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Unbundling Criminal Trial Rights

John Rappaport[†]

The notion that criminal defendants are put to an all-or-nothing choice between the guilty plea and full-blown jury trial is both pervasive and wrong. Defendants can, and sometimes do, “unbundle” their jury trial rights and trade them piecemeal, consenting to streamlined trial procedures to reduce their sentencing exposure. This Essay explores what would happen if, once and for all, we eschewed the all-or-nothing framework and actually encouraged these “unbundled bargains.” The parties could then tailor court procedures by agreement. Defendants, for example, could bargain for sentencing leniency by consenting to a six-person jury. Or the parties might agree to submit a case to private arbitration. Would such a world be better or worse than the one we have now? This Essay takes a first cut at this question, making the uneasy case that the benefits of unbundled bargaining may plausibly outweigh the costs.

INTRODUCTION

There are two paths an accused can go down to resolve criminal charges against him. He can elect a trial, invoking a bundle of procedural protections the law provides for his defense. Or, like the vast majority of defendants, he can plea-bargain, declining to contest guilt and trading this bundle of rights for leniency at sentencing. This single choice has generated a rich, varied, and exhaustive academic literature.

The choice, however, is largely illusory. Criminal defendants can, and sometimes do, “unbundle” their jury trial rights and trade them piecemeal, consenting to streamlined trial procedures to reduce their sentencing exposure. The mechanisms through which they do this—including jury waivers and

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conditional guilty pleas—are familiar. But no substantial literature addresses the distinctive set of common issues they raise. Hazy legal-cultural norms, meanwhile, backed by scattered legal precedent, cabin these pockets of “unbundled bargaining,” helping sustain the myth of binary choice.

Here I explore what might follow were we to dispel the illusion that plea bargaining occurs within an all-or-nothing framework. The guilty plea and jury trial would no longer be binary options but rather end points on a spectrum of adjudicative procedures ordered by complexity. As complexity increased, so would the defendant’s likely sentence if convicted, and vice versa. Immediately, a new universe of potential bargaining options opens up. Can the defendant, for example, bargain for sentencing leniency by consenting to be tried by a six-person jury? Can he barter away his Confrontation Clause rights? To what extent can the parties fine-tune court procedures by agreement? Need they go to court at all, or can they agree to submit a case to private arbitration? How should we think about bargains like this? Should they be encouraged? Prohibited? If the latter, does this make us think differently about society’s tolerance for plea bargaining?

And perhaps most important: Is a world of unbundled bargaining better or worse than the plea bargaining system as presently understood and practiced? I cannot purport to answer this last question definitively here, as both space and the topic’s complexity constrain me. I will instead suggest how to think through the preliminary issues and, in doing so, make the uneasy case that the benefits of unbundled bargaining may plausibly outweigh the costs. The calculus is somewhat complex—involving both private and social effects—but one potential consequence of unbundled bargaining deserves special note: By permitting the parties to streamline trials, we may make trials more common. By expanding the range of procedural issues over which the parties bargain, that is, we may reduce the frequency with which they bargain over guilt and innocence. This would have several salutary effects that I discuss below. And if my tentative normative position is wrong—and expanding unbundled bargaining would make society worse off—I will not have wasted the reader’s time. Instead I will have rendered ripe for reconsideration the unbundled bargains our system presently condones.

Because I treat plea bargaining as the baseline case, I need not, and do not, engage the extensive debate about plea

bargaining's legitimacy or desirability.¹ Nor do I entertain the abolitionist alternative. This is a pragmatic choice, not a normative one, and should not be understood to endorse plea bargaining or dismiss the many powerful critiques that have been leveled against it. Rather, my framing capitulates to the reality that "[t]he time for a crusade to prohibit plea bargaining has passed," and scholarly efforts are better spent exploring ways to make the criminal-justice system we have "less awful."²

A few scholars have, in recent work and varying terminology, acknowledged the possibility of unbundled bargains like the ones that I discuss. I build on their contributions, aiming to expose the extent to which present practice already embraces unbundled bargaining and pursue the underlying theory to its ends, including private arbitration.³ I do so, however, in a manner designed to stimulate rather than end the discussion. There will remain much more to say on the topic after I am done.

¹ Compare, for example, Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U Chi L Rev 931, 1024–43 (1983), with Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J Legal Stud 289, 308–22 (1983).

² Albert W. Alschuler, Lafler and Frye: *Two Small Band-Aids for a Festering Wound*, 51 Duquesne L Rev 673, 706–07 (2013) (conceding, after decades of abolitionist advocacy, that plea bargaining is here to stay). See also Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 Fordham L Rev 2117, 2141 (1998) (contrasting plea bargaining with a "formal model" of criminal justice "that has long been discarded in practice, and has little hope of ever being revived").

³ See, for example, Talia Fisher, *The Boundaries of Plea Bargaining: Negotiating the Standard of Proof*, 97 J Crim L & Crimin 943, 944–45 & n 6 (2007) (proposing a negotiable standard of proof and flagging, but not developing, the possibility of additional unbundled bargains); Gregory M. Gilchrist, *Counsel's Role in Bargaining for Trials*, 99 Iowa L Rev 1979, 1982, 1988–92 (2014) (identifying fact stipulations and bench trials as precedents for unbundled bargains and suggesting three bargains defendants might propose); Gregory M. Gilchrist, *Trial Bargaining* *1–24, 60–67 (University of Toledo College of Law Working Paper, Oct 2014), archived at <http://perma.cc/Q7SX-HUCA> (similar); Samuel R. Gross, *Pretrial Incentives, Post-conviction Review, and Sorting Criminal Prosecutions by Guilt or Innocence*, 56 NY L Sch L Rev 1009, 1011 (2012) (proposing a mechanism by which defendants "waive major procedural rights at trial, in return for important procedural advantages on post-conviction review"). See also Nancy Jean King, *Priceless Process: Nonnegotiable Features of Criminal Litigation*, 47 UCLA L Rev 113, 118–19, 124 (1999) (identifying the bargaining aspect of some stipulations and waivers and suggesting that "the market for some rights may yet emerge"); Saul Levmore and Ariel Porat, *Bargaining with Double Jeopardy*, 40 J Legal Stud 273, 282–92 (2011) (suggesting the potential utility of permitting defendants to waive double jeopardy protection against retrial after acquittal).

I. ANTECEDENTS

The plea bargaining literature tells us that criminal charges put defendants to an “all-or-nothing,” “binary” choice between the guilty plea and full-blown jury trial.⁴ Just beneath the surface, however, it is not difficult to identify practices in which prosecutors and defendants bargain incrementally. They do this in two ways.

The parties sometimes bargain over the *procedures for adjudication*. “Short of foregoing trial altogether,” that is, “defendants can make trials more economical or less risky for prosecutors by agreeing to a variety of stipulations or by waiving particular rules, including statutes that mandate certain factfinders, that require unanimous verdicts, or that require the defendant to be present.”⁵ Some defendants even agree to whittle down trial proceedings to a single issue. In a conditional guilty plea, for example, the prosecutor exchanges leniency for the defendant’s agreement to concede guilt if a particular procedural defense, such as a Fourth Amendment suppression motion, fails.⁶ A stipulated trial works similarly. The defendant pleads not guilty and, if he loses a pretrial motion, waives his right to a jury trial and stipulates to the prosecution’s case. This preserves the legal issue for appeal.⁷

Other bargains focus not on the procedures for adjudication, but the *identity of the adjudicator*. Juries slow down trials; defendants can thus extract concessions in exchange for their

⁴ See, for example, Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 Va L Rev 271, 313 (2013) (calling plea bargaining an “all-or-nothing proposition”); Josh Bowers, *Punishing the Innocent*, 156 U Pa L Rev 1117, 1130 (2008) (explaining that defendants “can expect only a binary choice: plea or trial”) (emphasis omitted); Gross, 56 NY L Sch L Rev at 1011 (cited in note 3) (“The pretrial choice that American criminal defendants face today is stark: plead guilty and accept the conviction and punishment the prosecutor offers, or go to trial and risk much worse.”); Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 Cal L Rev 539, 639 (1990) (describing the defendant’s “all-or-nothing choice”); Milton Heumann, *Plea Bargaining: The Experiences of Prosecutors, Judges, and Defense Attorneys* 167 (Chicago 1978) (describing the defendant’s options in court as “either trial or plea bargain”).

⁵ King, 47 UCLA L Rev at 118 (cited in note 3). See also Frase, 78 Cal L Rev at 643 (cited in note 4) (“Prosecutors and defense counsel [] engage in . . . ‘stipulation bargaining’ over issues such as chain of custody and authentication of records.”).

⁶ See FRCrP 11(a)(2).

⁷ See Nancy J. King, et al, *When Process Affects Punishment: Differences in Sentences after Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States*, 105 Colum L Rev 959, 970–71 & n 43, 979 & n 76 (2005).

consent to litigate before a more efficient arbiter. The best-known example is Philadelphia's bench trial system, in which defendants regularly agreed to waive their jury rights and proceed to trial before a judge.⁸ Bench trials were quicker, and the chances of acquittal were thought to be lower, both of which appealed to prosecutors.⁹ But sentencing exposure was also reduced, drawing in defendants.¹⁰ Likewise, federal misdemeanor defendants might be able to "purchase" leniency by consenting to trial before a magistrate judge.¹¹ And if we take seriously Judge Gerard Lynch's claim that ours is an "administrative system of criminal justice,"¹² plea bargaining itself incorporates an agreement about the identity of the adjudicator, at least in some cases. Lynch describes a practice—federal white-collar cases are the archetype—in which the defense makes an extensive presentation and argument to the prosecutor, who then essentially "adjudicates" the case and "sentences" the defendant.¹³ In other words, the parties agree to have the prosecutor, rather than a jury or judge, determine the defendant's guilt as well as the appropriate punishment.

II. POSSIBILITIES

This brief discussion shows that, notwithstanding the all-or-nothing framework that orders much scholarly thinking about plea bargaining, defendants sometimes unbundle their trial rights and trade them piecemeal for reduced sentencing exposure. Still, we seem to think, or perhaps assume, that many other rights are inalienable. Precedent forbids certain bargains. Most federal courts, for example, prohibit defendants from waiving jury unanimity.¹⁴ And other deals—such as an agreement to change the burden of proof—would simply strike us as odd (and possibly inappropriate) and have not, to my knowledge, been

⁸ See Alschuler, 50 U Chi L Rev at 1024–43 (cited in note 1).

⁹ See id at 1037–38; Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 Harv L Rev 1037, 1062–63 (1984).

¹⁰ See Schulhofer, 97 Harv L Rev at 1062–63 (cited in note 9).

¹¹ See 28 USC § 636(a). See also *Peretz v United States*, 501 US 923, 934 (1991) (reading the Federal Magistrates Act, 28 USC §§ 631–39, to permit courts to experiment with the use of magistrates "to improve the efficient administration of the courts' dockets").

¹² Lynch, 66 Fordham L Rev at 2117 (cited in note 2).

¹³ See id at 2125–27.

¹⁴ See, for example, *United States v Pachay*, 711 F2d 488, 493 (2d Cir 1983).

attempted.¹⁵ This should give us pause for the simple reason that, at least in theory, rights that cannot be “sold” individually are worth less than rights that can.¹⁶ This means that restricting unbundled trade risks depriving defendants of the full value of their entitlements. There may, after careful consideration, be good reasons for such strictures nonetheless. But we should not draw this conclusion reflexively.

In Section A, I consider why, in general, the parties might wish to enter into unbundled bargains. This discussion both explains existing practices and suggests that litigants would likely seize on expanded opportunities to bargain. In Section B, I suggest some of the specific trades that the parties might wish to make. Throughout my analysis, I make two assumptions to simplify exposition. First, I assume that the defendant’s counsel is publicly funded. The bargaining dynamics may differ when counsel is privately paid, and I focus on the more common case. Second, I assume that the prosecution compensates the defendant’s waiver of rights with charging or sentencing leniency. In practice, other forms of remuneration—such as a waiver of the prosecution’s own procedural entitlements—may also be available, but it is simpler for now to exclude them.¹⁷

A. Why Unbundled Bargaining?

There is reason to think that litigants in some cases would find an unbundled bargain more attractive than either a guilty plea or a full-blown jury trial. To see why, consider what makes the parties in a criminal case bargain over the defendant’s rights at all. Each of the defendant’s procedural entitlements has a tendency to increase the costs of trial, the odds of acquittal, or both. These are the things a prosecutor will “pay” to reduce. When the parties make a deal to streamline or eliminate

¹⁵ See, for example, Fisher, 97 *J Crim L & Crimin* at 947–48 (cited in note 3) (calling the burden of proof “a nonnegotiable, fixed, and indivisible feature of the criminal process,” though advocating a contrary arrangement); King, 47 *UCLA L Rev* at 124 (cited in note 3) (“Another procedural feature that has yet to be traded openly is the standard of proof.”).

¹⁶ Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 *Yale L J* 1969, 1975 (1992). See also Robert E. Scott and William J. Stuntz, *Plea Bargaining as Contract*, 101 *Yale L J* 1909, 1913 (1992).

¹⁷ See, for example, Gross, 56 *NY L Sch L Rev* at 1023–24 (cited in note 3).

trial, therefore, they engage in some combination of “costs bargaining” and “odds bargaining.”¹⁸

Note that these are porous categories that do not map neatly onto distinct sets of rights—one cannot say that a particular right impacts only costs or only odds. It depends on the circumstances. Confrontation Clause rights, for example, might raise the odds of acquittal if the defendant has a promising line of cross-examination, but may in another case merely threaten to prolong the trial. Indeed, the parties in a single case may not agree whether a right affects the likelihood of acquittal—the defendant might think it does not, and so see the “sale” of that right as a costs bargain only, whereas the prosecutor might think she is bargaining over both costs and odds. If it seems strange that the defendant would bargain away rights that raise his chances of acquittal, the key is the sentencing leniency he gets in return. Of course, he does not receive *as much* leniency as if he had pleaded guilty, but he retains the ability to contest guilt under a set of procedures that he finds at least minimally satisfactory, and which he had a hand in shaping.

Why, though, would the prosecutor not always want to reduce the costs of trial and odds of acquittal maximally, by insisting on a plea bargain? The simple answer is that, in some cases, obtaining a guilty plea may require the prosecutor to offer a sentence she views as unduly low. We can sharpen the point by examining the parties’ bargaining dynamics: In each individual case, the prosecutor and defendant bargain in a bilateral monopoly. There is a single seller of punishment leniency (the prosecutor) and a single buyer (the defendant, who pays with rights to process).¹⁹ Each party has a marginal rate of substitution between units of leniency and units of process. These measures capture how much process the defendant is willing to forgo to buy additional leniency, and how much leniency the prosecutor

¹⁸ Albert W. Alschuler, *Straining at Gnats and Swallowing Camels: The Selective Morality of Professor Bibas*, 88 Cornell L Rev 1412, 1412 (2003) (quotation marks omitted) (using this terminology in the plea bargaining context).

¹⁹ Commentators have long characterized the plea bargaining relationship as a bilateral monopoly. See, for example, Easterbrook, 12 J Legal Stud at 291, 311 (cited in note 1); Eric Rasmusen, *Mezzanatto and the Economics of Self-Incrimination*, 19 Cardozo L Rev 1541, 1583 (1998). This framing does, however, obscure some important aspects of the bargaining relationship stemming from the prosecutor’s role as a repeat player. See, for example, Oren Bar-Gill and Omri Ben-Shahar, *The Prisoners’ (Plea Bargain) Dilemma*, 1 J Legal Analysis 737, 738–39, 751 (2009); Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 Cal L Rev 1471, 1477–88 (1993).

is willing to sell to streamline and reduce the risk of adjudication, while each maintaining the same level of utility. The standard two-person bargaining model states that, if the parties make a deal, it will happen when their marginal rates of substitution are equal.²⁰ The point here is that these equilibria may occur at interim locations between the guilty plea and full-blown jury trial. In fact, it would be rather surprising if the parties' marginal substitution rates *always* equalized *only* at those endpoints.

Specific bargaining behavior and outcomes will depend on factors such as the defendant's attitude toward risk as well as the prosecution's marginal trial costs, and the parties' subjective assessments of their prospects in court, under different levels of process.²¹ For example, the parties might strike a deal over the defendant's Confrontation Clause rights if the defendant thinks that forgoing those rights will make little difference in his chances of acquittal, but the prosecutor thinks the difference will be great or that the trial will be substantially cheaper. In such a case, the prosecutor will be willing to offer a sentencing concession large enough for the parties to reach a deal. But to go all the way to pleading guilty, the defendant may demand a greater concession than the prosecutor is willing to give.

One generalization is possible: these interim deals are probably most likely in serious cases. In petty cases, prosecutors are said to try to maximize *convictions* rather than sentences.²² And defendants in petty cases reportedly care more about avoiding the process costs of disputing the charges—like missing work—than preserving their chance at acquittal.²³ This makes guilty pleas relatively more appealing to both sides, and adjudication less so. In serious cases, however, prosecutors aim to maximize *sentences* to a greater degree.²⁴ And defendants, facing long

²⁰ See James M. Buchanan and Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* 100–05 (Michigan 1962). See also Fisher, 97 J Crim L & Crimin at 953–66 (cited in note 3) (applying the model to negotiation in criminal cases).

²¹ See Fisher, 97 J Crim L & Crimin at 956–64 (cited in note 3).

²² See Bowers, 156 U Pa L Rev at 1128 (cited in note 4).

²³ See *id.* at 1132–39. The classic treatment is Malcolm M. Feeley, *The Process Is the Punishment: Handling Cases in a Lower Criminal Court* (Russell Sage 1979).

²⁴ See Bowers, 156 U Pa L Rev at 1153–54 (cited in note 4).

prison terms, are more likely to be risk seeking.²⁵ Both forces push toward adjudication.

B. What Unbundled Bargaining?

So what might these additional bargains look like? To start by expanding the example mentioned above, the defendant might barter his right to confront witnesses, agreeing to curtail cross-examination.²⁶ The recent line of Supreme Court decisions beginning with *Melendez-Diaz v Massachusetts*²⁷ enhanced the value of this right for many defendants. When the prosecution wishes to introduce a forensic report that certifies incriminating test results—say, that powder found in the defendant’s car is cocaine—it must bring to court the laboratory technician who authored the report.²⁸ Prosecutors have complained of the burdens this rule inflicts.²⁹ A defendant who does not wish to contest the lab results—perhaps his best defense is that he did not know the powder was in the car—might offer to release the State from its obligation to produce the analyst in exchange for charging or sentencing concessions.

There are many other examples. The defendant might barter his right to present a defense, for example by consenting to limits on the scope of his defense presentation (as measured by time or the number of witnesses called).³⁰ He might agree to reduce the prosecution’s burden of proof to a preponderance of the evidence.³¹ He might bargain for a modified jury trial with a smaller jury³² or a nonunanimous verdict, or agree to forgo

²⁵ This is true if defendants suffer decreasing marginal disutility from each year of imprisonment, a plausible assumption. See Alon Harel and Uzi Segal, *Criminal Law and Behavioral Law and Economics: Observations on the Neglected Role of Uncertainty in Detering Crime*, 1 Am L & Econ Rev 276, 295–98 (1999).

²⁶ See Gilchrist, 99 Iowa L Rev at 1988–89 (cited in note 3).

²⁷ 557 US 305 (2009).

²⁸ See id at 311.

²⁹ See, for example, Brief of Amici Curiae the National District Attorneys Association, and District, Prosecuting, and County Attorneys in Support of Respondent, *Melendez-Diaz v Massachusetts*, No 07-591, *8 (US filed Sept 9, 2008) (available on Westlaw at 2008 WL 4185393).

³⁰ See Gilchrist, 99 Iowa L Rev at 1988–89 (cited in note 3).

³¹ For an excellent, in-depth treatment of the viability and desirability of bargains over the standard of proof, see generally Fisher, 97 J Crim L & Crimin 943 (cited in note 3). For the civil analogue, see Robert E. Scott and George G. Triantis, *Anticipating Litigation in Contract Design*, 115 Yale L J 814, 866–78 (2006).

³² See Alschuler, 50 U Chi L Rev at 1016–17 (cited in note 1); Gilchrist, 99 Iowa L Rev at 1989–91 (cited in note 3).

attorney-conducted voir dire.³³ Or the parties might simplify the rules of evidence by eliminating certain grounds for objection.³⁴

The parties could even agree to litigate before an arbitrator, drastically reducing their draw on judicial resources.³⁵ The flexibility and informality of the arbitral setting would permit the parties more readily to streamline the issues for adjudication, focusing their efforts on what really matters. For example, a case might turn on the credibility of one or two witnesses, which the arbitrator could determine after proceedings directed to that question alone. Any relaxation of the formal-trial model must be compared to the “adjudication” that most defendants (that is, those who plead guilty) presently receive. Although an arbitrator is not a judge, neither is she a prosecutor. The defendant may prefer adjudication by an impartial—even if nonjudicial—decisionmaker rather than by the officer charged with pursuing the case against him.³⁶

There would be details to work out in this arbitration model, but they probably are not insurmountable. Retired judges might make good arbitrators, though any member of the bar (or possibly even nonlawyers) could volunteer. Endowing private citizens with essentially adjudicative powers, while uncommon outside civil arbitration, is hardly unprecedented in our legal order,³⁷ or even our criminal-justice system.³⁸ To make arbitration binding,

³³ See Alschuler, 50 U Chi L Rev at 1017–20 (cited in note 1).

³⁴ See Henry W. Taft, *Witnesses in Court: With Some Criticisms of Court Procedure* 5–6 (MacMillan 1934):

In my opinion the pursuit of truth would be promoted if most rules relating to oral testimony were abolished, except (1) those relating to materiality, (2) those excluding on direct examination questions so leading as to suggest the answer the examiner desires, and (3) those excluding testimony where evidence of a higher order of competency is available.

³⁵ The sole mention that I have seen of the possibility of arbitrating criminal cases is a student note. See generally Adina Levine, Note, *A Dark State of Criminal Affairs: ADR Can Restore Justice to the Criminal “Justice” System*, 24 Hamline J Pub L & Pol 369 (2003).

³⁶ See Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 Stan L Rev 869, 876–84 (2009) (outlining the dangers of vesting adjudicative powers in prosecutors who investigate and build cases). See also Tracey L. Meares, *What’s Wrong with Gideon*, 70 U Chi L Rev 215, 219 (2003) (discussing the importance of an independent adjudicator to the public’s perception that criminal justice proceedings are fair).

³⁷ See, for example, Cal Const Art VI, § 21 (authorizing members of the bar to serve as temporary judges and exercise judicial powers in certain cases with the parties’ consent).

³⁸ See Francis E. McGovern, *Appointing Special Masters and Other Judicial Adjuncts: A Handbook for Judges* *1917 (paper submitted at ALI-ABA Course of Study,

the court might conduct a prearbitration colloquy, advising the defendant of the trial-related rights he would lose; the defendant would waive those rights in open court, as in a plea colloquy.³⁹ The parties would also execute a written agreement—analogueous to a plea agreement—in which they would agree to be bound by the arbitrator’s decision.⁴⁰ They would then arbitrate and report the results back to the court, which would enter judgment accordingly. The court would not second-guess the arbitrator’s work save, perhaps, in cases of alleged manifest injustice.⁴¹

III. CONSEQUENCES

Of course, we would not wish to encourage unbundled bargains unless we believe that doing so will make our adjudicatory apparatus better rather than worse. Here I sketch out why this conclusion is plausible, and thus why unbundled bargaining is worthy of study alongside other potential reforms. I start by considering the effects of unbundled bargaining on the litigants before turning to third-party and social effects.

If indeed it is normatively desirable to expand the practice, I should add, the Constitution may well allow it: The Supreme Court presumes that even the most vaunted criminal procedure rights are waivable.⁴² And it seems not to “recognize the waiver of criminal protections through plea bargains to entail a form of the unconstitutional conditions problem.”⁴³ Many other potential

Civil Practice and Litigation Techniques in Federal and State Courts, July 2007) (available on Westlaw at SN009 ALI-ABA 1911) (“All courts have the power to appoint a special master or other type of judicial adjunct to assist with . . . criminal cases.”).

³⁹ See, for example, FRCrP 11(b).

⁴⁰ See, for example, FRCrP 11(c). There is at least a colorable argument that such an agreement would be valid under precedents enforcing bargains made in plea agreements. See, for example, *Santobello v New York*, 404 US 257, 262 (1971) (enforcing a prosecutor’s promise regarding sentencing); *United States v Hahn*, 359 F3d 1315, 1329 (10th Cir 2004) (en banc) (enforcing a defendant’s agreement to waive his right to an appeal).

⁴¹ See, for example, *Matthews v National Football League Management Council*, 688 F3d 1107, 1115 (9th Cir 2012) (discussing a similar exception in the civil context).

⁴² See *United States v Mezzanato*, 513 US 196, 200–03 (1995); *Peretz v United States*, 501 US 923, 936–37 (1990).

⁴³ Jason Mazzone, *The Waiver Paradox*, 97 Nw U L Rev 801, 801 (2003). See also *id* at 832–33. The unconstitutional-conditions doctrine limits the circumstances in which the government may condition the provision of a benefit on the recipient’s waiver of constitutional rights, which plea bargaining does. See Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 Stan L Rev 989, 1045–46 (2006) (calling the Court’s treatment of plea bargaining “a departure from its unconstitutional conditions jurisprudence”). Alternatively, to reconcile plea bargaining with the unconstitutional-conditions doctrine, one can read the plea bargaining decisions as holding that there is

constitutional objections overlap substantially with normative ones. With this in mind, and without fully closing the door on the constitutional question, I focus here on normative concerns.⁴⁴

A. Private Effects

In predicting the likely effects of increased unbundled bargaining, the initial intuition is simply that more choice makes the parties better off.⁴⁵ Examining the position of defendants and prosecutors separately helps confirm this intuition. Beginning with defendants: The majority of those accused plead guilty.⁴⁶ Some within this group might prefer to contest guilt but are not willing to pay the high price, in terms of potential punishment, for a full-blown jury trial. But these defendants might elect to purchase a cheaper, streamlined procedure were one available. Other defendants do opt for jury trials. These defendants may be paying for many rights they do not want—rights the exercise of which is unlikely to improve the fairness or accuracy of adjudication in their case. The principal value of these rights (to defendants like this) is to impose trial costs on the prosecution. Rather than make the prosecution suffer, a defendant might want to reduce his sentencing exposure by selling these rights to the government.

Prosecutors should benefit, too. The literature rightly focuses on *defendants* who plead guilty only reluctantly. But

“no ‘substantive’ constitutional right to trial in the presence of adequate alternative procedures for the determination of guilt,” of which plea bargaining is one example. Thomas R. McCoy and Michael J. Mirra, *Plea Bargaining as Due Process in Determining Guilt*, 32 *Stan L Rev* 887, 941 (1980). This view only strengthens the argument that unbundled bargaining is constitutional, as the streamlined adjudicatory procedures that unbundled bargaining contemplates provide *more* process than plea bargaining does—if plea bargaining is an adequate alternative to a full-blown jury trial, so is streamlined adversarial testing.

⁴⁴ When I say that unbundled bargaining may be constitutional, I mean that it seems to comport with the principles supporting the prior case law on waiver and plea bargaining. So if Ronald Dworkin’s omniscient Hercules were the judge, he may well permit it. See Ronald Dworkin, *Law’s Empire* 239 (Belknap 1986). I do not think that every trial judge would actually allow these bargains today. For example, as mentioned above, many federal courts forbid defendants to agree to a nonunanimous jury verdict. See note 14.

⁴⁵ See Easterbrook, 101 *Yale L J* at 1975 (cited in note 16). This is not always true, however. See generally Bar-Gill and Ben-Shahar, 1 *J Legal Analysis* 737 (cited in note 19) (showing that, due to collective-action problems, defendants may be worse off if plea bargains are permitted than if trials are mandatory).

⁴⁶ See *Sourcebook of Criminal Justice Statistics* at table 5.57.2006 (Bureau of Justice Statistics, 2006), archived at <http://perma.cc/58G6-TYYV>.

prosecutors may also have misgivings—namely, about deals they view as too lenient. Prosecutors may view these bargains as merely the lesser of two evils, preferable only to full-blown jury trials, with their high costs and risk of acquittal. If we think of guilty pleas as prosecutorial insurance against the costs and risks of trial,⁴⁷ the all-or-nothing framework forces prosecutors to insure fully or not at all. They usually insure. But they may often prefer to buy partial coverage.⁴⁸ The limited available empirical evidence supports this hypothesis. Prosecutors make deals for bench trials and appeal waivers, for example.⁴⁹

A skeptic might object that “market failures” render these benefits illusory: bargaining takes place within a coercive framework in which the parties have asymmetric information and act through imperfect agents, the argument goes. This is a serious objection, but it is not unique to unbundled bargains. Plea bargaining occurs in the same environment.⁵⁰ The market-failure objection, therefore, does not help us choose between a plea bargaining world and one of unbundled bargaining *unless* it takes on greater force in the latter system. It is possible that this is so, but it is not so obvious as to justify jettisoning the idea altogether. Indeed, unbundled bargains may well be *less* coercive than plea bargains because the sentencing differentials are smaller.⁵¹

B. Third-Party and Social Effects

Even if unbundled bargains benefit the parties, one might wish to restrict them if they generate significant negative

⁴⁷ See Gene M. Grossman and Michael L. Katz, *Plea Bargaining and Social Welfare*, 73 Am Econ Rev 749, 749 (1983).

⁴⁸ See Fisher, 97 J Crim L & Crimin at 950 (cited in note 3) (distinguishing between “partial” and “full” prosecutorial insurance against the risk of acquittal based on the degree of “sanction reduction” the prosecutor must “pay”).

⁴⁹ See King, 47 UCLA L Rev at 119 (cited in note 6); Schulhofer, 97 Harv L Rev at 1062–63 (cited in note 9).

⁵⁰ See John H. Langbein, *Torture and Plea Bargaining*, 46 U Chi L Rev 3, 12–13 (1978) (criticizing plea bargains as coercive); Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J Legal Stud 43, 47–60 (1988) (identifying “market failure[s]” in plea bargaining); Scott and Stuntz, 101 Yale L J at 1940–49 (cited in note 16) (showing how asymmetric information “breaks down” the “assumption of efficient contracting”).

⁵¹ See Langbein, 46 U Chi L Rev at 12 (cited in note 50) (asserting that the “sentencing differential is what makes plea bargaining coercive”).

externalities.⁵² Some criminal procedure rights, for example, are said to benefit individuals other than the defendant. Trading in these rights threatens harm to those third-party beneficiaries, potentially justifying restraints on alienation. This objection—however plausible on its face—confronts several difficulties. As an initial matter, the trajectory of Supreme Court doctrine points sharply away from the collectivist conception of rights the objection entails.⁵³ Criminal procedure rights, the Court has clarified over time, generally exist to benefit the defendant and thus are waivable—a conclusion that follows from the defendant’s right to control his defense.⁵⁴ So the universe of rights to which this objection could apply is increasingly small.

Still, there do remain rights we regard as inflected with collectivist values. For example, the Constitution forbids the prosecution, during jury selection, to exercise peremptory challenges to remove prospective jurors on the basis of race.⁵⁵ This prohibition (and its correlative right) protects not only the criminal defendant but also the excluded jurors and the community at large.⁵⁶ We might, therefore, think that the right is not really the defendant’s to trade away. Yet we let defendants forfeit the right through inaction or tardiness, with no recompense.⁵⁷ We do

⁵² See Guido Calabresi and A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv L Rev 1089, 1111–12 (1972) (discussing externalities and “moralisms” as grounds for inalienability); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U Pa L Rev 1293, 1378–93 (1984) (arguing that effects of alienation on “other members of society” may be a ground for inalienability of rights).

⁵³ See King, 47 UCLA L Rev at 120–30 (cited in note 3) (tracing the doctrinal history of the view that criminal procedure rights are principally aimed at shielding the interests of individual citizens rather than the public at large).

⁵⁴ See generally Erica J. Hashimoto, *Resurrecting Autonomy: The Criminal Defendant’s Right to Control the Case*, 90 BU L Rev 1147 (2010). See also Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv L Rev 1413, 1487–88 (1989) (arguing that an exclusive focus on the collective or social values that rights serve ignores “persistent constitutional conceptions of freedom as autonomous moral agency and of justice as respect for individuals’ choices for their own lives”).

⁵⁵ See *Batson v Kentucky*, 476 US 79, 89 (1986).

⁵⁶ See *Powers v Ohio*, 499 US 400, 406, 415 (1991). For an argument that, notwithstanding the doctrinal evolution discussed above, many criminal procedure rights “aim to protect persons other than those who assert them,” see William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 Va L Rev 761, 765–66 (1989).

⁵⁷ See, for example, *Clark v Newport News Shipbuilding and Dry Dock Co*, 937 F2d 934, 939–40 (4th Cir 1991) (“[I]t is [not] the duty of the court to act *sua sponte* to prevent discriminatory exclusion of jurors. Rather, even in criminal cases, the objection is deemed waived if not timely raised.”).

not force them to invoke it, nor do we require trial courts to police for discriminatory challenges *sua sponte*.⁵⁸

That said, we might fear that unrestricted alienability of the right will reduce the *rate* of rights enforcement by defendants; or that, if the prosecutor knows before jury selection that the usual rules do not apply, the odds of discrimination tick sharply upward. I cannot assuage these fears entirely. But neither are they overwhelming. After all, other stakeholders have an interest in monitoring prosecutorial behavior, including the jurors themselves and interest groups that represent them.⁵⁹ Once it is clear that restrictions on alienability impose costs on defendants—by reducing the value they can extract from their rights—the task becomes one of balancing the interests of defendants and third parties by calibrating the extent of reliance on each group for rights enforcement.

Other externalities might harm society more generally. Trading rights for sentencing concessions, it might be said, cheapens those rights and diminishes their place in our constitutional order. And it privileges private agreement over the public search for truth. Here, however, as before, the selfsame objections apply to plea bargaining. Plea bargains, too, commodify rights and reflect “an essentially agnostic and private view of criminal justice as an outcome of personal deals rather than of

⁵⁸ See *id.*

⁵⁹ For discussion of suits by individual jurors, see *Powers*, 499 US at 414 (“[I]ndividual jurors subjected to racial exclusion have the legal right to bring suit on their own behalf.”). But see *id.* at 414–15 (observing that “[t]he barriers to a suit by an excluded juror are daunting”). For discussion of the role that interest groups might play, see *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy* *47 (Equal Justice Initiative, Aug 2010), archived at <http://perma.cc/9XQD-VLUS> (urging community groups, civil and human rights organizations, and concerned citizens to attend court proceedings to monitor jury selection and to demand data from prosecutors on the use of peremptory strikes). The issue also falls within the DOJ’s ambit. See 18 USC § 243 (criminalizing racial discrimination in jury selection). See also Richard A. Epstein, *Why Restrain Alienation?*, 85 Colum L Rev 970, 970 (1985) (“The proper office for restraints on alienation is to provide indirect control over external harms *when direct means of control are ineffective to the task.*”) (emphasis added); King, 47 UCLA L Rev at 142 (cited in note 3) (noting the advantages of an approach to waiver doctrine “that conditions relief for defendants who trade away entitlements upon the absence of alternative means of protecting third-party interests injured by the trade”). In other contexts, some rights may be forfeited through inaction but not alienated (that is, transferred), such as the right to vote. The distinction makes less sense here. See Scott and Stuntz, 101 Yale L J at 1916 (cited in note 16) (noting that, in plea bargaining, the parties internalize most of the costs and benefits of the bargain, whereas in vote trading, “the social costs of the transaction are borne by the rest of the electorate”).

collective searches for the truth.”⁶⁰ And even granting some danger in commodifying rights, exalting them without regard for consequences is treacherous too.⁶¹

Social harms may, however, justify restraints on the alienation of one category of rights (and there may be others): rights that safeguard the judicial decisionmaking process. I do not think that the defendant, for instance, could agree to be tried in court by a jury of orangutans.⁶² If nothing else, judicial decisionmaking requires the application of general legal principles to the facts of individual cases. To hollow out that core is to threaten the judiciary’s legitimacy in both a legal and sociological sense.⁶³ Applying this principle, judicial impartiality might be thought necessary to “ensure the sort of detachment essential to principled reasoning.”⁶⁴ And public trials may be the only reliable way to monitor the adjudicative process to ensure its fundamental validity. Deals that sacrifice these rights would be highly suspicious. Despite its somewhat fuzzy edges, this carve-out, assuming it need be made, need not swallow the rule. The crucial question would be whether the decisionmaker is applying law to facts. A judge can do that as well as a jury; a small jury as well as a larger one; and the burden of proof and evidentiary rules do not dictate its feasibility.

⁶⁰ Inga Markovits, Book Review, *Playing the Opposites Game: On Mirjan Damaška’s The Faces of Justice and State Authority*, 41 Stan L Rev 1313, 1321 (1989).

⁶¹ See Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 Yale L J 2176, 2191 (2013) (arguing that “protecting defendants’ rights is quite different from protecting defendants” and may even legitimate the status quo).

⁶² See *United States v Josefik*, 753 F2d 585, 588 (7th Cir 1985) (“[I]f the parties stipulated to trial by 12 orangutans the defendant’s conviction would be invalid notwithstanding his consent, because some minimum of civilized procedure is required by community feeling regardless of what the defendant wants or is willing to accept.”).

⁶³ See Robert G. Bone, *Party Rulemaking: Making Procedural Rules through Party Choice*, 90 Tex L Rev 1329, 1387–88 (2012) (“If parties choose procedural rules that undermine the capacity of judges . . . to engage in principled reasoning [that applies general legal principles to particular facts of a case,] then perhaps their choices should not be honored.”); Fisher, 97 J Crim L & Crimin at 985–87, 991–93 (cited in note 3); *Mezzanatto*, 513 US at 204 (“There may be some evidentiary provisions that are so fundamental to the reliability of the factfinding process that they may never be waived without irreparably ‘discredit[ing] the federal courts.’”). See also Richard H. Fallon Jr, *Legitimacy and the Constitution*, 118 Harv L Rev 1787, 1794–1801 (2005) (disentangling legal, sociological, and moral senses of constitutional legitimacy).

⁶⁴ Bone, 90 Tex L Rev at 1387 (cited in note 63).

Further objections are certainly possible, especially once we consider potential second- and third-order effects.⁶⁵ My aim is not to defeat, or even identify, every potential one. For even if valid objections persist, they make up only one side of the equation. Indeed, perhaps the most important point I wish to make is this: *prohibiting or discouraging* unbundled bargaining imposes social costs of its own. A binary plea bargaining system prescribes a one-size-fits-all jury trial for every defendant who wishes to contest his guilt, no matter how awkwardly the procedures fit the case. This is not to fault those who designed the process. No single rulemaker—court or legislature (or Framer)—could possibly foresee, and account for in procedural rules, the myriad eventualities that might arise in the course of criminal litigation. Unbundled bargaining moves us toward a system in which trial procedures are tailored to meet the parties' preferences and the needs of the case, promoting both defendant autonomy and efficient deployment of judicial and attorney resources.⁶⁶ Put differently, streamlining some full-blown jury trials will conserve scarce resources, which can then be spent on additional trials for defendants who presently plead guilty. It is perhaps unsurprising, then, that analogies to unbundled bargaining exist in foreign systems⁶⁷ as well as domestic civil litigation.⁶⁸

⁶⁵ See Gross, 56 NY L Sch L Rev at 1029 (cited in note 3) (predicting that “the most important impact” of a proposed system in which defendants trade trial rights for procedural advantages on post-conviction review “might be its second- and third-level effects, which are impossible to predict”). One concern, for example, might be the way in which expanded unbundled bargaining, by changing the makeup of the body of cases that are litigated rather than settled, would influence the content of criminal procedure rules. See George L. Priest, *Selective Characteristics of Litigation*, 9 J Legal Stud 399, 421 (1980) (arguing that “the determinants of the parties’ litigation decisions are the instruments that will provide the most direct prediction of the content of litigated decisions”).

⁶⁶ See Note, *Comparative Domestic Constitutionalism: Rethinking Criminal Procedure Using the Administrative Constitution*, 119 Harv L Rev 2530, 2533–41 (2006) (discussing the benefits of substance-specific procedural law and the costs of its transsubstantive counterpart). See also Frase, 78 Cal L Rev at 641–44 (cited in note 4) (urging the adoption of “issue-narrowing procedures” that would permit courts to “concentrate on the issues that are genuinely in dispute . . . thereby encouraging the parties to litigate key issues that should not be plea bargained away”).

⁶⁷ In France, for example, the defendant can agree to have his offense “correctionalized”—that is, downgraded. This reduces his sentencing exposure, but the case is then heard in a lower court with fewer procedural protections, in which the odds of conviction are slightly higher. “The defendant receives a charge reduction in return for his or her ‘cooperation’ in not insisting on the greater procedural protections associated with felony charges.” Frase, 78 Cal L Rev at 631 (cited in note 4). See also *id.* at 622–23, 630–34;

At the other end of the spectrum, by offering cheaper, streamlined adjudication, unbundled bargaining should make genuine adversarial testing more common. This would have several benefits. First, plea bargaining appears to do a poor job distinguishing guilty from innocent defendants. Among other things, the dynamics of party interactions in plea bargaining make it hard for innocent defendants to identify themselves.⁶⁹ Even streamlined trials would likely be more accurate, which would reduce the social costs of wrongful convictions and enhance the criminal law's deterrent effects.⁷⁰ Second, plea bargaining involves serious agency costs—harms that stem from a divergence between the incentives of defense lawyers and defendants, and prosecutors and the public, respectively. Adjudication makes defense attorney and prosecutor performance more visible—and thus more accountable—thereby reducing these agency costs.⁷¹ Likewise, trials, like audits, shine a light on investigatory behavior and the exercise of governmental power more generally.⁷² Third, to the extent these additional

Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 Am J Comp L 199, 226 (2006) (reporting that German “judges would grant the defendant sentencing concessions in exchange for the defense ceasing [burdensome] evidence-gathering motions”).

⁶⁸ See Bone, 90 Tex L Rev at 1342–52 (cited in note 63). Civil arbitration permits adjudication by virtually any arbiter under contractually designated procedures.

⁶⁹ See Scott and Stuntz, 101 Yale L J at 1946–49 (cited in note 16). See also generally Lucian E. Dervan and Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J Crim L & Crimin 1 (2013) (reviewing the literature and conducting a new experiment, finding that a majority of innocent student-participants admitted to cheating in order to avoid academic consequences).

⁷⁰ See Gross, 56 NY L Sch L Rev at 1016 (cited in note 3) (asserting that “the accuracy of the system would improve if we . . . conducted contested public trials before neutral tribunals in at least a substantial proportion of criminal prosecutions,” even if these trials were not full-blown jury trials); Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J Legal Stud 307, 348 (1994) (explaining that accuracy improves deterrence by increasing the chances that guilty persons are punished and by decreasing the chances that innocent persons are punished, which makes “harmful acts less attractive and harmless behavior more attractive”); McCoy and Mirra, 32 Stan L Rev at 921–22 (cited in note 43).

⁷¹ See Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 Yale L J 1979, 1987–91, 2002–03 (1992). See also William J. Stuntz, *The Collapse of American Criminal Justice* 302 (Belknap 2011).

⁷² See Schulhofer, 97 Harv L Rev at 1105–06 (cited in note 9) (explaining that adversarial testing helps to protect individual and community freedoms from abuses of government power); Steven Zeidman, *Policing the Police: The Role of the Courts and the Prosecution*, 32 Fordham Urban L J 315, 324–32 (2005) (detailing how, in contrast to trials, “guilty pleas [] serve to insulate police practice from scrutiny”). On trials as audits, see generally Daniel Richman, *Framing the Prosecution*, 87 S Cal L Rev 673 (2014).

adjudications are jury trials (of any sort), they should promote democratic values like local control and help to cultivate an active and informed citizenry.⁷³ And finally, having more adjudications strengthens the bargaining position of defendants, whose threats of going to trial become more credible, nudging plea bargaining closer to the law's shadow.⁷⁴

CONCLUSION

Many scholars believe that the complexity of the American trial process drives the high rate of guilty pleas.⁷⁵ This view motivates calls for the repeal of procedural protections the Court has adopted, in order to streamline trials.⁷⁶ It seems unlikely that the Court will strip away criminal procedure protections wholesale in an effort to reduce plea bargaining, even if it thought the Constitution gave it the latitude to do so.⁷⁷ Nor do I wish for this to happen. After all, each procedural protection is very likely valuable to defendants in some cases. The right against discriminatory peremptory strikes may be crucial in a racially charged prosecution, for instance, or Confrontation Clause rights when the government's theory turns entirely on laboratory analysis. We want these rights to be available for defendants who wish or need to invoke them. But we should seriously consider whether, in other cases, we'd be better off to let defendants bargain them away, one at a time, instead.

⁷³ See Alexis de Tocqueville, *Democracy in America* 318 (Library of America 2004) (“[T]he jury, which is the most energetic form of popular rule, is also the most effective means of teaching the people how to rule.”); Stuntz, *Collapse* at 287, 303 (cited in note 71) (implying that a higher rate of jury trials better serves democracy).

⁷⁴ See Stephanos Bibas, *Plea Bargaining outside the Shadow of Trial*, 117 *Harv L Rev* 2464, 2478–79 (2004) (asserting that prosecutors give more-generous sentencing concessions when they face credible threats of going to trial); Lynch, 66 *Fordham L Rev* at 2146–47 (cited in note 2) (arguing that a critical mass of jury trials is necessary for “checking prosecutorial overreaching and setting the parameters of the bargaining system”).

⁷⁵ See, for example, Alschuler, 50 *U Chi L Rev* at 969–70, 988 (cited in note 1); John H. Langbein, *Land without Plea Bargaining: How the Germans Do It*, 78 *Mich L Rev* 204, 205–06 (1979).

⁷⁶ See, for example, Alschuler, 50 *U Chi L Rev* at 995–1011, 1016–22 (cited in note 1) (suggesting mixed tribunals of lay and professional judges in most cases, simplified jury-selection procedures and evidentiary rules, judicial control over ordering of proof and initial witness examinations, relaxed self-incrimination protections, and smaller juries).

⁷⁷ See *id.* at 1010 (conceding that simply streamlining trial procedures is a “pipe dream” given state constitutional requirements).