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## THE NEGOTIATED GUILTY PLEA: A FRAMEWORK FOR ANALYSIS

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*Discussions of plea bargaining to date in the case law and in the economic commentaries have exclusively employed the language of either fairness or efficiency and have as a result produced only partial analyses. Drawing on institutional economic theory, Professor Adelstein seeks to cure this defect. He proposes in this Article an analysis that looks to both the economic and "moral" costs of a crime and develops the concept of an "efficient offense": one in which the criminal has internalized both these costs. Plea bargaining, he argues, properly understood, is a transactional device designed to accomplish this internalization. This view of the bargain allows Professor Adelstein rigorously to formalize both the fairness concerns of the major plea bargaining cases and the efficiency concerns of the economic literature. Applying his model to Bordenkircher v. Hayes, a recent Supreme Court decision that allowed a prosecutor to use a threat to reindict under a recidivist statute as a chip in the bargaining process, Professor Adelstein explains and justifies the result by limiting it to the circumstances in which the bargain in the case took place.*

### INTRODUCTION

*In the area of plea bargaining, the lodestar must be the realization that our law solemnly promises each man accused his day in court. . . . Perhaps the promise must be tempered if society is unwilling to pay its price. But that decision should be made in sunlight, and not in the shrouded mist of unguided prosecutorial discretion.<sup>1</sup>*

The plea bargain—the surrender by an accused of his constitutional right to trial in exchange for sentence leniency<sup>2</sup>—occupies a

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<sup>1</sup> Scott v. United States, 419 F.2d 264, 277-78 (D.C. Cir. 1969) (Bazelon, C.J.).

<sup>2</sup> "Sentence leniency" usually takes the form of a reduction in the offense charged against the defendant or a prosecutor's recommendation of leniency with regard to the sentence for an

peculiar place in the American legal system. It has become the chief means of adjudicating criminal violations: ninety percent of criminal convictions are by guilty plea.<sup>3</sup> Until recently, however, courts refused to acknowledge that negotiations were commonplace; they clung to the fiction that "justice and liberty are not the subjects of bargaining and barter"<sup>4</sup> and required defendants to assert for the record that their pleas had not been induced by promises of leniency.<sup>5</sup>

Notwithstanding this verbal denial of its availability, leniency for those who pleaded guilty was thought justified on grounds such as the repentance evinced by the plea,<sup>6</sup> and the belief that a defendant convicted at trial has usually committed perjury in the course of his defense.<sup>7</sup> During the past decade, however, such rationalizations have been discarded in favor of a frank acknowledgment of the necessity and utility of the bargaining process.<sup>8</sup> This new openness has the twin virtues of reducing participants' uncertainty by permitting candid discussion of plea terms and of allowing explicit analysis of the value judgments and assumptions of fact that underlie the bargaining process.

The analysis of the plea-bargaining system proposed here draws its techniques from "institutionalism," a distinctive school of economic

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offense already charged. *But see* W. RHODES, PLEA BARGAINING: WHO GAINS? WHO LOSES?, at IV-1 to -45 (1978) (on file at the National Criminal Justice Reference Service) (to be published by Government Printing Office) (analysis of 1974 District of Columbia Superior Court dispositions in assault, robbery, larceny, and burglary cases suggested that only in robbery cases was the plea bargaining-sentence leniency paradigm accurate). For a more complete discussion of the various modes of plea bargaining in the United States, see D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 78-90 (1966); A. ROSETT & D. CRESSEY, JUSTICE BY CONSENT: PLEA BARGAINS IN THE AMERICAN COURTHOUSE (1976); White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439, 439-53 (1971).

<sup>3</sup> D. NEWMAN, *supra* note 2, at 3. Although some jurisdictions have recently imposed official bans on plea bargaining, the effectiveness of such bans remains very much open to question. See ALASKA JUDICIAL COUNCIL, INTERIM REPORT ON THE ELIMINATION OF PLEA BARGAINING (1977) (on file with National Criminal Justice Reference Service) (analysis of misdemeanor cases for single years preceding and following directive by state attorney general to all district attorneys forbidding plea negotiations); TIME, Aug. 28, 1978, at 44.

<sup>4</sup> *Shelton v. United States*, 242 F.2d 101, 113 (5th Cir.), *rev'd en banc on rehearing*, 246 F.2d 571 (5th Cir. 1957), *rev'd per curiam on confession of error*, 356 U.S. 26 (1958).

<sup>5</sup> D. NEWMAN, *supra* note 2, at 1 & n.1; PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967) [hereinafter TASK FORCE: COURTS].

<sup>6</sup> Note, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L.J. 204, 209-11 (1956).

<sup>7</sup> *Id.* at 211-17.

<sup>8</sup> See H.R. REP. NO. 247, 94th Cong., 1st Sess. 6 (1975), reprinted in [1975] U.S. CODE CONG. & AD. NEWS 674, 678.

thought rooted principally in the work of John R. Commons.<sup>9</sup> Institutional theory seeks to account both for the organization of various kinds of economic activity and for the evolution of particular social and economic institutions within a market exchange-based social order. The vehicle for understanding these macroscopic phenomena is the smallest unit of economic analysis, the individual market exchange or transaction at the margin. The individual transactions of greatest interest to institutional inquiry are those that, because of the characteristics of the parties involved or due to imperfections in the structure of the relevant market (or both), fail to be consummated though they might have resulted in benefits to the potential traders. When human and environmental factors are viewed as a source of cost or friction in the conduct of beneficial transactions, many social institutions are seen to be evolving mechanisms that respond to these transaction costs in such a way as to facilitate the completion of mutually beneficial market exchanges.<sup>10</sup> Problems in the definition and distribution of property rights,<sup>11</sup> in the organization of firms<sup>12</sup> and industries,<sup>13</sup> and in the structure of markets for insurance and contingent claims,<sup>14</sup> among others, have been usefully analyzed within an institutional framework.

The value of an institutional economic approach to issues in the criminal law derives from the ability of its market model to provide insights about observed phenomena—human activity—and to make explicit the set of value judgments inherent in the criminal process. Certainly, the economic perspective does not offer a theoretical explanation for every observed detail in this area, nor does the market model's consistency with empirical evidence foreclose other analyses. But the positive incorporation of widely shared social values into a

<sup>9</sup> J. COMMONS, *INSTITUTIONAL ECONOMICS* (1934).

<sup>10</sup> For a concise and useful statement of the institutional approach to problems of economic organization, see O. WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS* 1-19 (1975).

<sup>11</sup> See generally Calabresi, *Transaction Costs, Resource Allocation and Liability Rules—A Comment*, 11 J.L. & ECON. 67 (1968); Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967) (Papers & Proceedings).

<sup>12</sup> See generally O. WILLIAMSON, *supra* note 10, at 82-175; Alchian & Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777 (1972); Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937), reprinted in *AMERICAN ECONOMIC ASSOCIATION, READINGS IN PRICE THEORY* 331 (G. Stigler & K. Boulding eds. 1952).

<sup>13</sup> See generally Williamson, *The Economics of Antitrust: Transaction Cost Considerations*, 122 U. PA. L. REV. 1439 (1974).

<sup>14</sup> See generally K. ARROW, *ESSAYS IN THE THEORY OF RISK-BEARING* (1971); Arrow, *The Economics of Moral Hazard: Further Comment*, 58 AM. ECON. REV. 537 (1968); Pauly, *The Economics of Moral Hazard: Comment*, 58 AM. ECON. REV. 531 (1968).

market analysis can go far toward explaining the observed structure of the American criminal justice system, thereby clarifying a difficult and important line of federal cases and a group of procedural rules dealing with negotiated pleas. Moreover, by employing the market model to articulate the value judgments that lie concealed at the base of this structure and to uncover their role in it, we may be better able to predict both the systemic effects of changes in the law and the results of a transvaluation of the underlying values, given the substantive and procedural organization of the system.

This Article considers two closely related transactions: the criminal act itself, and society's subsequent effort to deal with the wrongdoer. The first section develops the idea of a market for criminal behavior and demonstrates that the substantive criminal law can be viewed as a means of forcing criminals to take account of the social costs of their criminal acts when they plan them. Society prosecutes criminal cases, it is argued, whenever the price society demands that the criminal pay for his act—whether in the form of a fine or an incarceration—exceeds the cost of the prosecution. In this setting, plea bargaining is characterized as a cost-reducing device, intended to lower the threshold at which the prosecution of a criminal case becomes worthwhile. The second section considers plea bargaining as a mode of transactional organization and argues that several court-imposed restraints on prosecutorial behavior in the plea bargaining area can be justified on solely pragmatic, cost-minimization grounds, independently of more common rationales based on considerations of fairness or of defendants' rights. The final section discusses the moral transaction costs incurred in plea bargaining. It examines the development of the voluntary plea as a method of reducing moral transaction costs and closes by examining a recent Supreme Court case in light of this analysis.

## I

### PRICE EXACTION AS A THEORY OF THE CRIMINAL LAW

#### *A. The Costs of Crime*

Crime is the source of two distinct types of costs imposed upon individuals who form the community. Most obvious are the economic, physical, and emotional costs that the criminal imposes directly upon his victim and those few individuals physically or emotionally closest to the criminal "transaction."<sup>15</sup> If Estragon, a worker, bashes in the

<sup>15</sup> The economic component of these costs is discussed and estimated in PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT:

nose of Vladimir, his foreman, the cost imposed on Vladimir includes medical expenses, the inconvenience of the injury, and a complex of less tangible costs.

Less apparent than the costs imposed directly on the foreman are other costs borne by persons only indirectly connected with the crime and its principal parties. Some indirect costs are easily expressed in material terms. The existence of crime diminishes incentives for the production of wealth through socially acceptable means. It also reduces personal and material security, leading to expenditures for protection, and to the foregoing of otherwise beneficial activities when the risk of crime is high.<sup>16</sup>

Other indirect costs, although equally real, are less easily translated into dollars and cents. When the evening news tells of a particularly heinous murder or assault, one's negative reaction cannot plausibly be explained as no more than disquiet at the knowledge that the general level of personal security has decreased in proportion to the increment in criminality that the act represents. There is something more at work than a selfish realization that one's own security is in slightly more peril than one had realized before learning of this new crime. Were this not true, statistics would produce the same reaction as does more graphic reportage, and the identities of assailant and victim and the circumstances of the crime would be of little interest. But the circumstances of the crime and the identities of the parties involved are of great interest. One is more outraged when a con man takes fifty dollars from a poor widow than when he takes the same amount from a prosperous businessman; the murder of a President evokes more grief than that of an underworld leader. Reasoning within an institutionalist model, details of the criminal act shape our reactions to, and the costs of, particular crimes because they are prime determinants of criminal punishments; and conversely, they determine punishments because they shape our reactions.

We shall refer to this component—the “something more” in our reaction to crime—as crime's “moral cost.” The selection of the term does not imply any normative justification for given reactions; the notion of moral cost is limited here to a positive measure of the social outrage that results from a given crime.<sup>17</sup> A consequence of each in-

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CRIME AND ITS IMPACT—AN ASSESSMENT 42-59 (1967) [hereinafter TASK FORCE: CRIME'S IMPACT].

<sup>16</sup> TASK FORCE: CRIME'S IMPACT, *supra* note 15, at 56-58.

<sup>17</sup> This notion of moral cost has been suggested elsewhere. In a remarkably perceptive essay, Professor Frank Michelman characterizes economic efficiency so as to emphasize the existence and importance of nonmaterial effects on personal welfare. “The concept of efficiency

dividual's sense of right and wrong, it reflects the indignation and sense of injustice one experiences at the plight of another who has been unjustly abused.<sup>18</sup>

The notion that crime involves both direct and indirect social costs, for which the criminal may be forced to compensate his victims, suggests that it might be profitable to view our system of crimi-

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is . . . a concept of ethical maximizing, implying the goodness of increasing some quantity to the limits of possibility . . . . [A]n 'efficient' process is one which maximizes the total amount of welfare, of personal satisfaction, in society, and not all satisfaction is material." Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation"* Law, 80 HARV. L. REV. 1165, 1173 (1967). Implicit in this passage, and more fully developed in the analysis that follows it, is Professor Michelman's argument that the traditional concept of allocative efficiency must be broadened to encompass not only costs and benefits ordinarily assigned values in monetary terms by market forces but those that are moral in character as well. *Id.* at 1214-18. Others have recognized the existence of costs that "do not lend themselves to collective measurement which is acceptably objective and nonarbitrary. This nonmonetizability is characteristic of one category of external costs which . . . are often called moralisms." Calabresi & Melamed, *supra* note 11, at 1111-12.

The concepts of moral and economic social cost are explored in another context in Comment, *Just Compensation and the Assassin's Bequest: A Utilitarian Approach*, 122 U. PA. L. REV. 1012, 1022-27 (1974). It should be noted here, of course, that moral *benefits* to crime may inhere in a situation in which there exists general antipathy toward the victim of crime or substantial sympathy for the cause of the lawbreaker.

<sup>18</sup> Within the Article's "democratic" price-exaction model, the cost of any crime is the sum of material and moral losses associated with the crime. Moral costs are estimated under an assumption that all citizens know of all crimes—perfect information—and that their reactions to such crimes need not be expressed and need not conform to any ethical norms. Thus, racially, culturally, and religiously bigoted reactions are included without qualification.

In working with the model, it is important to distinguish between positive and normative analysis in formulating policies intended to enhance the effectiveness with which the criminal process controls externalities. Though the Article focuses on the evolution of rules governing exaction of the punishment price, it is clear that the suggested analysis may have significant implications for the substance of the criminal law itself. Consider, for example, the inherently subjective way in which both legislatures and courts gather the information required to establish efficient punishment prices. The analysis suggests the argument that if these mechanisms were sufficiently decentralized so that the criminal law were created and administered by representatives of relatively small and homogeneous social groups, the extent of social cost associated with various activities, and the efficacy of the criminal process as a whole, ~~could be~~ substantially improved. ~~could be more reliably estimated~~

The fundamentally political nature of any system of criminal justice, however, makes it especially important that a prescriptive analysis be undertaken with the utmost sensitivity and circumspection. Yet much of the economic literature dealing with crime and its control has confused "what is" and "what ought to be" because of its uncritical reliance on the standard theorem of welfare economics. Under suitable assumptions regarding market structure, the theorem runs, the allocation of tradable resources resulting from free exchange will be efficient, or Pareto-optimal. More precisely, it can be shown that given a set of prices, an efficient market allocation of resources can be derived from any set of individual preferences and initial resource endowment. See K. ARROW, *supra* note 14, at 61-64. Whenever it appears that an important and interesting social phenomenon can be portrayed as an exchange process, however, there exists a strong temptation to assert uncritically the "optimal" character of the market outcome and to prescribe collective measures designed to realize the outcome when human or environ-

nal justice as a means of forcing potential offenders to account for each of these costs in planning their activities. Society can then be seen to exact a "price" from the offender (in the form of a deprivation of liberty or a pecuniary fine) that corresponds<sup>19</sup> roughly to the social costs of the offense.<sup>20</sup> Within the institutional model, an observed \$1,000 fine for a crime is, by hypothesis, sufficient to cover the crime's direct and indirect costs.

Although the price-exaction model of criminal jurisprudence is couched in the language of economics, the model has roots in the earliest expression of the English common law, before the line separating crime from tort had been drawn:

A deed of homicide is thus a deed that can be paid for by money. Outlawry and blood-feud alike have been retiring before a system of pecuniary compositions, of *bót*. . . . From the very beginning . . . some small offences could be paid for; they were 'emendable.' The offender could buy back the peace that he had broken. To do this he had to settle not only with the injured person but also with the king . . . . A complicated tariff was elaborated. Every kind of blow or wound given to every kind of person had its price, and much of the jurisprudence of the time must have consisted of a knowledge of these pre-appointed prices.<sup>21</sup>

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mental factors prevent free exchange from doing so. What is sometimes forgotten is that a particular market allocation, efficient though it may be, is neither unique nor necessarily desirable, for it is crucially dependent not only upon individual tastes and preferences but upon the distribution of resources that preceded the exchange process as well. This interdependence means that a prior judgment of desirability is presupposed by any claim that some allocation or exchange outcome is socially preferred or "optimal." This prior judgment validates the propriety of the underlying income distribution or the legitimacy of satisfying some individual preferences through the exchange mechanism. Given that moral costs play a central role in both the definition of crime and the organization of price-exaction procedures, particular caution is warranted concerning which social costs are adjudged worth counting. Class, income, social status, religious conviction, and simple bigotry all may be significant determinants of the moral cost associated with particular activities in specific circumstances, and a price-exaction process based largely on such costs may become an instrument of oppression, intended or otherwise.

<sup>19</sup> Unjust or excessive punishment of criminals also generates moral costs. See text accompanying notes 71-73 *infra*.

<sup>20</sup> Most of the economic literature on crime has not focused at this individual transactional level, concentrating instead upon the specification of conditions on a system-wide level that would produce an optimal allocation of resources for detection and punishment. See, e.g., R. POSNER, *ECONOMIC ANALYSIS OF LAW* 357-67 (1972); Becker, *Crime and Punishment: An Economic Approach*, in *ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT* 14-18 (G. Becker & W. Landes eds. 1974). More significant differences between the institutional approach espoused in this Article and the system-wide optimization model espoused by Posner and Becker are considered in text accompanying notes 185-86 *infra*.

<sup>21</sup> 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 451 (2d ed. 1898); see Ploscowe, *The Development of Present-Day Criminal Procedures in Europe and America*, 48 HARV. L. REV. 433, 437 (1935).



Even here we observe the two principal elements of the price-exaction framework. The notion of indirect social cost is reflected in the fact that mere restitution to the victim of a crime was deemed insufficient to heal a breach of the public order: the polity, in the person of the king, was also entitled to recompense. One can infer that the law recognized both that persons other than the direct victim might be injured by the offense and that the lawbreaker's duty extended to these individuals as well.<sup>22</sup> Further, the social damage attributable to a given act apparently depended as much on the circumstances of the act and the identities of the parties as on the act's abstract nature.<sup>23</sup>

This view of the criminal process has one immediately striking feature: it suggests that rather than trying *unconditionally to deter* crime, society *merely puts a price* on its commission. In effect, one might argue that the law *encourages* the commission of "efficient" offenses—those in which the gain to the criminal exceeds the cost to society.<sup>24</sup> To illustrate the concept of an efficient offense, imagine Estragon sorely irritated, deliberating about whether to punch his foreman Vladimir in the nose. The punishment for such a blow, equal to the crime's direct and indirect economic and moral costs, is assumed to be a \$1,000 fine, the price the state puts on the crime. If we assume further that apprehension and conviction are certain, Estragon is faced with the decision whether to commit the crime at a cost of \$1,000, or to obey the law and forgo the satisfaction that the blow might bring. If Estragon decides that the intangible cost of obeying the law would be greater than the cost of the fine, he would "trade" with society by punching Vladimir and paying the attendant price. Moreover, one could assert that society is better off because Estragon chose to break the law. If the worker could have been prevented from making the "trade" represented by his crime, society would be better off by the equivalent of \$1,000 (because the social costs generated by the punch would not be incurred) but society would be worse off by the equivalent of more than \$1,000 (since, by

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<sup>22</sup> See text accompanying notes 15-16 *supra*.

<sup>23</sup> See text accompanying note 17 *supra*.

<sup>24</sup> That unconditional deterrence of crime is incompatible with efficient resource allocation has been suggested elsewhere. See Becker, *supra* note 20, at 14-18. A similar notion is well accepted in the area of tort liability. See G. CALABRESI, *THE COSTS OF ACCIDENTS* 17-18, 68-72 (1970). Analysis to the same effect but more prescriptive in nature is presented in R. POSNER, *supra* note 20, at 41-102, 358-59. For a detailed critique of Posner's approach, see Polinsky, *Economic Analysis as a Potentially Defective Product: A Buyer's Guide to Posner's Economic Analysis of Law*, 87 HARV. L. REV. 1655 (1974). The analogy between the economic aspects of criminal law price-exaction and these aspects of civil law is developed in text accompanying notes 48-56 *infra*.

hypothesis, the worker's loss in not breaking the law is greater than the fine).<sup>25</sup> When the trade is allowed, however, society is compensated for the damage done, so it is equally well off, and that part of society represented by Estragon is better off than it would have been absent the trade. Within the model, it would appear that society's aim is merely to "internalize" the cost of crime—that is, to force criminals to pay for their crimes, rather than to allow criminals to impose those costs on others without recompense.<sup>26</sup> In this way the supply of crime is controlled, but not eliminated—inefficient crimes, like goods for which no buyer is willing to pay the full cost of production, are eliminated, but efficient crimes continue to be committed, and, in a sense, are even encouraged. Within the model, crime will always exist at some level of frequency, and so long as each crime can be characterized as efficient, each will represent a component of a socially efficient level of criminal activity. It should be clear that an efficient level of the production and consumption of crime is analogous to an efficient level, for example, of melon production—only those "goods" are produced for which a consumer is able and willing to pay the full cost of all resources used in producing the good. Such a level of crime is termed "allocationally efficient" because it allocates that amount of social resources into the production and consumption of crime that best comports with the sum of individual preferences in society.<sup>27</sup>

The objection might be urged against this analysis that, though we may look understandingly on an efficient exchange in the Vladimir-punching context, we would feel very differently if a more serious crime were involved. In the case of a burglary or a murder, it can be argued, we would not count the criminal's gain in satisfaction from the crime as worthy of measure, and would seek to deter unconditionally rather than to allow an "exchange." It is true that society *might* take that view of the criminal law, and perhaps it should, but the fact is that society does not. The law could set much higher penalties for burglary in order to deter more prospective burglars.<sup>28</sup>

<sup>25</sup> It should be emphasized that this is a positive, and not a normative, assertion.

<sup>26</sup> The economist's general concern with "internalizing" costs to the actors responsible for producing them is directed toward equalizing the private and social net benefits of an act. When private and social net benefits diverge—for example, when a factory is not forced to clean up its effluent—the system produces the "wrong" amount of the relevant product. See E. MANSFIELD, *MICROECONOMICS* 450-52 (2d ed. 1975); G. STIGLER, *THE THEORY OF PRICE* 110-14 (3d ed. 1966); Comment, *Internalizing Externalities: Nuisance Law and Economic Efficiency*, 53 N.Y.U.L. REV. 219, 231 (1978).

<sup>27</sup> See E. MANSFIELD, *supra* note 26, at 435-63.

<sup>28</sup> There can be little doubt that deterrence of burglary is far from perfect. In 1975, official estimates placed the number of burglaries at over 3,250,000. FEDERAL BUREAU OF INVESTIGATION, *UNIFORM CRIME REPORTS FOR THE UNITED STATES* 49 (1975).

Instead, society creates a set of penalties for criminal acts that increase in severity as the acts increase in social disutility, but that apparently does not attempt to deter *any* given crime absolutely. With serious crimes, just as with the foreman-punching hypothetical, society allows those crimes whose value to the offender (the sum of the economic rewards of the crime and the satisfaction gained by committing it) exceeds the crime's cost to society (the sum of direct and indirect costs). Society could presumably achieve far lower levels of burglary by providing stiffer punishments; that it fails to do so is consistent with a model that allows criminals to "buy" their crimes just as parties to a contract may buy their way out of performance with a payment of damages. The distinction between the bashed-Vladimir example and a more serious crime is not one of kind, but only one of degree.<sup>29</sup>

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<sup>29</sup> It need hardly be mentioned that the price-exaction model of criminal justice advanced here is somewhat at odds with the more traditional literature of criminal jurisprudence. For an excellent introduction to the latter, including both its legal and philosophical aspects, see CONTEMPORARY PUNISHMENT: VIEWS, EXPLANATIONS, AND JUSTIFICATIONS (R. Gerber & P. McAnany eds. 1972). Although a detailed comparison of the price-exaction model with the traditional literature is beyond the scope of this Article, two points deserve mention. First, the price-exaction model plainly weakens the traditional distinction between retribution and deterrence as separate goals of the criminal law. W. LAFAYE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 5, at 22-24 (1972); H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 37-48 (1968). The notion of punishing an offender in relation to the social harm he has caused is a clear realization of the retributive aspects of the law, but price exaction posits a potent general deterrent as well, given that an incentive to commit a particular crime exists only for those willing to pay the price for their actions. This is true whether the punishment price represents the full extent of the costs of the offense or is discounted by the less than certain probability of apprehension and conviction that faces most offenders. Secondly, the price-exaction model requires that the punishment imposed upon conviction extract a true *cost* from the offender, a cost equal to the social cost of his crime. See text accompanying notes 15-27 *supra*. Thus, punishment in the nature of price exaction must to some degree be painful, and therefore retributive, not solely rehabilitative. Although this position is by no means an uncontroversial one in normative terms, it would be difficult to argue, as a positive matter, that retribution has vanished from the administration of criminal justice. See *Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring); *id.* at 342-45 (Marshall, J., concurring); H. PACKER, *supra* at 37-39.

It should also be noted that the actual payment of compensation by the offender to his victims for economic and moral costs incurred is not necessary for the achievement of an efficient level of criminal activity; it is sufficient that the offender himself bear these costs in their entirety so that his decision to engage in crime takes full account of them. Especially in the case of indirect victims, criminal punishment in the form of incarceration or severe limitation of personal liberty provides a substantial measure of restitution. These punishments are highly visible affairs; the suffering imposed on convicted offenders is recognized by the community as universally painful, and the element of retribution it represents is payment "in kind" for moral costs incurred. But even if this punishment reflects the full extent of economic and moral costs imposed on both direct and indirect victims, important *distributional* issues arise if direct victims are not fully compensated for the economic costs they may have borne. Such concerns have motivated many jurisdictions to institute arrangements under which direct victims are

### B. *Determining the Punishment Price*

Turning now to the problems involved in ascertaining the social cost imposed by a particular criminal offense, the difficulty is best conveyed by elaborating on the story of Vladimir and Estragon. Suppose that in addition to the direct costs imposed on Vladimir, the act has generated substantial indirect economic and moral costs, all of which have conveniently fallen upon a third individual, Pozzo. Even assuming that an "exchange rate" exists that translates costs borne by Vladimir and Pozzo into punishment units to be exacted from Estragon, the crucial question remains: how are those costs (and thus the price due from Estragon in payment for this offense) to be ascertained?

#### 1. *The Problems of Private Determination*

One way to ascertain costs, of course, is to leave things in the hands of Vladimir and Pozzo. Left to their own devices, they might very likely extract from Estragon at least the full measure of costs he has imposed on them, thereby relieving society of the problem of assessing costs as well as that of translating them into punishment units. Indeed, the preceding analysis—particularly the suggestion that the criminal law appears to allow free exchange in the criminal "market"—might lead one to suppose that such a laissez-faire solution would be desirable. But the "self-help" solution has proven unacceptable over time: the law has long barred the vendetta.

There are at least four reasons why legal systems shun private vengeance. Two reasons are at once obvious and mundane. First, private vengeance threatens the peace of the entire society. Second, if Vladimir and Pozzo together are weaker than Estragon, they will be unable to exact the punishment price. Conversely, a chastened and callow Estragon, who could not stand up to a strong and vindictive Vladimir and Pozzo, might be charged far more for his act than is socially desirable. A third reason is also related to practical difficulties; because the indirect cost in most cases is borne not by a single Pozzo, but by thousands or millions of Pozzos, the task of collecting

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compensated by the state for economic costs resulting from criminal acts. *E.g.*, Act of Oct. 2, 1973, CAL. GOV'T CODE §§ 13959-13969.1 (West Cum. Supp. 1978); Florida Crimes Compensation Act, FLA. STAT. ANN. §§ 960.01-.25 (West Cum. Supp. 1978); Crime Victims Compensation Act, ILL. ANN. STAT. ch. 70, §§ 71-84 (Smith-Hurd Cum. Supp. 1978); Act of Jan. 2, 1968, MASS. GEN. LAWS ANN. ch. 258A, §§ 1-8 (West Cum. Supp. 1978-1979); Criminal Injuries Compensation Act of 1971, N.J. STAT. ANN. §§ 52:4B-1 to -21 (West Cum. Supp. 1978-1979); Act of Aug. 1, 1966, N.Y. EXEC. LAW §§ 620-635 (McKinney 1972 & Supp. Pamph. 1972-1977). For a general treatment of such programs, see H. EDELHERTZ & G. GEIS, PUBLIC COMPENSATION TO VICTIMS OF CRIME (1974).

punishment price data<sup>30</sup> is clearly beyond the capacity of any aggrieved individual, leaving him uncertain about how much the crime cost society. Moreover, the cost to each citizen may be small in relation to the cost of exacting payment from Estragon, thus making it uneconomic for the individual citizen to recover from him.<sup>31</sup>

The fourth and most important problem with the use of private vengeance, for the purposes of the price-exaction model, is an informational problem: private enforcement does not intelligibly reveal the correct punishment price. To understand the difficulty, it is useful to remember the premises of the price-exaction framework. Under the model's description, the criminal law does not "forbid" crime, but merely assigns each crime its true social cost (including moral cost) and permits the would-be criminal to "purchase" the crime if he is willing to pay for it. If society relies on Vladimir to exact this cost from Estragon, society must also rely on Vladimir to calculate the social cost of Estragon's action—that is, to tell society, by his retributive behavior, how much he, and they, have been hurt. The problem is that Vladimir may very likely feel an emotional incentive to overstate the extent of his injury and therefore to demand an inefficiently large punishment price.<sup>32</sup> Because the social cost of Estragon's crime does not generate the same social cost as an assault on some other individual, no other victim can serve as an indicator of Vladimir's and society's precise loss. Without such information, it is not possible to ascertain whether a specific crime, or whether the overall level of crime in society, is efficient.<sup>33</sup>

A commercial market analogue may help clarify the information problem. Consider the producer of melons. The price he sets for his fruit is, assuming perfect competition, equal to the resource cost of producing it. If he announces a price of 50¢ when the resource cost of a melon is only 25¢, another producer will undersell him. Eventually, consumers will know (and be charged) only the "correct" price for melons—the actual resource cost incurred in their production and marketing. The reason the second producer can force the first to

<sup>30</sup> Implicit in the model's assumption of perfect knowledge among citizens, *see* note 18 *supra*, is the assumption that such data exists for each crime.

<sup>31</sup> *See* text accompanying notes 48-56 *infra*. In law, this problem is familiar in the class action setting.

<sup>32</sup> A plaintiff in tort, in contrast, has an *economic* incentive to overstate the extent of his injuries, since his loss provides the basis for his recovery. *See* W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 1, at 4-7 (4th ed. 1971).

<sup>33</sup> *See* text accompanying notes 15-27 *supra*. This is known in economics as a "small numbers" problem. *See* Arrow, *The Organization of Economic Activity: Issues Pertinent to the Choice of Market Versus Non-Market Allocation*, in *PUBLIC EXPENDITURES AND POLICY ANALYSIS* 59, 65 (R. Haveman & J. Margolis eds. 1970).

charge no more than the resource cost for each melon is that he deals in exactly the same good as does the first producer, and he obtains his melons, as does the first producer, by paying the resource cost. A second producer dealing only in baby shoes, obviously, would not serve to force down the price of melons.

To return to the private vengeance example, Vladimir may step in as the first melon producer. He may be motivated to inflate the true cost of the harm he suffered at the hands of Estragon—his “good”—but because there can never be another producer of an identical good, there can be no force to drive his asking price down to the resource price. Each crime generates a unique set of costs, which is a function of its peculiar circumstances. Had Estragon bloodied the nose of his neighbor, rather than that of Vladimir, the total social cost of the offense might have been different. We cannot rely on the neighbor, therefore, to know whether Vladimir’s price is a fair one, so as to serve as a check on Vladimir’s price.

It is clear, however, that a troubling question is raised by this analysis of the information problem. Why should society care whether Vladimir overstates his injury and exacts a disproportionately high price from Estragon? Surely an assailant is entitled to scant consideration from us, and if Vladimir exacts the full social cost of the offense and then takes an extra whack, what has been lost? Is society truly interested in avoiding the deterrence of efficient crimes and, as a positive matter, in achieving by such means allocations of resources that yield greater levels of satisfaction for society? The question begs the point, however. Whether or not society *should* care about exacting a greater-than-cost price from the worker, it is apparent that society *does* care—that society forbids victims (and the state) from exacting disproportionate punishment prices. The victim of a simple burglary would not be permitted to kill the thief, and a jaywalker’s feet are not amputated. The notion of proportionality—that the punishment should fit the crime—has long been central to our criminal jurisprudence;<sup>34</sup> it is consistent with the model’s assertion that punishment prices are constrained by real moral costs that society attaches to unconditional deterrence, and that criminals are thus allowed, based on assessments of personal satisfaction, to decide

<sup>34</sup> H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 24-25, 161-73 (1968); 2 J. LOCKE, TWO TREATISES OF CIVIL GOVERNMENT § 8 (J. Gough ed. 1946) (1st ed. London 1690); H. PACKER, *supra* note 29, at 140. Within an institutional model, a corollary of proportionality is that fewer crimes will be deterred, and more persons will rationally choose to trade punishments for crimes, than would be the case without proportionality. For the price-exaction model’s specific approach to proportionality, see note 43 *infra*.

whether the punishment price for each type of criminal "good" is worth paying.

## 2. *Institutional Punishment Price Determinations*

An economist would characterize as a market failure the inability of unregulated transactions between individuals—self-help—to generate accurate information about the cost of crimes, so as to reach prices at which efficient<sup>35</sup> transactions could be carried out.<sup>36</sup> Institutionalism hypothesizes that this inability, which prevents society from relying on the affected parties to exact from each wrongdoer the price demanded by society's normative values, brings about the evolution of an alternative structure to gather information on the costs of crime and translate the costs into units of punishment.<sup>37</sup> This structure consists of two separate but interrelated information-gathering and price-setting mechanisms—the legislature and the judiciary.

It should be emphasized that the setting of punishment prices in the sentencing decision is an activity dominated by society's fundamental values, which define the goals of the criminal justice system and limit the range of acceptable punishment prices. Proportionality is a clear example of such a value: a hypothetical system whose only goal was the efficient allocation of physical resources would aim at minimizing the sum of the economic costs of crime and the economic costs of its prevention. To do so, the system would have to set a punishment price greater than the actual social cost (including moral cost) of the criminal act. The magnitude of the difference would depend on the chances of apprehension and conviction as perceived by the criminal at the time he contemplated the crime. In such a system, one would expect those who committed relatively petty but hard to detect crimes, such as shoplifting or trespassing, to receive far stiffer sentences than they do at present. Because we value proportionality, however, we reject the prospect of long prison sentences for relatively small offenses, and, therefore, our criminal justice system does not take into account in the sentencing decision (or assignment

<sup>35</sup> See text accompanying notes 24-27 *supra*.

<sup>36</sup> See O. WILLIAMSON, *supra* note 10, at 1-40.

<sup>37</sup> The institutionalist method articulates the details of market failures and then analyzes the ways in which society has attempted to achieve desired results by using nonmarket institutional structures. Nonmarket structures are endemically imperfect because of the difficulties of accurately determining personal and social preferences. See Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 530 (1945). Institutionalism thus seeks to *describe* (not to *prescribe*), at a fundamental level, the pressures that bring about the evolution of social institutions. See text accompanying notes 9-14 *supra*.

of the punishment price) the probability of apprehension and conviction.<sup>38</sup>

To return to the information-gathering and price-setting problem, initial estimates of social costs are made by the legislature, whose members represent society, but who are sufficiently removed from the costs of any given crime to permit disinterested judgment. Legislative assessments are best thought of as *guesses* at the true value of social costs—legislators make broad judgments based on their own perceptions of the sum of effects to be expected *ex ante* from a given type of offense, a process inherently prone to error. Even when such judgments are correct, putting them into effect poses the further difficulty that increased precision in the definition of offenses and in the fixing of penalties is achieved only at the cost of intelligibility and general applicability. Moreover, like all other human decisionmakers, legislators are characterized by what Herbert Simon has called “bounded rationality,”<sup>39</sup> a sharply limited capacity to acquire and assess all the information relevant to a given problem. The problem of estimating social costs is a knotty one—the practical obstacles to estimating economic social costs are formidable,<sup>40</sup> and the problem is compounded when moral costs must be considered as well. For these reasons, legislatures commonly couch their proscriptions in broad terms, and allow considerable variation in punishment prices.<sup>41</sup>

<sup>38</sup> Within the framework of institutionalism, the fact that sentence length is unrelated to the probability of apprehension and conviction for any given crime is accorded significance with regard to moral costs. It may be that prohibitive moral costs would be involved in sentencing a petty thief, whose probability of being caught and convicted were infinitesimally small, to a long prison term. In the system-wide optimization approach of Posner and Becker, however, the failure of the criminal justice system to take such probabilities into account is considered a mistake with regard to the goal of achieving overall allocative efficiency, unless justified on utilitarian grounds. See R. POSNER, *supra* note 20, at 36-67; Becker, *supra* note 20, at 14-24; text accompanying note 27 *supra*. See generally Rottenberg, *Introduction to THE ECONOMICS OF CRIME AND PUNISHMENT* 1-3 (S. Rottenberg ed. 1973). Although probability-weighted sentences might improve the system in terms of the proper allocation of physical resources to achieve Pareto-optimality, it must be understood that Pareto-optimality is a concept dependent on an underlying distribution of resources. See note 18 *supra*. See generally E. MANSFIELD, *supra* note 26, at 435-63. Given such a dependency, achieving Pareto-optimality in the criminal justice system should not be considered a goal superior to others more closely tied to moral cost considerations. See *id.* One should note, however, that it would be problematic for the price-exaction model if it could be shown that the probabilities of apprehension and conviction were taken into account in the criminal justice system's definitions of crimes, or in its procedural rules. There is, however, little evidence to suggest that these probabilities are in fact taken into account in sentencing practices. See generally R. DAWSON, *SENTENCING* (1969).

<sup>39</sup> See H. SIMON, *MODELS OF MAN* 198 (1957).

<sup>40</sup> See Baumol, *On Taxation and the Control of Externalities*, 62 AM. ECON. REV. 307, 316 (1972).

<sup>41</sup> See F. MILLER, *PROSECUTION* 161-62 (1969); TASK FORCE: COURTS, *supra* note 5, at 14-15; see, e.g., N.Y. PENAL LAW § 70.00 (McKinney 1975); AMERICAN BAR ASSOCIATION,



Ultimate responsibility for the specification of costs and penalties thus passes to the judiciary. Final authority over punishment price must be vested in a body that operates *ex post*, since only then can the exact price be specified.<sup>42</sup> The *ex post* character of the criminal process is significant. As described above, the social cost of an offense (and especially the moral component of that cost) is determined not merely by the abstract character of the act, but by a set of circumstances that distinguish it from statutorily identical acts. The burglar whose victim is a poor widow may generate more social (including moral) cost than one whose victim is a wealthy stockbroker. The habitual criminal may give rise to greater social opprobrium than the first offender. Because the outrage (moral cost) generated by a given act is subject to such variation, the price-exaction theory is consistent with judicial imposition of widely varying punishment prices on persons who have committed identical criminal acts in different circumstances. This "individualization" of sanctions<sup>43</sup> occurs throughout the American criminal process and is in fact one of its most distinctive features.<sup>44</sup>

Courts, then, receive an implicit mandate to individualize criminal sanctions, the key to whose implementation is the discretion vested in police officers, prosecutors, juries, and trial judges to modify legislative standards as they believe circumstances warrant.<sup>45</sup> When legislatures have attached mandatory penalties to crimes of

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CRIMINAL JUSTICE STANDARDS PROJECT, *Sentencing Alternatives and Procedures* § 2.1, commentary at 52-53 (1967) [hereinafter *Sentencing*].

<sup>42</sup> This fact is starkly exposed in the area of mandatory sentences. Legislatures that attempt to specify the punishment for a particular crime in advance and forbid sentence modification in view of particular circumstances invite either harshness or judicial nullification. *Sentencing*, *supra* note 41, commentary at 55-56; see *Lockett v. Ohio*, 98 S. Ct. 2954, 2965-67 (1978) (plurality opinion); D. NEWMAN, *supra* note 2, at 101. The elimination of mandatory sentencing provisions has been widely demanded. See, e.g., *Sentencing*, *supra* at § 2.1(c); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 141-43 (1967) [hereinafter *CHALLENGE OF CRIME*].

<sup>43</sup> H.L.A. Hart explains the traditional distinction between proportionality (scaling the punishment to the wickedness of the crime) and individualization (scaling the punishment to the wickedness of the offender). See H.L.A. HART, *PUNISHMENT*, *supra* note 34, at 24-25, 164-66. Because the moral cost of a crime is defined as society's response to a sum of circumstances that includes the identities of the offender and victim and the nature of the criminal act itself, see text accompanying notes 15-23 *supra*, however, both proportionality and individualization in their traditional senses may be considered, for the purposes of the price-exaction model, components of an overall concept that the punishment should fit the crime in all its circumstances.

<sup>44</sup> See R. DAWSON, *SENTENCING*, *supra* note 38, at 3-9; F. MILLER, *supra* note 41, at 161-62 (1969); D. NEWMAN, *supra* note 2, at 112-30; text accompanying note 41 *supra*; note 46 *infra*.

<sup>45</sup> Discretion is exercised by such actors, whether or not it is formally granted to them. See *CHALLENGE OF CRIME*, *supra* note 42, at 10-11.

general definition, moreover, other parts of the criminal justice system have adapted and continued the effort toward individualization;<sup>46</sup> the likely result of such legislation is an increase in the incidence of plea bargains and a concomitant decline in the number of trials.<sup>47</sup>

Individualization and proportionality of sanctions offer support for a model in which the criminal process is characterized as a system for internalizing the institutionally determined costs of crime, and thus for encouraging efficient crimes, rather than as a system aimed at the deterrence of all crime.

### C. *Exacting the Punishment Price—Transaction Costs*

We have described the criminal process as a price-exaction mechanism—a device for estimating the true cost of crime and for forcing the criminal to consider that cost in contemplating criminal activity. The criminal law does not “forbid” crimes or seek to reduce the level of crime to zero any more than the law of tort or contract forbids the behavior it regulates. Instead, the law establishes the true cost of the activity and permits an actor to engage in it as long as he pays that cost; that is, as long as he inflicts no “external” costs on other people.<sup>48</sup> The difference between the civil and criminal laws, of course, lies in the nature of the externalities involved. The costs imposed by torts and breaches of contract are generally economic in nature and are borne by relatively few people. Crimes, on the other hand, generate substantial moral costs that are widely dispersed throughout society.<sup>49</sup> Indeed, for victimless crimes, such as prostitution or consensual homosexuality, *all* the external costs appear to be moral in nature.<sup>50</sup>

<sup>46</sup> See text accompanying note 41 *supra*. Three Justices have opined that in capital cases, such mandatory penalties violate the eighth and fourteenth amendments insofar as the penalties foreclose consideration of the individual circumstances that surround each case. See *Roberts v. Louisiana*, 428 U.S. 325, 333-34 (1976) (plurality opinion); *Woodson v. North Carolina*, 428 U.S. 280, 302-03 (1976) (plurality opinion).

<sup>47</sup> See D. NEWMAN, *supra* note 2, at 53-56, 112-15. The large measure of discretion granted prosecutors in the formulation of charges and the conduct of individual plea bargains has been the subject of much legal criticism. See, e.g., White, *supra* note 2, at 449-52, 457-58, 465; Note, *Restructuring the Plea Bargain*, 82 YALE L.J. 286, 292-94 (1972).

<sup>48</sup> See text accompanying notes 19-27 *supra*.

<sup>49</sup> Conduct that generates substantial economic *and* moral cost, such as violations of the antitrust statutes, may give rise to both civil and criminal causes of action. An interesting intermediate case is provided by civil settlements that include substantial punitive damages, for the moral aspect of such cases that motivates the punitive measures endows the civil wrong with many attributes of a crime.

<sup>50</sup> It bears repeating that the definition of “moral cost” has neither ethical nor prescriptive content. See text accompanying notes 17-23 *supra*. Characterizing the criminal justice process as a price-exaction mechanism requires that we take account of costs that are not strictly economic,

### 1. Determining Costs

Crimes and civil wrongs share one important characteristic: in each, the transaction costs associated with the price-exaction procedure, together with the institutional rule that requires one party alone to bear those costs, determine whether the system will achieve its goal of forcing actors to internalize the full costs of their acts.<sup>51</sup>

An example drawn from the civil side will help clarify this point. Suppose Godot negligently breaks a vase owned by Lucky worth \$100. Godot refuses to compensate Lucky for the loss, or agrees to pay him but never shows up to do so, and Lucky envisions two possible avenues for recovering the vase's value. He could, at nominal immediate expense but with some possibility of discovery and apprehension, break into Godot's home, if he can locate it, and take \$100 from a wallet or cash box. Alternatively, at considerable cost but, let us assume, with perfect certainty of success, he could retain a lawyer and bring suit against Godot in the local court. Now if Lucky's behavior is "rational" in the economic sense, he will seek to recover his \$100 in the less costly way. Imagine a universe in which the criminal law does not exist and Lucky does not scruple to burgle. Then, even if Lucky is aware that his burglary would impose economic and moral costs upon society at large, he has an economic incentive to ignore these externalities, commit the burglary, and thus avoid paying an attorney to help him recover his loss. Without the criminal law, there is no sufficiently inexpensive way for the indirect cost bearers to hold Lucky accountable for *their* losses. But Lucky would, of course, not be beyond reckoning in a universe permeated by a criminal law, because a principal purpose of the criminal law would be to force him to account for just such indirect costs in planning his activities. By imposing a penalty for burglary so severe that, even when discounted by the probability of apprehension and conviction, Lucky's expected cost in a recovery by theft exceeded \$100, the law could effectively foreclose that option and leave him only the alternative of bringing suit. Of course, if the attorney's fees (which represent the transaction costs of the legal mode of recovery) exceeded \$100, we could safely assume that Godot's original tort would go un-

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and these are described as moral costs. There is, of course, a lively debate over the propriety of using the criminal justice system to enforce ethical views, as opposed to restricting it to the prevention of actual harm. Compare *Preface* to P. DEVLIN, *THE ENFORCEMENT OF MORALS* at ix-x (1965) (enforcement of morality a proper function of criminal law) with H.L.A. HART, *LAW, LIBERTY AND MORALITY* 15 & *passim* (1962) (criminal sanction should be confined to prevention of actual harm to others).

<sup>51</sup> See text accompanying notes 20-27 *supra*; text accompanying notes 53-56 *infra*.

challenged. Stated differently, whenever we observe that the damages resulting from negligence remain uncompensated, we can infer that the person who bears the transaction costs of the price-exaction procedure has concluded that those costs exceed the benefit of recovery.<sup>52</sup>

The level of transaction costs also determines whether and how society exacts a punishment price from a criminal. The criminal adjudication process requires government actors to consider the full social cost of criminal activities by collecting information about the economic and moral costs of crime and by translating these costs into units of punishment, which they then extract from criminals. This process, however, generates significant transaction costs for society: substantial expense is involved in apprehending the suspected offender and in detaining, prosecuting, and punishing him. The magnitude of this expense is critically important to the system—as we have suggested, only crimes whose net social costs are greater than the transaction costs of price exaction will be punished; in the remaining cases, the costs imposed by offenders will not be internalized. Thus, the magnitude of the transaction costs of price exaction defines the threshold level of prosecution; actors whose crimes create social costs lower than the threshold level are allowed to act without reference to the social costs of their deeds.

The magnitude of the moral, as distinguished from the economic, transaction costs of price exaction itself is directly influenced by our choices regarding guilt-determining and punishment systems.<sup>53</sup> Two components of the guilt-determining system are of particular interest. First, there is the choice of evidentiary standards. Clearly, a system requiring proof “beyond a reasonable doubt” makes it more difficult to convict suspected offenders than one requiring only proof “on a preponderance of the evidence.” Whether the “beyond a reasonable doubt” standard actually entails higher *total* transaction costs cannot be determined, however, without knowing the relative weights society places on mistaken verdicts of guilty and innocent. Suppose, for example, that the reasonable doubt standard generates nine percent incorrect innocent verdicts and one percent incorrect guilty verdicts, while the preponderance standard produces five percent of each. If we regarded incorrect guilty verdicts and incorrect innocent verdicts

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<sup>52</sup> Such reasoning about the role of economic transaction costs applies equally well in the context of the criminal law when the costs are borne by society at large rather than by private decisionmakers. See O. HOLMES, *THE COMMON LAW* 76-77 (M. Howe ed. 1963); Calabresi & Melamed, *supra* note 11, at 1093-98; Coase, *supra* note 12, at 15-19.

<sup>53</sup> Professor Richard Posner has explored this issue at length. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973).

as equally undesirable, we would be indifferent as between these standards, because each produces the same number of incorrect verdicts. That society chooses to employ the reasonable doubt standard, however, demonstrates that we regard incorrect convictions as far less acceptable than incorrect acquittals.<sup>54</sup>

The second interesting component of our guilt-determination system, given the reasonable doubt standard and other procedural and evidentiary rules, is the choice of procedural mechanisms, that is, the choice between plea bargains and full trials.<sup>55</sup> A full adversarial trial is an extremely expensive process, and a decision to allow punishment only upon conviction at trial would sharply raise the transaction costs of criminal justice, thereby significantly raising the threshold at which punishment will be exacted and concomitantly increasing the number of unredressed crimes.<sup>56</sup>

## 2. *A Composite Prosecutor*

Thus far we have discussed the operation of the criminal justice adjudication system in broad terms, without asking who makes transactional decisions and what criteria are employed in making them. Just as an essential element of our tort example was the assumption that the victim acted with economic "rationality" in deciding how to recover the value of his vase, an analogous behavioral specification is required in the criminal case. The "system" does not reach decisions; some individual, generally the chief prosecutor or his delegate, chooses whether to seek a conviction in a given case.<sup>57</sup> Imputing economically rational behavior to the model's actors thus requires specification of the decisionmaking behavior of prosecuting attorneys. There are two distinct schools of thought about the objectives of prosecutorial policy. One, which might broadly be termed the "maximization" hypothesis, characterizes prosecutorial behavior as the maximization of some objective measure of performance—such as the expected number of convictions weighted by the punishment anticipated for each—subject to constraints imposed by the allocation of scarce monetary and physical resources to the prosecuting agency.<sup>58</sup>

<sup>54</sup> See *In re Winship*, 397 U.S. 358, 363-64 (1975); *id.* at 370-72 (Harlan, J., concurring). See generally Posner, *supra* note 53, at 410-15.

<sup>55</sup> Cf. Posner, *supra* note 53, at 417 (costs of settlement and litigation in civil dispute resolutions).

<sup>56</sup> See ALASKA JUDICIAL COUNCIL, *supra* note 3, at 49-52 (prohibition of plea bargaining resulted in increase in number of cases district attorney declined to prosecute); text accompanying notes 51-52 *supra*.

<sup>57</sup> F. MILLER, *supra* note 41, at 10; CHALLENGE OF CRIME, *supra* note 42, at 10-11.

<sup>58</sup> This behavioral assumption is adopted by William Landes in his theoretical analysis of the prosecutor's choice between negotiating a settlement or pursuing a given case to trial. Landes,

The second, the "individualization" hypothesis, emphasizes the attempt to achieve dispositions that reflect the totality of circumstances surrounding each offense. Under this view, the prosecutor is seen not as maximizing a single statistical measure of output, but rather as seeking to reach in each case the outcome he believes best serves society's interest in law enforcement.<sup>59</sup>

The thread of empirical truth that runs through both of these schools of thought can be woven into a composite behavioral model that will be adopted here. It postulates the existence of a distinct prosecutorial utility function for each case in the agency's caseload. This function describes the degree to which the prosecutor's objectives are satisfied in each case and relates the satisfaction or utility derived by the prosecutor in a given case to the punishment price exacted from the defendant. As suggested by the individualization hypothesis, we assume the existence of a particular punishment, say  $P_0$ , which represents the outcome that, in the prosecutor's view, equates the punishment price to the social cost generated by the offense in question. From the maximization models, we take the assumption that, for punishments less than  $P_0$ , prosecutorial utility rises with increasing punishment, though at a decreasing rate. That is, each successive unit of punishment inflicted upon the defendant adds a smaller positive increment to the prosecutor's utility. In this way, the relative importance of the conviction itself—of imposing *some* measure of punishment upon the offender—is emphasized. For punishments exceeding  $P_0$ , however, we need make no specific assumptions concerning the shape of the prosecutor's utility function. Thus, the value of the function (the degree to which the prosecutor is satisfied) may fall when the punishment exceeds  $P_0$ , reflecting the prosecutor's sense that  $P_0$  is in fact the most appropriate outcome. Alternatively, it may remain constant or rise slightly with punishments greater than  $P_0$  to account for the value of these more severe sentences as bargaining chips in negotiations with other defendants.<sup>60</sup>

Additional features of the model derive from the twin facts that punishment prices can be exacted only after the defendant either has pleaded guilty to some charge or has been convicted of a criminal offense at trial, and that the choice between these two alternative

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*An Economic Analysis of the Courts*, 14 J.L. & ECON. 61, 63-65 (1971). See generally White, *supra* note 2, at 442-48; Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865, 901 (1964).

<sup>59</sup> F. MILLER, *supra* note 41, at 161-65; D. NEWMAN, *supra* note 2, at 76-77, 112-30.

<sup>60</sup> The degree to which a defendant is risk-averse is critically important in plea-bargaining negotiations. See text accompanying notes 126-37 *infra*.

modes of price exaction is substantially influenced in a given case by the wishes of the prosecution. When negotiated pleas are honored by the court at the time of sentencing,<sup>61</sup> the punishment prices in the prosecutorial utility function are agreed upon before the plea is entered and are thus known with substantial certainty by the prosecutor. In the trial situation, however, the uncertainty of conviction leads the prosecutor to focus upon his *expected* utility, which depends on both the sentence anticipated upon conviction and the probability that the defendant will be found guilty.<sup>62</sup> But in either the negotiated plea or the trial situation, the prosecutor can increase his *a priori* utility by investing some part of the limited material resources at his disposal in the pursuit of each individual case. When trials are involved, expenditures for case-strengthening efforts, such as witness interviews, legal research, and searches for additional evidence, can be viewed as ways of purchasing positive increments in the probability of conviction and, thus, in the prosecutor's expected utility.<sup>63</sup> Even in the plea-bargaining context, such expenditures directed toward individual cases improve *a priori* utility. Given that the defendant's willingness to agree to a negotiated plea is sharply affected by his estimate of conviction probability, a prosecutor who increases this probability in a given case strengthens his bargaining hand.<sup>64</sup> As a result, it seems reasonable to suppose that the prosecution will allocate its limited budget among its cases so as to maximize the sum of its individual *a priori* utility functions, whether by negotiating guilty pleas or by generating increased conviction probabilities when defendants demand full trials.<sup>65</sup> Moreover, recognizing its budgetary constraints and aware that the magnitude of the *economic* transaction

<sup>61</sup> In the federal courts, the terms of negotiated guilty pleas must be announced in open court and honored by the sentencing judge at the time the plea is accepted. FED. R. CRIM. P. 11; see text accompanying notes 89-93 *infra*.

<sup>62</sup> See Landes, *supra* note 58, at 63-64.

<sup>63</sup> *Id.* at 62-64.

<sup>64</sup> A number of observers have noted prosecutors' use of pretrial detention to induce pleas from incarcerated defendants, presumably because prosecutors find detention a less costly means of inducing pleas than investigation or trial. See, e.g., A. BLUMBERG, CRIMINAL JUSTICE 59 (1970); White, *supra* note 2, at 450. The effects of such detention on defendants awaiting trial and defendants' tactical use of delay are discussed in J. CASPER, AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE 51-68 (1972).

<sup>65</sup> Landes accepts essentially the same assumption, although his model postulates that prosecutors seek to maximize sentence length while also considering the notoriety or publicity value of certain cases. Landes, *supra* note 58, at 63-65. We have implicitly assumed that the size of the prosecutor's budget is determined independently of his prosecutorial decision process, and therefore our model is an example of what economists call "partial equilibrium" analysis. The partial equilibrium model outlined here is set forth and developed more fully in Adestein, *The Plea Bargain in Theory: A Behavioral Model of the Negotiated Guilty Plea*, 44 S. ECON. J. 488 (1978).

costs of imposing the punishment price depends on which of the competing price-exaction modes is selected,<sup>66</sup> the prosecution will, whenever possible, select the cheaper mode, just as did Lucky, the private decisionmaker in our tort example.

Suppose, for instance, that the prosecution, at a cost of \$500, is able to prepare a certain case for trial so as to create a probability of conviction that corresponds to an expected punishment of ten years' imprisonment. If, however, the expenditure of \$300 would persuade the defendant to plead guilty in return for a certain punishment of ten years in prison, then even a sentence-maximizing prosecutor, neutral to the risks of trial, will clearly choose the cheaper mode of price exaction and save the remaining \$200 for the pursuit of another case.<sup>67</sup> Further, if the prosecutor is risk-averse, as our behavioral assumptions imply,<sup>68</sup> he will continue to choose the negotiated plea for some range of punishment prices *less* than the expected punishment price of ten years rather than submit to the vagaries of the trial procedure.<sup>69</sup> Not surprisingly, defendants are aware of this tendency and will demand a less than maximum and perhaps a less than expected sentence in exchange for a plea.

As in the tort example, when the economic transaction costs of price exaction exceed the sum of social costs imposed by the crime, the case will generally not be pursued by the prosecution; when the cost of punishment is greater than the *total* cost of the crime, punishment does not make economic sense.<sup>70</sup> The sporadic enforcement of parking regulations and laws prohibiting the personal use of marijuana are examples of situations in which laws are not enforced because the administrative costs of price exaction outweigh the costs of the crime and thus the social benefits of internalizing those costs.

<sup>66</sup> Other components of the total transaction cost of price-exaction are substantially independent of whether the conviction follows a guilty plea or a full trial. Examples of such independent costs are the cost of apprehending a suspected offender and the unit cost of punishment following conviction.

<sup>67</sup> Landes, *supra* note 58, at 64.

<sup>68</sup> Our assumption of diminishing marginal utility of punishment up to  $P_0$ , see text accompanying notes 58-60, implies that if other things are equal, the risk-averse prosecutor will prefer a certain punishment of  $P_1 < P_0$  to a trial prospect with the same expected punishment. See Friedman & Savage, *The Utility Analysis of Choices Involving Risk*, 41 J. POL. ECON. 279 (1948), reprinted in AMERICAN ECONOMIC ASSOCIATION, *supra* note 12, at 57-96. See also text accompanying notes 126-37 *infra*.

<sup>69</sup> The difference between the smallest such punishment price and ten years represents the prosecutor's "risk premium," the value to him, in punishment units, of the removal of the uncertainty inherent in the trial situation.

<sup>70</sup> See text accompanying notes 51-52 *supra*. For an analogous statement of this conclusion in noneconomic terms, see F. MILLER, *supra* note 41, at 163-65.



### 3. Prosecutorial Limitations

We cannot assume that the prosecutor is always a fair proxy for society, and that his budgetary constraints will necessarily impel him to minimize the *total* transaction costs of the price-exaction mechanism; there are some costs that the prosecutor may not take adequately into consideration, given his goal of maximization and his limited budget. Moral transaction costs are generated whenever citizens not directly involved with the price-exaction mechanism perceive it to be "unfair" or "improper," violating notions of proportionality and individual justice. Moral transaction costs are the analogue of the "moral cost" component of crime.<sup>71</sup> Again, the term is not intended to imply ethical judgment—it is merely a measure of the sense of outrage or unfairness that certain behavior generates. If the prosecutor could extract confessions by beating defendants, he might save money and gain convictions, but it seems clear that some sort of external costs would be incurred, either because the mechanism would be perceived as generating false confessions (and thus punishing the innocent),<sup>72</sup> or for broader reasons having to do with shared values expressed in constitutional guarantees or in a general sense of fairness. Less drastic prosecutorial behavior may also generate moral transaction costs. For example, alternative procedures for price exaction—such as conviction by guilty plea rather than after a full trial—can be expected to create varying amounts of moral costs<sup>73</sup> for reasons similar to those given in the case of coerced confessions.

Once the prosecutor decides on a proper punishment, there is no mechanism, internal to the composite prosecutorial model, to cause him to account for the moral transaction costs involved in selecting a prosecutorial mode. Thus, even if a negotiated plea were to generate substantially greater transaction costs, both moral and economic, than the trial alternative, the prosecutor might still be induced to seek conviction through bargaining, because nothing com-

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<sup>71</sup> See text accompanying notes 17-20 *supra*.

<sup>72</sup> This "error cost" is considered in Posner, *supra* note 53, at 410-15.

<sup>73</sup> The relevant variable here is, of course, the *net* transaction cost of price exaction; that is, the cost of enforcing the law minus whatever benefits to society flow from the act of price exaction itself. "Moral benefits" of this kind refer largely to the symbolic and educative value of the criminal trial that one commentator has called "a lesson in legal procedure, dignity, fairness and justice, for the public and for the accused (whether he is convicted or acquitted)." Griffiths, Book Review, 79 YALE L.J. 359, 398 (1970). When price exaction is achieved in a less formal and less explicitly public way, much of this value is lost, a point quite clear to defendants so convicted. See J. CASPER, *supra* note 64, at 51-99. Transactional benefits are also lost (or costs incurred) when plea bargaining is perceived to result in unjustly lenient sentences. See TIME, *supra* note 3, at 44.

pels him to take account of moral costs that do not impinge upon his budget. Put starkly, the prosecutor does not have an incentive to allocate his budget in such a way as to protect all of society's interests.

It might be argued, of course, that the prosecutor necessarily takes the moral component of transaction costs into account because of his awareness that he is ultimately responsible to the public. Given this view, prosecutors would attempt to gauge the moral transaction costs of various price-exaction mechanisms and factor those costs into their decisions because they know that wrong decisions about moral costs (for example, about those involved in coercing confessions) would cause their removal from office. By extension, this argument would suggest that the prosecutorial behavior that actually occurs is a fair reflection of total transaction costs, and that the fact that a prosecutor might engage, for example, in coercing confessions demonstrates that the moral costs of coerced confessions are low. If an indirect political constraint were efficacious in channeling prosecutorial behavior as to moral costs, we would allow prosecutors to conduct their business at will, guided only by their estimates of public sentiment, checked only by the political process. But society has determined that indirect political constraints cannot be a completely effective limit on prosecutorial behavior; something more is needed. In the economic area that something more is a budget; in the area of moral costs it is a court. In the sections that follow we shall examine the choices concerning prosecutorial price exaction that courts have made and point out the implicit value judgments that have shaped those choices.<sup>74</sup>

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<sup>74</sup> Moral transaction costs may be imposed by various aspects of the trial procedure as well as by the practice of plea bargaining. See Posner, *supra* note 53, at 408-15. Consider, for example, the crime of rape and the rule in some jurisdictions that prohibits the conviction of an accused rapist solely on the uncorroborated testimony of the alleged victim. See Note, *Rape Reform Legislation*, 24 CLEV. ST. L. REV. 463, 486-91 (1975). The bases of the rule are first, the belief in a substantial likelihood that the uncorroborated testimony of the complainant is untrustworthy, and second, the fact that the elements of the offense (for example, the absence of consent) are uniquely difficult either to establish or to disprove. In this light, the rule can be seen as an attempt to guard against the risk—with its attendant moral costs—that many innocent defendants will be convicted of rape. Because moral costs are tied to shifting social values, however, they change over time. It may be that we are in the midst of a change in the moral costs associated with rape, as society takes increased cognizance of the social costs of rape and of the moral transaction costs of the corroboration rule itself. A majority of jurisdictions have now abolished the rule, *id.* at 486-87, and others have severely limited it, *id.* For a study focusing on one state's experience, see Pratt, *The Demise of the Corroboration Requirement—Its History in Georgia Rape Law*, 26 EMORY L.J. 805 (1977).

## II

## THE NEGOTIATED PLEA IN THE PRICE-EXACTION FRAMEWORK

A. *Framing the Issues*

A major theme of our analysis has been that a social benefit is realized from the exaction of appropriate punishment for criminal acts (that is, from internalization of the costs of crime) only when the costs of the price-exaction process are smaller than the total social cost imposed by the original offense.<sup>75</sup> One might expect, therefore, that decisionmakers in the system would try to select the least costly manner of price exaction, thus allowing cost internalization in the greatest number of cases. As we have seen, however, the incentive structure of the prosecution may preclude such a result if the immediate parties to the price-exaction procedure (defendant and prosecutor) are left entirely to their own devices, because the prosecutor may be motivated to seek out the mode of price exaction that minimizes only that part of the economic cost that his own budget must cover.<sup>76</sup> He may thus disregard both moral transaction costs and those economic costs not ultimately borne by the prosecution. The result could be inefficient organization of the criminal process: the prosecutor's unwitting selection of too costly a mode of price exaction may lead to prosecution of some cases that a more efficiently organized system would not pursue.

It is here that appellate courts play an important corrective role. Their part in the price-exaction process, according to our model, is to evaluate the uncounted moral transaction costs and, if necessary, to proscribe one mode of price exaction in favor of another when they believe that the other more successfully minimizes *total* transaction costs. Because plea bargaining is the overwhelmingly dominant mode of price exaction, we can infer that the courts have deemed bargaining, rather than trial, the mode that best minimizes costs. Courts have, however, attached important reservations to their approval of bargained justice, in the form of procedural limitations. These limitations may be viewed as attempts to constrain the bargaining process within broad limits and so to effect a tradeoff between economic and moral transaction costs. Although it may be the case that "the guilty plea system has grown largely as a product of circumstance, not choice,"<sup>77</sup> the ad hoc development of the plea-bargaining system in

<sup>75</sup> See text accompanying notes 51-52 *supra*.

<sup>76</sup> See text accompanying notes 72-74 *supra*.

<sup>77</sup> Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 50 (1968).

the American courts need not be seen as random or disorganized. Rather, it can be viewed as a series of institutional responses to specific costs—frictions that retard the smooth operation of the criminal process as a mechanism for internalizing the social costs of criminal activity. This developmental perspective suggests that many of the rules traditionally grounded in process notions can be justified on independent, pragmatic grounds, as necessary lubricants at the friction points of the bargaining process. The following discussion considers the problems associated with perfecting the plea-bargaining process as a transactional device.<sup>78</sup>

### *B. Perfecting the Plea Bargain: Economic Cost Considerations*

The essence of the plea-bargaining problem for both prosecution and defense is how to compare the proposed bargain with the alternative prospect of trial. Specifically, the defendant will agree to a guilty plea if he perceives the cost of the sentence received upon the plea as less than the expected disutility of the trial prospect and its associated sentence.<sup>79</sup> That is, the defendant will plead if

$$L(S_p) < q L(S_v) + (1-q) L(A),$$

where  $L$  is a function that measures the defendant's disutility for any given punishment;  $S_p$  is the sentence (punishment price) associated with a guilty plea;  $S_v$  is the sentence expected to result from a guilty verdict at trial;  $q$  is the defendant's *a priori* estimate of the probability of the conviction at trial;<sup>80</sup> and  $A$  is the sum of adverse consequences (presumably small relative to  $S_v$ ) of trial, even when it results in acquittal.<sup>81</sup>

Expressing the bargaining structure in this manner brings us back to the information problem, which we examined above in the context of private vengeance.<sup>82</sup> Because the prosecution is likely to be more familiar than the defendant with sentencing practices in the

<sup>78</sup> The analysis that follows is not meant to be exhaustive, but instead is intended to reflect the trend in the major federal court decisions in the area.

<sup>79</sup> The author has argued elsewhere that, from a behavioral standpoint, this formulation neglects important effects of time upon the defendant's decision. See Adelstein, *supra* note 65. Because this aspect of the problem has been generally ignored by courts and most commentators, however, it is omitted here.

<sup>80</sup> See Landes, *supra* note 58, at 65-69.

<sup>81</sup> These consequences may include, among other things, the cost of attorney's fees, lost income during judicial proceedings, and the stigmatization that often results merely from formal accusation and trial. See TASK FORCE: COURTS, *supra* note 5, at 11.

<sup>82</sup> See text accompanying notes 33-34 *supra*.

jurisdiction<sup>83</sup> and because, ultimately, the probability of conviction depends most directly on the evidence available to the prosecutor and the manner in which he intends to use it, the prosecution is likely to have more reliable information about the values of  $S_p$ ,  $S_v$ , and  $q$  than is the defense. This asymmetry of information can be an important source of economic transaction cost, because a lack of information may lead some defendants to refuse to bargain even when bargaining is to their advantage; further, other defendants may concede when they ought not. The result in either case may be that defendants are overcharged, which simultaneously distorts the equation of an offense's punishment price with its social costs<sup>84</sup> and raises associated moral transaction costs.<sup>85</sup> Thus, a prime structural necessity of the efficient plea bargain is the alleviation of such informational asymmetry between prosecution and defense. The importance of the point should be emphasized. We are suggesting that mechanisms that increase the amount of information available to the defendant—such as disclosure of prosecution evidence—can be justified independently of considerations such as due process or other constitutional rights. Such mechanisms are useful to the system as a whole, on a purely pragmatic level, because they facilitate the bargaining that we have chosen as our principal tool of adjudication.

### 1. Increasing Defendants' Information

The courts have primarily relied on the constitutional doctrine of waiver to increase the amount of information available to defendants in the plea-bargaining process. Because a plea of guilty, negotiated or otherwise, involves the waiver of the fifth amendment right against self-incrimination and the sixth amendment right to trial, the courts have long required that a defendant who pleads guilty do so knowingly and intelligently.<sup>86</sup> More precisely, the accused must be "fully aware of the direct consequences, including the actual value of any commitments made to him by the court, the prosecutor, or by his own counsel."<sup>87</sup> In the bargaining context, the requirement that a

<sup>83</sup> D. NEWMAN, *supra* note 2, at 46.

<sup>84</sup> See generally Posner, *supra* note 53, at 422-26.

<sup>85</sup> See text accompanying note 34 *supra*.

<sup>86</sup> *Brady v. United States*, 397 U.S. 742, 748 (1970); *Kercheval v. United States*, 274 U.S. 220, 223-24 (1927) (dictum). *Boykin v. Alabama*, 395 U.S. 238 (1969), requires that the record affirmatively disclose that the plea was so entered. For a discussion of the practical problems of waiver in the plea-bargaining context, see Tigar, *The Supreme Court, 1969 Term—Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1, 21-24 (1970).

<sup>87</sup> *Brady v. United States*, 397 U.S. 742, 755 (1970) (adopting the standard defined by the Fifth Circuit in *Shelton v. United States*, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc), *rev'd per curiam on confession of error*, 356 U.S. 26 (1958)).

defendant know the "direct consequences" and "actual value" of a proposed agreement means that he must be apprised of the values of  $S_p$  (plea-bargained sentence),  $S_v$  (sentence upon verdict of guilty), and  $q$  (probability of conviction). Three primary conduits have been opened by the courts to ensure that such information is adequately transmitted to the defendant: the judicial dialogue with the defendant; the requirement of defense counsel; and the availability of pre-plea discovery.

*a. Judicial Dialogue*—Until recently, this method of conveying information was poorly developed.<sup>88</sup> In 1966, rule 11 of the Federal Rules of Criminal Procedure was adopted, requiring trial judges to address the defendant personally before accepting a guilty plea, in order to ascertain whether the plea was being made with understanding of the nature of the charge and the consequences of the plea.<sup>89</sup> The recent amendments to rule 11<sup>90</sup> substantially clarify the procedure to be followed and identify more specifically just what must be explained to a defendant who wishes to enter a guilty plea.<sup>91</sup> Moreover, the rule provides that the precise terms of any

<sup>88</sup> See D. NEWMAN, *supra* note 2, at 27-31; TASK FORCE: COURTS, *supra* note 5, at 9.

<sup>89</sup> FED. R. CRIM. P. 11 (1976) (amended 1975).

<sup>90</sup> Federal Rules of Criminal Procedure Amendments Act of 1975, Pub. L. No. 94-64, § 3(5)-(10), 89 Stat. 370 (1975) (amending Amendments to the Federal Rules of Criminal Procedure, 416 U.S. 1005, 1006-07 (1974)).

<sup>91</sup> Rule 11 now reads, in relevant part:

(c) Advice to Defendant.

Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

(2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and

(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

(4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.

FED. R. CRIM. P. 11(c) (1976). See generally AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE STANDARDS PROJECT, *Pleas of Guilty* § 1.4(a) (approved draft 1968) [hereinafter *Pleas of Guilty*]; Illinois Supreme Court Rule 402(a)(1), ILL. ANN. STAT. ch. 110A, § 402(a)(1) (Smith-Hurd 1973).

agreement between the prosecution and defense must be disclosed in open court prior to the acceptance of any plea.<sup>92</sup> Taken together, the provisions of rule 11 ensure that significant information about the variables  $S_p$  and  $S_v$  is given the defendant;  $S_p$ —the consequences of the plea—is articulated precisely for him, and  $S_v$ —the possible consequences of a trial—is identified to within a statutory maximum and minimum.<sup>93</sup>

*b. The Requirement of Defense Counsel*—The presence of a lawyer sharply increases the information available to a defendant by assuring a detached and expert evaluation both of the risks of trial ( $q$ ) and the value of any proffered bargains (the value of  $S_p$  in light of  $S_v$  and of  $q$ ).<sup>94</sup> The Supreme Court has required that such counsel be present at the time the guilty plea is entered<sup>95</sup> and has exercised special care in the collateral review of guilty pleas made by uncounselled defendants.<sup>96</sup> This solicitude is consonant with the price-exaction model, in that increased information will facilitate bargaining

<sup>92</sup> (e) Plea agreement procedure. . . .

(2) *Notice of such agreement.* If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. Thereupon the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report.

FED. R. CRIM. P. 11(e)(2) (1976). A similar requirement has been imposed by case law in California. *People v. West*, 3 Cal. 3d 595, 609-10, 477 P.2d 409, 417-18, 91 Cal. Rptr. 385, 393-94 (1970).

<sup>93</sup> Some debate persists over whether the defendant must be informed of the collateral consequences of his plea and of problems such as that of his parole status following conviction on the plea. Compare *Durant v. United States*, 410 F.2d 689, 691, 693 (1st Cir. 1969) (defendant must be informed of his ineligibility for parole) with *Trujillo v. United States*, 377 F.2d 266, 269 (5th Cir.), cert. denied, 389 U.S. 899 (1967) (defendant need not be so informed). The new rule 11 is silent with respect to this issue. See FED. R. CRIM. P. 11, note at 1418 (1976). It remains improper for the court to express an opinion as to the likelihood of conviction at trial. See AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE STANDARDS PROJECT, *Function of the Trial Judge* § 4.1(a) & comment (Tent. Draft 1972); *Pleas of Guilty*, supra note 91, at § 3.3(a) & comment. See also *People v. Ramsey*, No. 127E (N.Y. App. Div. 2d Dep't Feb. 6, 1978), cert. granted sub nom. *Ramsey v. New York*, No. 77-6540 (U.S. Oct. 10, 1978) (judge notifies defendant that sentence upon guilty verdict would significantly exceed sentence upon plea of guilty).

<sup>94</sup> See D. NEWMAN, supra note 2, at 197-230; TASK FORCE: COURTS, supra note 5, at 12. The motivation and performance of defense counsel in the plea-bargaining situation are examined critically in Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1181-1270 (1975).

<sup>95</sup> *Santobello v. New York*, 404 U.S. 257, 261 (1971); *Arsenault v. Massachusetts*, 393 U.S. 5, 6 (1968); *Moore v. Michigan*, 355 U.S. 155, 161 (1957).

<sup>96</sup> See *Pennsylvania ex rel. Herman v. Claudy*, 350 U.S. 116, 122 (1956).

and help ensure that bargains are desirable from the standpoint of efficiency.<sup>97</sup>

*c. Pre-plea Discovery*—The potential of this third device as a source of information regarding the variable *q*—the likelihood of conviction at trial—has been considerably enlarged by the Supreme Court. Amended rule 16 of the Federal Rules of Criminal Procedure substantially broadens pretrial rights of discovery for both parties,<sup>98</sup> and those granted defendants under the new rule have been specific-

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<sup>97</sup> See text accompanying notes 83-85 *supra*. Of course, increasing the amount of information available to the defendant entails its own costs—particularly the purely administrative costs of lawyer and court time. Because the goal of increased information is, at least in terms of the price-exaction model, lowered transaction costs, we would expect courts to seek to increase information only to an efficient level; that is, to the point at which the decrease in transaction costs resulting from the final increment in information is equal to the costs of providing the added information. As we have seen, courts have required that a defendant be given fairly detailed information concerning the terms of a plea agreement and the consequences that might follow conviction at trial. See text accompanying notes 86-93 *supra*. A much lower level of information, however, has been mandated about the probability of conviction at trial. In *McMann v. Richardson*, 397 U.S. 759 (1970), the Court upheld a guilty plea shown to have been directly motivated by the prosecution's possession of a confession later ruled inadmissible. *Id.* at 768-71. Defendant's counsel erred in judging the confession's admissibility, and defendant agreed to the negotiated plea. The Court refused to overturn the plea, arguing that the type of uncertainty involved was unavoidable. "Waiving trial entails the inherent risk that good-faith evaluations of a reasonably competent attorney will turn out to be mistaken either as to the facts or as to what a court's judgment might be on given facts." *Id.* at 70. The Court's holding in *McMann* reflects the view that the advice of a competent attorney goes as far as is economically warranted toward alleviating this inherent uncertainty, and that further measures to reduce it would be too costly (considering both administrative expense and unconsummated plea bargains) for the value they might provide.

Three years after *McMann*, the Court extended the principle even further, barring collateral review of a claim that defendant had been subjected to unconstitutional treatment prior to his guilty plea except where failure to contest the issue at trial amounted to ineffective assistance of counsel. *Tollett v. Henderson*, 411 U.S. 258, 266 (1973) (claim that indicting grand jury was unconstitutionally selected). The opinion suggests that an attorney may properly decide that his client's interest lies not in the pursuit of every claim that might conceivably reduce the probability of conviction at trial, but in not raising some issues in the hope of a more favorable plea agreement. See *id.* at 268. This approach poses no problems within the price-exaction framework, as long as the attorney's interests and his client's do not diverge. Abraham Blumberg has argued, however, that in some cases those interests diverge sharply because of the need for many defense lawyers to maintain good relations with the prosecutor's office. A. BLUMBERG, *supra* note 64, at 95-115; see J. CASPER, *supra* note 64, at 100-25.

<sup>98</sup> Federal Rules of Criminal Procedure Amendments Act of 1975, Pub. L. No. 94-64, § 3(20)-(28), 89 Stat. 370 (1975); see FED. R. CRIM. P. 16, note at 1436 (1976). To the same general effect, see AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE STANDARDS PROJECT, *Discovery and Procedure Before Trial* §§ 2.1-3.2 (approved draft 1970) (proposing more permissive discovery practice for criminal cases than is now provided by applicable law in any United States jurisdiction).



ally designed to "provid[e] the defendant with enough information to make an informed decision as to plea."<sup>99</sup>

## 2. Reducing Uncertainty

Even if the defendant is assured accurate knowledge of the negotiated sentence ( $S_p$ ), the sentence upon a verdict of guilty ( $S_v$ ), and probability of conviction ( $q$ ), that knowledge can be rendered nugatory if the prosecutor fails to honor the previously negotiated agreement when the time comes for plea or sentencing. Such meretricious behavior on the part of the prosecutor will hamper appreciably the efficiency of plea bargaining. Suppose a defendant anticipates the possibility of a broken promise and a consequent sentence upon his plea greater than the one agreed on. Because the defendant has no way to distinguish good-faith bargains from bad-faith ones, he must add an uncertainty factor to his expected punishment in a plea bargain, replacing  $S_p$  in his disutility calculations with  $(S_p + U) > S_p$ , when  $(S_p + U)$  is the anticipated punishment associated with a plea agreement for the negotiated sentence  $S_p$ . Now suppose a prosecutor offers this defendant a good-faith bargain at  $S_p$ . The result is an asymmetry of information—the prosecutor knows the value of his promise, but the defendant does not and has no way to learn of it. If:

$$L(S_p) < q L(S_v) + (1-q)(A) < L(S_p + U),$$

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<sup>99</sup> Proposed Amendments to Federal Rules of Criminal Procedure for the United States District Courts, 62 F.R.D. 271, 308 (1974) (Advisory Committee Note); see Comment, *Preplea Discovery: Guilty Pleas and the Likelihood of Conviction at Trial*, 119 U. PA. L. REV. 527 (1971). The task of assuring adequate information in the bargaining context—and thus reducing transaction costs—is further complicated by the essentially subjective nature of knowledge in bargaining situations, and by the potential for misinformation that exists. In *United States ex rel. Thurmond v. Mancusi*, 275 F. Supp. 508 (E.D.N.Y. 1967), for example, petitioner alleged that he had pleaded guilty in apparent reliance upon a plea agreement that, in fact, had never been made. Judge Weinstein said that the defendant's subjective belief—rather than the objective facts—might control. *Id.* at 517 (dictum). Since voluntariness refers to a state of mind, a plea that would be held involuntary under a given set of actual circumstances must be equally involuntary if the defendant truly believed that such circumstances existed, even if later investigations showed his perceptions to be mistaken. If this view is widely adopted, the quality of information provided the defendant prior to pleading assumes paramount importance, and the rule 11 colloquy would have to be broadened to become a hearing on defendant's state of mind at the time of the plea. Given that instances of mistaken belief are rare, however, the adoption of the *Thurmond* approach would likely generate more transaction costs than the improved information would warrant. It appears that the Second Circuit considers the *Thurmond* approach unwise; it disapproved of the "subjective" test in *United States ex rel. LeFay v. Fritz*, 455 F.2d 297, 303 (2d Cir.), cert. denied, 407 U.S. 923 (1972). No other federal jurisdiction has adopted the procedure.

that is, if the expected disutility of the trial prospect to the defendant is greater than that of a good-faith bargain but less than that of a bad-faith one, then the defendant who is uncertain about the quality of a bargain may elect to go to trial, though he would have made a bargain in the absence of uncertainty. When this happens, the potential welfare gains to both parties that would have accompanied the bargain are never realized. The "price" of a bargain increases when uncertainty is present, because the prosecutor must then offer relatively lower values of  $S_p$  to gain a bargain. Thus, he will pay a premium because of the existence of unkept promises and the uncertainty they engender in the market.<sup>100</sup> A kind of Gresham's Law asserts itself; the bad-faith bargains drive the good-faith bargains from the market.

The price-exaction model requires a rule to reduce informational asymmetry arising from prosecutorial failure to adhere to bargained agreements. In *Santobello v. New York*,<sup>101</sup> the Supreme Court supplied such a rule, holding that when a guilty plea rests upon a plea agreement, the prosecution must honor its promise or face withdrawal of the plea.<sup>102</sup> Courts may grant a defendant specific performance of the sentence agreement in such a case,<sup>103</sup> and rule 11 as amended provides for sentencing upon a negotiated plea only up to the severity of the sentence agreed upon.<sup>104</sup>

Within the price-exaction framework, then, requirements like those for judicial dialogue, defense counsel, and pre-plea discovery can be seen as judicial responses to the potential losses in bargaining

<sup>100</sup> This analysis is suggested by Akerlof, *The Market for "Lemons": Quality, Uncertainty, and the Market Mechanism*, 84 Q.J. ECON. 488 (1970).

<sup>101</sup> 404 U.S. 257 (1971).

<sup>102</sup> *Id.* at 263; *United States v. Hammerman*, 528 F.2d 326, 332 (4th Cir. 1975). An interesting aspect of the *Santobello* case is the fact that it was argued and decided in terms of a denial of due process. *Santobello* claimed that New York, acting through the prosecutor, had treated him unfairly and therefore denied his rights under the fourteenth amendment. 404 U.S. at 257-60. But here, as elsewhere, the line between efficiency concerns and problems of equity and fairness is not an easy one to draw. Governmental actions or policies that lead to the imperfect operation of a particular market can often be seen as unfair to specific individuals or groups as well. An analysis that fixes attention on both these elements in a given situation can be of value not only in determining the likely effects of judicial policy, but also in formulating the grounds for public policy and avoiding, wherever possible, the adjudication of constitutional issues.

<sup>103</sup> See, e.g., *Palermo v. Warden, Green Haven State Prison*, 545 F.2d 286, 296-97 (2d Cir. 1976); *Correale v. United States*, 479 F.2d 944, 950 (1st Cir. 1973).

<sup>104</sup> "(e) Plea agreement procedure. . . . (3) *Acceptance of a Plea Agreement*. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement." FED. R. CRIM. P. 11(e)(3); see FED. R. CRIM. P. 11, note at 1420-21 (1976).

efficiency that would occur if defendants lacked adequate information about each of the variables at play in the bargain. And the case law and statutory requirements that prosecutors abide by their agreements may be considered a guarantee of the continuing validity of the information once obtained. Once again, such judicial responses to informational asymmetry can be justified on purely pragmatic grounds—they promote the efficient operation of bargaining as a transaction-cost minimizing device—independent of any support they may find in notions of fairness or due process.

### III

#### EXTERNAL ASPECTS OF THE PLEA BARGAIN: MORAL COST CONSIDERATIONS

We have seen that many of the legal rules governing plea bargains can be interpreted as practical efforts to ensure the internal efficiency of that mode of exacting the punishment price by minimizing its economic transaction costs.<sup>105</sup> As we have argued earlier, however, a substantial moral transaction cost may also be incurred in the price exaction in many cases, thereby reducing the efficacy of the criminal process as a device to internalize the social costs of criminal activity.<sup>106</sup> This section considers moral transaction costs in the bargaining context and explores the relative weight that courts have given them.

The primary analytic principle that courts have relied on in assessing the moral transaction costs involved in plea bargaining is the "voluntariness" of a negotiated plea. In terms of the price-exaction model, the concepts of knowing waiver and of voluntariness can be seen to serve complementary but quite different functions. The waiver requirement, whose application was discussed in section II, serves to ensure that the defendant has acquired information about each of the variables whose value he must know in order rationally to decide whether or not to accept a given bargain. The voluntariness requirement, outlined below, lies on a second analytic plane. Its application assumes that the relevant information has been transmitted and asks whether the decisionmaking environment in which the defendant must consider the information is hostile to the exercise of free choice. If a court finds that, though the defendant was apprised of the data relevant to a decision to waive his right to trial, he lacked free-

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<sup>105</sup> See text accompanying notes 79-85 *supra*.

<sup>106</sup> See text accompanying notes 71-74 *supra*.

dom of choice, the waiver will be found involuntary and will be invalidated.<sup>107</sup>

To an economist, of course, the concept of voluntariness is tautological. The economist's model of behavior postulates that individuals make decisions on a rational basis, with the aim of maximizing their utility (or minimizing the damage to it).<sup>108</sup> In such a model, the decision to pursue the least costly course of action from among a given set of alternatives must, in any meaningful sense of the word, be voluntary. The law, however, has taken a position at once more subtle and more commonsensical. Thus, in holding that a station-house confession by a fifteen-year-old boy was not a voluntary act, Justice Frankfurter wrote:

It would disregard standards that we cherish . . . to hold that a confession is "voluntary" simply because the confession is the product of a sentient choice. "Conduct under duress involves a choice." [C]onduct devoid of physical pressure but not leaving a free exercise of choice is the product of duress as much so as choice reflecting physical constraint.<sup>109</sup>

Although a wide range of issues has been subsumed under the heading of "voluntariness," an important (and perhaps the primary) concern of the courts has been to reduce the moral costs associated with erroneous convictions of innocent defendants by negotiated plea. The problems of erroneous convictions and voluntariness of the plea are thus intertwined, and the question that emerges is whether a given bargaining tactic, or the plea-bargaining process as a whole, creates substantial moral transaction costs by inducing innocent defendants to plead guilty.

#### *A. Voluntariness in the Lower Courts: Shelton and Scott*

We begin the analysis of voluntariness and moral costs with the vicissitudes of "that crafty litigator *pro se*,"<sup>110</sup> J. Paul Shelton.<sup>111</sup> In

<sup>107</sup> See text accompanying notes 110-64 *infra*.

<sup>108</sup> See generally E. MANSFIELD, *supra* note 26, at 20-21.

<sup>109</sup> *Haley v. Ohio*, 332 U.S. 596, 606 (1948) (Frankfurter, J., concurring) (quoting *Union Pac. R. Co. v. Public Serv. Comm'n*, 248 U.S. 67, 70 (1918)) (citation omitted). For a more formal philosophical treatment of this problem, see Nozick, *Coercion*, in *PHILOSOPHY, SCIENCE, AND METHOD: ESSAYS IN HONOR OF ERNEST NAGEL* 440-72 (S. Morgenbesser, P. Suppes & M. White eds. 1969).

<sup>110</sup> *Scott v. United States*, 419 F.2d 264, 272 (D.C. Cir. 1969).

<sup>111</sup> *Shelton v. United States*, 242 F.2d 101 (5th Cir.), *rev'd en banc on rehearing*, 246 F.2d 571 (1957), *rev'd per curiam on confession of error*, 356 U.S. 26 (1958).

exchange for a prosecutorial recommendation that he be sentenced to one year's imprisonment, Shelton pleaded guilty to transporting a stolen motor vehicle. Shelton was in fact given a one-year prison term on the plea, whereupon he expressed his gratitude to the court and to the prosecution for their cooperation in his case.<sup>112</sup> After he had begun serving his sentence, however, Shelton moved to vacate the conviction on the ground that his plea had been involuntary, in that it had been motivated solely by the prosecutor's agreement to recommend the one-year term he ultimately received. The district court denied the motion,<sup>113</sup> but a Fifth Circuit panel reversed, holding that any guilty plea induced by a promise of leniency was, as a matter of law, involuntary, whether or not the plea bargain was kept.<sup>114</sup> At the heart of the court's argument was the premise that a plea of guilty was legally identical to a confession in open court and so would receive the same scrutiny on the issue of voluntariness that a confession would receive.<sup>115</sup> The panel reasoned that because a confession of guilt is rendered involuntary if induced by a threat or promise,<sup>116</sup> Shelton's plea, motivated as it was by the prosecutor's promise, was invalid as well.<sup>117</sup>

Judge Tuttle registered a strong dissent, arguing that the majority's equation of guilty pleas and confessions was inapposite and misleading,<sup>118</sup> and that the elimination of plea bargaining mandated by

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<sup>112</sup> See 246 F.2d at 573, 574.

<sup>113</sup> See 242 F.2d at 108.

<sup>114</sup> *Id.* at 113.

<sup>115</sup> See *id.* at 112. To avoid impeachment of the plea on the ground that it was bargained for, the court must ascertain that the plea was, in fact, voluntarily made. *Id.*

<sup>116</sup> See *Ziang Sung Wan v. United States*, 266 U.S. 1, 3 (1924); *Bram v. United States*, 168 U.S. 532, 549 (1897).

<sup>117</sup> 242 F.2d at 113.

<sup>118</sup> *Id.* at 113-14. Judge Tuttle's position on this issue is closer to controlling law. Perhaps the principal source of confusion is the pronouncement by the Supreme Court in *Kercheval v. United States*, 274 U.S. 220, 223 (1927), a case cited by the majority on other points, that "[a] plea of guilty differs in purpose and effect from a mere admission or extra-judicial confession; it is itself a conviction. Like a verdict of a jury, it is conclusive. More is not required; the court has nothing to do but give judgment and sentence." The extent to which confessions in open court can be distinguished, for evidentiary purposes, from "mere admissions [or] extra-judicial confessions" is, at best, unclear.

The Supreme Court has more recently held that where there exists a strong indication of guilt based on evidence available to the court at the time of the plea, a defendant may voluntarily and intelligently accept a plea bargain despite his protestations of innocence of the crime involved. *North Carolina v. Alford*, 400 U.S. 25, 37-38 (1970); *cf. People v. Foster*, 19 N.Y.2d 150, 153, 225 N.E.2d 200, 202, 278 N.Y.S.2d 603, 605 (1967) (although there is question whether person charged with manslaughter may logically and technically plead guilty to charge of attempted manslaughter, since latter requires intent yet former does not, such plea was sustained when defendant knowingly accepted plea in satisfaction of indictment charging crime

the equation would place an intolerable burden upon the efficient administration of criminal justice.<sup>119</sup> He offered an alternative standard of voluntariness that left room for the practice of plea negotiation:

[A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes).<sup>120</sup>

Upon rehearing en banc, the court reversed the panel's opinion,<sup>121</sup> adopting Judge Tuttle's dissent,<sup>122</sup> and his test for voluntariness became the basis of the new majority opinion.<sup>123</sup> Judges Rives and Brown, dissenting, restated the prior majority view, analogizing guilty pleas to courtroom confessions, and argued that both situations require strictly construed voluntariness standards "to make certain that the confession is *trustworthy* testimony of guilt and to avoid accepting a plea of guilty from an accused who may be innocent."<sup>124</sup> The purpose of bargaining is to induce guilty pleas by promises, yet, the dissenters argued, "[s]uch inducements in any particular case may be sufficient to elicit an untrue plea of guilty."<sup>125</sup>

The problem of involuntary and potentially erroneous pleas was considered by the Court of Appeals for the District of Columbia in *Scott v. United States*,<sup>126</sup> and was resolved using an approach differ-

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carrying heavier penalty). Amended rule 11(f) of the Federal Rules of Criminal Procedure requires the court to ascertain the existence of a factual basis for the plea prior to entering judgment. FED. R. CRIM. P. 11(f) (1976).

<sup>119</sup> 242 F.2d at 115.

<sup>120</sup> *Id.*

<sup>121</sup> 246 F.2d 571 (5th Cir. 1957) (en banc), *rev'd per curiam on confession of error*, 356 U.S. 26 (1958).

<sup>122</sup> Judge Tuttle wrote the en banc majority opinion.

<sup>123</sup> 246 F.2d at 572 n.2. The second *Shelton* opinion was reversed in a memorandum decision by the Supreme Court "[u]pon consideration of the entire record and confession of error by the Solicitor General that the plea of guilty may have been improperly obtained," *Shelton v. United States*, 356 U.S. 26, 26 (1958). The Fifth Circuit has subsequently held that this decision neither upset Judge Tuttle's en banc majority opinion, nor adopted the dissenting opinion of Judges Rives and Brown. *Brown v. Beto*, 377 F.2d 950, 954 (5th Cir. 1967); *Busby v. Holman*, 356 F.2d 75, 77 (5th Cir. 1966). The Fifth Circuit's conclusion was later explicitly endorsed by the Supreme Court. *Brady v. United States*, 397 U.S. 742, 755 (1970).

<sup>124</sup> 246 F.2d at 579 (emphasis in original).

<sup>125</sup> *Id.*

<sup>126</sup> 419 F.2d 264 (D.C. Cir. 1969).

ent from the Fifth Circuit's. Scott was convicted at trial of robbery and sentenced to a prison term of five to fifteen years. At the sentencing hearing, however, the trial judge told the defendant, "If you had pleaded guilty to this offense, I might have been more lenient with you."<sup>127</sup> In remanding the case for resentencing in light of the impropriety of the remark, the court of appeals posed the issue in *Scott* as the obverse of that in *Shelton*. The question in *Shelton* had been whether the consideration in sentencing that the defendant accepted in exchange for his guilty plea was such a powerful inducement to plead that the defendant's voluntary choice was overcome. In *Scott*, Chief Judge Bazelon asked whether the defendant had not been penalized for pleading innocent at trial rather than bargaining for a guilty plea—whether he received a heavier sentence, having pleaded innocent and having been convicted after trial, than he would have received had he pleaded guilty. If the question were answered affirmatively, then the defendant was impermissibly penalized for exercising his right to be tried.<sup>128</sup> Insofar as Scott received a longer sentence merely because of his refusal to negotiate, Judge Bazelon wrote, "he was a pawn sacrificed to induce other defendants to plead guilty."<sup>129</sup>

It is, of course, not true (holding aside for a moment the question of defendant's risk preferences)<sup>130</sup> that the imposition of a stiffer sentence on a defendant found guilty at trial than on one who pleaded guilty amounts, per se, to a price exacted for the exercise of the right to trial.<sup>131</sup> Judge Bazelon recognized this fact, noting correctly that the relevant comparison is between two defendants *prior* to the decision by either as to plea.<sup>132</sup>

Consider a defendant who, prior to his plea decision, knows that his chances of being convicted at trial are fifty percent, and that the

<sup>127</sup> *Id.* at 269.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 272.

<sup>130</sup> See text accompanying notes 134-37 *infra*.

<sup>131</sup> Strictly as an economic matter, such a penalty might not be improper. By opting for a trial, the defendant has caused society to incur greater economic costs than would have been incurred had a guilty plea been entered. As a result, society may be justified in exacting a greater punishment price from the defendant upon conviction as compensation for the additional cost of a trial. As *Scott* suggests, however, the fundamental nature of the right to trial in our society limits the extent to which sentencing judges may take into account (at least overtly) a defendant's decision to go to trial. Perhaps the failure to accord the defendant his right to trial unhampered by threats of a heavier sentence in the event of conviction may generate such substantial moral transaction costs that the economic costs to society of the exercise of his right would be outweighed. See text accompanying notes 71-73 *supra*.

<sup>132</sup> 419 F.2d at 277.

sentence he will receive if convicted is ten years. His trial prospect—viewed *ex ante*—is five years in prison, arrived at by multiplying the expected sentence upon conviction by the probability of conviction. If a prosecutor offers this defendant a five-year sentence in exchange for a guilty plea, the defendant has neither gained nor lost (again, holding aside questions of risk preference). Thus, even if the defendant goes to trial and loses, and the judge in sentencing him to ten years remarks, "If you had pleaded guilty I would have given you five years," there should be no question of impropriety. The defendant has not "paid a price" for the exercise of his trial right—he has merely chosen a structure with two possible outcomes instead of another with one outcome whose actuarial value was equal to the weighted average of the two. This will be the case whenever the plea concession reflects only the less than certain probability of conviction at trial. Using the notation we have employed, no pressure to plead is placed on a defendant who goes to trial when  $S_p \geq q S_v$ , even if  $S_v$  exceeds  $S_p$ , for in this case the consideration offered in exchange for a guilty plea merely reflects the uncertainties of litigation. The trial prospect then represents a fair gamble for the defendant, and the imposition of the longer sentence  $S_v$  upon conviction is simply the result of a losing play in a fair game.<sup>133</sup>

Judge Bazelon's analysis in *Scott* suggests that sentence concessions reflecting merely the uncertainties of litigation are proper, although greater inducements designed to deter defendants from seeking a trial may not be. Therefore,  $S_v$ -directed overcharging by the prosecution—sentencing practices such that  $S_p < q S_v$ —places a clear burden on defendants who insist upon a trial and constitutes improper inducement to those who do not, for it requires a defendant to formulate his choice on the basis of risk-aversion factors that may dominate considerations of guilt or innocence. The *Scott* analysis sanctions concessions that reflect the less than certain probability of conviction, but proscribes those that go significantly further.<sup>134</sup> The latter evoke the fear that, as the plea offered diverges increasingly from the actuarial value of the trial prospect, the risk preferences of the defendant become correspondingly more important than the ob-

<sup>133</sup> In terms of our earlier arguments, of course, the salient issue is the *defendant's* perception of the values of the various alternatives, and therefore the crucial comparison is between  $L(S_p)$  and  $[q L(S_v) + (1-q) L(A)]$ . This correction, however, does not affect the analysis in the text, except to the extent that it magnifies the court's difficulties in extracting the information relevant to its decision. Note Judge Bazelon's assumption that  $A$  is of negligible magnitude. *Id.* at 278.

<sup>134</sup> *Id.* at 277-78.



jective probability of conviction in influencing his decision, resulting in high moral transaction costs derived from guilty pleas by factually innocent but risk-averse defendants.

To illustrate the problem of the risk-averse defendant, consider two defendants, Guido, who is a gambler, and Douglas, who is more prudent, each facing a ten-year sentence if convicted at trial, and each having a fifty percent chance of conviction. A risk-neutral defendant would, as we have seen, regard a plea offer of five years as perfectly equivalent to the fifty percent chance of the ten-year term. But let us assume that Guido, given the chance for an acquittal, regards the ten-year term as less than twice as bad as the five-year term—for him, each additional year of prison represents a positive but decreasing cost. In order to try for an acquittal, Guido would reject an offer of five years, and would continue to reject offers of less than five years until offered the prison term that was, in his eyes, half as painful as a ten-year term. Stated differently, Guido would prefer to play the game of trial unless offered a bargain considerably better than the actuarial value of the trial prospect. Douglas, on the other hand, regards the ten-year term as more than twice as bad as the five-year term. For him, the pain of confinement rises at an increasing rate for each additional year. Thus, Douglas would accept even sentences greater than the five-year actuarial value of the trial prospect, say those of seven years, to avoid the fifty percent chance of the ten-year term.

In the situation described, Guido would reject a plea offer equal to the actuarial value of the trial prospect, while Douglas would accept it eagerly (he would have been willing to accept an even higher offer). As the offers become more lenient, a point is reached (at, say, two years) at which even Guido will accept the plea. Under the economist's view of voluntariness, neither outcome would be "involuntary," because neither was coerced and each party was at least as happy with the outcome as with the alternatives. But it does raise questions under the more sophisticated legal definition of voluntariness. If Douglas were so risk-averse that he would have accepted a seven-year term rather than face the chance of ten, is the offer of two years such a powerful inducement as to risk overbearing his will?<sup>135</sup> For an extremely risk-averse defendant, even a plea concession that

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<sup>135</sup> Cf. *Culombe v. Connecticut*, 367 U.S. 568, 603 (1961) (Frankfurter, J., opinion of) (voluntariness determined by three-prong test focusing on (1) events, (2) state of mind, and (3) application of legal standards); Enker, *Perspectives on Plea Bargaining*, in *TASK FORCE: COURTS*, *supra* note 5, at 116 (fear of conviction of perverse crime may induce innocent to plead guilty to lesser offense).

reflected only the actuarial value of the trial prospect presents this danger.

Although the *Scott* analysis represents an important exercise in the judicial understanding of the bargaining process, it is not without problems. First, innocent but highly risk-averse defendants may be induced to plead guilty even by offers of sentences no greater than the actuarial value of their trial prospect.<sup>136</sup> Second, the task of distinguishing proper from improper agreements becomes quite formidable, for it requires the court to estimate the probability of conviction at trial for itself and to compare its estimate with that of the prosecutor in order to test the latter's motives in bargaining.<sup>137</sup> Third, if the only proper concessions in bargaining are those reflecting the uncertainties of litigation, prosecutors will bargain most readily with defendants whose guilt is in substantial doubt, precisely those who most deserve the formalities of the trial procedure, and trials will be likely in only the most perfunctory open-and-shut cases in which the defendant's guilt is readily provable and in which the prosecutor has no reason to concede anything.

#### B. Voluntariness in the Supreme Court:

##### Brady v. United States

In *Brady v. United States*,<sup>138</sup> the Supreme Court considered the issue of voluntariness in plea bargaining squarely, accepted the Fifth Circuit's analysis, and sanctioned plea concessions reflecting more than litigation uncertainties.<sup>139</sup> The defendant in *Brady*, who had been indicted in 1959 under the Federal Kidnaping Act,<sup>140</sup> and who

<sup>136</sup> It should not be forgotten, however, that a risk-averse prosecutor may be willing to offer a defendant a negotiated sentence shorter than that expected to result from trial. See text accompanying notes 68-69 *supra*.

<sup>137</sup> This point is made in *Scott* by Judge Wright. 419 F.2d at 280 (Wright, J., concurring). The prosecutor's motives thus could be inferred from a comparison of the magnitudes of  $S_p$  and  $q(S_v) + (1-q)(S_v)$ .

<sup>138</sup> 397 U.S. 742 (1970).

<sup>139</sup> *Id.* at 747; see text accompanying notes 140-60 *infra*.

<sup>140</sup> 18 U.S.C. §§ 1201-1202 (1976) (amended 1972). The statute provided in relevant part:

Whoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.

Federal Kidnaping Act, ch. 645, § 1201(a), 62 Stat. 683 (1948) (current version at 18 U.S.C. § 1201(a) (1976)). The 1972 amendment to the statute struck out the provisions relating to the death penalty. Act of Oct. 24, 1972, Pub. L. No. 92-539, § 201, 86 Stat. 1070.

if tried and convicted could be sentenced to death, at first persisted in a plea of not guilty and was prepared to be tried before a jury. After learning that his codefendant had elected to plead guilty and would be available to testify against him, however, Brady changed his plea to guilty and was ultimately sentenced to thirty years' imprisonment.<sup>141</sup> In 1967, Brady sought collateral relief from his conviction, claiming that his guilty plea had been involuntary because the Act's death penalty provision had operated unconstitutionally to coerce his plea. The district court denied relief, finding specifically that Brady's plea had been induced not by the kidnaping statute but instead by his partner's decision to plead guilty and testify against Brady at trial.<sup>142</sup> The Tenth Circuit affirmed,<sup>143</sup> and the Supreme Court agreed to consider Brady's claim in light of a prior ruling in *United States v. Jackson*<sup>144</sup> that the Kidnaping Act's death penalty provision could not be constitutionally imposed.<sup>145</sup>

The Court affirmed the denial of relief in Brady's case,<sup>146</sup> taking special care to clarify its earlier decision in *Jackson*. The *Jackson* Court had found the Act's capital punishment provision constitutionally infirm because it operated "to discourage assertion of the fifth amendment right not to plead guilty and to deter exercise of the sixth amendment right to demand a jury trial."<sup>147</sup> The statute's infirmity lay in its failure to provide a procedure for imposing the death penalty upon defendants who waived the right to jury trial or pleaded guilty.<sup>148</sup> In Judge Bazelon's terms, the statute plainly placed a burden, in the form of the potential application of the death penalty, on those defendants who sought to exercise their right to a jury trial; the death penalty provision could not be justified as a reflection of litigation uncertainties, since it applied to all defendants.

But, as Justice White wrote in *Brady*, *Jackson* did not hold all pleas under the Kidnaping Act involuntary on the ground that the death penalty provision was inherently coercive. Instead, *Jackson* voided the penalty provision because, as written, it *unnecessarily* encouraged guilty pleas and the waiver of the right to jury trial.<sup>149</sup>

<sup>141</sup> 397 U.S. at 743-44.

<sup>142</sup> *Id.* at 745.

<sup>143</sup> 404 F.2d 601 (10th Cir. 1968).

<sup>144</sup> 390 U.S. 570 (1968).

<sup>145</sup> *Id.* at 581-85.

<sup>146</sup> 397 U.S. at 745-48.

<sup>147</sup> 390 U.S. at 581. *See also* *Corbitt v. New Jersey*, 74 N.J. 379, 378 A.2d 235, *prob. juris. noted*, 98 S. Ct. 1231 (1978) (statute mandating life sentence upon guilty verdict, but allowing lesser sentence upon guilty plea challenged).

<sup>148</sup> *Id.* at 584-85.

<sup>149</sup> 397 U.S. at 746-47.

Thus, " 'the fact that the Federal Kidnaping Act tends to discourage defendants from insisting upon their innocence and demanding trial by jury hardly implies that every defendant who enters a guilty plea to a charge under the Act does so involuntarily.' " <sup>150</sup>

The *Brady* Court could have reached a narrow holding predicated on the finding below that Brady's plea had in fact been a knowing and intelligent waiver, motivated by his partner's decision rather than by the statute's penalty provision. The Court instead chose to formulate a broad test of voluntariness for plea bargaining. Stressing the "mutuality of advantage" <sup>151</sup> to prosecution and defense that underlies the negotiated plea, the Court endorsed offers of leniency "to a defendant who in turn extends a substantial benefit to the State." <sup>152</sup> Embracing Judge Tuttle's *Shelton* standard, <sup>153</sup> the Court condemned as involuntary only those pleas produced by threats of physical harm or by mental coercion "overbearing the will of the defendant." <sup>154</sup> The definition of such overbearance in terms of risk-aversion considerations <sup>155</sup> is not made clear by the opinion, but there is a suggestion that prosecutorial overcharging in a given case or judicial abuse of the sentencing power to induce a defendant's plea might render such a plea involuntary. <sup>156</sup> The Court emphasized that the presence of competent counsel during bargaining is evidence that the plea decision is made both voluntarily <sup>157</sup> and intelligently <sup>158</sup> in the face of the inevitable psychological pressures that attend plea negotiations.

At the close of his opinion, Justice White pointed out that the Court was not placing an unqualified imprimatur on the plea negotiation process, but rather was alert to its hazards. If it could have been shown that a particular bargaining practice, or the negotiation process itself, "substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves," Justice White noted, the Court would have had serious doubts about the case. <sup>159</sup>

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<sup>150</sup> *Id.* at 746-47 (quoting *United States v. Jackson*, 390 U.S. 570, 583 (1968)).

<sup>151</sup> 397 U.S. at 752.

<sup>152</sup> *See id.* at 753.

<sup>153</sup> *See id.* at 755; text accompanying note 120 *supra*.

<sup>154</sup> *See* 397 U.S. at 750.

<sup>155</sup> *See* text accompanying notes 126-37 *supra*.

<sup>156</sup> *See* 397 U.S. at 751 n.8; text accompanying notes 163-64 *infra*.

<sup>157</sup> *See* 397 U.S. at 754 & n.12.

<sup>158</sup> *See id.* at 756-57.

<sup>159</sup> *See id.* at 756-58.

But our view is to the contrary and is based on our expectations that courts will satisfy themselves that pleas of guilty are voluntarily and intelligently made by competent defendants with adequate advice of counsel and that there is nothing to question the accuracy and reliability of the defendants' admissions that they committed the crimes with which they are charged.<sup>160</sup>

After *Brady* and *Jackson*, the institutional rules structuring the bargaining process were fairly clear, and, for our purposes, have not been altered subsequently.<sup>161</sup> Recalling our earlier assertion that a defendant will waive his right to trial and plead guilty whenever  $L(S_p) < q L(S_v) + (1-q) L(A)$ , three conclusions are justified:

(1) The state can induce pleas by increasing the expected disutility of the trial prospect through increases in  $q$ , the probability of conviction at trial. This, of course, is precisely what occurred in the *Brady* case; Brady pleaded guilty immediately after his accomplice became available to testify against him. To the extent that guilt is defined by the conviction of the defendant at trial, inducements of this kind do not increase the moral transaction costs of the bargain—they raise no problem with respect to persuading innocent defendants to plead guilty.

(2) The state can induce pleas by lowering the disutility of the bargained settlement through decreases in  $S_p$ ; the approval of this usual bargaining tactic flows directly from *Brady*. Underlying the *Brady* result is the assumption that the moral costs associated with convicting the innocent can generally be avoided if defendants are advised by competent counsel. This assumption may in turn be grounded in the belief that preliminary screening of cases by the prosecution or grand jury will ensure that almost no defendants faced

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<sup>160</sup> *Id.* at 758. A behavioral model of the plea bargain developed elsewhere by the author suggests that the effects of time on the defendant, in addition to the effects of risk aversion, may play an important role in the decision to bargain rather than to insist on a trial. To the extent that time factors pressure guilty and innocent defendants alike, there is a suggestion that innocent defendants may indeed be induced to plead guilty by the structure of the bargaining system itself. This theme is explored further in Adelstein, *supra* note 65.

<sup>161</sup> The major plea bargaining cases in the Supreme Court subsequent to *Brady* have not changed the outlines of the analysis suggested here. See, e.g., *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) (prosecutor can use threat to reindict under recidivist statute as chip in plea negotiation); *Tollett v. Henderson*, 411 U.S. 258 (1973) (no collateral relief for defendant who pleaded guilty on advice of counsel when, unknown to both counsel and defendant, the indicting grand jury had been unconstitutionally selected); *McMann v. Richardson*, 397 U.S. 759 (1970) (no collateral relief for defendant who pleaded guilty and alleges that a coerced confession led him to plead).

with the decision to accept or reject a proposed bargain are, in fact, factually innocent of the offense in question.<sup>162</sup>

(3) The state is forbidden to induce pleas by increasing  $S_v$ , the sentence to be expected upon conviction, to inappropriately high levels, either by prosecutorial overcharging (as suggested in *Scott* and *Brady*) or by a legislatively-designed penalty structure (as in *Jackson*). Although highly risk-averse defendants might be induced to plead guilty even absent prosecutorial misbehavior,<sup>163</sup> there seems to be an implicit assumption that the moral costs of erroneous convictions must be balanced against the administrative costs of providing for defendants who are cautious beyond risk-neutrality, and that no intolerably large number of innocent defendants will elect to admit to a false charge rather than face the possibility of punishment upon conviction. The Court's proscription against threats of disproportionately high penalties, analyzed within the price-exaction framework, avoids other problems as well. Extreme overcharging may cause a distortion of the equation of punishment price with the social costs of a given criminal act, and, consequently, may reduce the efficacy of the bargaining process as a device for individualized cost internalization. If the prosecutor's charging power is held in check, the ultimate plea agreement reached is more likely to represent the actual social cost imposed by an offense than would be the case were unwarranted charges used to induce a settlement primarily motivated by fear. Judicial disapproval of overcharging as a bargaining tactic can thus be seen as a corrective response to failures in the price-exaction mechanism that are attributable to opportunistic behavior on the part of prosecutors.<sup>164</sup>

*C. Recent Developments: Bordenkircher v. Hayes  
and the Threat to Reindict*

The Supreme Court's most recent foray into the plea bargaining arena, *Bordenkircher v. Hayes*,<sup>165</sup> arose in the context of the application of a recidivist statute and may be usefully analyzed on the transactional model. The analysis will demonstrate the correctness of the Court's result, with which four Justices took exception, and will

<sup>162</sup> This view is held by a former Solicitor General of the United States. See Griswold, *Criminal Procedure, 1969—Is It a Means or An End?*, 29 MD. L. REV. 307, 314 (1969).

<sup>163</sup> See text accompanying notes 134-36 *supra*.

<sup>164</sup> Distinguishing increases in  $S_v$  from decreases in  $S_p$  may also express the social value judgment based on moral cost considerations that prosecutorial or judicial mercy in the latter case is to be encouraged, while the imposition of a severe sentence upon conviction is not.

<sup>165</sup> 434 U.S. 357 (1978).

suggest that the result be limited to recidivist statutes whose application is automatic upon proof of a prescribed number of prior felony convictions. The defendant in *Bordenkircher* was indicted for uttering a forged check in the amount of \$88.30, an offense punishable under state law by a prison sentence of from two to ten years.<sup>166</sup> During plea negotiation, the prosecutor threatened that if the defendant did not accept a plea offer of five years, he would return to the grand jury and seek an indictment under the state's recidivist statute, which carried a mandatory life sentence.<sup>167</sup> The defendant refused the plea, was indicted and convicted under the recidivist statute, and was sentenced to life imprisonment.<sup>168</sup> The Sixth Circuit granted the defendant habeas relief on the ground that the prosecutor's behavior—seeking the indictment for the more serious offense—was vindictive.<sup>169</sup> The Supreme Court, however, in a five to four decision, reversed the appellate court and denied relief.<sup>170</sup>

In the terms of the price-exaction model, the prosecutor was attempting to raise  $S_v$  during the plea negotiations, solely for the frankly acknowledged purpose of inducing the defendant to agree to a plea.<sup>171</sup> Justice Stewart's majority opinion did not label the prosecutorial desire to induce a guilty plea an impermissible motive in the charging decision, but rather emphasized the " 'give-and-take' " element of plea negotiation and the accused's opportunity to reject the plea offer.<sup>172</sup> The Court noted that the prosecutor could have entered the higher charge before beginning plea negotiations and that his "overcharging," although undesirable, was essentially nonreviewable.<sup>173</sup> The Court reasoned that original indictment on a minor offense and a later threat to increase the charge ought to be no more objectionable than original indictment on a serious charge and ultimate reduction via bargaining.<sup>174</sup>

Justice Blackmun, joined in dissent by Justices Brennan and Marshall, argued that the prosecutor's action was vindictive and therefore violative of due process.<sup>175</sup> Justice Blackmun analogized

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<sup>166</sup> *Id.* at 358.

<sup>167</sup> *Id.* at 358-59.

<sup>168</sup> *Id.* at 359.

<sup>169</sup> *Hayes v. Cowan*, 547 F.2d 42, 45 (6th Cir. 1976), *rev'd sub nom. Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

<sup>170</sup> 434 U.S. at 365.

<sup>171</sup> *Id.* at 358 n.1.

<sup>172</sup> *Id.* at 363.

<sup>173</sup> *Id.* at 364.

<sup>174</sup> *Id.* at 360-61.

<sup>175</sup> *Id.* at 365 (Blackmun, J., dissenting). Justice Powell, in a separate dissent, *id.* at 368-73, argued that the prosecutor's exercise of discretion in seeking the recidivist indictment was so

the situation in *Bordenkircher* to that in *Blackledge v. Perry*,<sup>176</sup> in which the Court condemned the conduct of a prosecutor who reindicted a misdemeanor on a felony charge after the misdemeanor had appealed his conviction and obtained a trial de novo, which he had an absolute right to do under state law.<sup>177</sup> Arguing that because the prosecutor in *Bordenkircher* had threatened to reindict the defendant if the defendant did not accept the offered plea and thus had impermissibly discouraged the defendant's exercise of his right to trial, Justice Blackmun concluded that this discouragement was as vindictive as the reindictment in *Perry*.<sup>178</sup>

Were Justice Blackmun correct in arguing that the *Bordenkircher* prosecutor could be said to have acted vindictively, his due process conclusion would have been accurate. Prosecutorial vindictiveness, a form of bad faith, is one of the most straightforward subversions of the bargaining process.<sup>179</sup> But the similarity between *Bordenkircher* and *Perry* is not even notional. Clearly, the prosecutor in *Perry* retaliated against the defendant's exercise of his right to appeal by reindicting him on a more serious charge.<sup>180</sup> In *Bordenkircher*, the prosecutor did not penalize any exercise of the defendant's right to trial. He instead used the threat of reindictment under the recidivist statute as a chip in the bargaining process at the time negotiations opened. The prosecutor in *Bordenkircher* was playing the characteristic prosecutorial role, attempting "to persuade the defendant to forgo his right to plead not guilty."<sup>181</sup> And though it may be that the prosecutor had a particularly full hand when playing with the defendant, his choice of the way in which to play his hand did not render his conduct vindictive. Prosecutorial vindictiveness in the plea bargain area, aptly illustrated by analogy to *Perry*, has a quite different character. It occurs when the prosecutor, failing to inform the defendant that he will seek an indictment for a more serious offense if the defendant does not accept the bargain offered, in fact does so.

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unreasonable that it violated due process. He cited as evidence for this proposition the fact that the prosecutor did not initially seek the recidivist indictment and so must have "himself deemed it unreasonable and not in the public interest." *Id.* at 371 (Powell, J., dissenting). This argument is a less extreme variant on Justice Blackmun's argument and is answered by noting the argument from administrative convenience, see text accompanying note 184 *infra*, and the fact that the prosecutor was plainly acting within the law and was supported by the evidence in seeking the recidivist indictment, see 434 U.S. at 362-65.

<sup>176</sup> 417 U.S. 21 (1974).

<sup>177</sup> *Id.* at 22-24.

<sup>178</sup> 434 U.S. at 366-68.

<sup>179</sup> See text accompanying notes 82-84 *supra*.

<sup>180</sup> 417 U.S. at 27-28.

<sup>181</sup> *Bordenkircher v. Hayes*, 434 U.S. at 364.



The prosecutor distorts the bargaining process by denying to the defendant important information necessary in making a rational calculation of sentencing possibilities.

The interesting facet of *Bordenkircher* is that the prosecutor had yet to obtain the indictment under the recidivist statute at the time he used the potentiality of a life sentence as a chip in the bargaining process. This "full disclosure" approach indicates that vindictiveness is not present in the case. In our model,  $S_v$  (call it  $S_{v1}$ ) and its attendant variable  $q$  indicate, respectively, the sentence expected upon conviction and the probability of conviction. Let  $S_{v2}$  indicate the sentence to be expected upon conviction under the recidivist statute indictment, and let  $r$  indicate the probability that the indictment will be handed down by the grand jury when the prosecutor requests it. It can be seen that a second-order probability, or degree of uncertainty, has been introduced into the defendant's utility calculation by the threat of the recidivist indictment—he must determine  $r$ , the probability that the prosecutor can obtain the indictment, in addition to determining  $q$ , the probability of conviction on the offense.<sup>182</sup> In *Bordenkircher*, however, the uncertainty associated with  $r$  vanishes because the recidivist statute in the case is automatically triggered upon the prosecutor's seeking an indictment and the grand jury's determination that there have been three previous convictions. Other recidivist statutes operate differently, requiring the prosecutor to demonstrate to the grand jury not only the existence of prior convictions, but the reasonableness of the recidivist penalty given the nature of the prior felonies.<sup>183</sup> When the recidivist statute is of this latter kind, the information the defendant is required to consider reaches a level of complexity at which he can no longer reasonably be expected to make a rational calculation.<sup>184</sup> In such situations, in contradistinction to *Bordenkircher*, it would be a distortion of the process to allow the prosecutor to use the threat of the recidivist penalty without having an indictment in hand.

The argument from administrative convenience—that as long as the prosecutor does not misrepresent the facts, it is convenient to allow him to mention his ability to reindict during plea negotiation—is compelling in the *Bordenkircher* situation. To allow him to do so would save the time and expense of having to seek reindict-

<sup>182</sup> The defendant then must judge the respective values of the variables in the inequality  $L(S_p) < [q L(S_{v1}) + (1-q)(A)] + [r L(S_{v2}) + (1-r)(A)] \times q$

<sup>183</sup> See, e.g., CONN. GEN. STAT. ANN. § 53a-40(a) (West Cum. Supp. 1978); N.D. CENT. CODE § 12.1-32-09 (1975 & Supp. 1978).

<sup>184</sup> See text accompanying notes 86-97 *supra*.

ments before the fact of their availability could be used at the bargaining table. Note that in the *Bordenkircher* situation, in which there is no uncertainty that the prosecutor can obtain an indictment under the recidivist statute, the risk-averse defendant, assuming his guilt, would have little difficulty in reaching a rational judgment that the five-year plea would be preferable to potential life imprisonment. And if he is innocent, he ought to be able to make an equally rational judgment, whether the indictment were actual or potential. The result is similarly unexceptionable from the point of view of the risk-prone defendant, who will insist on a better bargain than would a risk-averse defendant before he is willing to plead. For the risk-prone defendant, the greater the uncertainty of reindictment ( $r$ ), the more likely he is to rely on his risk preferences and gamble on a trial outcome. It is a postulate of our adversarial system, however, that the trial is an accurate mechanism for determining truth, and so we are institutionally committed not to worry that risk-prone defendants would tend to gamble on a trial—if they are not guilty, we assume they will not be convicted.

A court, then, would have no reason to resolve *Bordenkircher* in a way other than the way the Supreme Court did: the prosecutorial conduct sanctioned there is not unfair to any identifiable group of defendants. But if a legislature were persuaded that permitting threats to reindict were unwise because of moral cost considerations or, say, because it appeared to encourage too many risk-prone defendants to seek expensive trials, it could regulate prosecutorial conduct in one of several ways. It could, for example, provide that possible indictments under the recidivist statutes not be mentioned during plea negotiations, but had to be handed down by a grand jury before they were used in bargaining. Or it could apply this proscription to some wider group of statutes, after reaching a judgment that no punishment should be mentioned during plea negotiations until the prosecutor is certain that he has an indictment that could result in that punishment.

#### CONCLUSION

My intention in this Article has been to provide a new explicatory schema for the bargaining system currently employed to decide over ninety percent of the criminal cases in the United States. In closing, I would like to put my argument in perspective by noting that it is more analytically accurate and more sophisticated than are two other arguments. My argument—that a transactional view of so-

ciety's attempt to deal with a wrongdoer reveals that society does not aim unconditionally to deter crimes, but instead to make criminals internalize both the economic and moral costs of crime—has advantages over both the utilitarian economic approach and the traditional due process notions concerned not with utility but with justice.

The model I have outlined parallels the utilitarian view, of course, insofar as it describes the internalization of the costs of crime. It does not, however, as would that model, allow criminal penalties to be raised to the level required to achieve efficient allocation given the uncertainty of apprehension and conviction. This is not to say that the institutional model encourages crime per se. On the contrary, it merely describes actual constraints on the utilitarian approach—what I have called moral costs—that foreclose systemic efficiency with respect to material resources. The utilitarian economic approach, which fixes the prices for criminal activity as for other economic goods, is unresponsive to the existence of moral costs and society's determination of them. It would posit, for example, that if society desires a more effective deterrent to rape, it ought simply to raise the price the criminal must pay for his crime. The institutional economic model, in contrast, pegs this price to the retributive limits allowed by the notions of justice at play in society at the time a crime is committed. Its pretensions are humbler than are those of earlier economic models; it recognizes, realistically, that society will not pay the moral costs associated with an efficient allocation of physical resources in an uncertain world. Moreover, the institutional model is a more apt description of what actually takes place in the plea-bargain transaction than is the due process language of the case law. As pointed out above in reference to *Scott*,<sup>185</sup> process discussions tend to lack subtlety when they turn to the pricing of crime.<sup>186</sup>

The institutional model, then, is an empirical, or sociological, advance over previous discussions of process because it more accurately reflects the true costs of crime. It is an analytic, or jurisprudential, advance over previous economic (utilitarian) approaches because it is informed by the notion of moral costs—justice constraints. Finally, the institutional economic view points toward a possible reconciliation of the utilitarian and process views. The two views are in tension in that the former speaks only to the increase in efficiency, positing the productive society as its end, while the latter speaks only to the augmentation of justice, positing the just society as its end.

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<sup>185</sup> *Scott v. United States*, 419 F.2d 264 (D.C. Cir. 1969).

<sup>186</sup> See text accompanying notes 130-33 *supra*.

The institutional economic view, which frames answers to questions about how to increase efficiency in terms chamfered by justice notions, leaves as an open but well-formed question whether a society with bipolar goals—efficiency and justice—might not be, in a larger sense, a utilitarian society.

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