); 2125 (referring to the "inquisitorial process of the prosecutor"); 2129 (characterizing the prosecutorial process as inquisitorial and administrative); 2135 (in negotiated dispositions, the prosecutor sits as an inquisitor seeking the "correct" outcome). See also Geraldine Szott Moohr, Prosecutorial Power in an Adversarial System: Lessons from Current White Collar Cases and the Inquisitorial Model, 8 Buff. Crim. L. Rev. 165 (2004) (agreeing basically with Judge Lynch's assessment but also emphasizing a number of institutional and procedural differences between the federal system in the United States and the French legal system).

n116. Lynch considers the American system to be a hybrid because it presents an inquisitorial/administrative system of plea dispositions by the prosecutor and an adversarial trial. See Lynch, supra note 2, at 2145. My point is that the very system of plea dispositions by the sole prosecutor (the Prosecutorial Adjudication System) is not inquisitorial but a hybrid between adversarial and inquisitorial conceptions of the criminal process, complete with other features that do not fit into either of these two classic models.


n118. In addition, in many cases the investigation is de facto unitary because defense attorneys fail to conduct an adequate investigation, or any investigation. The Bureau of Justice Assistance observes, "Many defenders who face excessive caseloads make decisions analogous to those made by physicians in a M.A.S.H. unit... Too often in these cases, early investigation and regular client communication fall by the wayside." U.S. Dep't of Justice, Dept. of Justice Programs, Bureau of Justice Assistance, Keeping Defender Workloads Manageable 4 (2001), available at http://www.ncjrs.gov/pdffiles1/bja/185632.pdf. A study by the National Legal Aid and Defender Association in 1973 found that 60 percent of responding defenders did not have full time staff investigators, and 83 percent had no investigators at all. Joe Margulies, Criminal Law: Resource Deprivation and the Right to Counsel, 80 J. Crim. L. & Criminology 673, 680 (1989) (citing National Legal Aid and Defender Association, The Other Face of Justice (1973)). Commentators today still express concern over inadequate investigations by defense counsel. See, e.g., Jenny Roberts, Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases, 31 Fordham Urb. L.J. 1097 (2004).

n119. It is because of this feature that Judge Lynch considers this prosecutorial system of adjudication as inquisitorial. See Lynch, supra note 2, at 2124 ("If we put aside for the moment our conception of the prosecutor as one side of an anticipated adversarial courtroom procedure, and focus on the function of the prosecutor at the investigative stage, it is easy enough to re-imagine the prosecutor as the agent of an inquisitorial state process for determining the facts and assessing the culpability of persons who are or might be accused of crime.").

n121. William T. Pizzi, Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform, 54 Ohio St. L.J. 1325 (1993). The courts and prosecutorial ethical rules emphasize that the prosecutor is an officer who must seek justice. And, no doubt, for most U.S. prosecutors this is a defining feature of their roles. But, at the same time, the criminal justice system and offices of the prosecutor create incentives for the prosecutor to behave as a party with an interest in winning the case. For instance, the number of convictions that prosecutors get are, in many offices of the prosecutor, an important factor in determining promotions and the size of their budgets. And, in most states, the head of the office of the prosecutor is popularly elected, in many cases by running "tough-on-crime" political campaigns. See, e.g., Daniel S. Medwed, The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence, 84 B.U. L. Rev. 125 (2004).

n122. Sometimes they do, though, as Judge Lynch's experience as a former prosecutor shows.

n123. See Dama<ka s>ka, supra 103, at 16-70.

n124. In the federal system, this is a nationwide bureaucracy of legal professionals who are appointed based on a combination of technical knowledge and political background. In most state jurisdictions, though, the head of the office is popularly elected; she chooses the other members of the office based on a combination of technical knowledge and political background; and the size of the DA offices tends to be small. See, e.g., Richman, supra note 2.

n125. See Lynch, supra note 2, at 2124.

n126. Inquisitorial judges are part of a hierarchically organized bureaucracy. But in contemporary civil law jurisdictions they may not receive orders from higher courts about how they are supposed to decide individual cases until they make a decision on them and only if the prosecutor or the defense appeals their decision. On the court structure and jurisdiction in Germany, see, e.g., Erhard Blankenburg, Changes in Political Regimes and Continuity of the Rule of Law in Germany, in Courts, Law & Politics in Comparative Perspective 249, 256-66 (Herbert Jacob et al. eds., 1996). This does not mean that there have not been problems of internal judicial independence from lower to upper courts in civil law countries. An example of these problems was the system of "cooptation" that Colombia had until the beginning of the 1990s under which the Supreme Court appointed its own members and lower judges.

n127. Recall that factual guilt refers to the defendant's conduct fitting into the substantive criminal law definition of the offense. See supra note 47. So, for instance, if A intentionally shoots B to death, the factual truth is not only that A has intentionally shot B to death but also that A has committed a murder. Legal guilt refers to the specific rules that the criminal process has to follow - i.e., rules of evidence, rules of procedure, etc. - in order to determine what happened. See supra note 47. Since the inquisitorial system conceives procedure as an official
investigation and since its adjudicators are legal professionals who are supposed to apply technical rules in their decisions, the inquisitorial system emphasizes determining the truth about what happened - instead of, for instance, applying notions of substantive fairness to decide the case. In addition, since the inquisitorial system has fewer evidentiary barriers to conviction than the adversarial system, it aims at having a narrower gap between factual and legal guilt. See Mirjan Damaska, Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study, 121 U. Pa. L. Rev. 506 (1973); Mirjan Damaska, Evidence Law Adrift (1997) [hereinafter Damaska, Evidence].

In the adversarial system, one of the goals of procedure is determining the truth - i.e., whether the defendant committed the alleged offense. But the adversarial system's conception of truth is more relative, and truth is less important, than in the inquisitorial system. The adversarial system conceives procedure as a dispute between two parties. So, if the parties reach an agreement about a factual or legal issue - e.g., through stipulations or plea bargaining - what actually happened is not that important. The rationale for this is an adversarial conception of procedural and substantive fairness. If the equal parties reach an agreement about an issue, it is not the adjudicators' business to interfere with it. So, for instance, if A intentionally shoots B, the adversarial system may accept B's guilty plea to involuntary manslaughter - even if the death was intentionally, not negligently, caused - as long as the prosecution and the defense agree that this is a fair disposition of the case. In addition, since trial decision-makers are lay people, factual guilt - including, again, the matching of what actually happened with the specific offense that describes the defendant's conduct - also becomes less important in this system because the adjudicators tend to introduce their lay notions of substantive fairness whenever they disagree with the legislative definition of specific criminal offenses or with the criminalization of certain conduct. Finally, given the emphasis of the adversarial system on procedural fairness even at the price of truth, the gap between factual and legal guilt is allowed to be larger than in the inquisitorial one. See William Pizzi, Trials without Truth (1999).

n128. See, e.g., Code de procedure penale [C. PR. PEN.] [Criminal procedure code] art. 81 (France); §168, 168a, and 168b StPO (Germany).

n129. For a normative defense of the prosecutor as the sole adjudicator that goes in this direction, see Lynch, supra note 2, at 2124 ("It is easy enough to re-imagine the prosecutor as the agent of an inquisitorial state process for determining the facts and assessing the culpability of persons who are or might be accused of crime. Such a process may not be preferable to the traditional common law system: it may not even be acceptably fair. But it is hardly self-evident that a system in which a responsible government official is assigned to investigate allegations of crime, by investigating means strictly limited to protect the rights of suspects, and then to make decisions based on the results of the investigation after hearing evidence and arguments presented by the suspect, is beyond the pale of civilization. Indeed, that is not so very different from the model of criminal procedure used in most of the world...."); 2129 (describing that the prosecutorial process, at least when it operates at its best, "cannot be dismissed as arbitrary. It is not, however, an adversarial or judicial system. It is an inquisitorial and administrative one, characterized by informality and ad hoc flexibility of procedure."); and 2142-43 ("Admirers of the civil law system are right that countries with a strong tradition of liberty, a democratic form of government, and a free press can operate fair punishment systems while relying heavily on professional, state-employed functionaries to adjudicate criminal cases; they simply fail to realize that the United States is one of those countries.").

n130. U.S. Const. amend. VI.

n131. See, e.g., Codigo Procesal Penal de la Nacion [Cod. Proc. Pen.] [Criminal Procedure Code] art. 363 (Arg.); C. PR. PEN. art. 306 and 400 (France). Inspired by the English system, France imported the trial by jury - and, with it, public and oral trials - in 1791 and 1808. This trial model expanded throughout Europe during the 19th Century. For a classic account, see Adhemar Esmein, Histoire de la Procedure...
Criminelle en France (1882). Colonialism exported the oral and public trial to other civil law countries during the 19th Century. See, e.g., Jean Pradel, Droit penal compare (2d ed. 2002). In Latin America, the province of Cordoba, Argentina, adopted the oral and public trial in 1939; the institution expanded from there to other Argentinean provinces and Costa Rica. But it was not until the last fourteen years that most of the countries of the region adopted oral and public trials. On this last development, see Las Reformas Procesales Penales en America Latina (Julio B.J. Maier et al. eds., 2000).

n133. In inquisitorial systems, all the evidence is gathered in a written dossier. The defendant has access to such a dossier before trial and, in many systems, even during the pre-trial phase. See, e.g., COD. PROC. PEN. art. 106 and 204 (Arg.); C. PR. PEN. art. 114, 280 and 394 (France); §147 StPO (Germany). In this sense, defendants and their defense attorneys get full discovery of the existing evidence before adjudicators make a decision about the case at trial.

n134. See, e.g., COD. PROC. PEN. art. 199, 202, 304, 355 and 389 (Arg.); C. PR. PEN. art. 82-1, 281 312, 326, 329, 332, 442-1, 454 and 456 (France); §163a(2), 168c(2), 201, 219, 220, 239-41, 244-5 and 250-51 StPO (Germany).

n135. See, e.g., COD. PROC. PEN., art. 393 (Arg.); C. PR. PEN. art. 346 and 459 (France); §258 StPO (Germany).

n136. Procedural due process, which is required of the federal government by the 5th Amendment and of state and local governments by the 14th Amendment, provides a similar set of procedural protections in the case of deprivations of liberty or property. Procedural due process provides at least a right to notice, hearing, an impartial decision-maker, counsel, separation of functions, exclusive record, and statement of reasons. The right to a "hearing" ordinarily includes a right to present one's position orally and to confront opposing witnesses. See Goldberg v. Kelly, 397 U.S. 254, 271 (1970). The subsequent case of Mathews v. Eldridge, 424 U.S. 319 (1976), required courts to engage in a balancing process to determine the timing and precise ingredients of a due process hearing. However, in the case of a serious deprivation of liberty or property, at least the fundamental elements specified in Goldberg would ordinarily be required, absent some exigent circumstance. Federal and state administrative procedure acts (APAs) normally provide even greater procedural protections than procedural due process, but these APAs are not applicable to many federal or state adjudicatory procedures and are not applicable to local government at all. See, e.g., the federal APA, 5 U.S.C. §§554 to 557; Model State APA of 1961, 15A Unif. Laws Annot. 1 (2000).


n140. On the publicity of trial proceedings in the U.S., see, e.g., Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980); Globe Newspaper Co. v. Superior Court for the County of Norfolk, 457 U.S. 596 (1982). On the publicity of the trial in civil law countries, see, e.g., COD. PROC. PEN., art. 363 (Arg.); C. PR. PEN. art. 306, 400, 512 and 535 (France); Gerichtverfassungsgesetz, §169 (Germany). On the requirement that, as a general matter, U.S. administrative agencies open their hearings to the public, see A Guide to Federal Agency Adjudication 64-67 (Michael Asimow et al. eds., 2003) [hereinafter A Guide].

n141. See Mann, supra note 104.


n144. On the in dubio pro reo principle (that establishes the court must acquit unless it has certainty about the defendant's guilt) in civil law countries, with special reference to Argentina, see Maximo Langer, El Principio In Dubio Pro Reo y su Control en Casacion [The Beyond a Reasonable Doubt Standard and its Control by the Court of Appeals], 1998 A Nueva Doctrina Penal 215 (1998). On the application of this principle in France and Germany, see, e.g., Jean Pradel, Manuel de Procedure Penale 329-30 (12th ed. 2004) [hereinafter Pradel, Manuel]; Gaston Stefani et al., Procedure Penale 104 (19th ed. 2004); Claus Roxin, Strafverfahrenrecht 106-09 (1998). In U.S. administrative proceedings, the federal APA, 5 U.S.C. §556(d) establishes: “Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.” But the standard of proof is only preponderance of the evidence. See Steadman v. SEC, 450 U.S. 91 (1981).

n145. See, e.g., Julio B.J. Maier, I Derecho procesal penal 494-95 (2d ed. 1996); Roxin, supra note 144, at 106.

n146. For instance, probable cause is the standard of proof that both indictments and informations have to meet in the federal system. See infra note 187, and accompanying text.
n147. As indicated above, some ethical standards and prosecutorial guidelines establish that the prosecutor should not file charges or make a plea proposal unless she has enough admissible evidence to make a conviction at trial probable. See supra note 48 and infra note 190, and accompanying text. But many rules of procedure and ethical standards only require probable cause for filing charges and do not establish a different standard for making plea proposals. See infra note 187 and accompanying text.

n148. On the different rationales for the privilege against self-incrimination and the problems they present, see David Dolinko, Is There a Rationale for the Privilege against Self-Incrimination?, 33 UCLA L. Rev. 1063 (1986).

n149. The Supreme Court has held that the privilege against compulsory self-incrimination gives protection to interrogations beyond the trial context - e.g., to custodial interrogations by the police. See, e.g., Miranda v. Arizona, 384 U.S. 436 (1966); Dickerson v. United States, 530 U.S. 428 (2000). In Chavez v. Martinez, 538 U.S. 760 (2003), six Justices of the Supreme Court adopted the position that the Fifth Amendment limitations regarding these pre-trial interrogations attach only once, at the very least, criminal proceedings have been initiated. See id. at 766-67 (plurality opinion of Thomas, J., joined by Rehnquist, O'Connor and Scalia); and id. at 777 (Souter, joined by Breyer).


n152. See, e.g., Argentine Constitution, art. 18; COD. PROC. PEN., art. 184, 296 and 378 (Arg.); §115(3), 128, 136, 136(a) and 243(4) StPO (Germany). France has a much more deficient regulation of this right that I cannot analyze here.

n153. The right against compulsory self-incrimination applies to U.S. administrative proceedings. One of the most important differences in the U.S. between administrative law and criminal law regarding this right is that, in administrative law, the party does not have a right to refuse to take the stand. But once the party takes the stand and is sworn, he has a right not to answer specific questions if he claims that the answers might incriminate him. On the differences between criminal and other settings regarding the privilege against self-incrimination, see, e.g., Paul E. Rosenthal, Speak Now: The Accused Student's Right to Remain Silent in Public University Disciplinary Proceedings, 97 Colum. L. Rev. 1241 (1997).

n155. See, e.g., Maier, supra note 145, at 739-74. On the right to an impartial decision-maker under procedural due process in U.S. administrative law, see supra note 136. Regarding this requirement in the federal APA, see 5 U.S.C. §556(b) (2006).

n156. This is why, for instance, the Supreme Court has discussed extensively the effects of pretrial publicity on the impartiality of potential jurors. See, e.g., Murphy v. Florida, 421 U.S. 794 (1975); Patton v. Yount, 467 U.S. 1025 (1984); Mu'Min v. Virginia, 500 U.S. 415 (1991).


n158. At least, this is the theory behind the assertion in the U.S. that the right to a fair cross-section of the community derives from the right to an impartial jury. However, the Supreme Court has not extended this theory as imposing constitutional limitations on the use of peremptory challenges during the voir dire. See Holland v. Illinois, 493 U.S. 474 (1990); Powers v. Ohio, 499 U.S. 400 (1991).

n159. See, e.g., §155(2) and 244(2) StPO (Germany).

n160. This duty to look for both inculpatory and exculpatory evidence extends not only to the court which investigates and adjudicates the case at trial, but also to the official in charge of the pre-trial investigation. See, e.g., C. PR. PEN. art. 81 (France); §160(2) StPO (Germany).

n161. For a debate in Germany on the problems that previous knowledge and activism may generate and on different ways to address these problems, see Claus Roxin, Fragen der Hauptverhandlungsreform im Strafprozess, in Festchrift fur Schmidt-Leichner 145 (1977); Bernd Schunemann, Zur Reform der Hauptverhandlung im Strafprozess, GA 161 (1978); Bernd Schunemann, Der Richter im Straverfahren als manipulierter Dritter? Zur empirischen Bestatigung von Perseveranz-und Schulterschulsseffect, StV 3/2000, 159.

n162. In most contemporary civil law countries, the trial court judges that adjudicate the case are different (with exceptions I cannot analyze here) from the preliminary investigation judge and/or the prosecutor that works with the police during the pre-trial phase. See, e.g., C. PR. PEN. art. 253 (France). In France, this is one of the consequences of the principe de la separation des functions judiciaries [principle of separation of judicial functions]. See Pradel, Manuel, supra note 144, at 31-36. In Germany, the same judge may participate in the pre-trial and trial phases. See §23 StPO (Germany); BGHSt 9, 23. But since the prosecutor is in charge of the pre-trial phase investigation, the judge
still keeps a certain distance from such an investigation when deciding the case at trial.


n164. See, e.g., §160(1) StPO (Germany).

n165. See, e.g., CPP, art. 180 and 188 (Arg.); C. PR. PEN. art. 80, 175, 178-79, 190, 213, 214 and 231 (France); §151, 155 and 266 StPO (Germany). In France, this is also considered a consequence of the principle of separation of judicial functions. See Pradel, Manuel, supra note 144, at 25-37. In Argentina and Germany, this is considered a consequence of the principio acusatorio or Anklagegrundsatz or Akkusationsprinzip [acusatorial principle]. On this principle in Argentina and Germany, see, respectively, Julio B.J. Maier & Maximo Langer, Acusacion y Sentencia, 1996B Nueva Doctrina Penal 617 (1996); Roxin, supra note 144, at 82-83.

n166. See Maier, supra note 145, at 554-55.


n168. See, e.g., Medwed, supra note 121.

n169. For an analysis of the relationship between the police and other investigative agencies and prosecutors, see Richman, supra note 2.

n170. Common law jurisdictions have also seen this problem. See, e.g., Criminal Prosecution, New Zealand Law Commission Rep. No. 66, at 3 (Oct., 2000), available at http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_73_150_R66.pdf ("Prosecution should be separated from investigation. Separation of these two key functions ensures that there are checks and balances incorporated into the system to protect the individual. It also promotes impartiality and ultimately respect for the criminal justice system and the rule of law.").
n171. See, e.g., C. PR. PEN. art. 75, 151 and 224 (France); §161 StPO (Germany). See also Hegmanns, supra note 167, at 434-6.

n172. See Dama<s>ka, Evidence, supra note 127.

n173. See, e.g., CPP, art. 399 (Arg.); C. PR. PEN. art. 186, 186-1 (France); §267 StPO (Germany). In U.S. administrative law, procedural due process includes a statement of reasons by the decision-maker. See supra note 136. The federal APA, 5 U.S.C. §557(c)(A) (2006) also establishes such a requirement.


n175. Since the plea exchanges and plea dispositions that compose the Prosecutorial Adjudication System take place within criminal justice practices that are partly adversarial and whose actors perceive it as adversarial, it is not surprising that they do not present most of the institutional and procedural safeguards of inquisitorial systems and U.S. administrative law. Some of these inquisitorial procedural safeguards (e.g., oral and public trials and the division of labor between prosecutors and judges) were originally inspired by the adversarial system though deeply transformed in their translation to an inquisitorial procedural culture and institutional setting. See Langer, supra note 98. Other safeguards (e.g., the motivation of adjudicatory decisions) came from the internal logic of the inquisitorial system. See, e.g., Langer, Managerial Judging, supra note 96, at 847.

n176. Bilateral adjudication meets the minimum due process requirements of the adversarial system because prosecution and defense autonomously and voluntarily adjudicate the case. But this does not mean that there may not be additional normative issues to address in bilateral adjudication, such as the fairness of the negotiation between prosecution and defense. However, these potential normative issues in bilateral adjudication are less problematic than the ones prosecutorial adjudication presents. Since the goal of this Article is to analyze prosecutorial adjudication, addressing these additional problems of bilateral adjudication is beyond our scope.

n177. Given the priority of reducing prosecutorial adjudication over improving it as a system of adjudication, any potential tension between reform proposals should give priority to those that would reduce the scope of the system. Even if the two avenues of reform are not incompatible, by limiting prosecutors’ powers, a few of the reforms proposed by Section V may push prosecutors into seeing themselves as advocates, not officials that must seek justice. If that became the case, these reforms would contribute to eliminating prosecutorial adjudication, but would make prosecutorial adjudicators less impartial. This would be a cost worth paying given the priority that the elimination of prosecutorial adjudication should have.
n178. Langer, supra note 98.

n179. See, e.g., Adams v. United States ex rel. McCann, 317 U.S. 269, 275 (1942) (clarifying that a fair trial is one in which evidence subjected to adversarial testing is presented to an impartial tribunal); Penson v. Ohio, 488 U.S. 75, 84 (1988) ("The paramount importance of vigorous representation follows from the nature of our adversarial system of justice."); Blakely v. Washington, 542 U.S. 296, 313 (2004) ("Our Constitution and the common-law traditions it entrenches ... do not admit the contention that facts are better discovered by judicial inquisition than by adversarial testing before a jury.").

n180. I owe this point to Carol Steiker.


n182. First of all, DA offices may restrain themselves from charging in weak cases by establishing their own screening mechanisms, and all of them do so to some extent. On some of the systems that have been used for making the charging decision, see, e.g., Norman Abrams, Prosecutorial Charge Decision Systems, 23 UCLA L. Rev. 1 (1975). Marc Miller and Ron Wright described the DA Office of New Orleans as a model in this respect. This office had a charging division that independently investigated each case after receiving the police file in order to avoid the filing of weak charges. Ronald Wright & Marc Miller, The Screening/Bargaining Tradeoff, 55 Stan. L. Rev. 29 (2002). However, it is not clear whether the New Orleans DA Office was actually such a model (see Hon. Eddie J. Jordan, Jr., Dist. Attorney, Orleans Parish, Toward a Fully Integrated Criminal Justice System, (May 19, 2005) http://www.cityofno.com/resources/portal102/DaComstat.pdf#search=%22%22Toward%20a%20Fully%20Integrated%20Criminal%20Justice%20System%22; Daniel Richman, Institutional Coordination and Sentencing Reform, 84 Tex. L. Rev. 2055 (2006)). In addition, since the preliminary hearing and the grand jury are the two main mechanisms to screen out weak criminal cases in the American criminal justice system, improvements of their screening role would also contribute to the reduction of the Prosecutorial Adjudication System. The criminal procedure literature and policy-makers have discussed this issue extensively; thus, it is not necessary to reiterate these proposals here. See, e.g., Arenella, supra note 2; Arenella, Reforming the State, supra note 101; Sara Sun Beale et al., Grand Jury Law and Practice (2d ed. Supp. 2002); William Glaberson, New Trend Before Grand Juries: Meet the Accused, N.Y. Times, June 20, 2004; Graham & Letwin, supra note 101; Peter J. Henning, Prosecutorial Misconduct in Grand Jury Investigations, 51 S.C. L. Rev. 1 (1999); Kuckes, supra note 101; Andrew D. Leipold, Why Grand Juries Do Not (and Cannot) Protect the Accused, 80 Cornell L. Rev. 260 (1995); Robert G. Morvillo & Robert J. Anello, Proposals for Grand Jury Reform, N.Y.L.J., Aug. 1, 2000, at 3 (col. 1). Ric Simmons, Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?, 82 B.U. L. Rev. 1 (2002); National Association of Criminal Defense Lawyers, Commission to Reform the Grand Jury, Federal Grand Jury Reform Report & "Bill of Rights." (May 18, 2000), available at www.criminaljustice.org.

n183. Current professional ethical rules already express this aspiration. The ABA Standards Relating to the Administration of Criminal Justice, Standard 14-3.2(b), establish: "Defense counsel should not recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed." However, studies have indicated that in many cases this aspiration is not fulfilled. See supra note 118. There are at least three areas for potential reform to improve defense pre-guilty-plea investigations. The first involves prosecutorial ethics and prosecutorial guidelines, which should make clear that, even if prompt disposition may be a factor that prosecutors take into account in order to evaluate what plea proposals to make, prosecutors have to give defense attorneys enough time to carry out a proper investigation and to study the case. Prosecutorial ethical rules and guidelines must explicitly state that prosecutors may not hold against the defendant the time that his defense attorney needs to perform these tasks. Yet the Principles of Federal Prosecution, for example,
do not meet this proposed requirement. See The Principles of Federal Prosecution, supra note 48, at 9-27.420. The second area for reform has to do with the limitations of the standard for ineffective assistance of counsel that the Supreme Court set in Strickland v. Washington, 466 U.S. 668 (1984) which also applies to guilty pleas (Hill v. Lockhart, 474 U.S. 52 (1985)). Criminal procedure scholarship has addressed this issue extensively, and it is not necessary to repeat their analyses and reform proposals here. See, e.g., Stephanos Bibas, The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel, 2004 Utah L. Rev. 1 (2004). The third area for reform has to do with defense resources to carry out adequate defense investigations. The literature has also analyzed this issue extensively. See, e.g., David Cole, No Equal Justice (1999); William J. Stuntz, The Uneasy Relationship between Criminal Procedure and Criminal Justice, 107 Yale L.J. 1 (1997); Ronald F. Wright, Parity of Resources for Defense Counsel and the Reach of Public Choice Theory, 90 Iowa L. Rev. 219 (2004). But it is important to mention that the recent DNA tests that have exonerated around 160 American convicts have included cases in which defendants pled guilty. This offers a historical opportunity to show that guilty pleas also may lead to convictions of the innocent - a claim that scholars made in the past but which was hard to prove categorically until recently. This revelation makes the case for additional resources for defense investigations even stronger. See Samuel R. Gross et al., Exonerations in the United States 1989 through 2003, 95 J. Crim. L. & Criminology 523, at 536-37 (2005) (describing research results that 20 out of 340 DNA-exonerated defendants had pled guilty; and a higher percentage of exonerated defendants wrongly convicted because of police perjury or corruption had pled guilty). I am very grateful to Sam Gross who shared with me the portion of their database that lists guilty-plea exonerated defendants.

\[n184. \text{See Bar-Gill & Gazal Ayal, supra note 41 (describing how a restriction in the permissible sentence reduction in a plea bargain creates incentives for defendants in weak cases not to plead guilty which creates incentives for prosecutors to select fewer weak cases).}\]

\[n185. \text{See California Penal Code §1192.7(a) ("Plea bargaining in any case in which the indictment or information charges any serious felony, any felony in which it is alleged that a firearm was personally used by the defendant, or any offense of driving while under the influence of alcohol, drugs, narcotics, or any other intoxicating substance, or any combination thereof, is prohibited, unless there is insufficient evidence to prove the people's case, or testimony of a material witness cannot be obtained ... "). On the political process that led to the adoption of this rule, see Candace McCoy, Politics and Plea Bargaining: Victims' Rights in California (1993). Notice that the first exception that authorizes the use of plea bargaining does not say "insufficient admissible evidence" but just "insufficient evidence." In this sense, the text seems to authorize the use of plea bargaining not only in cases in which the prosecutor is convinced of defendant's factual guilt but does not have sufficient admissible evidence to prove it at trial. It also does so in cases in which the prosecutor is not fully convinced of the defendant's factual guilt. There do not seem to be judicial decisions interpreting the phrase "insufficient evidence." California Criminal Procedure and Practice §26.38 C. indicates in reference to these three exceptions: "As a rule of thumb, a criminal defense attorney who first practices in a "new" jurisdiction should discuss local practice with either a public defender or a local defense attorney. Most jurisdictions vary on these kinds of questions." For another example of a prosecutorial guideline that also seems to violate this first requirement by not embracing the notion of legal guilt, see Memorandum from Richard Thornburgh, U.S. Att'y Gen., to U.S. Attorneys on Plea Policy for Federal Prosecutors (Mar. 13, 1989) reprinted in 1 Fed. Sent'g. Rep. 421-422 (1989) ("The basic policy is that charges are not to be bargained away ... unless the prosecutor has a good faith doubt as to the government's ability readily to prove a charge for legal or evidentiary reasons.").}\]

\[n186. \text{California Penal Code §1192.7's prohibition against plea bargaining should also be eliminated for two different reasons. First, by prohibiting plea bargaining after the indictment or information has been filed, the rule has encouraged early plea agreements before the prosecution and the defense can make a proper assessment of the strength of the case. See McCoy, supra note 185, at 178-87. Second, as this Article explains infra in footnotes 274-75 and accompanying text, eliminating plea bargaining may make the Prosecutorial Adjudication System less fair, not more.}\]

\[n187. \text{See, e.g., Model Rules of Prof'l Conduct, R. 3.8 (1983) Special Responsibilities of a Prosecutor ("The prosecutor in criminal cases shall ... refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause."); Model Code of Prof'l Responsibility, DR 7-103 ("A public prosecutor ... shall not institute or cause to be instituted charges when he knows or it is obvious that the}\]
charges are not supported by probable cause”). In the federal system, probable cause is enough for obtaining an indictment or information. See, e.g., Fed. R. of Crim. P.5.1(e) & (f) (setting probable cause as the standard for preliminary hearings); Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978); United States v. Ucciferri, 960 F.2d 953 (11th Cir. Fla. 1992); United States v. Muldoon, 931 F.2d 888 (unpublished disposition, 1991 WL 65768, 4th Cir. (Va.), 1991). But neither the Federal Rules of Criminal Procedure nor the courts have established a different standard for the prosecutor making a plea proposal.

n188. See ABA Standards for Criminal Justice §3-3.9(a) (3d ed. 1993) and its commentary ("This Standard suggests that it is unethical for a prosecutor to institute criminal proceedings where he or she knows probable cause is lacking.").

n189. See id. §14-3.1(h) (3d ed. 1999).

n190. The commentary of the standard makes clear, though, that the requirement refers to the possibility of getting a conviction at trial: "It would be improper for a prosecutor to seek to induce a plea of guilty by charging or threatening to charge the defendant with a crime not supported by facts the prosecutor believes to be provable at trial. Standard 14-3.1(h) implements these principles by barring the prosecutor from bringing or threatening charges "where admissible evidence does not exist to support' those charges or where he or she 'has no good faith intention of pursuing them." Id. §14-3.1, cmt.


n192. In the federal system, if the courts kept probable cause as the standard to issue formal charges, Rule 11 of the Federal Rules of Criminal Procedure would be the natural place to include a different standard for making plea proposals.

n193. For a similar proposal, see Lynch, supra note 2 , at 2148.

n194. Recall that our first baseline requirement does not necessarily entail that the prosecutor is hiding the weakness of her case to the defense. However, broad discovery discourages prosecutors from making plea proposals in weak cases and gives more information to defendants to reject non-credible plea proposals. See notes 52-54 and accompanying text.
n195. The Supreme Court has held that an intelligent guilty plea requires awareness of the relevant circumstances and likely consequences of the guilty plea, but not perfect information about the case. See Brady v. United States, 397 U.S. 742, 748 (1970); United States v. Ruiz, 536 U.S. 622, 628 (2002). This is a reasonable position because it would be too demanding to ask for perfect information as a necessary condition for intelligent guilty pleas. But the real question is then how imperfect this information may be. The Supreme Court has not analyzed whether the nondisclosure of exculpatory information would make a guilty plea involuntary. But a number of lower and state courts have held that it would. See, e.g., State v. Gardner, 885 P.2d 1144, 1150 (Idaho, 1994); State v. Kenner, 900 So.2d 948 (La. App. 4 Cir. 2005) (holding that nondisclosure of crime laboratory report indicating that the blood and saliva found in the victim were different from defendant's makes defendant's guilty plea unintelligent) (the decision was later vacated on factual, not legal grounds; see State v. Kenner 917 So.2d 1081 (La. 2005)); Ex Parte Lewis, 587 S.W.2d 697 (Texas App. 1979) (holding that nondisclosure of favorable information by the State renders guilty plea unintelligent).

n196. Brady v. Maryland, 373 U.S. 83 (1963). For a constitutional standard of prosecutorial discovery duties during the pre-trial phase that is broader than that specified in Brady, see United States v. Safavian, 233 F.R.D. 12 (2005) ("The question before trial is not whether the government thinks that disclosure of information or evidence it is considering withholding might change the outcome of the trial going forward, but whether the evidence is favorable to the accused and therefore must be disclosed.").


n198. United States v. Ruiz, 536 U.S. 622 (2002). The Supreme Court said that "impeachment information is special in relation to the fairness of the trial, not in respect to whether a plea is voluntary …." Id. at 629. In addition, the Supreme Court stated that a rule requiring the disclosure of impeachment evidence would affect the efficiency of criminal law enforcement by requiring the prosecution to spend more time preparing cases before plea bargains are struck and by putting at risk ongoing investigations and the identity of informants. Id. at 631-32. The Supreme Court also added that due process and the Brady doctrine do not require the disclosure of evidence on affirmative defenses before a guilty plea is entered. Id. at 633.

n199. Id. at 631 (emphasizing that the Government's proposed plea agreement specified that the Government would provide any information establishing the factual innocence of the defendant). See also McCann v. Mangialardi, 337 F.3d 782, 788 (7th Cir. 2003) (reasoning that "Ruiz indicates a significant distinction between impeachment information and exculpatory evidence" that makes it "highly likely the Supreme Court would find a violation of the Due Process Clause if prosecutors … have knowledge of a criminal defendant's factual innocence but fail to disclose such information to a defendant before he enters into a guilty plea." However, the Court of Appeals did not resolve this question).

n201. See, e.g., United States v. Avellino, 136 F.3d 249 (2d Cir. 1998) (stating that Brady obligations of the government to make disclosures are pertinent not only to an accused's preparation for trial but also to his determination of whether or not to plead guilty); Tate v. Wood, 963 F.2d 20 (2d Cir. 1992); Sanchez v. United States, 50 F.3d 1448 (9th Cir. 1995); United States v. Millan-Colon, 829 F. Supp. 620 (S.D.N.Y. 1993); Fambo v. Smith, 433 F. Supp. 590 (W.D.N.Y.), aff'd, 565 F.2d 233 (2d Cir. 1977); People v. Benard, 620 N.Y.S.2d 242 (1994); State v. Gardner, 885 P.2d 1144, 1150 (Idaho App. 1994) (allowing defendant to withdraw his guilty plea because prosecution failed to disclose material, exculpatory witness statement prior to the entry of the guilty plea); State v. Johnson, 816 P.2d 364 (Idaho App. 1991) (allowing defendant to withdraw his guilty plea because the State had failed to disclose police reports that were exculpatory and material); State v. Kenner, 900 So.2d 948 (La. App. 4 Cir. 2005) (upholding district court's decision granting application for post-conviction relief because nondisclosed crime laboratory report indicated that the blood and saliva specimens found in the victim were different from defendant's) (the decision was later vacated on factual, not legal grounds; State v. Kenner, 917 So.2d 1081 (La. 2005)); Ex Parte Lewis, 587 S.W.2d 697 (Texas App. 1979) (holding that a prosecutor's duty to disclose favorable information extends to defendants who plead guilty, in a case where state did not disclose expert report indicating that the defendant may have been incompetent and had an insanity defense). These courts have held that in this context, evidence or information is material if there is a reasonable probability that, but for the nondisclosure of the evidence, the defendant would have not pleaded guilty. See, e.g., United States v. Avellino, 136 F.3d 249 (2d Cir. 1998); United States v. Millan-Colon, 829 F. Supp. 620 (S.D.N.Y. 1993); Banks v. United States, 920 F. Supp. 688 (E.D. Va. 1996); United States v. Patel, 1999 WL 675293 (N.D. Ill. 1999); Sanchez v. United States, 50 F.3d 1448 (9th Cir. 1995). In the trial context, evidence is material if there is a reasonable probability that its nondisclosure would affect the outcome of the trial. See United States v. Bagley, 473 U.S. 667 (1985); Kyles v. Whitley, 514 U.S. 419 (1995); Strickler v. Green, 119 S. Ct. 1936 (1999).

n202. The Brady doctrine was conceived with the trial in mind. At trial, the defense naturally sees the prosecution's case and then can assess and make use of the favorable and material evidence that the prosecution has disclosed. But in the context of guilty pleas, the defense does not have such access to the prosecution case. A way to deal with this issue would be to hold that, in the context of guilty pleas, the government has the duty to disclose not only exculpatory information, but also inculpatory information and evidence that the defense needs to know in order to make a good assessment of the prosecution's case. But this would require a change in the Brady doctrine as currently defined.


n204. It may have been this lack of flexibility which led the Supreme Court in Ruiz to reject the application of the Brady doctrine to impeachment evidence in the context of guilty pleas.

n205. See, e.g., Fed. R. Crim. P. 16(a)(1)(A) ("Government must disclose to the defendant any relevant oral statement made by the defendant ... if the government intends to use the statement at trial."); Fed. R. Crim. P. 16(a)(1)(F) (the government must disclose reports of examinations if "the item is [either] material to preparing the defense or the government intends to use the item in its case-in-chief at trial."); Fed. R. Crim. P. 16(a)(1)(G) ("The government must give to the defendant a written summary of any [expert] testimony that the government intends to use ... during its case-in-chief at trial."); Fed. R. Crim. P. 26.2 (the government must provide to the defense any statement of any witness that testifies on direct examination).
n206. See, e.g., Ex Parte Lewis, 587 S.W.2d 697 (Texas App. 1979) (Douglas, J., dissenting) (explaining that the District Attorney office's policy in the County of Walker, State of Texas, is that when a plea of guilty is arranged, the office allows the defense attorney complete access to the State's file). For an early call among commentators to introduce this reform, see Eleanor J. Ostrow, The Case for Preplea Disclosure, 90 Yale L.J. 1581 (1981).

n207. As Scott and Stuntz point out, even "the police report - the primary source of information for the prosecutor about the case - is not ordinarily discoverable, except at the prosecutor's discretion." See Scott & Stuntz, supra note 6, at 1936 (citing Fed. R. Crim. P. 16(a)(2), and 2 Wayne R. LaFave & Jerold H. Israel, Criminal Procedure §19.3, at 498-500 (1984)).

n208. See, e.g., Brown, supra note 14, at 1623 ("In contrast to federal constitutional and statutory requirements, more than forty states require that exculpatory evidence be disclosed to defendants at some point before trial.").


n210. For an earlier identification of this limitation facing judges, see Arnold Enker, Perspectives on Plea Bargaining, in The President's Commission on Law Enforcement and Administration of Justice, Appendix A 109 (1966).

n211. The problem of excessive harshness has its origins in the current political and institutional structures of the United States. Given that substantial segments of the population are understandably worried about crime and do not sympathize with people who commit offenses, running on "tough-on-crime" campaign platforms and adopting harsh criminal policies generally has been a safe strategy for politicians on both the right and the left to get elected and stay in office. In addition, groups lobbying for harsher punishments have been more powerful than groups opposing them. See Rachel E. Barkow, Administering Crime, 52 UCLA L. Rev. 715, 724-27 (2005); Harold J. Krent, Should Bouie Be Buoyed?: Judicial Retroactive Lawmaking and the Ex Post Facto Clause, 3 Roger Williams U. L. Rev. 35, 85-86 (1997); Daniel C. Richman, The Past, Present, and Future of Violent Crime Federalism, paper presented at the 2005 Annual Meeting of the Law & Society Association (on file with the author) (describing how crime became a political campaign issue at a national level); Michael Tonry, Punishment Policies and Patterns in Western Countries, in Sentencing and Sanctions in Western Countries 3 (Michael Tonry & Richard S. Frase eds., 2001). Prosecutors have had the incentives to support and lobby for this process because it has given them more tools to perform their work and more leverage to make defendants plead guilty. See, e.g., William J. Stuntz, Reply: Criminal Law's Pathology, 101 Mich. L. Rev. 828, 836 (2002); Testimony of John Roth, Department of Justice, Before the Subcommittee on Criminal Justice, Drug Policy, and Human Resources, House Committee on Government Reform, 2000 WL 644411 (F.D.C.H. May 11, 2000) (stating that mandatory-minimum sentences for drug crimes provide "an indispensable tool for prosecutors" to induce defendants to cooperate) (cited by Wright, supra note 2, at 112-13).


n214. See, e.g., David Garland, The Culture of Control: Crime and Social Order in Contemporary Society (2001); Tonry, Sentencing, supra note 81; Whitman, supra note 83.

n215. See, e.g., id. at 57-58.

n216. On the potential reasons for this phenomenon, Steiker, supra note 90.

n217. See supra note 57 and accompanying text.

n218. This is why, for instance, the right against cruel and unusual punishment also sets limits on legislative powers. See, e.g., Ewing v. California, 538 U.S. 11 (2003) (the 8th Amendment includes a prohibition against grossly disproportionate imprisonment sentences that sets limits for the legislature, with seven Justices in agreement.).

n219. A number of commentators have partially blamed sentencing guidelines for the increasing harshness of the American criminal justice system in the last three decades. See, e.g., Garland, supra note 214. According to these scholars, the elimination of the parole regime, harsh sentencing ranges and the limitation of judges’ discretion are among the factors that explain this phenomenon. There is evidence that the Federal Sentencing Guidelines have contributed to the increasing harshness of the federal criminal justice system. See, e.g., Bowman, supra note 82, at 284-85. However, a number of studies have shown that there is no necessary link between the level of harshness of a jurisdiction and the adoption of sentencing guidelines (including here the elimination of parole). In fact, leaving the federal system aside, jurisdictions with presumptive sentencing guidelines have shown a lower increase in their sentences than the national average. This is because sentencing commissions have functioned in several jurisdictions as a buffer between legislatures and the demands for ever increasing punishment from certain segments of the population. This has been the case in jurisdictions in which the legislature has given sentencing commissions enough room to work independently, and especially in those jurisdictions in which the sentencing commission has had to take prison capacity into consideration in setting punishments and sentencing ranges. See, e.g., Thomas B. Marvell, Sentencing Guidelines and Prison Population Growth, 85 J. Crim. L. & Criminology 696 (1995); Kevin R. Reitz, The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes, 105 Colum. L. Rev. 1082 (2005); Tonry, supra note 211. In terms of sentencing guidelines design, judges and commentators have rightly criticized the federal guidelines for their complexity, their very narrow sentencing ranges and because they have been very restrictive in allowing judges’ departures. See Kate Stith & Jose A. Cabranes, Fear of Judging (1998). These features have led to a high circumvention rate in the federal system in order to avoid the harsh sentences that the guidelines establish. See, e.g., Stephen J. Schulhofer & Ilene H. Nagel, Plea Negotiations under the Federal Sentencing Guidelines: Guidelines Circumvention and its Dynamics in the Post-Mistretta Period, 91 Nw. U. L. Rev. 1284 (1997) (describing a guidelines circumvention rate from 20 to 35%). In contrast, most state guidelines have been simpler, have established broader sentencing ranges and have given more room for departures. These state guidelines
are a better model for the design of future sentencing guidelines because policymakers should conceive guidelines as a way not to fight
against judges but to work with judges towards the common goal of reducing sentence disparities. This approach would reduce the rate of
guidelines circumvention and would build on the knowledge and experience that judges have on sentencing.

(2005) (stating that given the complexity of the federal guidelines, disparate performances of attorneys generate sentencing disparities);

n221. For an early analysis in this direction and proposals to address these sorts of problems, see, e.g., Daniel J. Freed, Federal Sentencing

create by their design serious obstacles or disincentives to focused inquiry into the punishment demanded in particular cases); James S.
Liebman & Lawrence C. Marshall, Less is Better: Justice Stevens and the Narrowed Death Penalty, 74 Fordham L. Rev. 1607 (2006);

n223. For recent analyses on the right against excessive punishment, see Youngjae Lee, The Constitutional Right Against Excessive
Punishment, 91 Va. L. Rev. 677 (2005) (identifying "retributivism as a side constraint" as the principle behind the Eighth Amendment ban
on excessive punishment); Alice Ristroph, Proportionality as a Principle of Limited Government, 55 Duke L.J. 263 (2005) ("[A]
proportionality requirement is better understood as an external limitation on the state's penal power that is independent of the goals of
punishment.").

n224. In order to avoid allowing prosecutors' charging decisions and plea bargaining to undermine the federal sentencing guidelines, the
latter guidelines establish a real-offense system. This system allows judges to go over the maximum potential sentence that the guilty plea or
the jury verdict would allow by finding, by a preponderance of the evidence, that certain elements - such as the use of a gun or the amount of
drugs or money involved in the offense, are present. In a series of cases, the Supreme Court has held the real-offense system
unconstitutional, at least in certain contexts. See Apprendi v. New Jersey, 530 U.S. 466 (2000); Ring v. Arizona, 536 U.S. 584 (2002); Harris
opinion by Justice Stevens). But by declaring the Federal Sentencing Guidelines to be advisory, the Booker majority opinion by Justice
Breyer saved the real-offense system of the federal guidelines. Notice that the real-offense system is a control on the prosecutor's
circumvention of the guidelines only when the prosecutor tries to be more lenient - not harsher - than the guidelines. In this sense, the
real-offense system has not been a safeguard against the Prosecutorial Adjudication System, but rather has actually re-enforced it. By
questioning the constitutionality of the real-offense system under the constitutional rights to trial by jury and to proof beyond a reasonable
doubt, the Apprendi line of case may have contributed to hinder the harshness of the criminal justice system. For a recent empirical study
showing that Apprendi actually reduced the harshness of sentences in the federal system, see J.J. Prescott, Measuring the Consequences of

n226. Sentencing guidelines fall in a continuum between being fully discretionary for sentencing judges and tying judges’ hands. Before Booker, the Federal Sentencing Guidelines "were, by far, the most vigorously enforced sentencing guidelines" in the United States. Kevin R. Reitz, The Enforceability of Sentencing Guidelines, 58 Stan. L. Rev. 155 (2005). In Booker, the Supreme Court declared the Federal Sentencing Guidelines to be advisory. By making the Federal Sentencing Guidelines advisory, United States v. Booker, 543 U.S. 220 (2005) (majority opinion by Justice Breyer) may have contributed to hindering the harshness of the federal criminal justice system because it has given more room for judicial departures from the guidelines sentencing ranges. See Bowman, supra note 82, at 309-14. However, given that district courts still have to consider the guidelines range in determining sentences and that sentencing decisions by federal trial courts are still reviewable by appeals courts (now on the basis of reasonableness instead of de novo appeal review), prosecutors still hold considerable power in sentencing. See, e.g., id. at 292 (arguing that since Booker did not render the guidelines voluntary, in the sense that judges may choose to employ them or not, the debate is over how much weight district and appellate courts should give to the guidelines) and at 307 (stating that after Booker, "the government remains, by a roughly two-to-one margin, the greatest institutional source of below-range sentences."); Reitz, supra at 156 ("Booker has reduced the mandatory character of the Federal Guidelines, but the degree of change should not be overstated. The Court has not made the Federal Guidelines toothless, nor has it reinstituted the kind of sentencing discretion held by district court judges in the days of indeterminate sentencing.").

n227. See, e.g., 18 U.S.C. §3553(e) (2006) ("Upon a motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense."); 18 U.S.C. app. §5K1.1 (2006). After Booker, courts have upheld the government motion requirement for substantial assistance departures below a statutory mandatory minimum, and the majority of the circuits seem to have upheld the government motion requirement for substantial assistance departures below the low end of a guideline range. See Bowman, supra note 82, at 304 (citing judicial decisions).

n228. See, e.g., U.S. Sentencing Comm'n, supra note 222, at 31 ("Mandatory minimums employ a structure that allows a shifting of discretion and control over the implementation of sentencing policies from courts to prosecutors.").


n232. ABA Standards for Criminal Justice §3-3.9(b) (3d ed. 1993). The Reno Bluesheet on Charging and Plea Decisions reflected a similar idea regarding the Federal Sentencing Guidelines: "(A) faithful and honest application of the Sentencing Guidelines is not incompatible with selecting charges or entering into plea agreements on the basis of an individualized assessment of the extent to which particular charges fit the specific circumstances of the case... . (I)t is appropriate that the attorney for the government consider, inter alia, such factors as the sentencing guideline range yielded by the charge, whether the penalty yielded by such sentencing range (or potential mandatory minimum charge, if applicable) is proportional to the seriousness of the defendant's conduct, and whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation." Memorandum from Janet Reno, U.S. Att'y Gen., to Holders of U.S. Attorneys' Manual, Title 9, on Principles of Federal Prosecution (Oct. 12, 1993), reprinted in 6 Fed. Sent'g Rep. 352 (1994). However, when this document was attacked by Senator Hatch, the Justice Department provided no support for it. See Letter from Senator Orrin G. Hatch to Janet Reno, U.S. Att'y Gen., (Jan. 13, 1994), reprinted in 6 Fed. Sent'g Rep. 352 (1994); Letter from Janet Reno, U.S. Att'y Gen., to Senator Orrin G. Hatch (Mar. 8, 1994), reprinted in 6 Fed. Sent'g Rep. 352 (1994); and James K. Bredar & Jeffrey E. Risberg, The Reno Retreat: New Department of Justice "Bluesheet" DOA, reprinted in 6 Fed. Sent'g Rep. 313 (1994).

n233. See, e.g., Memorandum from John Ashcroft, U.S. Att'y Gen., to all Federal Prosecutors, on Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing, available at http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm (establishing that it is the policy of the Department of Justice that, in all federal criminal cases, federal prosecutors must charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case and setting a number of limited exceptions that do not include the clear disproportion of the authorized punishment).

n234. See e.g., Alschuler, supra note 220, at 91-93 (describing in general terms the appropriate influence of situational and personal characteristics on sentences is often impossible).

n235. See, e.g., id. at 112-13 ("The Sentencing Guidelines and mandatory minimum sentences have set the stage for the "good-cop, bad-cop' stratagem on a grand scale. Congress and the Sentencing Commission play the bad cops, threatening the accused with harsh treatment. The prosecutor takes the part of the good cop, promising to protect the defendant if he abandons the right to trial and cooperates. Substantial sentencing discretion remains except for defendants who resist the prosecutor's will.").

n236. See Barkow, supra note 213 and accompanying text.

n237. The extent to which sentencing guidelines ranges should enjoy a presumption of reasonableness depends in part on how advisory or presumptive sentencing guidelines ranges are in specific jurisdictions. Post-Booker, there has been an on-going discussion between federal circuits precisely on this issue regarding the federal sentencing guidelines. For decisions establishing such a presumption of reasonableness for sentences that fall within the guidelines range, see, e.g., United States v. Green, 436 F.3d 449 (4th Cir. 2006); United States v. Alonzo,
n238. That was the case in the Federal Sentencing Guidelines before Booker because they were mandatory for judges and judicial departures were limited, and it is still the case post-Booker - though to a lesser extent - given that the advisory character of the guidelines does not mean that the judges have full discretion to make their sentencing decisions. In addition, there are sentencing regulations (like those regarding certain mandatory minimums) that have been unaffected by Booker.

n239. On the broad prosecutorial discretion that prosecutors enjoy, see supra note 100 and accompanying text.

n240. For instance, if a prosecutor files charges that trigger a mandatory minimum that would be clearly unfair for the case, the possibility that the judge may later declare that mandatory minimum disproportionate may not be safeguard enough against the coercive proposal. The defendant may still decide to plead guilty given the possibility that the unfair mandatory minimum will be applied to his case if he decides to go to trial. If the prosecutor determines that the mandatory minimum would be clearly unfair for the case, she should then not file the charges that trigger such a minimum. On the need for ex ante relief to help a party that receives a credible coercive proposal, see Oren Bar-Gill & Omri Ben-Shahar, Credible Coercion, 83 Tex. L. Rev. 717 (2005).

n241. One of the main goals of the Federal Sentencing Guidelines has been the reduction of inappropriate disparity between sentences. It is not totally clear, though, whether the federal guidelines have actually reduced disparity and, if they have, to what extent that disparity has been reduced. For a summary of the main studies on this issue, see Alschuler, supra note 220, at 95-106.

n242. See, e.g., Linda Drazga Maxfield & John H. Kramer, Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice 13-14 (1998) (indicating that blacks are 8% to 9% less likely than white to receive substantial assistance departures and that Latinos are 7% less likely), cited by Alschuler, supra note 220, at 105.

n243. The Federal Rules of Criminal Procedure, Rule 11(b)(1) establishes that the court must inform the defendant and determine that the defendant understands the nature of the charge he is pleading guilty to and any maximum penalty and mandatory minimum that applies to that charge. But Rule 11 does not require the court to find out what penalties the defendant thinks he would face if he decided not to plead guilty and go to trial.

n245. There are cases in which awareness of the likely sentence after trial conviction is not necessary for the guilty plea to be intelligent. For instance, if a defendant decides to plead guilty exclusively out of remorse and regardless of what the potential trial sentence is, it is not necessary that the defendant be aware of the potential trial sentence for his guilty plea to be intelligent. But in a substantial number of cases - including cases of innocent defendants - the potential trial sentence is an element that the defendant considers in deciding whether or not to plead guilty. In those cases, it is necessary that the defendant has an accurate representation of the potential trial sentence for his guilty plea decision to be intelligent. Since it may not be possible for the judge to distinguish between these two types of cases, the requirement of awareness of potential trial sentence should be included for all guilty pleas.


n247. See, e.g., United States v. Datcher, 830 F. Supp. 411 (M.D. Tenn. 1993); and the decision by Judge Lynch, not available in Westlaw, but analyzed and reversed by the Appeals Court in United States v. Pabon-Cruz, 391 F. 3d 86 (2d Cir. 2004).

n248. See, e.g., United States v. Chesney, 86 F. 3d 564, 574 (6th Cir. 1996); United States v. Pabon-Cruz, 391 F. 3d 86, 94-95 (2d Cir. 2004) (holding that defendant does not have a legal entitlement that the jury be instructed on the sentencing consequences because the principle that juries should not consider the consequences of their verdicts is a reflection of the basic division of labor between judge and jury, and because the power of juries to nullify or exercise power of lenity is just a power, not a right or something that a judge should encourage or permit if it is within his authority to prevent). These decisions invoked two decisions of the Supreme Court, Rogers v. United States and Shannon v. United States, in their support. But the Supreme Court has not specifically addressed the proposal in question. See Rogers v. United States, 422 U.S. 35 (1975) (holding that the trial court committed prejudicial error when, without notice to defendant and out of his presence, it answered in the affirmative a communication sent by the jurors during their deliberations inquiring whether the court would accept a verdict of guilty as charged "with extreme mercy of the Court"); Shannon v. United States, 512 U.S. 573 (1994) (holding that a federal district court is not required to instruct the jury on the consequences for the defendant of a verdict of not guilty by reason of insanity).

n249. See Rachel E. Barkow, Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing, 152 U. Pa. L. Rev. 33, 62 (2003) ("As voters, people consider the perceived overall threat of crime and tend to be harsher than when they are presented with a concrete case. Jury trials force the people - in the form of community representatives - to look at crime not as a general matter, the way they do as voters, but instead to focus on the particular individual being charged.").

n250. This knowledge about potential sentences may explain why federal judges have become more acquittal prone than juries in recent years. See Andrew D. Leipold, Why are the Federal Judges so Acquittal Prone?, 83 Wash. U. L.Q. 151 (2005).


n253. To give just a few examples, Illinois has a general property-damage offense. But special offenses have been added for damaging library materials, damaging an animal facility, defacing delivery containers, damaging anhydrous ammonia equipment, and so on. See Paul H. Robinson & Michael T. Cahill, Can a Model Penal Code Second Save the States from Themselves?, 1 Ohio St. J. Crim. L. 170 (2003). Federal law criminalizes the "unauthorized use of the image of "Woodsy Owl" and "tearing the tag of a mattress." More importantly, it gives broad definitions of mail and wire fraud that protect "the intangible right of honest services" and do not require either misrepresentation or reliance and covers a great many mere breaches of fiduciary duty. The federal criminal code also includes "100 separate misrepresentation offenses, some of which criminalize not only lying but concealing or misleading as well, and many of which do not require that the dishonesty be about a matter of any importance. Taken together, these misrepresentation crimes cover most lies (and, as just noted, almost-but-not-quite-lies) one might tell during the course of any financial transaction or transaction involving the government." The examples and the quote are from Stuntz, The Pathological Politics, supra note 2, at 517. The point is not that we should refrain from criminalizing, for instance, mail fraud. Rather, it is that mail fraud is too broadly defined, which gives room for prosecutorial abuse.

n254. For a recent example of this kind of risk, see Arthur Andersen v. United States, 544 U.S. 696 (2005) (reversing the conviction against the accounting firm Arthur Andersen for obstruction of justice).

n255. A first possibility to clarify definitions and reduce the number and overlap of criminal offenses would be the revision or enactment of a new Model Penal Code. The American Law Institute (ALI) is currently working on the revision of the sentencing section of the Code, and this task could be extended to other sections. See Kevin R. Reitz, American Law Institute, Model Penal Code: Sentencing, Plan for Revision, 6 Buff. Crim. L. Rev. 525 (2002). For skeptical views on the reform potential of a new model penal code, see Stuntz, The Pathological Politics., supra note 2, at 583-85. Legislatures could also engage in a serious revision of their own legislation by creating special commissions to identify unnecessary overlapping offenses, improve the definitions of particular offenses, and work to give internal coherence to their criminal codes. Illinois and Kentucky are two states that have worked in this direction. See Robinson & Cahill, supra note 253.

n256. Even assuming that the ALI or a special commission would go forward with the proposal of reforming or adopting a new Model Penal Code, and that legislatures would adopt the proposed revisions in full or in part, the real challenge would be how to ensure that
legislatures adopt better legislative techniques for the future. Those states that wholly or partially adopted the original MPC today have better criminal statutes than those jurisdictions that did not. See Paul H. Robinson et al., The Five Worst (and Five Best) American Criminal Codes, 95 Nw. U.L. Rev. 1 (2000). But even the former jurisdictions have added many new layers to their criminal statutes based on short-term political calculations. The adoption of certain legislative techniques could help keep this situation better under control. For instance, once a jurisdiction adopts a new and coherent criminal code, the very same code could establish that the legislature must incorporate any addition or modification of a criminal offense within the structure of the code as opposed to in special statutes. This requirement would force legislatures to review the general system of criminal law when considering and introducing changes. For a similar proposal for the Italian criminal justice system, see Luigi Ferrajoli, Diritto e Ragione: Teoria del Garantismo Penale (1989). In addition, legislatures can make further use in criminal codes of a commentary section following the actual criminal provisions. When dealing with specific cases of offenses that are already in their criminal statutes, legislatures could respond to public concern on these issues by including the specific cases in the commentary instead of creating new offenses. For a proposal in this direction, see Robinson & Cahill, supra note 253. This would help to limit duplication and overlap of offenses.

n257. See supra note 182.

n258. For all crimes with a potential sentence of incarceration, the prosecutor would have to show that a substantial number of other defendants in factually similar cases have been prosecuted for the same offense. This would limit the power of prosecutors to charge defendants for relatively innocuous conduct, as adultery. It would also reduce the incentives for legislatures to create crimes that are rarely prosecuted, which would also contribute to the reduction of prosecutorial adjudication. See Stuntz, The Political Constitution, supra note 64, at 70-71.

n259. For reform proposals in this direction, see Stuntz, The Pathological Politics, supra note 2, at 587-96.

n260. ABA Standards for Criminal Justice again provides a model in this respect. Standard 3-3.9(f) establishes: "The prosecutor should not bring or seek charges greater in number or degree ... than necessary to fairly reflect the gravity of the offense." The commentary to this standard explains: "Although there are many different conceptions of what 'overcharging' actual is, the heart of the criticism is the belief that prosecutors have brought charges, not in the good faith belief that they fairly reflect the gravity of the offense, but rather as a harassing and coercive device in the expectation that they will induce the defendant to plead guilty.... The line separating overcharging from the sound exercise of prosecutorial discretion is necessarily a subjective one, but the key consideration is the prosecutor's commitment to the interests of justice, fairly bringing those charges he or she believes are supported by the facts without 'piling on' charges in order to unduly leverage an accused to forgo his or her right to trial." ABA Standards for Criminal Justice 3-3.9(4) (3d ed. 1993).

n261. This stricter judicial control of the voluntariness of the guilty plea means that, in the plea colloquy, the court should find out about all the charges that were included in the prosecutor's plea proposal in case the defendant decides to go to trial. If those charges are a stretch or include socially innocuous conduct, the court should reject the guilty plea as involuntary. The prosecution and the defense may then re-discuss the conditions of a plea disposition without the defendant facing a coercive plea proposal.


n264. For analyses of the shortcomings of the Blockburger test, see, e.g., George C. Thomas III, Double Jeopardy: The History, the Law 170-71 (1998); Kirstin Pace, Fifth Amendment - Adoption of the "Same Elements" Test: The Supreme Court's Failure to Adequately Protect Defendants from Double Jeopardy, 84 J. Crim. L. & Criminology 769, 798-99 (1994).

n265. Model Penal Code, Section 1.07(4) establishes that an offense is included in the other if it is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or it consists of an attempt or solicitation to commit the offense charged or to commit an offense otherwise included therein; or it differs from the offense charged only in respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability to establish its commission.

n266. See Model Penal Code §1.07(1). For a summary of other proposals to define "same offense" as well as a suggestion that the analysis of the protections against multiple punishments and successive prosecutions for the same offense should be separated, see Anne Bowen Poulit, Double Jeopardy Protection from Successive Prosecution: A Proposed Approach, 92 Geo. L.J. 1183 (2004). See also Nancy J. King, Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties, 144 U. Pa. L. Rev. 101 (1995) (proposing a "cumulative excessiveness" review especially when the protection against multiple penalties is weak).


n268. See, e.g., Richard St. John, Note, License to Nullify: The Democratic and Constitutional Deficiencies of Authorized Jury Lawmaking, 106 Yale L.J. 2563, 2597 (1997) ("Whereas juries are charged with finding the facts and applying them to the law, jurors, as citizens in a democratic polity, have a responsibility to work through democratic channels to reform laws that violate their consciences.").

n269. See, e.g., Strickland v. Washington, 466 U.S. 668, 695 (1984) ("An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed.").
n270. For a proposal to give legal power to judges to acquit for any reason, see Stuntz, The Political Constitution, supra note 64, at 70.

n271. Some jurisdictions have adopted statutes incorporating this doctrine for criminal cases. See, e.g., Hawaii Penal Code, Section 702-236; New Jersey Code of Criminal Justice, Section 2C:2-11; Pennsylvania Consolidated Statutes, Section 312. For a description of criminal cases in which this doctrine was raised by the defense, see Brent G. Filbert, Defense of inconsequential or de minimis violation in criminal prosecution, 58 A.L.R.5th 299.


n273. Langer, supra note 98.

n274. Wright & Miller, supra note 182.

n275. Marc Miller and Ron Wright praised the New Orleans DA Office's policy for substantially reducing plea exchanges and the practice of charging and binding over weak cases for trial. See id. The analysis of this Article shows that it would be the reduction of charging and binding over weak cases for trial - not the reduction of plea bargains - that may be normatively appealing about the New Orleans system.

n276. Some prosecutorial standards already establish this duty. See, e.g., ABA Standards for Criminal Justice 3-4.1(a) (3d ed. 1993) and its commentary ("The prosecutor should have and make known a general policy or willingness to consult with defense counsel concerning disposition of charges by plea.").

n277. The defense does not have search powers, subpoena power, or means to generate incentives for testimony such as offers of immunity. See, e.g., Brown, supra note 142.
n278. A few states already allow depositions for criminal discovery. See, e.g., Fla. R. Crim. P. 3.220(h); Iowa R. Crim. P. 2.13(1).

n279. See Langer, supra note 98.


n282. Without proposing the separation of functions explored in this subsection, other commentators have seen this problem. See, e.g., Robert W. Gordon, Imprudence and Partisanship: Starr's OIC and the Clinton-Lewinsky Affair, 68 Fordham L. Rev. 639, 645 (1999).

n283. See Richman, supra note 2, at 775.

n284. Id.; Pizzi, supra note 121.

n285. For a sophisticated analysis about how the relationships between prosecutors and investigating agencies can be regulated, see Daniel Richman, supra note 2 (offering a theory of working groups and mutual monitoring).

n286. In order to perform their role, adjudicating prosecutors could interview witnesses, talk to experts, deal with physical evidence, and so on. A way of differentiating these prosecutors from the other two kinds could be by assigning them investigative units. A number of DA offices already have these kinds of units, though not under the orbit of a special adjudicating unit. See Bureau of Justice Statistics, U.S. Dep't of Justice, National Survey of Prosecutors: State Court Prosecutors in Large Districts, 2001, at 2 tbl.1 (2001), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/scpld01.pdf (reporting that staff investigators comprise 9.9% of total personnel in prosecutors' offices in large districts).
n287. England establishes a clear distinction between prosecutors investigating and deciding upon the charges, and attorneys in charge of representing the prosecution at trial. The Crown Prosecution Service prepares criminal cases but then transfers them to barristers who represent the prosecution at trial. See Pizzi, supra note 128.

n288. At the same time, distinguishing between investigating and adjudicating prosecutors could make it more acceptable for the former to work more closely with police, including the same physical agents.

n289. See, e.g., Berend, supra note 101, at 541 n. 342 (“Many jurisdictions assign prosecutors to cases for the duration of particular procedures, such as issuing, arraignment, preliminary hearing, pretrial motions, or trial. Vertical prosecution, whereby one prosecutor follows the case through the trial process, is often reserved for the most serious cases or particular categories of case, such as gang, child abuse, or domestic violence cases.”); Wendy Keller, Disparate Treatment of Spouse Murder Defendants, 6 S. Cal. Rev. L. & Women's Stud. 255, 274 (1996) (identifying that horizontal prosecution is a more common practice than vertical prosecution, citing Howard Abadinsky, Discretionary Justice 83 (1984)).

n290. Bibas, supra note 15, at 2502 (citations omitted).

n291. See supra note 191 and accompanying text.

n292. For a special report on this issue, see Keny Armstrong & Maurice Possley, The Verdict: Dishonor, Chicago Trib., January 10, 1999, at C-1.

n293. See Lynch, supra note 2, at 2135.


n295. See, e.g., Schulhofer, Disaster, supra note 5, at 1983-84; Schulhofer, Inevitable, supra note 5; Alschuler, Implementing the Criminal Defendant's Right to Trial, supra note 5.

n297. Wright, supra note 2, at 44-48.

n298. On the differences between federal and state criminal procedures that result in less protections for defendants prosecuted in the federal system, see Steven D. Clymer, Unequal Justice: The Federalization of Criminal Law, 70 S. Cal. L. Rev. 643, 668-75 (1997).