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Enhancing the Judicial Role in Criminal Plea and Sentence Bargaining

Susan R. Klein *

Conventional wisdom in criminal procedure scholarship offered two competing models of the American criminal justice system, famously labeled by Professor Herbert Packer as the “Crime Control” and “Due Process” models.¹ The Crime Control model posited “the efficient, expeditious, and reliable screening and dispositions of persons suspected of crime as the central value to be served by the criminal process.”² The Due Process model asserted that the truth-seeking function is “limited by and subordinate to the maintenance of the dignity and autonomy of the individual.”³ Most criminal law casebooks began with a description of these models and asked the student to consider which direction the Court should head. These descriptions are now disappearing from the literature. The first reason is normative: we realize that neither model can be adopted without undesirable changes in constitutional precedent and executive functions, and neither would optimally serve the consensus goals of accuracy and equality. The second is practical: we realize that the American criminal justice system, like the civil system, would collapse if even a small percentage of suspects took advantage of these procedures and demanded trials.

The Due Process model ascended during the civil rights movement with the Warren Court revolution, due in large measure to the shameful treatment of African Americans in the southern states.⁴ This model has been eroded by

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1. Herbert L. Packer, *The Courts, the Police and the Rest of Us*, 57 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 238, 239 (1966).

2. *Id.*

3. *Id.*

4. See, e.g., Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 808 (1994) (pointing out that one of the most open Fourth Amendment discussions of race to date occurred in an opinion authored by Chief Justice Warren); Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 214–15 (1991) (claiming that in many contexts the Warren Court conceptualized equal protection rights as “entitlements to particular substantive outcomes” rather than merely “restrictions on deliberate governmental disadvantaging”); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 63 (1996) (asserting that “for the justices of the Warren Court, criminal procedure questions were never entirely divorced from racial concerns”). Chief Justice Warren imposed numerous restrictions on investigative techniques and trial procedures to protect the rights of those suspected of crime, which applied to state as well as federal actors. See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 467 (1966) (holding that the Fifth Amendment requires state law enforcement officials to

various judicial and societal trends. First, as Professor Carol Steiker has written, the Burger and Rehnquist Courts steadily chipped away at the contours and enforcement of constitutional criminal procedural guarantees, denying the promise of procedures that would protect liberty and equality while ensuring the safety of the community through the conviction of guilty and dangerous criminals.⁵ Second, the erroneous public perception, fueled by politicians and the media, that violent crime has increased since the 1970s,⁶ has led to such a broadening of the scope of substantive criminal law that procedural protections have little force.⁷ With thousands of federal offenses to choose from,⁸ a determined prosecutor can generally locate some charge that will stick.⁹ Finally, the drug war has transformed a large percentage of our population, especially young African American males, into criminals, even though these perpetrators are primarily non-violent offenders

apprise suspects of their rights before conducting any custodial interrogation); *Mapp v. Ohio*, 367 U.S. 643, 654–55 (1961) (applying the Fourth Amendment exclusionary rule to the states).

5. Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2468 (1996).

6. Sara Sun Beale, *What's Law Got to Do with It? The Political, Social, Psychological, and Other Non-legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 39 (1997); see also FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA (2001) (noting that the homicide rate was no higher in 1994 than in 1974).

7. William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 7 (1997) [hereinafter *Uneasy Relationship*]; see also William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 567 (2001) [hereinafter *Pathological Politics*] (explaining that appellate criminal litigation is more procedural than substantive partly because of “the growing ease, in a world of expanding criminal codes, of filing charges that capture the defendant’s conduct unambiguously”).

8. Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 980 (1995) (noting that by the mid-1990s there were more than 3,000 federal crimes).

9. Various independent counsels have made this apparent. See, e.g., *United States v. Blackley*, 167 F.3d 543, 547–48 (D.C. Cir. 1999) (determining that the Independent Counsel had jurisdiction to prosecute the former chief of staff to the Secretary of Agriculture where the original appointment order encompassed crimes related to or arising out of the primary investigation); *In re Espy*, 80 F.3d 501, 507 (D.C. Cir. 1996) (holding that a court may refer a related matter to an independent counsel only where the effect of the referral is to “interpret[], but not expand[], the independent counsel’s original prosecutorial jurisdiction”); *United States v. Libby*, No. 05-394(RBW), 2006 WL 1109454, at *4–5 (Apr. 27, 2006) (holding that the Attorney General has the authority to delegate his authority to oversee an investigation into alleged leaks to a Special Counsel); *Jones v. Clinton*, 993 F. Supp. 1217, 1218–19 (E.D. Ark. 1998) (restricting, at the Office of Independent Counsel’s request, discovery related to President Clinton’s affair with Monica Lewinsky and excluding such evidence from the trial of Paula Jones’s sexual harassment claims where such civil discovery could interfere with the federal criminal investigation); *United States v. McDougal*, 906 F. Supp. 499, 502 (E.D. Ark. 1995) (holding that the Independent Counsel has authority to prosecute defendants for criminal wrongdoing in financial transactions involving savings and loan associations). See generally Joseph S. Hall et al., *Independent Counsel Investigations*, 36 AM. CRIM. L. REV. 809, 827 (1997) (discussing the nearly fifty convictions resulting from independent counsel investigations and noting that many of these “have been criticized for their cost, length, scope, and for the zeal with which independent counsels pursued their target”).

who can be captured only through the most invasive investigative processes or interpretations of Fourth Amendment doctrine.¹⁰

However, neither did the law enforcement model of criminal procedure triumph. Serious flaws with those criminal procedures that concern accuracy¹¹—especially the doctrines surrounding eyewitness identification,¹² adequacy of counsel, prosecutorial misconduct, provision of exculpatory information, and scientific and forensic testing¹³—have led to recently discovered wide-spread wrongful convictions of innocent persons.¹⁴

10. See MARC MAUER, THE SENTENCING PROJECT, THE CRISIS OF THE YOUNG AFRICAN AMERICAN MALE AND THE CRIMINAL JUSTICE SYSTEM 8–9 (1999), available at <http://www.sentencingproject.org/pdfs/5022.pdf> (finding that one in three black males ages 20–29 is under some form of correctional supervision); William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795 (1998) (arguing that police and prosecutors focus on drug crimes perpetrated in poor urban neighborhoods because such “downscale” crack cocaine markets are easier to penetrate than “upscale” powder cocaine markets, producing a racial or ethnic “tilt” towards largely black defendants). The Court has approved investigative techniques under the Fourth Amendment that defy human nature—people carrying contraband either voluntarily “consent” to be searched, or they lack standing to challenge the governmental action. See *infra* notes 38–42 and accompanying text.

11. Daniel Givelber, *Lost Innocence: Speculation and Data About the Acquitted*, 42 AM. CRIM. L. REV. 1167, 1198–99 (2005) (suggesting that friendly plea bargains, like those for time served, may “be to good to ignore,” such that innocent people can be convicted by pleas as well as by trial); Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1321 (1997) (asserting that the U.S. criminal justice system “creates a significant risk that innocent people will be systematically convicted”); Susan R. Klein, *Enduring Principles and Current Crises in Constitutional Criminal Procedure*, 24 LAW & SOC. INQUIRY 533, 537, 557–62 (1999) (citing advances in DNA testing that have exonerated wrongfully convicted defendants and criticizing the Supreme Court’s poor test for excluding unreliable eyewitness testimony); Daniel S. Medwed, *Anatomy of a Wrongful Conviction: Theoretical Implications and Practical Solutions*, 51 VILL. L. REV. (forthcoming 2006), available at <http://ssrn.com/abstract=893831> (citing research that “eyewitness misidentifications contributed to the initial convictions in over eighty percent of documented DNA exonerations”).

12. Klein, *supra* note 11, at 557–59 & nn.72–81.

13. One of the most notorious recent scandals involved the Houston Police Department Crime Laboratory. In 2003, the Houston Police Department was forced to shut down the DNA and serology section of its crime laboratory after a television report exposed serious procedural deficiencies. William C. Thompson, *Tarnish on the ‘Gold Standard’: Understanding Recent Problems in Forensic DNA Testing*, CHAMPION, Jan.–Feb. 2006, at 10. Subsequently, two men convicted due to lab evidence were released when DNA testing proved their innocence. *Id.* The Houston Chronicle maintains an archive of articles on the laboratory investigation at www.chron.com/content/chronicle/special/03/crimelab/index.html.

14. See EDWARD CONNORS ET AL., NAT’L INST. OF JUSTICE, U.S. DEP’T OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL 2, 13–14 (1996) (finding twenty-eight innocent but convicted men behind bars, some of them on death row); INNOCENCE PROJECT, FACTS ON POST-CONVICTION DNA EXONERATIONS, <http://www.innocenceproject.org/docs/DNAExonerationsFactsWEB.pdf> (noting that there have been 176 post-conviction DNA exonerations in the United States as of May 16, 2006); Michael D. Shear & Jamie Stockwell, *DNA Tests Exonerate 2 Former Prisoners*, WASH. POST, Dec. 15, 2005, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/14/AR2005121401643.html> (announcing that the Governor of Virginia had ordered a broad re-examination of convictions between 1973 and 1988 based on DNA technology after a random test of thirty-one cases exonerated two prisoners); Press Release, Governor of Ill., Governor Ryan Declares Moratorium on Executions, Will Appoint Commission to

Erroneous convictions cannot be squared with the Crime Control model, as each wrongful conviction allows the guilty party to escape punishment and further endanger society. The coercive power of plea bargaining leaves us little data to determine what percentage of defendants pleading guilty actually are.¹⁵ Unequal treatment of criminal defendants based on wealth, race, ethnicity, geography, and gender plainly prevails,¹⁶ giving rise to social unrest (or at least misgivings), even among the middle class. Draconian mandatory minimum penalties, especially for drug offenses,¹⁷ challenge community notions of fairness, leading to a lack of respect for the system and arguably to a decrease in the deterrent and expressive force of the law.¹⁸ It is

Review Capital Punishment System (Jan. 31, 2000), available at <http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=3&RecNum=359> (announcing a moratorium on executions of Illinois death row inmates after numerous prisoners were exonerated).

15. C. RONALD HUFF ET AL., CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY 73–74 (1996) (asserting that many innocent defendants accept guilty pleas, in part because they can result in immediate freedom, suspended sentences, or relief from potentially severe punishments); Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 60 (1968) (noting that, in plea bargaining practices, “the greatest pressures to plead guilty are brought to bear on defendants who may be innocent”); Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 CARDOZO L. REV. (forthcoming 2006), available at <http://ssrn.com/abstract=794549> (arguing that plea bargaining allows prosecutors to extract a guilty plea in nearly every case, including those where the defendant is innocent); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 979, 1003 (1992) (arguing for abolition of the plea bargaining system).

16. See Becky Pettit & Bruce Western, *Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration*, 69 AM. SOC. REV. 151, 153 (2004) (noting that racial and class disparities in imprisonment are partly attributable to differential treatment by police and the courts); see also THOMAS H. COHEN & BRIAN A. REAVES, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2002, at 4 (2006), available at www.ojp.usdoj.gov/bjs/pub/pdf/fdluc02.pdf (showing racial and ethnic disparities in the number of felony defendants in the nation's seventy-five largest counties); FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 2004, at 281 tbl.30 (2004), available at http://www.fbi.gov/ucr/cius_04/documents/CIUS_2004_Section4.pdf (showing geographic disparities in arrest rates); MATTHEW R. DUROSE & PATRICK A. LANGAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, STATE COURT SENTENCING OF CONVICTED FELONS, 2002, at tbl.2.1 (2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/scscf02.pdf> (showing disparities in state court felony convictions based on race and gender); *id.* at tbl.2.12 (showing disparities in the mean length of state felony sentences based on race and gender).

17. See 21 U.S.C. §§ 841, 846 (2000) (imposing mandatory minimum sentences for controlled substance violations and imposing the same penalties for attempt and conspiracy as for the primary drug-related offense); JUSTICE KENNEDY COMMISSION, AM. BAR ASS'N, REPORTS WITH RECOMMENDATIONS TO THE ABA HOUSE OF DELEGATES 9 (2004), available at <http://www.abanet.org/crimjust/kennedy/JusticeKennedyCommissionReportsFinal.pdf> (opposing mandatory minimum penalties).

18. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—2002, at 123 tbl.2.24 (Kathleen Maguire & Ann L. Pastore eds., 2003), available at <http://www.albany.edu/sourcebook/pdf/sb2002/sb2002-section2.pdf> (finding that 56% of African Americans do not think that law enforcement officers “treat all races fairly”); Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 679–80 (1995) (presenting racial critiques of the criminal justice system and arguing that racial considerations by African American jurors are legally and morally appropriate); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 350, 378 (1997) (positing that

perhaps for these reasons that the current conservative Court has nonetheless recently expanded jury trial rights,¹⁹ strengthened the Sixth Amendment's Confrontation Clause,²⁰ contracted the class of defendants eligible for the death penalty,²¹ and reigned in prosecutorial control over sentencing.²²

In Part I of this Article, I suggest that both models have failed, at least on the federal level.²³ While the right and left wings of the Court, along with Republican and Democratic politicians, continue to battle over law enforcement versus individual liberties, this is not where the procedural game is being played.²⁴ Instead, as Professor and Federal District Court Judge Gerard Lynch has explained, the federal criminal justice system has moved to a de facto administrative regime,²⁵ where prosecutors interpret the law and adjudicate cases without written standards or hearings. Although pleas are theoretically negotiated in the shadow of a jury trial, constitutional criminal procedures that protect suspects during the investigation and prosecution of crime are largely irrelevant in a world of guilty pleas and appeal waivers.²⁶

social norms play a large role in criminal behavior and that certainty of conviction has a stronger deterrent effect than extremely severe punishment).

19. *Blakely v. Washington*, 542 U.S. 296, 305 (2004) (holding that facts supporting an exceptional sentence under a state's mandatory sentencing guidelines must either be admitted by the defendant or found by a jury); *Ring v. Arizona*, 536 U.S. 584, 608–09 (2002) (overruling prior doctrine that would allow a sentencing judge, without a jury's involvement, to find an aggravating circumstance necessary for imposing the death penalty); *Apprendi v. New Jersey*, 530 U.S. 466, 481, 491–92 (2000) (requiring any fact that increases the penalty for a crime beyond the statutory maximum to be submitted to a jury and proven beyond a reasonable doubt).

20. *Crawford v. Washington*, 541 U.S. 36, 68–69 (2004) (determining that “[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is . . . confrontation”).

21. *Roper v. Simmons*, 543 U.S. 551, 578 (2004) (holding that the Eighth Amendment prohibits the execution of individuals who were juveniles at the time of the offense); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (ruling that the execution of mentally retarded felons violates the Eighth Amendment).

22. *United States v. Booker*, 543 U.S. 220, 226–27 (2005) (holding that the Federal Sentencing Guidelines are advisory and not mandatory, and thus, the Sixth Amendment is not violated based upon the sentencing judge's determination of facts).

23. This Article will focus on the federal criminal justice system. While I realize that federal law enforcement accounts for less than 10% of this country's total criminal caseload, the federal system, for many reasons, plays a role disproportionate to its numbers. See MATTHEW R. DUROSE & PATRICK A. LANGAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2002, at 1 (2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fssc02.pdf> (noting that state courts accounted for 94% of total felony convictions in the United States).

24. These battles are, of course, still being fought with regard to the substance of federal and state criminal law.

25. Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117, 2142 (1998) (arguing that our existing system is one of de facto prosecutorial administration).

26. See *Brady v. United States*, 397 U.S. 742, 752 (1970) (refusing to find a guilty plea invalid under the Fifth Amendment simply because the defendant prefers the certainty or probability of a lesser sentence and suggesting that guilty pleas are not unconstitutional because they provide “mutuality of advantage” to both the prosecution and defense); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE tbl.5.24.2004 (2006), <http://www.albany.edu/sourcebook/pdf/t5242004.pdf> (indicating that 96%—70,591 of 73,616—of all federal district court convictions in 2004 were a product of guilty pleas); BUREAU OF

In Part II, I detail what I consider to be the two most pernicious problems with the present quasi-administrative model in the federal criminal justice system—lack of information for defendants and a biased and coercive process for obtaining pleas. Unlike our civil system, defendants have almost no opportunity to obtain discovery (even of exculpatory material) prior to a negotiated settlement. Also unlike our civil system, where the parties have relatively equal bargaining power or submit to impartial arbitration, the primary decision-maker in criminal plea negotiations is the federal prosecutor, one of the parties to the suit. Though the procedures for investigating offenses and conducting sentencing hearings are ostensibly regulated by the federal Constitution,²⁷ the vast majority of these procedures are waived by the defendant.²⁸ Moreover, procedures for plea negotiations, the most significant and least visible stage of the criminal process, are thus far untouched by constitutional regulation. To ensure accuracy and equality, federal criminal defendants and jurists need the information necessary to determine whether a prosecutor could prove guilt beyond a reasonable doubt to a jury, and the data regarding charges imposed and sentences levied against suspects alleged to have engaged in similar conduct.

In Part III, I will begin to sketch out methods for collecting and distributing information and implementing fairer and more accurate procedures. Supreme Court constitutional oversight of the process by which criminal defendants obtain information and bargain about the process by which pleas are taken and sentence length determined will almost certainly

JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—2003, at 450 tbl.5.46 (Kathleen Maguire & Ann L. Pastore eds., 2005), available at <http://www.albany.edu/sourcebook/pdf/t546.pdf> (noting that 95% of all state court felony convictions in 2000 resulted from guilty pleas); see also Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2467–68 (2004) (arguing that “[p]lea-bargaining practices need many reforms to conform more closely to the shadows of trial and to iron out inequities”); Nancy Jean King, *Priceless Process: Nonnegotiable Features of Criminal Litigation*, 47 UCLA L. REV. 113, 180 (1999) (concluding that in plea bargaining, constitutional rights are something more like “an expensive option-package that a defendant can purchase if he does not want the models available on the lot for a discount”).

27. Most of the protections contained in the Bill of Rights, discussed *infra* notes 33–37 and accompanying text, are applicable in state as well as federal criminal proceedings. The Due Process Clauses of the Fifth and Fourteenth Amendment apply at sentencing hearings. *Almendarez-Torres v. United States*, 523 U.S. 224, 248 (1998) (reserving the issue of “whether some heightened standard of proof [beyond a preponderance of evidence standard] might apply to sentencing determinations that bear significantly on the severity of sentence”). However, the procedures mandated at sentencing hearings are very lax—the prosecutor need not strictly conform to the Federal Rules of Evidence, and the defendant has no right to confront witnesses against him. See *Williams v. New York*, 337 U.S. 241, 247 (1949) (“[M]odern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.”); see also *United States v. Navarro*, 169 F.3d 228, 236 (5th Cir. 1999) (noting that there is no Confrontation Clause right at sentencing).

28. See *infra* notes 62–74 and accompanying text.

not occur, at least in the foreseeable future.²⁹ Direct Congressional regulation is even less likely.³⁰ The most hopeful avenues include changing the Federal Rules of Criminal Procedure, changing local federal district court rules, or as a third choice, allowing each federal district judge to use her pre- and post-*Booker* sentencing authority to demand certain information from the government and minimally fair procedures at the investigation and plea stages as a prerequisite to approving guilty pleas and Rule 11(C) sentences.

What I propose here is a change in plea and discovery procedures only. I am not suggesting any alterations in the substance of federal criminal law or regulation regarding what misconduct law enforcement agents choose to investigate and which cases federal prosecutors decide to pursue. Nor am I suggesting a change in substantive sentencing rules, though federal district court judges can and have used the post-*Booker* transformation of the Federal Sentencing Guidelines into an advisory system to substitute the Commissions' normative judgments regarding appropriate sentencing with their own.³¹ In fact, Professor Jordan Steiker and I have defended determinate sentence systems in theory, if not in practice, on the grounds that they enhance the opportunity for equality and transparency in noncapital sentencing decisions.³² I suggest, instead, that changes in the way defendants and prosecutors bargain over plea negotiations and sentences could be improved regardless of what substantive sentencing rules are employed. Given that we agree that crime *x* is worthy of more prison time than crime *y*, we must ensure that a defendant pleading guilty to crime *x* really committed crime *x*, and that he is receiving approximately the same sentence discount as other defendants who plead guilty to crime *x*.

29. See, e.g., *United States v. Redondo-Lemos*, 955 F.2d 1296, 1299 (9th Cir. 1992) (noting that prosecutorial decisions regarding plea bargaining are ill-suited for judicial oversight). The Court, which has grown more conservative since President George W. Bush's first term, has taken a "hands-off" approach to criminal discovery and plea negotiations. See *infra* notes 75–79 and accompanying text.

30. See DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 101–02 (2001) (discussing the governmental focus on "law and order" politics); Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1088–94 (1993) (arguing that legislators undervalue the rights of the accused because there is substantial political risk in taking the side of the suspect). While Congressional approval is required to amend the Federal Rules of Criminal Procedure, the rules themselves are created by the judiciary. See *infra* note 140.

31. Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 VAL. U. L. REV. 693, 725–30 (2005).

32. Susan R. Klein & Jordan M. Steiker, *The Search for Equality in Criminal Sentencing*, 2002 SUP. CT. REV. 223, 237–38 (suggesting that mandatory guidelines enhance equality and transparency by prohibiting the sentencer from considering nonneutral factors such as race and gender and consulting his own penal philosophy, and by providing ex ante what characteristics regarding an offense and an offender are relevant to sentencing and the weight to assign each factor).

I. The Failed Crime Control and Due Process Models

While the Supreme Court continues to pay lip service to the Due Process model, in reality our criminal justice system is more administrative than adversarial. Despite the Warren Court's application, in the 1960s, of most of the Fourth, Fifth, and Sixth Amendments' criminal procedural protections directly against the states, this complex edifice of detailed constitutional protections for criminal defendants does little to obstruct successful criminal prosecutions in the overwhelming majority of cases. This is due in part because of the Court's interpretation of the contours of these protections, and in larger measure because all protections are generally waived.

In theory, the Fourth Amendment's ban against unreasonable searches and seizures protects the privacy and dignity of an individual by disallowing police searches without probable cause to believe that the individual has committed a criminal offense and by requiring an impartial magistrate to make that determination.³³ The Fifth Amendment's Self-Incrimination Clause protects a suspect from being physically or psychologically coerced into confessing (falsely or otherwise) by a government agent.³⁴ The Fifth Amendment's Grand Jury Clause provides a bulwark between the government and a citizen.³⁵ The Fifth Amendment's Double Jeopardy Clause prevents government harassment and protects finality by barring successive trials for the same offense.³⁶ The Sixth Amendment's right to effective assistance of counsel assures a fair trial by placing the adversaries on a relatively equal playing field, even where a defendant is indigent and the government has essentially unlimited resources at its disposal.³⁷

In reality, the system rarely operates in this manner. The scope of constitutional criminal procedural protections have been largely interpreted so as not to hamper investigation and prosecution of suspects. For example, most searches bypass the Fourth Amendment entirely by obtaining "consent" of the suspect. Why would anyone, especially a criminal who knows she has contraband or evidence of illegal activity in her possession, vehicle, or residence, voluntarily allow police to search? It is only through the Court's

33. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (holding that the Fourth Amendment exclusionary rule applies to the states).

34. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (holding that the Fifth Amendment requires warnings before law enforcement can ask incriminating questions of a suspect in custody).

35. *See Hurtado v. California*, 110 U.S. 516, 532 (1884) (describing the Bill of Rights as a "bulwark[] . . . against arbitrary legislation").

36. *See United States v. Dixon*, 509 U.S. 688, 704 (1993) (reversing *Grady's* same conduct test and reverting back to *Blockburger's* same elements test).

37. *Strickland v. Washington*, 466 U.S. 668 (1984) (holding that a defendant must show that counsel's representation fell below an objective standard of reasonableness and was prejudicial to the defense); *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (recognizing that "the right to counsel is the right to the effective assistance of counsel"); *Gideon v. Wainwright*, 372 U.S. 335, 342-44 (1963) (applying Sixth Amendment's right to counsel to states).

surreal definition of “consent” that the fruits of such searches are admitted into evidence.³⁸ In cases where time constraints do not permit consent, or where the suspect’s refusal to allow the search is sufficiently unambiguous for the Court to reinterpret, evidence obtained through the search will most likely be admitted through one of the myriad of exceptions to the warrant and probable cause requirements.³⁹ Finally, the substantive content of the Fourth Amendment and the standing doctrine will permit fruits of any search to be admitted where a defendant lacks a reasonable expectation of privacy in the item or place to be searched,⁴⁰ and with each passing day the Court is finding more and more such expectations, at least outside the suspect’s home, to be unreasonable.⁴¹ All told, the Fourth Amendment is sufficiently rife with exceptions and limitations that it does little to protect privacy or hamper law enforcement.⁴²

38. See, e.g., Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 221–22 (2003) (critiquing the Supreme Court’s consensual search jurisprudence in the context of public bus searches).

39. See, e.g., *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 (1995) (special needs); *Illinois v. Rodriguez*, 497 U.S. 177, 182–89 (1990) (apparent consent of co-occupant); *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 455 (1990) (sobriety checkpoints); *New York v. Burger*, 482 U.S. 691, 712–14 (1987) (closely regulated business inspections); *Illinois v. LaFayette*, 462 U.S. 640, 648 (1983) (inventory searches of arrestees); *United States v. Martinez-Fuerta*, 428 U.S. 543, 563–67 (1976) (immigration roadblocks); *South Dakota v. Opperman*, 428 U.S. 364, 373–74 (1976) (automobile inventory searches); *Coolidge v. New Hampshire*, 403 U.S. 443, 465–73 (1971) (plain view); *Chambers v. Maroney* 399 U.S. 42, 52 (1970) (automobile exceptions); *Louisiana v. Vale*, 399 U.S. 30, 33–36 (1970) (exigent circumstances); *Chimel v. California*, 395 U.S. 752, 762–68 (1969) (search incident to arrest); see also Klein, *supra* note 11, at 544–45 (discussing exceptions to warrant and probable cause requirements).

40. See *Katz v. United States*, 389 U.S. 347, 353 (1967) (“The Government’s activities in electronically listening to and recording the petitioner’s words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a ‘search and seizure’ within the meaning of the Fourth Amendment.”); see also *California v. Greenwood*, 486 U.S. 35, 40–43 (1988) (holding that defendant had neither standing nor a reasonable expectation of privacy in abandoned property); *United States v. Karo*, 468 U.S. 705, 719–21 (1984) (holding that nonconsensual installation of a beeper does not violate Fourth Amendment if the monitoring is only done in public, but it is unconstitutional when the monitoring reveals information that could not have been obtained through visual surveillance); *Oliver v. United States*, 466 U.S. 170, 176–77 (1984) (holding that no warrant or probable cause is necessary for the government to trespass onto open fields); *Rawlings v. Kentucky*, 448 U.S. 98, 104–05 (1980) (holding that defendant had no standing to contest a search because he had no reasonable expectation of privacy in girlfriend’s purse).

41. See, e.g., *Illinois v. Caballes*, 543 U.S. 405, 409–10 (2005) (holding that a dog sniff conducted during a lawful traffic stop that revealed the location of an illegal substance did not violate the Fourth Amendment). But see *Georgia v. Randolph*, 126 S. Ct. 1515, 1523–28 (2006) (holding that a warrantless search was unreasonable as to the co-occupant who had expressly refused consent to allow the police to enter the home); *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (holding that thermal imaging of a house to discover indoor marijuana growth, without warrant, violated the occupant’s reasonable expectation of privacy).

42. See Susan R. Klein, *Enduring Principles and Current Crises in Constitutional Criminal Procedure*, 24 LAW & SOC. INQUIRY 533, 544–45 (1999) (listing the numerous “well-established exceptions to the warrant preference”).

Current Fifth Amendment jurisprudence fares no better. Despite a failure to deliver the warnings that law enforcement officers must give a suspect in custody to protect their privilege against self-incrimination, or even the intentional disregard of a suspect's assertion of her Miranda rights once the warning is given, prosecutors can use such statements to find derivative evidence⁴³ and impeach a testifying defendant.⁴⁴ Moreover, they can intentionally refrain from warning at all where public safety is endangered.⁴⁵ These doctrines, of course, encourage questioning "outside" of Miranda.⁴⁶ Though it appeared at the time it was rendered that the Warren Court strengthened the Fifth Amendment privilege against self-incrimination through the *Miranda* decision, recent empirical studies show that these warnings have not reduced the rate in which suspects confess.⁴⁷ The decision has also resulted in a de facto rule that statements taken after Miranda warnings are voluntary, providing greater incentive for police to obtain confessions and making it more difficult for courts to ferret out the coerced ones.⁴⁸

43. See *United States v. Patane*, 542 U.S. 630, 643 (2004) (holding that the "physical fruit" of a voluntary statement—in this case, a gun—is admissible even if the statement is given without a sufficient *Miranda* warnings); *Michigan v. Tucker*, 417 U.S. 433, 450 (1974) (holding that testimony of a witness whom the police discovered as a result of a criminal defendant's statement was admissible even though the underlying statement by the defendant would not be admissible because he had received an incomplete *Miranda* warning).

44. See *Oregon v. Hass*, 420 U.S. 714, 723–24 (1975) (holding that statements that would be inadmissible due to a *Miranda* violation may nevertheless be used against a defendant-witness to impeach on rebuttal); *New York v. Harris*, 401 U.S. 222, 226 (1971) (holding that testifying-defendant's credibility "was appropriately impeached by the use of earlier conflicting [and otherwise inadmissible] statements").

45. *New York v. Quarles*, 467 U.S. 649, 655–56 (1984) (holding that there is a "public safety" exception which allows a suspect's answer to a question to be admissible even without a proper *Miranda* warning if the questions "are necessary to secure [the safety of the officers] or the safety of the public").

46. See Susan R. Klein, *Miranda Deconstitutionalized: When the Self-Incrimination Clause and the Civil Rights Act Collide*, 143 U. PA. L. REV. 417, 418 (1994) ("Thus, a rational police officer in today's world will (and often does) ignore the dictates of *Miranda*. This problem can be solved only if the Supreme Court reconstitutionalizes *Miranda*, at least to the extent necessary to enforce those restraints on state and federal officials that it initially found crucial to properly safeguarding an individual's Fifth Amendment privilege against self-incrimination."); see also Charles D. Weisselberg, *In the Stationhouse After Dickerson*, 99 MICH. L. REV. 1121, 1122 (2001) ("By transforming *Miranda* from an affirmative constitutional command governing conduct in the stationhouse into a weak rule of evidence, the new vision has encouraged officers to continue to question suspects who have asserted the right to counsel or the right to remain silent. During the last decade, the practice has become so pervasive in some jurisdictions that it has acquired its own moniker: questioning 'outside *Miranda*.'").

47. See, e.g., Louis Michael Seidman, *Criminal Procedure as the Servant of Politics*, 12 CONST. COMMENT. 207, 208 (1997) ("Virtually every empirical study of the impact of *Miranda* suggests that it has not reduced the rate at which suspects confess.").

48. See Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1075 (2001) (indicating that *Miranda* warnings result in courts being more likely to hold that statements were voluntary); Klein, *supra* note 46, at 472 (stating that if law enforcement personnel properly recite a *Miranda* warning, "*Miranda* provides the convenient presumption that the confession was voluntary");

The Fifth Amendment's Grand Jury Clause's role as a "bulwark" between the citizen and the government is likewise all talk and little protection. A prosecutor need not present exculpatory evidence to the grand jury ostensibly screening the charge,⁴⁹ ensuring the accuracy of the aphorism that "a grand jury would indict a ham sandwich if the prosecutor asked it to."⁵⁰ The rejection of the "same conduct" test in favor of the "statutory elements" test in double jeopardy doctrine allows a prosecutor to multiply punish in a single trial and charge successively in sequential trials as many times as there are slightly different federal statutes covering the misconduct.⁵¹

Defense attorneys appointed in criminal matters have been found "effective" within the meaning of the Sixth Amendment despite having been asleep⁵² or intoxicated during parts of the trial, or employing the "trial strategy"⁵³ of doing no witness interviews, examination of physical evidence, or any investigation whatsoever.⁵⁴ The poor quality of most criminal defense

see also William J. Stuntz, *Miranda's Mistake*, 99 MICH. L. REV. 975, 976–77 (2001) (asserting that *Miranda's* regulatory strategy "shift[ed], from courts to suspects, the burden of separating good police interrogation from bad").

49. *See* *United States v. Williams*, 504 U.S. 36, 55 (1992) (holding that a lower court could not require the prosecution to present "exculpatory evidence" to the grand jury because the grand jury is an institution separate from the court); *see also* *Bank of Nova Scotia v. United States*, 487 U.S. 250, 263 (1988) ("[T]he District Court had no authority to dismiss the indictment on the basis of prosecutorial misconduct absent a finding that petitioners were prejudiced by such misconduct."); *United States v. Calandra*, 414 U.S. 338, 354–55 (1974) (holding that a grand jury witness may not refuse to answer questions because they are based on illegally seized evidence); Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 290–304 (1995) ("[Grand] jurors will almost inevitably defer to the prosecutor's conclusion . . . [and] prosecutors . . . are therefore unlikely to refrain from bringing weak, unfounded, or malicious charges. The grand jury therefore fails to provide the screening that has traditionally justified its existence.").

50. R. Michael Cassidy, *Toward a More Independent Grand Jury: Recasting and Enforcing the Prosecutor's Duty to Disclose Exculpatory Evidence*, 13 GEO. J. LEGAL ETHICS 361, 361 (2000).

51. The Court overruled its more defendant-friendly "same conduct" test from *Grady v. Corbin*, 495 U.S. 508, 510 (1990), in *United States v. Dixon*, 509 U.S. 688, 704 (1993). For a thorough critique of current double jeopardy jurisprudence, *see* Susan R. Klein, *Double Jeopardy's Demise*, 88 CAL. L. REV. 1001 (2000) (reviewing GEORGE C. THOMAS III, *DOUBLE JEOPARDY: THE HISTORY, THE LAW* (1998)).

52. *See e.g.*, *Burdine v. Johnson*, 231 F.3d 950, 958 (5th Cir. 2000) ("[F]or circumstances where . . . counsel sleeps for unidentified portions of a trial, prejudice is *not* so likely that case-by-case inquiry into prejudice is *not* worth the cost." (emphasis in original)), *rev'd en banc*, 262 F.3d 336 (5th Cir. 2001).

53. Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 COLUM. L. REV. 9 (1986) (suggesting the rejection of *Strickland's* outcome-prejudice test); Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242 (1997) (suggesting that most decisions made by trial counsel could be labeled "trial strategy" and thus beyond review).

54. *See generally* DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* 78 (1999) (arguing that the *Strickland* standard for ineffective assistance of counsel "has proved virtually impossible to meet"). The Court, however, has been willing to find violations in death penalty cases where there was essentially no counsel at all. *See Rompilla v. Beard*, 125 S. Ct. 2456, 2464–69 (2005) (holding that defense counsel's failure to examine the file on defendant's prior felony convictions at the sentencing phase of a capital murder

work, particularly on the state level, coupled with the Court's lax standards of what constitutes competent counsel, results in many trial conducted without minimally sufficient procedural safeguards.⁵⁵

While there are still a few academics who believe that the Warren Court revolution successfully moved us toward the Due Process Model, and still fewer who believe that this was to the detriment of law enforcement,⁵⁶ most scholarship tells a different story. For example, Professor Carol S. Steiker convincingly suggested that the Burger and Rehnquist Courts have dismantled the Warren Court's constitutional criminal procedure revolution by retaining the Warren Court's "conduct" rules but dramatically changing the "decision" rules that unconstitutional conduct does not hamper law enforcement.⁵⁷ Professor Seidman has gone so far as to suggest that "constitutional protections intended to make prosecution more difficult instead serve [to] make the prosecutor's job easier."⁵⁸ Professor William Stuntz has likewise argued that the Warren Court's broadening of constitutional procedural guarantees backfired and is one of the root causes of overcriminalization, excessive penalties, and the country's racially skewed prison population.⁵⁹

While I place myself firmly in the category of scholars who do not believe that constitutional criminal procedural guarantees have achieved fair

trial constituted ineffective assistance). However, the latest study shows huge deficiencies in death counsel remain. Professor James Liebman studied the approximately 6,000 death cases between 1973 and 1995. He found an overall error rate (cases reversed) of 68%, and 37% of these reversals were for "egregiously incompetent defense lawyering." JAMES S. LIEBMAN ET AL., *A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995*, at ii (2000), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=232712.

55. See, e.g., COLE, *supra* note 54, at 64 (noting that "at least every five years," since *Gideon* "a major study has been released finding that indigent defense is inadequate"); Richard Klein, *The Eleventh Commandment: Thou Shalt Not be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363, 432 (1993) (noting that no state politician is willing to provide the necessary funding to criminal defense systems at the state and local levels); Stephen J. Schulhofer & David Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants*, 31 AM. CRIM. L. REV. 73, 74 (1993) (noting that there is general agreement that criminal defense systems are in "a state of perpetual crisis").

56. See, e.g., Akhil Reed Amar, *The Future of Constitutional Criminal Procedure*, 33 AM. CRIM. L. REV. 1123, 1125 (1996). Professor Amar explains:

[M]any of the Warren Court's constitutional criminal procedure pronouncements did not sit well with the American electorate. The guilty too often seemed to spring free without good reason—and by this time the guilty regularly included murders, rapists, and robbers and not just federal income tax frauds and custom cheats.

Id.; see also Joseph D. Grano, *Ascertaining the Truth*, 77 CORNELL L. REV. 1061, 1062 (1992) (bemoaning the fact that "[m]any lawyers and judges sanctimoniously defend our criminal injustice system . . . [w]hile . . . law abiding citizens desert the city's activities, restaurants, and retail merchants").

57. See Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences*, 94 MICH. L. REV. 2466, 2470 (1996) ("My primary descriptive claim . . . is that the Supreme Court's shift in constitutional criminal procedure from the 1960s to the 1990s has occasioned much more dramatic changes in decision rules than in conduct rules.").

58. Seidman, *supra* note 47, at 210.

59. William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 781-82, 816-20 (2006).

and accurate trial, I believe that a move to the law enforcement model would be much worse. Police officers are rightly dedicated to catching criminals, not protecting individual liberties, particularly where these liberties hamper the successful functioning of their investigations. Without constitutional procedures enforced by the judiciary, we could expect the kind of official lawlessness of the pre-Civil Rights era. Few have the unrealistic expectation that Congress or state legislatures would be willing to police law enforcement, at least not if they wish to be reelected.⁶⁰ A recent example is Congress's lack of response to our Chief Executive's decision to wiretap American citizens, though our stated fear is now of Muslims rather than African Americans.⁶¹

All of our present constitutional procedural protections, whether or not they would advance or impede individual liberties if employed, are less relevant than the ink spilled on them would suggest. The Supreme Court allows defendants to waive virtually all of these protections, and that is exactly what most defendants do.⁶² For example, a defendant can waive his privilege against self-incrimination during custodial interrogation,⁶³ his right to a jury trial,⁶⁴ his right to counsel or to represent himself,⁶⁵ his right to a

60. See David Alan Sklansky, *Killer Seatbelts and Criminal Procedure*, 119 HARV. L. REV. F. 56, 61 (2006), <http://www.harvardlawreview.org/forum/issues/119/jan06/sklansky.pdf> (explaining that when the Court has left regulation of law enforcement to legislative bodies, legislatures usually do not act).

61. See, e.g., Richard Henry Seamon & William Dylan Gardner, *The Patriot Act and the Wall Between Foreign Intelligence and Law Enforcement*, 28 HARV. J.L. & PUB. POL'Y 319 (2005) (discussing the recent expansion of the Foreign Intelligence Surveillance Act of 1978); Charles Babbington, *Senators Debate Move to Censure Bush; Democrats Bring in Nixon Nemesis, but GOP Defends Chief Executive's Powers*, WASH. POST, Apr. 1, 2006, at A2 (discussing a proposal by Congressional Democrats to censure President Bush over alleged violations of the Foreign Intelligence Surveillance Act of 1978); David Kravets, Associated Press, *Whistle-Blower Says AT&T Gave Spy Agency Access to Network*, SAN JOSE MERCURY NEWS, Apr. 13, 2006, available at http://www.mercurynews.com/mld/mercurynews/news/breaking_news/14336462.htm (describing the court battle between the Electronic Frontier Foundation and AT&T to unseal documents allegedly exposing the reach of the Bush Administration's "secretive domestic wiretapping program"); Sheryl G. Stolberg & David E. Sanger, *Facing Pressure, White House Seeks Approval for Spying*, N.Y. TIMES, Feb. 20, 2006, at A9 (describing White House efforts to have Congress retroactively approve its controversial wiretapping program).

62. See *infra* notes 64–71 and accompanying text. The only exception is the right to effective assistance of counsel.

63. *Miranda v. Arizona*, 384 U.S. 436, 444–45 (1966).

64. See, e.g., *Singer v. United States*, 380 U.S. 24, 33 (1965) (“[A] jury trial [is] a right which the accused might ‘forego at his election.’”) (quoting *Patton v. United States*, 281 U.S. 276, 298 (1930)). The right to waive jury trial can be conditioned on the court's approval and the government's consent. *Patton*, 281 U.S. at 297–306 (waiver of jury trial was permissible because the constitutional provisions as to jury trials are “primarily for the protection of the accused,” the absence of the jury does not affect the jurisdiction of the court, and public policy does not require a jury trial as a defendant may plead guilty and thus dispense with a trial altogether). In the federal system, the defendant must have “the approval of the court and the consent of the government” to waive his right to a jury trial. FED. R. CRIM. P. 23(a); *Singer*, 380 U.S. at 36 (holding that there is “no constitutional impediment to conditioning a waiver of this right on the consent of the prosecuting attorney and the trial judge . . .”).

65. *Faretta v. California*, 422 U.S. 806, 819–21 (1975).

grand jury indictment,⁶⁶ his right to be present at trial,⁶⁷ his right to the protection of the Double Jeopardy Clause,⁶⁸ his right to receive exculpatory evidence,⁶⁹ and, finally, his right to appeal his conviction and/or his sentence.⁷⁰ On the federal level, negotiated plea bargains generally contain waivers of most trial⁷¹ and appellate rights.⁷² The bottom line is that, at the investigative stage, over 80% of suspects waive their *Miranda* rights,⁷³ and at the adjudicatory stage, 97% of federal criminal defendants waive all trial rights and plead guilty.⁷⁴

In addition to the Supreme Court's blessing of a defendant's waiver of all constitutional criminal procedural protections at her plea colloquy, the Court has consistently refused to place any meaningful constitutional limits on the threats a prosecutor can make to compel a plea deal. For example, pleas are voluntary even where a defendant pleads guilty in response to a threat by the prosecutor to otherwise seek the death penalty⁷⁵ or to impose a

66. While there is no Supreme Court case on waiver of grand jury indictment, the majority of federal courts view it as a personal right that can be waived. 4 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 15.1(f), at 241 (2d ed. 1999).

67. *Taylor v. Illinois*, 484 U.S. 400, 417–18, 418 n.24 (1988) (holding that the defendant's constitutional right to be present is one of those “basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client”). Waiver of the right by the defendant may be presumed where the defendant engages in disruptive behavior, *Illinois v. Allen*, 397 U.S. 337, 343 (1970), and where the defendant absents himself during the trial, *Taylor v. United States*, 414 U.S. 17, 20 (1973).

68. *Ricketts v. Adamson*, 483 U.S. 1, 8 (1987).

69. *United States v. Ruiz*, 536 U.S. 622, 632–33 (2002) (holding that plea agreement can contain a waiver of *Giglio* rights). In *Giglio v. United States*, 405 U.S. 150, 154–55 (1972), the Court held that the constitutional requirement under *Brady* of providing exculpatory evidence to the defendant included impeachment evidence against government witnesses. The circuit courts are split as to whether a defendant can waive his right to exculpatory evidence that establishes actual innocence of the crime charged, and the Court expressly reserved this issue in *Ruiz*.

70. *United States v. Hernandez*, 134 F.3d 1435, 1437 (10th Cir. 1998) (“A defendant’s knowing and voluntary waiver of the statutory right to appeal his sentence is generally enforceable.”).

71. See generally CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE, §§ 171–78, at 126–314 (2004) (offering rules and commentary relating to pleas, including waivers of rights by the defendant).

72. See FED. R. CRIM. P. 11(b)(N) (advisory committee note for 1999 amendment) (taking no position on the constitutionality of appeal waivers); RAYMOND BANOUN, AM. BAR ASS’N, THE YEAR IN REVIEW: WHITE COLLAR CRIME, at ix (2000) (noting that U.S. Attorneys in the Southern and Northern District of California have incorporated *Brady* waivers into plea agreements); Nancy J. King & Michael E. O’Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 224 (2005) (reporting the “near-uniform acceptance of appeal waivers by the courts of appeals”); U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL: CRIMINAL RESOURCE MANUAL § 626 (Oct. 1997), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00626.htm (providing language for appeal waivers).

73. Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 860 (1996) (finding a 83.7% waiver rate).

74. *United States v. Booker*, 543 U.S. 220, 289 (2005) (Stevens, J., dissenting in part).

75. See *Brady v. United States*, 397 U.S. 742, 746–47 (1970) (holding the defendant’s guilty plea voluntary where the defendant pled in response to a threat to seek the death penalty, in spite of the fact that the Court invalidated the death penalty provision of the statute subsequent to the plea).

life sentence.⁷⁶ Prosecutors can threaten to add additional felony charges if a defendant refuses to plea, so long as this threat is made during the “give and take” of plea negotiations, rather than after the defendant has exercised her right to a trial.⁷⁷ Prosecutors need not disclose exculpatory information material to guilt or punishment, otherwise required by due process, to defendants prior to entering into plea arrangements.⁷⁸ As Professor William Stuntz has so astutely put it, “[i]n criminal trials, the Constitution is omnipresent. In guilty pleas, it is nearly invisible.”⁷⁹

The failure of the due process model, coupled with the waiver of those procedures that are mandated by the constitution, does not signal that the law enforcement model has prevailed. Suspects can reject plea offers and demand jury trials. The presence of this option is a bargaining chip some defendants use to their advantage to sweeten deals and reduce sentences,⁸⁰ and even, now and then, results in a trial and an acquittal. Unfortunately, this bargaining chip is not evenly or sensibly distributed.

II. Informational and Power Inequities in the Federal System

The enormous power of federal prosecutors to persuade suspects to accept guilty pleas is well documented.⁸¹ Prosecutors have, to mix metaphors, a bundle of clubs (invoking the federal three strikes provision, threatening mandatory minimum or consecutive sentences, charging a weapon as a separate offense rather than penalty enhancer, including loss amount attributable to coconspirator, granting immunity to pro-government witnesses⁸²), as well as a few carrots (sentence reductions for acceptance of

76. See *Bordenkircher v. Hayes*, 434 U.S. 357, 363–65 (1978) (holding that it was constitutionally permissible for a prosecutor to threaten to seek a life sentence under a state three-strikes law unless the defendant pled guilty to a minor forgery charge in return for a five-year sentence).

77. *Blackledge v. Perry*, 417 U.S. 21, 27–29 (1974) (creating a vindictive prosecution claim). This claim was later limited. See *United States v. Goodwin*, 457 U.S. 368, 380–85 (1982) (declining to adopt a presumption of prosecutorial vindictiveness); *Bordenkircher*, 434 U.S. at 363–65 (allowing a prosecutor to present unpleasant alternatives to the defendant in plea negotiations).

78. *United States v. Ruiz*, 536 U.S. 622, 629 (2002).

79. Stuntz, *supra* note 59, at 791.

80. Nancy J. King & Susan R. Klein, *Apprendi and Plea Bargaining*, 54 STAN. L. REV. 295, 296 (2001) (examining the various facets of a prosecutor’s expansive power within the context of the Court’s holding in *Apprendi*); J.J. Prescott, *Measuring the Consequences of Criminal Jury Trial Protections* 43 (unpublished Ph.D. dissertation), available at http://econ-www.mit.edu/graduate/candidates/download_rip.php?id=114 (finding that the expansion of jury trial rights mandated by *Apprendi* reduce the average sentence more than 5%).

81. See Stephanos Bibas, *The Feeney Amendment and the Continuing Rise of Prosecutorial Power to Plea Bargain*, 94 CRIM. L. & CRIMINOLOGY 295 (2004) (discussing the effect of the Feeney Amendment on prosecutorial leverage in plea arrangements); Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409, 1415 (2003) (stating that the extraordinarily high percentage of guilty pleas in the federal system could be the result of “prosecutorial domination and an administrative system run amok”).

82. Note that this last club, like all the others, can be used by the prosecution only. The defense cannot offer immunity to pro-defense witnesses and cannot prevent the prosecution from offering such immunity to government witnesses. See, e.g., *Kastigar v. United States*, 406 U.S. 441, 459–62

responsibility, fast-track programs, and substantial assistance reductions for defendants—generally the only way out of a mandatory minimum penalty). Coercive pleas affect innocent defendants as well as guilty ones, especially those defendants who happen to be risk averse.⁸³

Such a criminal justice system favors three very small classes of criminal defendants. First is the wealthy, who can buy a dream team of lawyers to poke holes in the prosecutor's case.⁸⁴ This works especially well when the defendant is not guilty, guilty of a minor or victimless crime, or can argue that the prosecution is politically motivated.⁸⁵ The second category is those criminal defendants, innocent or guilty, who are able to obtain cause lawyers.⁸⁶ Thus, if you are actually innocent and are lucky enough that the prosecutor retained DNA evidence that can prove this, you may get one of

(1972) (holding that the prosecution does not violate a federal anti-gratuity statute in offering immunity in exchange for testimony against defendant); *U.S. v. Singleton*, 165 F.3d 1297, 1301–02 (10th Cir., 1999) (en banc) (same).

83. *Bibas*, *supra* note 26, at 2509–10 (suggesting that innocent defendants likely are more risk averse than guilty ones).

84. *Compare* ALAN M. DERSHOWITZ, REVERSAL OF FORTUNE: INSIDE THE VON BÜLOW CASE (1990) (demonstrating the value of a high-priced defense attorney in the successful defense of a rich, aristocratic client), *and* William J. Stuntz *The Uneasy Relationship Between Criminal Procedure and Criminal Justice* 107 *YALE L.J.* 1, 28 (1997) (describing how a defendant's wealth is an effective deterrent against prosecution), *with* Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure: From Powell to Gideon, from Escobedo to . . .*, in *CRIMINAL JUSTICE IN OUR TIME* 9–11 (A.E. Dick Howard ed. 1965) (arguing that extending the right to counsel to police-house interrogations would best uphold the poor's Fourteenth Amendment rights), *and* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 *YALE L.J.* 1835 (1994) (discussing examples of court-appointed attorneys incompetently representing their poor clients).

85. *See* Tom Delay's Motion for Change of Venue at 2, *State v. Tom Delay*, No. D1-DC-05-900725 (331st Dist. Ct., Travis County, Tex. Oct. 20, 2005), *available at* http://www.foxnews.com/projects/pdf/102105_delay_change_venue.pdf (seeking change of venue after a money laundering indictment claiming, "There is a dangerous combination instigated by influential persons, by reason of which [Delay] cannot expect a fair trial in Travis County"); *Big John Connolly Acquitted*, *TIME*, Apr. 28, 1975, at 24 (discussing Edward Bennett Williams's representation of John Connolly, resulting in an acquittal on charges of accepting a \$10,000 gratuity); Lianne Hart, *Senator Acquitted of Misusing Old Office; Hutchison Was Charged with Telling State Workers to Use State Equipment to Aid Her Campaign, Judge Directed the Not-Guilty Verdict*, *L.A. TIMES*, Feb. 12, 1994, at A16 (reporting Senator Kay Bailey Hutchison's acquittal after offering a primary defense that charges were politically motivated); Alan C. Miller & Dwight Morris, *Majority of House Members Expected to Win Reelection*, *L.A. TIMES*, Nov. 5, 1994, at A22 (reporting that Representative Joseph McDade claimed his indictment was politically motivated); *Nation in Brief; Pennsylvania; Lawmaker Acquitted in Bribery Case*, *L.A. TIMES*, Aug. 2, 1996, at A16 (reporting McDade's acquittal). After his acquittal and much publicity, McDade lobbied Congress to enact a statute authorizing monetary recovery where a federal prosecution against a public official was frivolous. M.J. Zuckerman, *Perkolating on Hill: Lawsuit Reimbursement*, *USA TODAY*, July 29, 1997, at A6.

86. *See, e.g.*, Margareth Etienne, *The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers as Cause Lawyers*, 95 *J. CRIM. L. & CRIMINOLOGY* 1195, 1197 (2005) (conducting an empirical study of cause lawyers and noting that "sometimes criminal defendants are better represented by defense attorneys who are 'cause lawyers' passionately seeking to advance their political and moral visions . . .").

the several innocence projects to take your case pro bono.⁸⁷ Likewise, if you are guilty but can get a civil liberties group such as the ACLU involved, you'll likely get excellent defense counsel and an expensive trial. Finally, the third group consists of those with information to sell. If you are a guilty small fish in a large pond, and have information regarding more serious offenders to trade, your guilty plea may be well-rewarded.⁸⁸

Even those who are unconvinced that the percentage of federal criminal defendants pleading guilty is excessive, or who believe that the problem of innocent defendants pleading guilty is overstated, may still recognize equity problems with the status quo. First, sentence length hinges as much on the skill and price of the defendant's counsel, willingness to snitch on others, and socioeconomic class, as on the offense and offender characteristics listed in the statute (or that are arguably relevant). Though there is disagreement as to the magnitude of the problem, most scholars and many judges and defense attorneys agree there are informational and accuracy problems that need to be addressed.⁸⁹

One solution suggested some time ago is to abolish plea bargaining.⁹⁰ Other scholars have admitted that plea bargaining, as much as they dislike it, is here to stay and have instead suggested set discount rates.⁹¹ In a system

87. Look, for instance, at the innocence projects at Northwestern University, <http://www.law.northwestern.edu/depts/clinic/wrongful/links.htm>; the University of Houston, <http://www.law.uh.edu/faculty/ddow2/dpage2/innocence.html>; and the University of Texas, <http://www.utexas.edu/law/academics/clinics/innocence>.

88. See 18 U.S.C. § 3553(e) (2000) (providing congressional authorization for 5K1.1 departures); FEDERAL SENTENCING GUIDELINES MANUAL § 5K1.1 (allowing federal prosecutors to request that federal judges depart downward from the Federal Sentencing Guidelines Manual based upon a defendant's cooperation with the authorities); Frank O. Bowman, III, *Departing Is Such Sweet Sorrow: A Year of Judicial Revolt on "Substantial Assistance" Departures Follows a Decade of Prosecutorial Indiscipline*, 29 STETSON L. REV. 7, 15 (1999) (detailing the increased use of plea agreements for cooperating defendants); Bruce M. Selya & John C. Massaro, *The Illustrative Role of Substantial Assistance Departures in Combating Ultra-Uniformity*, 35 B.C. L. REV. 799, 807 (1994) (discussing sentence reductions due to substantial assistance).

89. See *supra* notes 11–15 and accompanying text. I have intentionally omitted federal criminal prosecutors, who, for the most part, appear quite content with their enormous discretion.

90. See, e.g., Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652, 652 (1981) (arguing that "plea bargaining remains an inherently unfair and irrational process [dependant upon tactical decisions] irrelevant to any proper objective of criminal proceedings"); Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 935–36 (1983) (responding to and refuting defenses of plea bargaining and exploring reforms to replace the "unjust practice"); John H. Langbein, *Land Without Plea Bargaining: How the German's Do It*, 78 MICH. L. REV. 204, 204–05 (1979) (refuting the comparative law arguments of plea bargaining's apologists by presenting West Germany as an example of an industrial country that does not resort to the "evasion" of the "common law tradition of criminal trial" that is plea bargaining); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1980 (1992) (using economic analysis to dispute the claim that "prohibition of bargaining would create even more serious problems than bargaining" and advocating that "plea bargaining should be abolished").

91. See, e.g., Paul Schuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1122–28 (1976) (recognizing that "plea negotiation will probably remain a central feature of the American criminal justice system for the foreseeable future" and suggesting that to determine the

where upwards of 97% of the defendants plead guilty,⁹² the impossibility of eliminating plea bargaining seems to be clear.⁹³ There are many disadvantages of set discount rates: the inability of prosecutors to account for factual or procedural weaknesses in their case, the unfairness of treating unlike cases alike, and the certainty that bargaining around the set rate would go underground by way of charge-bargaining, fact-bargaining, and cooperation.⁹⁴

A second quite thoughtful proposal made by Professor Nancy King is to restrict bargaining regarding certain criminal procedural guarantees that effect the interest of third parties or the public.⁹⁵ She suggests that defenses based on separation of powers, federalism, and the Eighth Amendment prohibition against cruel and unusual punishment are constitutional rules that “should not be subject to evasion by the consent of the parties unless effective enforcement mechanisms exist to otherwise protect such interests.”⁹⁶ I fear that the pressures to allow waivers of constitutional criminal procedural guarantees to foster plea bargaining are too strong to resist. Limits on the defendant’s ability to waive the right to effective assistance of counsel and the prohibition against cruel and unusual punishment would not ultimately effect many cases resolved by plea, as such claims are almost never successful on the merits (counsel is never ineffective and no noncapital sentence short of life without the possibility of parole is excessive). This proposal, while meritorious, does not sufficiently check the imbalance in the negotiation process.

Professor Darryl K. Brown argues that the criminal justice system suffers from underfunding of the defense bar (which is certainly true), and suggests that judges and politicians explicitly acknowledge the problem of scarce resources and compensate by using cost-benefit analysis to improve criminal justice policy-making and enforcement practice.⁹⁷ I am not

sentence for a guilty plea a judge should first determine the sentence that would be appropriate if the defendant were convicted at trial and then apply a “specific discount rate”); Stephen J. Schulhofer, *Due Process of Sentencing*, 128 U. PA. L. REV. 733, 792–94 (1980) (suggesting small set concessions to guilty pleas); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1560–61 (1981) (suggesting set sentencing concessions of ten to twenty percent).

92. *United States v. Booker*, 543 U.S. 220, 289 (2005) (Stevens, J., dissenting in part).

93. *See Santobello v. New York*, 404 U.S. 257, 260 (1971) (noting that plea bargaining is “an essential component of the administration of justice”); GEORGE FISHER, *PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* 158–74 (2003) (examining forces that led to the rise of plea bargaining in England, California, and New York); Bibas, *supra* note 26, at 2527.

94. *See, e.g.*, Bibas, *supra* note 26, at 2535–37 (noting that fixed discount rates lead to black-market bargaining and are also manipulable).

95. King, *supra* note 26, at 140.

96. *Id.* at 117.

97. *See, e.g.*, Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CAL. L. REV. 323, 323 (2004) (exploring “the prospects for integrating criminal law into the widespread trend elsewhere in the executive branch of using cost-benefit analysis (CBA) to improve criminal justice policy making and enforcement practice”); Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument From Institutional Design*, 104 COLUM. L. REV. 801, 801–08 (2004) (examining the underfunding of criminal procedural rights and the “rationing” of rights by attorneys and trial judges).

convinced that suggesting that police and prosecutors focus on deterrence, and that defense attorneys focus on likely factual innocence, will have much of an impact upon the crisis in the criminal justice system. Policy-makers and prosecutors will certainly allege that they currently focus on deterrence, law enforcement is likely to take offense at the suggestion that they are not already investigating the facts surrounding each case, and criminal defense attorneys will respond that they have an ethical obligation to advocate zealously for all clients, not just the ones whose stories they believe.

Professor William Stuntz has claimed, in a succession of marvelous articles, that the criminal justice system is diseased.⁹⁸ Some of the symptoms of this disease are that many who break the law go unpunished, and the ones who get punished are too often poor or minorities, and the cause of the disease is in large part current constitutional law.⁹⁹ He has suggested, at various times, using the federal constitution to limit the reach of substantive criminal law,¹⁰⁰ requiring the executive to enforce the same laws against the privileged that it enforces against the poor,¹⁰¹ regulating police forces through institutional injunctions rather than constitutional procedural conduct rules,¹⁰² mandating adequate funding for indigent criminal defense,¹⁰³ and enforcing federalism in such a way that federal criminal sentences apply only if federal criminal law is exclusive in that area.¹⁰⁴ While many of these changes would be improvements, Professor Stuntz admits that these changes will “probably not” be imposed by the courts and are unlikely to be mandated by politicians.¹⁰⁵ Unfortunately, his assessment is correct.

The most significant drawbacks of all of these scholarly proposals is that they require either that the Supreme Court change criminal procedural rights via constitutional interpretation or that Congress or state legislators change criminal procedural rights via legislation. Neither of these events appear likely.¹⁰⁶ The current Supreme Court appears unwilling to expand

98. Stuntz, *supra* note 59, at 781.

99. *Id.* at 781; *see also* Stuntz, *Pathological Pursuit*, *supra* note 7, at 511 (arguing that prosecutorial discretion encourages legislators to expand criminal law and that legislative supremacy prevents courts from preventing the law’s growth); Stuntz, *supra* note 10, 1798–99 (arguing that contemporary drug policy is overly paternalistic and that its roots grow not from race but class); Stuntz, *Uneasy Relationship*, *supra* note 7, at 4 (arguing that constitutional criminal procedure gives wealthier defendants more issues to litigate thereby increasing the costs of their prosecution and encouraging prosecutors to pursue poorer defendants).

100. Stuntz, *Uneasy Relationship*, *supra* note 7, at 66–67.

101. Stuntz, *supra* note 10, at 1835.

102. Stuntz, *supra* note 59, at 829–31.

103. Stuntz, *Uneasy Relationship*, *supra* note 7, at 70–71; *see also* Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 254 (2004) (suggesting that state legislators could be convinced to impose resource parity between the prosecution and defense funding).

104. Stuntz, *supra* note 59, at 845.

105. *Id.* at 846.

106. Another proposal—prosecutorial self-regulation as a means toward producing uniform sentences—appears to me less likely still. *See* Ronald F. Wright, *Sentencing Commissions as*

most constitutional criminal procedural protections, and the recent appointments of Chief Justice Roberts and Associate Justice Alito won't help. Likewise, politicians never run on a platform of being soft on crime. The only exception that comes to mind is legislation requiring DNA testing, where an innocent person might otherwise be imprisoned.¹⁰⁷ Politicians cease to care if the constituent is admittedly or even possibly guilty.

A systemic change in how pleas are negotiated seems to me a better and more realistic solution.¹⁰⁸ Permitting Rules Committees or individual district judges to take the impetus for drafting such rules, and selling them as a method of ferreting out the innocent and racially equalizing sentencing, may make it possible to experiment with new rules, at least on a temporary basis.

III. Maximizing Accuracy and Equity with Procedural Changes

I suggest a few procedural changes that are both more modest and more likely than those suggested by my colleagues. First, I recommend formal amendments to Federal Rules of Criminal Procedure 11 and 16, the rules concerning the process by which pleas are accepted and the defendant obtains discovery from the government. These changes would require that some entity—the Sentencing Commission or staff, the probation department, federal prosecutors, or other federal judicial staff—collect and disseminate additional information necessary to level the playing field between criminal defense attorneys and prosecutors. Such changes could best be accomplished as part of the ordinary business of the Advisory Committee to the Federal Rules of Criminal Procedure, which every few years proposes amendments to be approved by Congress.

In the event that such changes aren't approved by the Criminal Rules Advisory Committee, or are approved but are then rejected by Congress, I suggest in the alternative that the chief judges in each of our ninety-three judicial districts amend the local rules of Federal Criminal Procedure to

Provocateurs of Prosecutorial Self-Regulation, 105 COLUM. L. REV. 1010, 1013, 1043–46 (2005) (arguing that extensive prosecutorial power should be controlled through a system of self-regulation that promotes transparency both on a case-by-case and system wide basis).

107. TEX. CODE CRIM. PROC. art. 38.43 (Vernon 2005) (requiring government to preserve evidence containing biological material that could establish the identity of the perpetrator); Ronald Weich, *The Innocence Protection Act of 2004: A Small Step Forward and a Framework for Further Reforms*, CHAMPION, Mar. 2005, at 28–29 (examining the emergence of support critical for the passage of the Innocence Protection Act, in spite of congressional efforts to limit federal review of state-level capital sentences); see also Zuckerman, *supra* note 85 (discussing the McDade Amendment).

108. See Julian A. Cook, III, *All Aboard! The Supreme Court, Guilty Pleas, and the Railroading of Criminal Defendants*, 75 U. COLO. L. REV. 863, 913–18 (2004) (suggesting that Rule 11 of the Federal Rules of Criminal Procedure be amended to reverse the effect of *United States v. Hyde*, 520 U.S. 670 (1997), concerning a defendant's ability to withdraw a guilty plea). While this suggestion is a good one, it would affect only the few cases where a defendant seeks to withdraw her plea. See Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. (forthcoming 2006) (manuscript at 49–58, on file with the Texas Law Review) (suggesting a model for greater judicial involvement in plea negotiations, including inquiries into the factual basis of a plea bargain and efforts to increase the transparency of the plea bargaining process).

achieve similar results. This alternative has certain advantages—it allows as many different forms of discovery and plea procedures as there are districts, and thus, fosters experimentation and data collection on which procedures are most effective. Of course there is the corresponding disadvantage—the lack of uniform rules and treatment of offenders across districts. Failing even the consensus to change the local rules, I suggest that individual federal district judges use their new post-*Booker* sentencing authority to require fairer procedures in their courtrooms before accepting plea agreements and determining and imposing appropriate sentences.

Defendants' current rights to discovery under Federal Rule of Criminal Procedure 16 and the Jencks Act are puny, even after the debate on and expansion of discovery opportunities that accompanied the major reform in 1966.¹⁰⁹ A defendant is entitled to his prior written statements, including statements before a grand jury, and prior oral statements only if the government intends to use those statements at trial and the statements were made in response to interrogation.¹¹⁰ Thus key elements of a prosecutor's case, such as statements a defendant allegedly made to witnesses and statements encompassed by the coconspirator hearsay exception, are not discoverable. While the Jencks Act,¹¹¹ codified in Federal Rule of Criminal Procedure 26.2, makes discovery of witnesses' statements available to both the defense and the government, the right to discovery arises only after the witness testifies at trial and is thus not useful to either pretrial preparation or to plea negotiations.¹¹²

That portion of Federal Rule of Criminal Procedure 16 that covers documents and objects mandates disclosure only when the item is in the federal government's possession, custody, or control, and the item is material to preparing the defense, or the government intends to use that item in its case-in-chief at trial.¹¹³ This rule neither requires that the government obtain documents through due diligence nor that the government retain or test any physical evidence. The defendant may request discovery of summaries of the prosecutor's expert witnesses, but only those the government plans to introduce during its case-in-chief at trial. This does not include experts that

109. See, e.g., FED. R. CRIM. P. 16 advisory committee's note; WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE CRIMINAL 3D § 251, at 921–24 (4th ed. 2004); CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 251, at 56–57 (2000 & Supp. 2006).

110. FED. R. CRIM. P. 16(a)(1)(A); see also *In re United States*, 834 F.2d 283, 285–87 (2d Cir. 1987) (holding that statements made by defendant to a third party who then repeated the statements to a government agent were not discoverable); *United States v. Bailey*, 123 F.3d 1381, 1399 (11th Cir. 1997) (holding that statements are not discoverable where defendant did not know the listener was a government agent).

111. 18 U.S.C. § 3500 (2000).

112. *Id.* § 3500(a) (“[N]o statement or report . . . shall be the subject of subpoena, discovery or inspection until said witness has testified on direct examination in the trial of the case.”).

113. FED. R. CRIM. P. 16(a)(1)(E).

may be used in rebuttal.¹¹⁴ While the Due Process Clause, as interpreted by the Court in *Brady*, theoretically grants defendants access to any additional evidence which is material to his guilt or punishment,¹¹⁵ prosecutors decide materiality, and this decision will not be second guessed absent a defendant's showing on appeal that it is likely she would have been acquitted if the exculpatory evidence had been revealed.¹¹⁶ Thus, in the rare case where a defendant somehow discovers on her own, after trial, that there was exculpatory evidence, her chances at reversal are exceedingly slim.¹¹⁷

A comparison of the criminal discovery processes to civil discovery in this country, criminal discovery in certain state jurisdictions, criminal discovery mandated in England and Canada, and the aspirational goals of the American Bar Association,¹¹⁸ highlight the unfairness and inaccuracy of forcing defendants to negotiate pleas based on inadequate information—particularly where life and liberty are at stake.¹¹⁹

Unlike criminal discovery, civil discovery in the United States has developed under the Federal Rules of Civil Procedure into a system that facilitates the flow of relevant information between opposing parties.¹²⁰ Almost all materials relevant to a claim or defense must be disclosed through

114. See FED. R. CRIM. P. 16(a)(1)(G) (“At the defendant’s request, the government must give to the defendant a written summary of any testimony that the government intends to use . . . during its case-in-chief at trial.”); FED. R. EVID. 702–05 (providing the evidentiary rules regarding expert witnesses).

115. *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that “suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution”).

116. See *Strickler v. Greene*, 527 U.S. 263, 289 (1999) (upholding a conviction when the defendant could not show a “‘reasonable probability’ that the result of the trial would have been different if the suppressed documents had been disclosed to the defense”); *Kyles v. Whitley*, 514 U.S. 419, 437–40 (1995) (recognizing the prosecutor’s role in determining whether favorable evidence is material); *United States v. Bagley*, 473 U.S. 667, 682 (1985) (“The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.”).

117. Janet C. Hoefel, *Prosecutorial Discretion at the Core; The Good Prosecutor Meets Brady*, 109 PENN ST. L. REV. 1133, 1145–46 (2005) (noting that because of strict materiality requirements in *Brady* cases, prosecutors know that withholding or falsifying evidence will not necessarily lead to reversal even if discovered); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 705–09 (1987) (noting that because of strict materiality requirements in *Brady* cases, prosecutors know that withholding or falsifying evidence will not necessarily lead to reversal even if discovered).

118. See generally AM. BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE, DISCOVERY AND PROCEDURES BEFORE TRIAL (1986).

119. William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth? A Progress Report*, 68 WASH. U. L.Q. 1, 15 (1990) (comparing the English and ABA disclosure procedures to current discovery practices); Turner, *supra* note 108 (manuscript at 49–58, on file with the Texas Law Review) (suggesting that a judge’s early input in plea negotiations in Germany, Florida, and Connecticut render the final dispositions more accurate and procedurally just than in those jurisdictions that prohibit such involvement).

120. See FED. R. CIV. P. 26 (stating the general requirements for discovery as well as the disclosures parties must make in civil litigation).

a structured timeline of discovery set at the discovery conference. This information includes the names and addresses of witnesses, documents, data compilation, tangible things, summaries of testimonies of expert witnesses, exhibits, and identification of evidence the other parties intend to present at trial.¹²¹ If a party wishes to discover an additional matter that was not disclosed through discovery, they may do so through depositions, written interrogatories, production of documents or things, permission for inspection, physical and mental examinations, and requests for admission.¹²² Unlike the criminal system, most of this discovery is accomplished prior to settlement.¹²³

Also, unlike the criminal system, civil defense attorneys are well paid on an hourly basis by defendants or through contingent fees, statutory attorney's fees, or class actions law suits by plaintiffs. While parties do regularly contract out of civil procedures through mediation and arbitration, federal judges continue to assess whether these alternatives meet the minimum requirements of due process; thus the playing field is more level in making the crucial decision to contract out of the Rules.¹²⁴ Unlike Federal Rule of Criminal Procedure 11, which prohibits a judge from participating in plea negotiations,¹²⁵ Federal Rule of Civil Procedure 16 was amended in 1983 and 1993 to explicitly place settlement discussion on the agenda at pre-trial conferences, to involve the judge in encouraging settlement, and to compel participation even when the parties are reluctant to engage in settlement negotiations.¹²⁶

The gulf between criminal and civil discovery is difficult to justify. Prosecutors and some judges have suggested that widening the Federal Criminal Rules of Discovery to mirror the Federal Civil Rules would lead to

121. *Id.*

122. FED. R. CIV. P. 26(a)(5).

123. David A. Sklansky & Stephen C. Yeazell, *Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 GEO. L.J. 683, 713 (2006).

124. *See, e.g.*, Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 599 (2005) (stating that judges are required to determine whether the alternatives of mediation and arbitration allow disputants to "effectively vindicate their rights").

125. FED. R. CRIM. P. 11(c)(1) (stating that "the court must not participate" in plea negotiations); *United States v. Olesen*, 920 F.2d 538, 541 (8th Cir. 1990) (concluding the district judge may not "intervene in the plea agreement process absent a showing of fraud"); *United States v. Werker*, 535 F.2d 198, 200 (2d Cir. 1976) (granting a petition for mandamus to prevent a judge from participating in plea bargain agreements). Very few courts have interpreted Rule 11 to allow some judge other than the one hearing the case to serve as a facilitator for reaching a plea agreement, but the Advisory Committee in its Notes to the 2002 Amendments to Federal Rule of Criminal Procedure 11(c)(1)(A) has declined to approve this interpretation. *See* FED. R. CRIM. P. 11(c)(1)(A) advisory committee's note; *United States v. Torres*, 999 F.2d 376, 378 (9th Cir. 1993) (providing an example where a judge other than the one hearing the case facilitated the plea agreement); Resnik, *supra* note 124, at 644 n.200.

126. *See* FED. R. CIV. P. 16(c)(7) (1983) (amended 1993); FED. R. CIV. P. 16(c)(9) advisory committee's note to 1993 Amendments. Some districts advise that the judge assigned to the case not also serve as settlement judge; either another district or magistrate judge can so serve. *See, e.g.*, FED. R. CIV. P. 53(a)(1) advisory committee's note to 1993 Amendments; E.D. Cal. R. 16-270(b).

perjury and witness intimidation.¹²⁷ However, these claims have no empirical support,¹²⁸ are belied by the open file experiences of New Jersey and Florida,¹²⁹ and can be resolved by alternative means such as protective orders.¹³⁰ A few commentators have suggested that reciprocal discovery is unfair to the government due to the defendant's privilege against self-incrimination. In light of the government's wealth of resources, subpoena power, ability to grant immunity to witnesses, and authority to obtain search and seizure warrants, an individual's right to remain silent in the face of a criminal accusation (a right generally waived during custodial interrogation) cannot balance the field.

Over a decade ago, the Canadian Supreme Court held that the prosecution must provide the defendant with "all relevant information," and further specified that such disclosure must occur before the defendant enters into a plea agreement.¹³¹ This disclosure, which is not reciprocal, includes witness statements, materials the prosecution intends to produce as evidence, materials that the prosecution does not intend to produce as evidence, and both inculpatory and exculpatory evidence.¹³² It is limited by the trial judge only to protect privileges and witnesses.¹³³ Similarly, the British have greatly expanded disclosure obligations for prosecutors and the defense first in the Criminal Procedure and Investigations Act of 1996 and later in the Criminal Justice Act of 2003.¹³⁴ English investigators have a statutory duty both to preserve evidence throughout their investigation and to create records to facilitate discovery.¹³⁵ This duty extends to crime reports, police officers'

127. MICHAEL H. GRAHAM, WITNESS INTIMIDATION: THE LAW'S RESPONSE 41, 50 (1985); FRANK W. MILLER ET AL., CASES AND MATERIALS ON CRIMINAL JUSTICE ADMINISTRATION 781 (4th ed. 1991) (summarizing the arguments against broad discovery in criminal cases).

128. Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1192-94 (1960); H. Lee Sarokin & William E. Zuckerman, *Presumed Innocent? Restrictions on Criminal Discovery in Criminal Court Belie This Presumption*, 43 RUTGERS L. REV. 1089, 1090-92 (1991).

129. See FLA. R. CRIM. P. 3.220(b) (listing information the prosecutor must disclose to the defense); N.J. CT. R. 3:13-3 (providing a list of relevant material that the defense can inspect and copy).

130. William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U. L.Q. 279, 292 (noting that judicial protective orders would be adequate to guard against witness intimidation); John G. Douglass, *Balancing Hearsay and Criminal Discovery*, 68 FORDHAM L. REV. 2097, 2191 (2000).

131. R. v. Stinchcombe, [1991] S.C.R. 326, 343.

132. *Id.* at 343-44; see also TIM QUIGLEY, PROCEDURE IN CANADIAN CRIMINAL LAW 275 (1997) (listing the disclosure requirements imposed by the Supreme Court of Canada in *Stinchcombe*); Steve Skurka et al., *Northern Lights*, CHAMPION, Apr. 2000, at 41, 42 (noting that the "Supreme Court [of Canada] enunciated the general principle that all relevant information in the Crown's possession or control must be disclosed").

133. QUIGLEY *supra* note 132, at 275.

134. See generally JOHN SPRACK, A PRACTICAL APPROACH TO CRIMINAL PROCEDURE 137-38 (10th ed. 2004) (noting that the common law disclosure duty of the prosecution has been made subject to the statutory regime).

135. *Id.* at 138.

notebooks, draft and final versions of witness statements, interview records, expert reports, any material casting doubt upon the reliability of a confession, and any material casting doubt upon the reliability of a witness.¹³⁶ This disclosure is made not by the court or the prosecutor, but by an agency, nominally within the police force, called the Disclosure Office.¹³⁷

As the above examples illustrate, jurisdictions can provide information to defendants by enacting legislation (New Jersey, England) or by constitutional interpretation (California, Canada). There are advantages to improving discovery by amending the Federal Rules of Criminal Procedure rather than by creating new constitutional rights. One such advantage is that the former may be easier to accomplish than the latter. More importantly, revising a rule of procedure, unlike interpreting a constitution (or even a statute), will not improvidently bind us into a rigid system of enforcing any particular right.¹³⁸ Particularly where the granting or defining of a right depends upon facts and details on the ground, it may be preferable to employ non-constitutional strategies that can be modified to fit changing facts or our changed understanding of facts due to new empirical research or advances in scientific fields.¹³⁹ For example, if we learn that providing certain types of additional discovery to defense counsel doubles the cost of negotiations and pleas with no discernable affect on ferreting out the innocent, we could quickly eliminate the discovery procedures without waiting for a Supreme Court case.

Other advantages of using procedural rules include political feasibility, ease of Congressional reversal, and optional compliance by States (which could pick and choose what aspects, if any, they want to replicate). These rules could be temporary, and might include sunset provisions. Minimally sufficient information and procedures would have to be nonwaivable, lest they turn into just another set of rules that prosecutors could avoid with sentence discounts.

The optimal way to improve procedural rules is by amending the Federal Rules of Criminal Procedure. The Advisory Committee on the Federal Rules of Criminal Procedure periodically proposes changes to these rules, consistent with the Federal Constitution, based upon the recommendation of its members. This Committee is composed of judges and academics

136. *Id.* at 139.

137. See generally Stanley Z. Fisher, *The Prosecutor's Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons from England*, 68 *FORDHAM L. REV.* 1379, 1409–10 (2000) (describing the procedure by which the police disclosure officer must reveal exculpatory evidence to the defense).

138. See Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 *HARV. L. REV.* 1212, 1227 (1978) (asserting that federal officials are legally obligated to effect the full force of constitutional norms); Cass R. Sunstein, *Minimalism at War*, 2004 *SUP. CT. REV.* 47, 67 (noting the binding nature of constitutional norms in matters of national security).

139. I have advanced similar arguments regarding employing prophylactic or subconstitutional rules in Klein, *supra* note 48, at 1051.

appointed by the Chief Justice of the United States Supreme Court.¹⁴⁰ Committee members have the opportunity to explain the reasons for their proposed changes in Advisory Committee Notes, which accompany the rules and serve as “legislative history” for construing the rules.¹⁴¹ The original rules were promulgated by the Supreme Court, effective March 21, 1946, under authority of two Acts of Congress.¹⁴² The rules are amended regularly (over twenty-five times so far), then go to the Supreme Court for approval, and are thereafter submitted by the Chief Justice to Congress for approval.¹⁴³

Changes to Rule 16 might require the government to both collect and disseminate information to defense attorneys, judges, and the probation department.¹⁴⁴ In addition to sharing exculpatory evidence (and selecting the definition of “exculpatory” offered by the ABA, rather than the narrow version offered in *Brady*), the government could be required to gather all physical evidence left at a crime scene, such as blood, semen, fingerprints, or clothing fibers. Further, a sensible rule would require the retention of all physical evidence until the individuals whose convictions are associated with this evidence are released from incarceration, in case of scientific advances, third-party confessions, or victim recantations.¹⁴⁵ Rule 16 should require the best available testing of this physical evidence, such as DNA testing, handwriting analysis, fingerprint identification, ink dating, and so forth. This rule would additionally require the automatic disclosure of all test results to both parties. A neutral agency (perhaps the probation department) could be charged with investigating all nonphysical leads that may establish innocence or mitigate a penalty, such as locating and interviewing alibis and witnesses and retaining documentation regarding their statements.¹⁴⁶

140. 28 U.S.C. § 331 establishes the Judicial Conference of the United States, and provides that the Conference shall “carry on a continuous study of the operation and effect of the general rules of practice and procedure.” 28 U.S.C. § 331 (2000). The Conference resolved that an Advisory Committee on the Federal Rules of Criminal Procedure be appointed by the Chief Justice. *See ANNUAL REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES* 6–7 (1958).

141. *Use of Notes and Statements of Advisory Committee in Construction of Rules*, 2 Fed. R. Serv. 2d (Callaghan) 632 (1940); *see also* *Tome v. United States*, 513 U.S. 150, 167 (1995) (Scalia, J., concurring) (asserting that while Committee Notes “are assuredly persuasive scholarly commentaries—ordinarily the most persuasive—concerning the meaning of the Rules,” the Notes cannot alter plain meaning).

142. STAFF OF HOUSE COMM. ON THE JUDICIARY, 109TH CONG., *FEDERAL RULES OF CIVIL PROCEDURE*, at vii (Comm. Print 2005).

143. *See id.* at vii–xiii (reviewing amendments to the rules); *see also* 28 U.S.C. § 2072 (2000) (designating that the Supreme Court has the power to prescribe rules of procedure and evidence for the federal courts).

144. *See* FED. R. CRIM. P. 16.

145. The Constitution currently provides that due process is violated by government loss or destruction of physical evidence only if the prosecutor acts in bad faith. *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988).

146. Federal Rule of Criminal Procedure 12.1 mandates that a defendant give discovery to the government regarding the names of alibi witnesses. FED. R. CRIM. P. 12.1(a)(2)(B); *see also* *Wardius v. Oregon*, 412 U.S. 470, 472 (1973) (holding that due process requires reciprocal discovery rights for defense); *Williams v. Florida*, 399 U.S. 78, 80–86 (1970) (finding that Florida’s notice of alibi

The following sorts of information gathering might be useful:

1. Declinations by United States Attorney Offices. A defendant or judge cannot establish selective prosecution or unwarranted sentencing disparity unless there are statistics regarding those suspects receiving the most favorable treatment of all—nonprosecution.

2. The charge recommendation by the agent who brought the case file to the prosecutor. What were the reasons for charging differently than originally suggested?

3. The actual real-offense conduct after an independent investigation reflected in a presentence investigative report (PSI), versus what misconduct is revealed by the prosecution and reflected in the plea deal. The judge and defense counsel cannot know if some defendants are receiving favorable pleas simply by comparing plea deals without knowing what the original charge was and, even more importantly, what the defendant actually did. However, no national database for PSIs currently exists. Instead, the U.S. Probation Office has a different website for each district. Moreover, each district has a headquarters as well as several smaller offices. Most importantly, there is no requirement that the probation office or anyone else keep statistics of real offense versus plead offense. So the parties and judges cannot determine what a particular case is “worth” (what the average sentencing discount is for actual misconduct) nationally or even locally. The U.S. Sentencing Commission does not keep any information on actual conduct or even the original indictment—they keep statistics only on the plea deal eventually entered into by the parties and the sentence received.

4. Statistics on the discount between indictment and the plea deal; frequency at which mandatory enhancements based upon recidivism or weapons are included in plea deals.

5. Factors determining which defendants are offered substantial assistance arrangements; how much of a discount is requested.

Changes to Rule 11 might allow the sentencing judge to increase or decrease a sentence (within *Apprendi* limits) based upon the strength of the government’s evidence; a comparison of the defendant’s real conduct as opposed to plead conduct; knowledge of what plea deals were offered to codefendants and coconspirators in the same case or to similarly situated defendants in unrelated cases; whether a substantial assistance deal was offered; whether there were prior convictions or mandatory sentence enhancements that were omitted; and how far from the national average an agreement deviates.

Unfortunately, amending the Federal Rules of Criminal Procedure is much easier said than done. The process is cumbersome, time-consuming,

rule does not violate the Fifth Amendment right against self incrimination). There is no requirement, however, that the defense attorney adequately investigate whether there are alibi witnesses or other witnesses to the alleged crime.

and as likely as not to fail.¹⁴⁷ While any person can submit a proposal to change the rules, this must be submitted in writing to the Criminal Advisory Committee, which meets twice a year. The Committee accepts, rejects, modifies, or defers. If accepted, the Reporter for the Committee prepares a draft amendment that must be approved by the Standing Committee on Rules of Practice and Procedure and distributed to the bench, bar, and public for a six-month comment period. After revisitation for approval by the Advisory Committee and the Standing Committee, it is sent to the Judicial Conference, which meets only once a year. If approved by the Conference, it requires approval by the Supreme Court and Congress. This process takes, on average, two to three years to complete.¹⁴⁸

However, the Department of Justice opposes the vast majority of proposed changes, particularly ones that provide additional information to criminal defendants or attempt to level the procedural playing field. The Advisory Committee declined to adopt a number of proposals between 2003 and 2005, including proposals by Judges Paul Friedman, David Dowd, and Bill Wilson to advise a defendant of collateral immigration consequences of entering a guilty plea, and a proposal by James Felman which would require the government to produce all materials it intends to use at sentencing.¹⁴⁹ In 2004, the American College of Trial Lawyers recommended amending Rules 11 and 16 to “require disclosure of all favorable information to a defendant fourteen days before a guilty plea is entered.”¹⁵⁰ This impressive recommendation is currently being considered by the Advisory Committee.

Another promising proposal is to use the Supreme Court’s recent grant of criminal sentencing discretion to federal district judges (from the *Booker* case) as an opportunity to gather information and change procedures. Each of the ninety-four federal districts has local federal court rules that regulate the practice of law before the federal bench. Judges within each district could amend their local rules on a district-wide basis. A recent report by the Federal Judicial Center noted that thirty of these ninety-four districts have local rules governing the disclosure of information. This same report

147. The authority and procedures for promulgating rules are set forth in 28 U.S.C. §§ 2017–2077 (2000). For a summary of the entire process, see James C. Duff, Director, Admin. Office of the U.S. Courts, *The Rule Making Process: A Summary for the Bench and Bar* (Apr. 2006), <http://www.uscourts.gov/rules/proceduresum.htm>.

148. Duff, *supra* note 147.

149. See Memorandum from Judge Susan C. Bucklew, Chair of the Advisory Comm. on Fed. Rules of Criminal Procedure to Judge Levi, Chair of the Standing Comm. on Rules of Practice and Procedure (May 17, 2005), available at <http://www.uscourts.gov/rules/Reports/CR5-2005.pdf> (recommending only one proposed amendment to Rule 11 to conform the rule to *Booker* by eliminating the requirement that a court advise the defendant during the plea colloquy that it must apply the Federal Sentencing Guidelines).

150. AM. COLL. OF TRIAL LAWYERS, PROPOSED CODIFICATION OF DISCLOSURE OF FAVORABLE INFORMATION UNDER FEDERAL RULES OF CRIMINAL PROCEDURE 11 AND 16, at 2 (2003), http://www.actl.com/AM/Template.cfm?Section=All_Publications&Template=/CM/ContentDisplay.cfm&ContentFileID=62.

indicated that many of these districts have rules more stringent than required under *Brady, Giglio v. United States*, Federal Rule of Criminal Procedure 11 (governing plea negotiations) and Federal Rule of Criminal Procedure 16 (governing discovery).¹⁵¹ The content of these rules varies greatly. For example, eighteen districts define *Brady* material to include anything “favorable to the defendant”,¹⁵² twenty-one mandate automatic disclosure;¹⁵³ five dictate that the government provide such material only upon request;¹⁵⁴ some require the disclosure within fourteen days of arraignment;¹⁵⁵ some require the disclosure within five days;¹⁵⁶ one requires disclosure in a pretrial conference statement;¹⁵⁷ and about half require due diligence (the prosecutor must ferret out exculpatory information from other government agencies).¹⁵⁸ The District of Massachusetts probably has the most defendant-friendly rule, enacted in 1998 as a reaction to federal prosecutors’ indifference to pretrial discovery obligations.¹⁵⁹

If a district cannot agree upon amendments to the local rules, each federal district judge could mandate procedural change in her own courtroom by dismissing counts, refusing to accept plea deals, or sentencing lower or higher than the parties might like if they refuse to cooperate. A defendant could “opt out” by requesting a trial. If the prosecution refuses to cooperate, the judge could make her life difficult by employing the Federal Rules of Evidence at the sentencing hearing, or applying the beyond a reasonable doubt standard to all facts that trigger a mandatory minimum sentence. Although the Constitution presently doesn’t require application of the reasonable doubt standard,¹⁶⁰ it probably doesn’t prevent judges from finding that there is an insufficient factual basis underlying a plea without better proof.

There is certainly a chance that Congress would terminate such an experiment with more information-generating procedures in favor of a return to the old system. This threat may be greater if the result of better information and a more level playing field at plea negotiations is a decrease in the percentage of federal criminal defendants who plead guilty and the length of

151. LAURA L. HOOPER ET AL., FED. JUDICIAL CTR., TREATMENT OF *BRADY V. MARYLAND* MATERIAL IN UNITED STATES DISTRICT AND STATE COURTS’ RULES, ORDERS, AND POLICIES 4, 8–14 (2004), available at [http://www.fjc.gov/public/pdf.nsf/lookup/bradymat.pdf/\\$file/bradymat.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/bradymat.pdf/$file/bradymat.pdf).

152. *Id.* at 9.

153. *Id.* at 10.

154. *Id.*

155. *Id.* at 10–11.

156. *Id.*

157. *Id.*

158. *Id.* at 14.

159. AM. COLL. OF TRIAL LAWYERS, *supra* note 150, at 11–13; HOOPER ET AL., *supra* note 151, at 9–10.

160. See *Harris v. United States*, 536 U.S. 545, 567–68 (2002) (holding that the Constitution permits a judge to find the facts giving rise to the mandatory minimum sentence even when those facts are not proved beyond a reasonable doubt).

the average sentence. However, I think Congress is less likely to overturn my proposal calling on the judiciary to experiment with new procedures than any proposal that would change the interpretation of substantive criminal law to favor a criminal defendant.¹⁶¹ Neither Congress nor state legislatures reacted to *Apprendi* by increasing the statutory maximum for all crimes (which would have effectively eliminated the new jury requirement for all facts which increased the otherwise proscribed statutory maximum penalty),¹⁶² and Congress has not yet reacted to *Booker*'s revival of judicial discretion in federal sentencing by redrafting the United States Code as a series of mandatory minimum penalties (though there has been a proposal to do so).¹⁶³ The stalemate between Congress and the federal Judiciary may continue, allowing the Judiciary to experiment with different procedures.

IV. Conclusion

I want to make clear that I am not suggesting that we return to indeterminate sentencing, where each federal judge or each judicial district makes substantive sentencing policy. Equality and democracy concerns suggest to me that this authority should rest with Congress or the U.S. Sentencing Commission. Requiring a regulatory body to provide published substantive sentencing rules *ex ante*, enforceable on appeal, is the only way to generate public debate about penalties and ensure that similarly situated

161. There are numerous recent instances where Congress overturned the Court's interpretation of substantive criminal law doctrine that favored defendants. For example, in *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994), the Court held that the government must prove that a defendant knew that the activity was illegal as part of its antistruccuring case. Congress responded to the heightened mens rea requirement by amending the antistruccuring provision in Title 31 of the United States Code (31 U.S.C. § 5324 (2000)) to exclude the word "willfully." Pub. L. No. 103-325, § 411(a), 108 Stat. 2160, 2253 (1994). In the famous *United States v. Lopez*, 514 U.S. 549, 561-62 (1995), the Court struck down the "Gun-Free School Zone" act as violative of the Commerce Clause. Congress responded by adding a jurisdictional hook to 18 U.S.C. § 922(g) (2000). Pub. L. No. 104-208, § 101(f), 110 Stat. 3009 (1996) (adding a requirement that the firearm "has moved in or that otherwise affects interstate or foreign commerce"). In *Bailey v. United States*, 516 U.S. 137, 143-44 (1995), the Court interpreted the "use" provision, 18 U.S.C. § 924(c) (2000), to require actual use. Congress responded by adding a "carry" provision to include defendants the Court had excluded. Pub. L. No. 105-386, § 1(a)(1), 112 Stat. 3469 (1998).

162. Justice O'Connor erroneously predicted that legislatures would react in this fashion. See Klein, *supra* note 31, at 706 n.73 (detailing the state and federal response to *Apprendi* as recognizing these new facts as "elements" of offenses and sending them to juries for beyond a reasonable doubt determinations); see also Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1488-95 (2001) (arguing that the Court's recognition in *Apprendi* of legislatures' reactions to court opinions by amending statutes was correct by engaging in a review of minimal state and federal reaction to seven significant United States Supreme Court cases permitting the government to circumvent pro-defendant procedural guarantees through changes in substantive criminal law).

163. See *Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005*, H.R. 1528, 109th Cong. § 12 (2005) (transforming the guidelines into a complex series of mandatory minimum penalties); see also Frank O. Bowman, III, *Train Wreck? Or Can the Federal Sentencing System Be Saved? A Plea for Rapid Reversal of Blakely v. Washington*, 41 AM. CRIM. L. REV. 217, 259-63 (2004) (supporting an approach that effectively converts the Guidelines into a system of "permeable mandatory minimums").

defendants receive similar sentences—sentences based upon published offense and offender characteristics, rather than upon which judge a defendant happens to draw and how the judge is feeling that day.

Thus, I do not condone the behavior of a few federal district judges post-*Booker* who are using their new-found judicial authority to substitute their substantive sentencing preferences for those of the Commission. As I have described elsewhere,¹⁶⁴ some federal judges are decreasing (and in a very few cases increasing) sentences based upon facts that Congress and/or the Commission expressly found to be irrelevant to an appropriate sentence, such as family circumstances, the need for medical treatment, rehabilitation potential, the 100:1 powder to crack cocaine disparity, the minimal involvement with a conspiracy, that the loss amount in a fraud that was not for the defendant's personal gain, and other such disfavored circumstances.¹⁶⁵

However, moving substantive sentencing discretion from judges to prosecutors is unlikely to improve transparency or equality. The most modest way I can conceive to decrease the prosecutorial discretion that hampers accuracy of adjudication and equality among defendants is to modify the procedural rules in play at the plea negotiation stage of the criminal process. If the federal judiciary mandates that defense attorneys receive information necessary to determine whether their client would be found guilty at a jury trial and whether a particular plea deal for a guilty client is standard, and if judges can ensure that minimally sufficient due process guarantees at the plea negotiation stage allow the utilization of such information to affect the terms of the bargain, both liberals and conservatives might be satisfied.

164. Klein, *supra* note 31, at 719–34.

165. The U.S. Sentencing Commission has begun to collect information on post-*Booker* sentences and categorize Guideline departures as to whether or not they are attributable to *Booker*. Memorandum from the Office of Policy Analysis to Judge Hinojosa, Chair of the U.S. Sentencing Comm'n (Mar. 22, 2005), available at <http://www.ussc.gov/Blakely/BookerDataMemo022805.pdf>.