INTRODUCTION........................................................................................................... 30
I. A FALSE DICHOTOMY: PLEA BARGAINING VERSUS TRIALS........................... 36
   A. The Traditional Plea Bargain/Trial Tradeoff.............................................. 37
   B. Traditional Alternatives to Plea Bargaining............................................ 40
      1. Short trials....................................................................................... 42
      2. Plea bans......................................................................................... 43
II. THE SCREENING ALTERNATIVE....................................................................... 48
   A. Screening as Random Event or Plan?...................................................... 50
   B. Screening as Threat or Opportunity?..................................................... 51
   C. Setting Prosecutorial Goals from the Inside.......................................... 55
   D. Internal Prosecutorial Responses to Plea Bargaining......................... 57
III. THE SCREENING/BARGAINING TRADEOFF IN PRACTICE: NODA DATA........... 58
   A. Harry Connick Sings a Reform Tune..................................................... 60
   B. What a Difference a Trade Makes......................................................... 67
      1. Direct evidence of open pleas, clues about charge bargains................ 68
      2. Secondary clues about the tradeoff..................................................... 74
      3. Precharge bargaining?..................................................................... 77
      4. The role of sentence bargains......................................................... 79
   C. Potential Unseen Effects of the Tradeoff.............................................. 82

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INTRODUCTION

When it comes to plea bargaining, we have created a false dilemma. The dilemma grows out of the central reality of criminal adjudication in the United States. The vast majority of criminal cases are resolved through guilty pleas rather than trials.¹ Most of those guilty pleas result from negotiations between prosecution and defense.²

Scholars, judges, prosecutors, defense lawyers, and politicians have offered only two basic responses to the fact that guilt is mostly resolved through negotiated guilty pleas: They take it or they leave it.

Some take the system more or less as it is. They accept negotiated pleas in the ordinary course of events, either because such a system produces good results or because it is inevitable.³ They might identify some exceptional cases that create an intolerable risk of convicting innocent defendants, or unusual cases where there are special reasons to doubt the knowing and voluntary nature of the defendant’s plea. These special cases might call for some regulation.⁴ But the mine run of cases, in this view, must be resolved with a heavy dose of plea bargains and a sprinkling of trials.⁵

¹. In the federal system, the proportion of convictions obtained through pleas of guilty or nolo contendere has reached 95%, and has been climbing steadily for over 30 years. In the state systems, guilty pleas accounted for 94% of felony convictions in 1998. See BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 1998, at 8-9 (2001).


Then there are those who leave it, arguing that our system's reliance on negotiated guilty pleas is fundamentally mistaken. Some call for a complete ban on negotiated guilty pleas. Others, doubting that an outright ban is feasible, still encourage a clear shift to more short trials to resolve criminal charges. Restoring the criminal trial to its rightful place at the center of criminal justice might require major changes in public spending, and it might take a lifetime, but these critics say the monstrosity of the current system demands such a change.

This dilemma about plea bargaining—take it or leave it—is a false one. It is based on a false dichotomy. It errs in assuming that criminal trials are the only alternative to plea bargains. In this erroneous view, fewer plea bargains lead inexorably to more trials; indeed, the whole point in limiting plea bargains is to produce more trials.

This paper offers a different choice, and points to prosecutorial "screening" as the principal alternative to plea bargains. Of course all prosecutors

5. See, e.g., Thomas W. Church, Jr., In Defense of "Bargain Justice," 13 LAW & SOC'Y REV. 509, 513 (1979) (arguing that plea bargaining, when it meets certain requirements, "is no less rational or constitutional than the trial process upon which the negotiation is based"); Fred C. Zacharias, Justice in Plea Bargaining, 39 WM. & MARY L. REV. 1121, 1123 (1998) (accepting plea bargaining "as a given"). This view is also the overwhelming position of the judiciary. See Blackledge v. Allison, 431 U.S. 63, 71 (1977) ("Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned."). For example, prominent federal judge Patricia Wald, upon stepping down from service on the war crimes tribunal for Bosnia in January 2002, criticized the tribunal for its nominal ban on plea bargaining. Judge Wald contrasted the dominant role of guilty pleas in the U.S. criminal justice system, explaining that "[o]ur system would break down tomorrow if we did not have that option." Marlise Simons, An American with Opinions Steps Down Vocally at War Crimes Court, N.Y. TIMES, Jan. 24, 2002, at A12.

6. See, e.g., NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, A NATIONAL STRATEGY TO REDUCE CRIME standard 3.1, at 163 (1973) (recommending the prohibition of "plea negotiation in all courts by not later than 1978"); Raymond I. Parnas & Riley J. Atkins, Abolishing Plea Bargaining: A Proposal, 14 CRIM. L. BULL. 101 (1978) (proceeding from "the premise that there is no legal or wise basis for the retention of" plea bargaining); Stephen J. Schulhofer, Plea Bargaining as Disaster, 101 YALE L.J. 1979, 2009 (1992) ("Plea bargaining is a disaster [that] can be, and should be, abolished.").

7. See, e.g., Albert W. Alschuler, Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System, 50 U. CHI. L. REV. 931, 969 (1983) ("In providing elaborate trials to a minority of defendants while pressing all others to abandon their right to trial, our nation allocates its existing resources about as sensibly as a nation that attempted to solve its transportation problem by giving Cadillacs to ten percent of the population while requiring everyone else to travel by foot. . . . [L]ess would be more.").

8. In making this argument, we hope to link the plea bargaining literature to the less voluminous academic work on prosecutorial screening decisions. The screening literature is best exemplified in a classic article by Richard S. Frase, The Decision to File Federal
“screen” when they make any charging decision. By prosecutorial screening we mean a far more structured and reasoned charge selection process than is typical in most prosecutors’ offices in this country. The prosecutorial screening system we describe has four interrelated features, all internal to the prosecutor’s office: early assessment, reasoned selection, barriers to bargains, and enforcement.

First, the prosecutor’s office must make an early and careful assessment of each case, and demand that police and investigators provide sufficient information before the initial charge is filed. Second, the prosecutor’s office must file only appropriate charges. Which charges are “appropriate” is determined by several factors. A prosecutor should only file charges that the office would generally want to result in a criminal conviction and sanction. In addition, appropriate charges must reflect reasonably accurately what actually occurred. They are charges that the prosecutor can very likely prove in court. Third, and critically, the office must severely restrict all plea bargaining, and most especially charge bargains. Prosecutors should also recognize explicitly that the screening process is the mechanism that makes such restrictions possible. Fourth, the kind of prosecutorial screening we advocate must include sufficient training, oversight, and other internal enforcement mechanisms to ensure reasonable uniformity in charging and relatively few changes to charges after they have been filed.

If prosecutors treat hard screening decisions as the primary alternative to plea bargaining, they can produce changes in current criminal practice that would be fundamental, attractive, and viable.

The changes to prosecutorial practices we explore in this article would be fundamental. A prosecutor who makes a realistic and early evaluation of the case will no longer need to depend on negotiations with defense counsel to sort the wheat from the chaff. The screening decisions make possible a decrease in the number of negotiated guilty pleas, especially charge bargains. Without careful initial screening, the prosecuting trial attorney who refuses to negotiate


9. Prosecutors may be required to file some charges very quickly in cases where a suspect has been arrested, sometimes within twenty-four or forty-eight hours of arrest. We are not referring to the decision whether a prosecutor has probable cause to sustain some charge that justifies detention, bail or other conditions of release. By “initial charge” we mean the charge, filed early in the case, that the screening prosecutor and the entire office commit to prosecute absent extraordinary and unexpected circumstances.

10. In a charge bargain, the prosecutor agrees to dismiss some charges in return for a plea of guilty to the remaining charges. Most scholars and prosecutors have favored charge bargains over sentence and other bargains, arguing that charge selection is inherently an executive branch function, while sentencing necessarily involves other institutions and actors. We discuss and reject this preference, see infra Part V.B, finding it to be exactly backwards.
for reduced charges faces the risk of acquittals, with the corresponding political and personal costs.

Intense prosecutorial screening may produce a small increase in the number of trials, but the more substantial change would likely be an increase in the number of “open” pleas—defendants pleading guilty as charged without any prior negotiated agreement with the prosecutor. Negotiated pleas are currently the rule; with this fundamental change in practice, they would become the exception. Open pleas, however, do not necessarily mean that defendants simply throw their fate to the court’s mercy: Defendants may obtain information from judges about a likely sentence, and in some cases negotiate with judges, and thus retain some voice in their fate.11

Many critics of plea bargaining lump negotiated pleas together with open pleas. Because an open plea is likely based on the defendant’s desire to receive a less severe sentence, even in the absence of a specific promise from the prosecutor, critics condemn open pleas as “implicit plea bargaining.” In our view, however, a screening system that produces mostly open pleas, or pleas that reflect specific information from judges, is more attractive than a system where negotiated pleas predominate.

The dishonesty and inaccessibility of plea bargaining are two of its least attractive features. Plea bargaining is dishonest because the offense of conviction does not match either the charges the state filed or the reality of the offender’s behavior. A particularly noxious form of dishonesty is overcharging by prosecutors—the filing of charges with the expectation that defendants will trade excess charges for a guilty plea.12

The public in general, and victims in particular, lose faith in a system where the primary goal is processing and the secondary goal is justice. The public doubts justice has been done when the sanction in a negotiated plea case does not match the actual behavior. Defendants and defense attorneys also consider bargaining for pleas to be dishonest, even when the bargain inures to their benefit. Defendants develop the cynical belief that they have received some undeserved favorable treatment because of a skillful defense lawyer or a sloppy or harried prosecutor. Defense attorneys in systems driven by bargains believe that they must convince most of their clients—even innocent defendants—to accept lesser punishments to avoid a substantial risk of much greater punishment.

11. One of the interesting features of the New Orleans process is the active involvement of judges in making offers to, and sometimes negotiating with, defendants. The involvement of judges in plea negotiations may represent an emerging trend around the country, as more state statutes, rules, and cases allow judicial involvement. See infra Part IV.B.


For our discussion of the relevance of the screening/bargaining tradeoff hypothesis to overcharging, see infra Part IV.A.
Honesty of the sort we are discussing, therefore, appears when the offense of conviction aligns as closely as possible with both the actual criminal behavior and the charges the prosecutor initially files. In an honest system, the prosecutor sends a single, consistent signal about the wisdom and worth of the case.

The second strong critique of plea bargains points out that the process is largely inaccessible; it is not open for review or evaluation. Plea bargaining is inaccessible because bargains are made in the shadows. Only the final product of each negotiation is reported on paper and in the courtroom. Negotiations may turn on a huge range of factors going well beyond the elements of the offense and the strength of the government's evidence. Some of these factors may be appropriate, others inappropriate, but only the parties themselves ever know the actual factors that determined the outcome of the public proceeding.

Jurisdictions that implement the screening/bargaining tradeoff will be more honest and more accessible. In hard screening systems, prosecutors will be less likely to "overcharge" or "undercharge." The weakest cases exit early, while those remaining should stand up at trial. A screening-based system should also be more accessible than a system of negotiated pleas, because the public (especially the victims of alleged crimes) will receive clearer and more accurate signals about how the system adjudicates and punishes crimes. The charge is declared publicly from the outset and is easy to evaluate.

In addition to being more attractive than the current reality, the prosecutorial practices we advocate here are viable, both in the short and the long run. This is no call for a doubling or tripling of the public budget for criminal adjudication.

We know this practice is viable because it is now operating in a few American jurisdictions, without much controversy and without attracting the attention it deserves. For instance, over the last three decades New Orleans District Attorney Harry Connick has emphasized early screening of cases and has actively discouraged any changes of criminal charges as a result of negotiations after the charges are filed. Furthermore, the office maintains an extraordinary database, containing detailed information on more than ten years' worth of felony cases. This data allows us to test whether the District Attorney's policies have any real impact.

The heart of this paper—the empirical sword that cuts through abstract claims about what is possible—is our study of the New Orleans data. It confirms that a prosecutor can invest serious resources in early evaluation of cases and maintain this practice over the long run. This screening leads to relatively high rates of declination (that is, refusals to prosecute a case after the police recommend charges). When combined with policies discouraging reductions in charges once they are filed, the results are lower levels of negotiated pleas, slightly higher rates of trial, and notably higher rates of open guilty pleas than in typical American jurisdictions. This combination of policies can survive political and administrative challenges of many types.
The implications of the screening/bargaining tradeoff for real world policies and practices are immense. Every prosecutor in the country should rethink how the office screens cases and how it explains its practices to the public. Of course, every prosecutor’s office invests some resources in the initial screening of cases. But this study calls on prosecutors to appreciate the link between screening and negotiated guilty pleas, and to use screening devices with the explicit goal of lowering the number of plea bargains. Every prosecutor’s office should now set targets for the maximum percentage of negotiated guilty pleas; then it should invest more resources in early screening until the office achieves those goals. The explicit connection between screening and plea bargains should be a regular part of a prosecutor’s self-assessment and public explanations for charging and trial decisions.

The screening/bargaining tradeoff should also become part of the public, political dialogue about the justice system, especially at election time. The interesting public question should not be the “conviction rate,” but rather the “as charged conviction rate.” This rate could be expressed as a simple ratio. The higher the ratio of “as charged convictions” to “convictions,” the more readily a prosecutor should be praised and reelected. A ratio near one—where most convictions are “as charged,” whether they result from guilty pleas or trials—is the best sign of a healthy, honest, and tough system. The lower the ratio of “as charged convictions” to “convictions” (approaching zero), the more the prosecutor should be criticized for sloppiness, injustice, and obfuscation. A lower ratio might also reflect a prosecutor’s undue leniency.

This Article begins by revealing the false dichotomy inherent in the current academic discussion about plea bargaining. The current literature sets up a tradeoff between plea bargaining and criminal trials, but does not consider other kinds of tradeoffs in the criminal process, including the tradeoff between enhanced screening and plea bargaining. This same false dichotomy limits the vision of reformers, who have traditionally offered interesting but limited alternatives to plea bargains in the form of quick trials and plea bans.

The second Part moves from bargaining to the screening side of the tradeoff. We explore here the legal scholarship and public discourse on screening and charging decisions, noting that this literature radically underplays
the institutional setting for an individual prosecutor's screening choice in a particular case. Part II looks to prosecutorial office policies and practices as the most prominent and promising source of limits on screening decisions. We make explicit here our reasons for considering these internal policies to be a form of law worth studying and changing.

The third Part of this Article describes the implementation of the screening/bargaining tradeoff in New Orleans. We describe the New Orleans system and present data about actual charging and bargaining decisions in New Orleans between 1988 and 1998 to assess whether the screening/bargaining tradeoff works.

The fourth Part considers whether the screening/bargaining tradeoff provides a more honest and accessible option than traditional plea bargaining-centered systems and trials from the perspective of prosecutors, defense attorneys, police, legislatures, and the public. The fourth Part also considers whether the well-known federal screening policies disprove the screening/bargaining hypothesis. The fifth Part considers the implications for prosecutors who want to implement the screening/bargaining tradeoff, and for their critics.

I. A FALSE DICHOTOMY: PLEA BARGAINING VERSUS TRIALS

A huge literature exists on plea bargaining, much of it produced over the past thirty years. Despite its girth and apparent variety, the literature shares

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15. The articles and books on this subject are certainly not monochromatic. They invoke different sorts of evidence and use different styles of argument, drawing on history, moral philosophy, economic theory, journalism, and other disciplines. See, e.g., Debra S.
this feature: It treats plea bargains and criminal trials as a zero-sum tradeoff.\textsuperscript{16} The literature assumes that fewer plea bargains will lead to corresponding increases in criminal trials.\textsuperscript{17} It evaluates plea bargaining in light of the criminal trial, since the virtues of criminal trials—their public and open nature, the independent decisionmakers, the defendant’s constitutional rights and privileges—have corresponding vices in plea bargaining. The scholars differ on how much a system can and should allow plea bargains to encroach on criminal trials, but their recommendations fall along a continuum between the fixed poles of plea bargains and trials.

This Part begins with a short description of the widely perceived virtues and vices of plea bargaining. In all of these discussions, the virtues and vices are proffered in the context of a seemingly simple choice: Should there be more bargains or more trials? The second section of this Part considers the traditional solutions of plea bans and “quick trials” offered by scholars who see plea bargaining as a serious problem.

A. The Traditional Plea Bargain/Trial Tradeoff

Most observers find that plea bargaining offers institutional advantages to each actor in the criminal justice system, and most especially to prosecutors and judges, compared to a trial-centered world. Because it offers something for everyone, the dominance of plea bargaining is easy to understand.

Simmering beneath the discussion of plea bargaining’s advantages and costs is an enormous normative question: Is plea bargaining desirable compared to a trial-centered system? There is no consensus answer to this question. When compared to a system where trials predominate, the effects of


16. The exceptions to this general rule are few and far between. Albert Alschuler, although he painstakingly documented the evils of plea bargaining and argued powerfully for more trials, also recognized the possibility of other options, including the prosecution of fewer cases. Alschuler, supra note 7, at 1011-13. The sort of screening that Alschuler discussed, however, involved less prosecution of consensual behavior. This sort of screening does not fulfill the four requirements we lay down for principled screening systems. See infra Part V.A.

plea bargaining are equivocal. In some circumstances, plea bargains look more attractive than trials; on other criteria, trials look better.

Most discussions of plea bargaining begin with the observation that plea bargaining makes the prosecutor more administratively efficient. Negotiated pleas allow each prosecutor to handle far more cases than she could if each case were to proceed to trial.¹⁸ For some, this greater efficiency makes the shift from trials to negotiated pleas worthwhile, perhaps even ideal.¹⁹ In theory, the prosecutor could divert resources from current cases to new cases, allowing the prosecutor to use plea bargains as a pricing mechanism to get the greatest deterrent power out of limited resources.²⁰

Plea bargaining makes prosecutors more efficient because it gives them a greater ability to predict outcomes in cases.²¹ In a system where almost every case is tried on the original charges, the prosecutor would have to account for some risk that the judge or jury would acquit. The government might win most trials but would lose others outright. On the other hand, where prosecutors can reduce charges, they achieve a reliable compromise between maximum punishment and no punishment at all. Some list this as one of the major benefits of plea bargaining, both because it allows prosecutors to predict the effects of their charges, and because the public receives “half a loaf” where it might have received none at all.²² Indeed, the compromise outcome allows the prosecutor to respond to the “equities” in particular cases.²³

¹⁸. See Charles P. Bubany & Frank F. Skillern, Taming the Dragon: An Administrative Law for Prosecutorial Decision Making, 13 AM. CRIM. L. REV. 473, 483 (1976) (noting that “the primary justification for plea-bargaining is system maintenance—the necessity of its use if most criminal offenders are to be processed”); Warren Burger, The State of the Judiciary—1970, 56 A.B.A. J. 929, 931 (1970) (discussing the large impact that even a small reduction in guilty pleas would have on the court system); Dominick R. Vetri, Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas, 112 U. PA. L. REV. 865, 881 (1964) (arguing that prohibiting plea bargaining would result in more trials which would in turn require more state and federal employees, including prosecutors); cf. Santobello v. New York, 404 U.S. 257, 260-61 (1971) (“If every criminal charge were subjected to a full-scale trial, the States and Federal Government would need to multiply by many times the number of judges and court facilities.”).

¹⁹. See MILTON HEUMANN, PLEA BARGAINING 170 (1978) (concluding that plea bargaining cannot be “reformed” away and “will inevitably provide a central means of disposing of cases” in both high and low volume districts).

²⁰. See Easterbrook, supra note 3, at 299 (describing how a prosecutor can “obtain the highest marginal return per case given his budget”).

²¹. 1 RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 131 (Alfred Blumstein, Jacqueline Cohn, Susan F. Martin & Michael H. Tonry eds., 1983) (noting that prosecutors and defense attorneys prefer the certainty of a plea to the uncertainty of a trial).


²³. See Zacharias, supra note 5, at 1136, 1137 fig.1 (including as a justification for plea bargaining that it allows prosecutors to equalize results among similarly situated defendants).
For the critics of plea bargaining, this compromise outcome is morally suspect, for the judge imposes a criminal sanction without any public resolution of what really happened. Further, critics say, the gain in prosecutorial efficiency is not enough to justify the practice because of its many other ill effects. Some maintain that a prosecutor’s ability to reach new cases creates new inefficiencies in a system designed to detect and punish true wrongdoers. Others insist that the true costs of expanded prosecutorial reach are beside the point; the reliance on guilty pleas rather than trials is simply wrong.

The clearest effect of plea bargains on trial judges is to marginalize them. Judges have little voice in traditional plea bargains. The parties settle on the charges and agree on the likely or acceptable sentence that will flow from the facts and charges they plan to present to the judge. A few judges might keep their sentencing options open and refuse to accept a guilty plea if the plea agreement includes a “binding” sentence agreement. But in the end, judges have every reason to listen to the recommendations of the parties and to follow the outlines of their agreement. In an adversary system, judges reason, the judge has limited justification to upset an agreement that satisfies both parties. The judge, facing major caseload pressures, has little incentive to

24. See Donald G. Gifford, Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion, 1983 U. ILL. L. REV. 37, 70-73 (discussing the trial process' “value to the community aside from determining which members of society should be labelled as criminals and punished”); Kenneth Kipnis, Plea Bargaining: A Critic's Rejoinder, 13 LAW & SOC'Y REV. 555, 557 (1979) (emphasizing that jury trials “open[] up the criminal process through citizen involvement” and thereby reduce the “cynicism and contempt bred by less visible proceedings”).

25. See LYNN M. MATHER, PLEA BARGAINING OR TRIAL? 141-42 (1979) (explaining how simultaneous consideration of guilt and sentencing issues leads to mixed use of evidence relevant to only one of those issues).

26. See L. HAROLD DEWOLF, CRIME AND JUSTICE IN AMERICA: A PARADOX OF CONSCIENCE 212 (1975) (“So long as the negotiation of pleas is permitted, it will continue ... to deprive great numbers of persons of their right to trial, to hide corruption ... and to serve as an escape hatch for the affluent or politically powerful [defendant].”); Albert W. Alschuler, The Changing Plea Bargaining Debate, 69 CAL. L. REV. 652, 670-80 (1981) (arguing that it is morally impermissible in Kantian terms to balance the virtues of trial against the economic costs of trial).

27. See Thomas A. Goldsmith, Felony Plea Bargaining in Six Colorado Judicial Districts: A Limited Inquiry into the Nature of the Process, 66 DENV. U. L. REV. 243, 244 (1989) (reporting that most of the judges surveyed felt that plea bargains are forced on them); George W. Pugh & Dallis W. Radamaker, A Plea for Greater Judicial Control over Sentencing and Abolition of the Present Plea Bargaining System, 42 LA. L. REV. 79, 80 (1981) (“Plea bargaining is an area which judges, hesitating to enter, leave largely to the prosecutor and defense lawyer.”).


30. See William Stafford, Settling Sentencing Facts at the Guilty Plea Hearing: A
inquire behind the parties’ agreement. Indeed, sentencing judges tend to validate and encourage bargains through a “plea discount” (or a trial penalty): They impose lighter sentences on those who waive their right to trial.

These advantages in plea bargaining for prosecutors and judges are contrasted to the costs that would come with shifting substantial numbers of plea bargains into the full trial process. Indeed, operating under the assumption that the only available tradeoff is between plea bargains and more trials, many observers of plea bargaining are convinced that any normative arguments about the effects of plea bargaining are pointless. The question, critics say, is not whether plea bargaining is more desirable than a system resolving most cases through trial, but whether it is possible to replace our current system, dominated by negotiated guilty pleas, with a different one dominated by criminal trials.

B. Traditional Alternatives to Plea Bargaining

The sharpest critics of plea bargaining have offered some responses to the claim that alternatives to plea bargaining are not feasible. The search for viable alternatives, however, remains trapped in a trial-centric world. The possibilities for reform have, like the assessments of the virtues and vices of plea bargaining, been limited by the false dichotomy between plea bargains and trials.

Scholars have looked to other times or places (through historical or comparative studies) to observe systems that rely less on negotiated pleas. In early America, plea bargains were virtually unknown. Plea bargaining became the dominant method of resolving criminal cases in the United States some time during the nineteenth century. The primary engine behind the shift from trials to plea bargaining was an increasing civil and criminal caseload. The caseload burden was multiplied by institutional and doctrinal changes that made


32. See J. Fred Springer, Burglary and Robbery Plea Bargaining in California: An Organizational Perspective, 8 JUST. SYS. J. 157, 168-71 (1983) (detailing findings of study showing shorter sentences for convictions based on plea bargains); Comment, The Influence of the Defendant’s Plea on Judicial Determination of Sentence, supra note 14, at 206-07 (“87 per cent of the judges who acknowledged that the plea was [a relevant factor in sentencing] indicated that a defendant pleading guilty to a crime was given a more lenient punishment than a defendant who pleaded not guilty.”). Plea discounts in the federal system were assessed to be about one third of the sentence before the implementation of new sentencing guidelines in the 1980s, and a roughly similar discount for pleading guilty was then built into the guideline system. U.S. SENTENCING COMM’N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS (1987).

33. See Albert W. Alschuler, Plea Bargaining and Its History, 13 LAW & SOC’Y REV. 211, 240 (1979) (noting that “cumbersome and expensive” jury trials of the twentieth
trials more costly and time-consuming. Plea bargaining responded to the needs of prosecutors and judges to dispose of large numbers of cases when the public failed to fund increases in the system’s capacity to try cases.35

Scholars have also looked at modern jurisdictions with unusually high trial rates, which are typically explained by “quick trials” (or, some say, “slow pleas”). The search for alternatives to plea bargains also points to periodic experimental efforts by a few American prosecutors to “ban” plea bargaining entirely.

...
1. Short trials.

Whenever prosecutors claim to have reduced plea bargains and increased trial rates, academics respond with more than their usual dose of skepticism. Bargaining is inevitable, say observers, not only because of severe caseload pressure, but also because of social habits. The “repeat players” in criminal cases—prosecutors, experienced defense attorneys (especially public defenders), and judges—interact in predictable ways. Prosecutors and defense attorneys develop routines for handling similar cases, and the “work group” makes it difficult for any one actor to change bargaining terms too abruptly. The human beings who engage daily in this process have a limited capacity for conflict and innovation, and will naturally, over the long haul, find ways to accommodate one another.

Sometimes, however, this theory about group dynamics is hard to square with reality. For those who wish to establish that plea bargaining is an inevitable and irrepressible force in American criminal justice, Philadelphia is a problem. The city has long operated a system that relies more on short bench trials than on pleas of guilty. A number of scholars conducted case studies in Philadelphia (and a few other cities with high rates of bench trials) and concluded that the trials in those cities were not truly adversarial trials. Instead, they were “slow pleas” of guilt. The brief trials allowed the defendant to present evidence about the circumstances of the case, not to obtain an acquittal, but to influence the judge at sentencing.

36. See SAMUEL WALKER, TAMING THE SYSTEM 87 (1993) (arguing that the “informal norms” established by prosecutors, defense attorneys, and judges “are capable of effectively resisting any significant change in operating procedures imposed from without”).
Stephen Schulhofer visited the Philadelphia courts and took away a different impression. In his famous 1984 article, Schulhofer observed a large number of bench trials in the city and concluded that they were genuinely adversarial proceedings where defendants retained many of the constitutional protections sacrificed during plea bargaining. Schulhofer called for other jurisdictions to follow Philadelphia's lead and to treat short trials as a viable alternative to plea bargaining.

The point of studying Philadelphia and other cities with exceptionally high trial rates is to evaluate this one alternative to negotiated pleas, since it fits the preconceptions of the plea bargain/trial tradeoff. For those debating short trials, the combination of prosecutorial screening and open guilty pleas does not present another alternative worth studying, since it qualifies in this world view as, at best, "implicit bargaining."

2. Plea bans.

Explicit efforts to shorten trials have not been the preferred technique among American prosecutors who want to limit the reach of negotiated pleas. Instead, the handful of prosecutors who aspire to "ban" plea bargaining—either for targeted crimes or for the entire criminal docket—have issued strong ukases against bargaining, enforced by more rigorous screening and modest staffing increases, as their most workable solution.

Academic verdicts on these experiments have been subdued, because the efforts never produced the expected large increases in the trial rate. These periodic experiments deserve closer attention and more enthusiastic reception than they have received. Granted, they demonstrate how negotiations between defense lawyers and prosecutors will persist in some form despite a nominal "ban" on negotiations. But they also show the power of screening—combined

40. See Schulhofer, supra note 3, at 1062-86.
41. See id. at 1106-07. Other leading critics of plea bargaining have also endorsed techniques for shortening trials as the best alternative to widespread negotiated pleas. See Alschuler, supra note 7, at 969-70; Pugh & Radamaker, supra note 27, at 84, 118-21. Prosecutors in some cities have followed this strategy. See Anthony M. DeStefano & Patricia Hurtado, B'klyn Makes Case for Faster Trials, N.Y. NEWSDAY, Apr. 23, 1993, at 8.
44. See Douglas D. Guidorizzi, Should We Really "Ban" Plea Bargaining?: The Core Concerns of Plea Bargaining Critics, 47 EMORY L.J. 753, 754 (1998) (concluding that "the claims of limited success [of plea bans] in some jurisdictions are not strong enough to suggest that a complete prohibition of plea bargaining can ever be achieved").
with restrictions on charge bargains—to reduce the importance of negotiated pleas.

Among the most famous American plea bargaining bans occurred in Alaska during the 1970s and 1980s. In 1975, state Attorney General Avrum Gross declared that prosecutors would no longer engage in charge bargaining or sentence bargaining. Attorney General Gross hoped to restore public confidence in the system, increase the number of trials, improve the litigation skills of prosecutors, and return prosecutors to their traditional roles of evaluating evidence and trying cases instead of negotiating.45

Major studies in 1978 and 1991 evaluated the impact of the Alaska plea ban.46 By all accounts, both charge bargaining and sentence bargaining became rare events during the first ten years of the policy. During the late 1980s, charge bargains reappeared, but prosecutors continued to avoid sentence bargains. For a few years, the trial rate increased modestly. Seven percent of charged cases went to trial before the ban, and the rate moved to 10% before returning to 7% by the end of the 1980s.47

Since the cases were not ending in negotiated pleas or trials, what was happening to them? The answer was a combination of aggressive screening and open guilty pleas. Before the ban, prosecutors in Fairbanks refused to prosecute about 4% of the felonies referred to them by the police or other investigators. After the ban, the proportion of felonies that prosecutors declined to prosecute increased to about 44%.48 A large portion of the case load (about 23%) was disposed of through open pleas of guilt.49 This was part of the Attorney General’s thinking when he created the plea ban. More careful selection of cases would make it possible to stick with the initial charges, even in front of a judge or jury.

The Alaska experience received lackluster academic reviews. Some implied that the failure to increase trials proved that unseen bargains were still driving the system, and explained the high number of open guilty pleas.50

47. See Carns & Kruse, supra note 46, at 43 tbl.1.
48. See Carns & Kruse, supra note 45, at 316. In Anchorage, the number of felony cases screened out went from 11% in 1974-1975 to 25% in 1987.
49. See RUBINSTEIN ET AL., supra note 46, at 146.
50. WALKER, supra note 36, at 95 (“There were subtle adaptations, but no fundamental changes.”). Carns and Kruse themselves temper their findings because “implicit” bargaining may have occurred. Carns & Kruse, supra note 46, at 35. But see Jacqueline Cohen &
Others pointed to the reappearance of charge bargaining after ten years, and suggested that it is futile to place controls on the quintessential prosecutorial decision of charge selection. Some implied that Alaska was too unusual a jurisdiction to offer any guidance to prosecutors in most major American cities. However, other jurisdictions scattered around the country have duplicated pieces of the Alaska experience over the years. Some prosecutors in other locales have picked out priority crimes like homicide and banned plea bargains for those cases. Some of the bans target particular forms of bargaining rather than particular crimes. The reaction to these experiences,


51. See Alschuler, supra note 7, at 943 (noting that “one may suspect that some form of explicit or implicit bargaining . . . continues to exert an influence”); Colquitt, supra note 4, at 707 (noting that charge bargaining is still permitted in Alaska); Guidorizzi, supra note 44, at 775-77 (noting that Alaska prosecutors are given greater flexibility in charge bargaining). On the inevitability of charge bargaining, see generally John Gleeson, Sentence Bargaining Under the Guidelines, 8 Fed. Sentencing Rep. 314 (1996) (noting that if court rejects plea bargain based on sentence recommendation, prosecutor simply dismisses or charge bargains).


53. In the 1970s, the prosecutor in Maricopa County (Phoenix), Arizona barred plea bargains in cases involving designated crimes such as drug sales, homicide, robbery, burglary, assault with a deadly weapon, and sexual misconduct. The policy did not increase trial rates for these crimes because more defendants pled guilty as charged. Moise Berger, The Case Against Plea Bargaining, 62 A.B.A. J. 621 (1976). Similar reports came after prosecutors in Multnomah County, Oregon and Black Hawk County, Iowa banned plea bargaining for selected crimes during the early 1970s. See Parnas & Atkins, supra note 6, at 112-13 (describing Oregon ban); Note, The Elimination of Plea Bargaining in Black Hawk County: A Case Study, 60 Iowa L. Rev. 1053 (1975) (describing Iowa ban). In 1994, David Lynch published an account of a pseudonymous county that discouraged (but did not ban) plea bargaining more generally. David Lynch, The Impropriety of Plea Agreements: A Tale of Two Counties, 19 Law & Soc. Inquiry 115 (1994). From reading Lynch, the trial rate was somewhat higher than in Alaska, yet according to Lynch, open pleas of guilty remained the most common method of disposition.

54. In an example of one such effort to discourage some forms of bargaining, the District Attorney for Manhattan in the mid-1970s prohibited his attorneys from recommending sentences and established (and published!) a 1974 memorandum suggesting specific charge discounts to offer in exchange for guilty pleas. Richard H. Kuh, Plea Bargaining: Guidelines for the Manhattan District Attorney’s Office, 11 Crim. L. Bull. 48 (1975). Thomas Church documented the efforts of a county in a Midwestern state during the early 1970s to eliminate charge bargaining in drug sale cases. Thomas Church, Jr., Plea Bargains, Concessions and the Courts: Analysis of a Quasi-Experiment, 10 Law & Soc’y Rev. 377 (1976). The prosecutor left sentence bargaining in place, and the proportion of the cases resolved through defendants pleading guilty as charged increased from 17 to 90% between 1972 and 1974. Id. at 383. In Church’s view, the county’s experience demonstrated the inevitability of plea bargaining. But his interviewees believed that the concessions the defendants were promised after the ban were far less reliable and valuable
like the reaction to the Alaska plea ban, has been subdued. If these prosecutors were not increasing their trial rates, the critics found the effort unimportant.55

These experiences do not mean that any ban on charge reductions will produce small trial increases and large numbers of open guilty pleas. If prosecutors do not change their screening principles to insist on more declinations of cases referred to the office, the dispositions shift in other directions. In El Paso County, Texas during the 1980s, the chief prosecutor announced an end to all plea bargaining in burglary cases. There was no organized effort to change the screening of such cases, and the number of trials increased enough to create a serious backlog of untried cases.56

Partial bans on plea bargaining appear regularly around the country. Most prosecutors today who plan to restrict plea negotiations focus on priority crimes, such as homicide or sex crimes.57 Some of the bans are limited to particular courts or phases of litigation, such as the statutory ban on plea bargains for most serious felonies in Superior Court in California,58 or the ban on plea bargaining in the Supreme Court in the Bronx in the mid-1990s.59


56. For detailed descriptions of the backlog resulting from the El Paso ban, see Sam W. Callan, An Experience in Justice Without Plea Negotiation, 13 LAW & SOC’Y REV. 327 (1979); Howard C. Daudistel, On the Elimination of Plea Bargaining: The El Paso Experiment, in PLEA BARGAINING 57 (William F. McDonald & James A. Cramer eds., 1980); Robert A. Weninger, The Abolition of Plea Bargaining: A Case Study of El Paso County, Texas, 35 UCLA L. REV. 265 (1987). Similar backlogs resulted from efforts in Wayne County, Michigan (Detroit’s location) during the 1970s that barred plea bargains for defendants charged with possession of a firearm while engaged in a felony under a statute that required a mandatory sentence. See Heumann & Loftin, supra note 39 (describing effects of prosecutor’s promise not to seek plea bargains under the felony firearms statute); Colin Loftin, Milton Heumann & David McDowall, Mandatory Sentencing and Firearms Violence: Evaluating an Alternative to Gun Control, 17 LAW & SOC’Y REV. 287 (1983) (same); Raymond T. Nimmer & Patricia Ann Krathaus, Plea Bargaining: Reform in Two Cities, 3 JUST. SYS. J. 6 (1977) (comparing Detroit’s trial rates to Denver’s). In Wayne County, charge reductions mostly disappeared, but the prosecutors actually declined fewer cases than before. Trials increased somewhat, but the most common outcomes involved negotiated sentence bargains. The negotiations sometimes did not qualify as “sentencing bargaining” in the classic sense because some of the discussions about sentences took place directly between the judge and the defense counsel. Loftin et al., supra. In the early 1980s in Merrimack County, New Hampshire, a ban on sentence bargains resulted in increased trial rates and dismissal of cases after filing. Amy R. Pellenberg Fixsen, Plea Bargaining: The New Hampshire “Ban,” 9 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 387 (1983).


58. See Jeff Brown, Proposition 8: Origins and Impact—A Public Defender’s Perspective, 23 PAC. L.J. 881, 939 (1992) (noting that California’s Proposition 8 prohibited plea bargaining for any serious felonies as defined by Cal. Penal Code 1192.7(c) and drunk driving unless any one of three “exceptional situations” existed).

59. For descriptions of Bronx District Attorney Robert T. Johnson’s decision to end...
When plea bans are limited to a particular court (such as the highest trial court), the effects are usually minimal because the bargainers simply move to a different (typically earlier) point in the process.60

Plea bans exist today, but we know little about their effects on case dispositions and sentences. The attention of academic observers has strayed to other areas, even as prosecutors keep innovating. There have been few efforts to sort out the amazing variety of plea bans over the last twenty years. Apparently, once it was established that plea bans would not necessarily increase the trial rate, these real-world developments no longer fit the terms of academic debate and were ignored. For each reform proposal—greater use of trials, fast trials, and plea bans—the critical question has remained the tradeoff between plea bargains and trials.

Thirty years of scholarship has missed a fundamental perspective on plea bargaining: there are in fact many alternative points of comparison when assessing the wisdom and necessity of plea bargains. Bargaining systems could be devised to bring negotiations more into the light. Review systems could be established, perhaps by allowing appeals after pleas on much broader grounds than currently allowed.61 Executive branch authorities such as parole boards could modify or enhance sentences to adjust for erroneous or excessive pleas.62

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61. Appellate challenges to plea bargains are currently limited to claims that pleas were coerced or made without effective defense counsel or without providing the defendant with minimal information about the consequences. People v. Seaberg, 541 N.E.2d 1022 (N.Y. 1989).

62. The federal parole system served this function before the appearance of the sentencing guidelines. See John C. Coffee, Jr., The Repressed Issues of Sentencing: Accountability, Predictability, and Equality in the Era of the Sentencing Commission, 66 GEO. L.J. 975 (1978) (criticizing the efforts of the legislature “to achieve procedural regularity in the sentencing and parole process without discarding the idea of individualization”). Federal parole reform sought to achieve principled release across a
Substantive criminal code reform can also be considered as an alternative to plea bargaining. Criminal codes filled with poorly worded and highly duplicative provisions not only invite bargains, but also less honest bargains. This broader perspective on the possible tradeoffs between plea bargains and many other aspects of the criminal justice process requires an understanding of the full range of institutions involved in the criminal system, and of the multiple overlapping processes for assessing and resolving cases. To apply the screening/bargaining tradeoff we highlight and discuss in this Article, we must first understand the institutional setting of the prosecutor's decision to file or decline criminal charges. The next Part turns from bargaining to screening and explores the internal regulation of prosecutorial discretion.

II. THE SCREENING ALTERNATIVE

If plea bargaining and massive increases in trials are not the only available options, what alternatives might exist? In this Part we argue that prosecutors could establish "hard screening" procedures. Such procedures involve more than just a policy of prosecuting fewer cases. Four interlocking features define the hard screening practices we advocate as a better alternative to negotiated guilty pleas: early assessment, reasoned selection, barriers to bargains, and enforcement.
The prosecutor must spend resources immediately after receiving a case to
gather information and evaluate the prospects at trial. The various prosecuting
attorneys who decline charges in some cases and select charges in others must
engage in a reasoned selection; that is, they must apply a common set of criteria
that establish priorities for the entire office. Once the charges are in place, the
office must normally expect trial prosecutors to keep the charges as originally
selected. Negotiation over dismissing or reducing charges is either forbidden
or severely limited. In this system, the prosecutor spends resources up front in
assessing the case, and then lives with the consequences through final
adjudication, whether by an open plea or at trial. Taken together, the intent
behind these hard screening policies is to shift case outcomes away from
negotiated guilty pleas.

The linkage between screening and the pattern of dispositions in a
jurisdiction has attracted no comment. Academic writers have assigned
prosecutorial screening to play many bit parts, but no starring roles. A few
pieces examine the screening choices of prosecutors in specialized contexts,
such as limiting the federalization of crime, or white-collar crime
investigations. But the nature of screening choices in normal cases,
accounting for most of the volume in a prosecutor’s office, has not received the
sustained attention it deserves.

Our goal is to examine prosecutorial screening discretion not as a problem
to be solved or a threat to justice in individual cases, but as a regulatory device,
a means to various ends in the prosecutor’s office. The important regulation
comes from within the office rather than from external reviewers.

64. See Michael A. Simons, Prosecutorial Discretion and Prosecution Guidelines: A
65. For descriptions of prosecutorial discretion in different white-collar crime contexts,
see generally Donald I. Baker, To Indict or Not to Indict: Prosecutorial Discretion in
Sherman Act Enforcement, 63 CORNELL L. REV. 405 (1978); Kathleen F. Brickey, Charging
Kades, Exercising Discretion: A Case Study of Prosecutorial Discretion in the Wisconsin
Department of Justice, 25 AM. J. CRIM. L. 115 (1997). The vast literature on the fairness of
the death penalty mentions prosecutorial decisionmaking as a source of bias, racial and
otherwise. See Samuel R. Gross, ABA’s Proposed Moratorium: Lost Lives: Miscarriages of
Justice in Capital Cases, 61 LAW & CONTEMP. PROBS. 125, 142 (1998) (“[M]ost of the work
of sorting criminal cases after arrest is done pretrial, by the exercise of prosecutorial
discretion to dismiss, reduce charges, or recommend or agree to a particular sentence.”);
Rory K. Little, Why a Federal Death Penalty Moratorium?, 33 CONN. L. REV. 791, 801
(2001) (“The federal system leading to prosecution for, and conviction of, capital charges is
exhaustively protective and thorough in its review. First, federal prosecutors and centralized
Main Justice review screen out questionable capital cases.”).
66. Our perspective emphasizes the office rather than the individual prosecutor. The
approach finds its closest theoretical kin in the new legal process school. See Edward L.
Rubin, The New Legal Process, the Synthesis of Discourse, and the Microanalysis of
Institutions, 109 HARV. L. REV. 1393, 1394 (1996) (arguing that “contemporary law and
economics and outsider scholarship” attempt “to locate law, social policy, and social change
in a closely analyzed institutional context”).
deliberate choices about screening, a chief prosecutor can change the place of jury trials, the pattern of convictions and dismissals, the allocation of police and correctional resources, and the public's access to information about the system. And it is the consistency of these effects across normal cases—not just the prevention of the occasional biased prosecution—that offers the greatest benefits of principled screening.

This Part begins with a review of the negative treatment that prosecutorial screening typically receives. We view prosecutorial screening as a plan rather than a random event, and thus as an opportunity rather than a threat. The two final sections of this Part look at the goals that prosecutors might pursue through internal administration, and focus on one such goal, the minimization of plea bargaining.

A. Screening as Random Event or Plan?

Screening could include any fork in the criminal justice road—stopped or not stopped, arrested or not arrested, charged or not charged, imprisoned or not imprisoned, released or not released. That suspects and cases are screened is a familiar idea. But the usual account of screening describes the end product more than the decisionmaking process itself. The most famous illustration of this product-oriented view of screening appears as a chart in the 1967 President's Commission on Crime, which shows potential cases that fall away like apples from the tree. The chart portrays the steady attrition from the initial incident, through investigation, charging, dismissals, acquittals, and then, at the end, to the few remaining incidents where an offender is convicted and sentenced to prison.67 But the chart does not explore who dropped the cases and why.68 Those who ask why cases drop out assume that they should not. When cases do drop, something either wrong or random has occurred.69

Screening can be understood in a very different way, as systematic and affirmative decisions. These decisions may move a case forward or reject the case. Both sorts of decisions are interesting, and either may be principled or unprincipled, consistent or inconsistent. This perspective on screening shifts from the mere product of the decisions to the decisionmaking calculus itself.


68. Even the language in regard to most screening discussions is passive: cases "drop out," or are "dropped" (though it is not always clear who does the dropping) or perhaps "diverted." They are rarely "thrown" or "selected" and never "pushed" or "shoved" out of the system.

69. The most famous response to the question of why cases drop out appears in Vera Inst. of Justice, supra note 8, at 19-20. See also Floyd Feeney, Forrest Dill & Adrienne Weir, Arrests Without Conviction: How Often They Occur and Why 6 (1983).
A few screening decisions, such as grand jury review and preliminary hearings, are already perceived in this more active and positive light. The screening function of the grand jury is said to act as barrier to oppressive or biased decisions by prosecutors.\(^{70}\) One might say the same (and with more plausibility) about preliminary hearings.\(^{71}\) The police screen at every step of their investigative, arrest, and preliminary charging functions.\(^{72}\) Just as surely as judges at preliminary hearings, and more consciously than police officers making street-level judgments, prosecutors send some cases out of the system and reevaluate others.

**B. Screening as Threat or Opportunity?**

The leading scholarly efforts to evaluate prosecutorial screening discretion appeared twenty to thirty years ago.\(^{73}\) The pieces held enormous promise. They focused (properly) on office-wide prosecutorial choices rather than the individual decisions of prosecuting trial attorneys. Some emphasized internal

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\(^{70}\) Grand juries exercise at most a modest screening power, a fact recognized by the familiar courthouse saying that a grand jury would indict a ham sandwich if the prosecutor asked it to do so. R. Michael Cassidy, *Toward a More Independent Grand Jury: Recasting and Enforcing the Prosecutor's Duty to Disclose Exculpatory Evidence*, 13 GEO. J. LEGAL ETHICS 361, 361 (2000). Grand juries typically do not have sufficient information to assess patterns of charges, and there is no remedy for undercharging or failure to bring a case before the grand jury for indictment. In exceptional circumstances, grand juries may issue reports or "no bills" encouraging or signaling prosecutors to decline prosecutions in classes of cases. See MARC L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES—PROSECUTION AND ADJUDICATION: CASES, STATUTES, AND EXECUTIVE MATERIALS 246-47 (1999).

\(^{71}\) Preliminary hearings are said to be necessary because, in the words of Herbert Packer, "[t]he prosecutor cannot be trusted to determine" if there is prima facie evidence for a case "any more than the police can." HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION 207 (1968); see also Laura Berend, *Less Reliable Preliminary Hearings and Plea Bargains in Criminal Cases in California: Discovery Before and After Proposition 115*, 48 AM. U. L. REV. 465, 486-87 (1998) (noting that preliminary hearing can "facilitate the ascertainment of the facts and a fair trial").

\(^{72}\) The perspective on police screening remains passive; a police judgment to stop, investigate, arrest, or charge a suspect draws attention only because it confirms the power of the police. The patterns and reasons lying behind those judgments get far less ink than the basic fact that the power exists. See generally LAFAVE ET AL., supra note 22, § 1.3(d), (h) ("Some police departments have developed 'solvability' or 'screening' models aimed at assisting officers in determining whether further investigation is worth pursuing as to particular types of crimes.").

The screening concept also operates at the back end of the criminal process for sentencing and release determinations. Sentencing guidelines, for example, sort offenders after conviction.

control mechanisms within prosecutors' offices rather than external control techniques such as statutes or judicial review.

But most of these early efforts to understand prosecutorial screening also singled out an overly narrow purpose for "controls" on prosecutorial discretion. Their examinations of prosecutorial screening discretion aimed to control biased or "selective" prosecution in individual cases.\textsuperscript{74} While principled screening practices might serve such a function, they do so only as a byproduct of a broader goal. Screening can prevent arbitrary allocation of resources and inconsistent decisions in prosecution more generally.

In his path-breaking 1969 volume \textit{Discretionary Justice}, Kenneth Culp Davis called for limits on the discretionary power vested in both police and prosecutors in the American legal system. According to Davis, "the American legal system seems to be shot through with many excessive and uncontrolled discretionary powers, but the one that stands out above all others is the power to prosecute or not to prosecute."\textsuperscript{75} Two years later, Norman Abrams wrote to establish the viability of developing internal office policy to guide the exercise of prosecutorial discretion. His argument focused on whether such internal guidance should be published and subject to judicial review.\textsuperscript{76} A decade after Abrams, Richard Frase studied in some detail the declination practices of federal prosecutors in one district and discussed the implications of those practices,\textsuperscript{77} and James Vorenberg developed recommendations for the "decent restraint" of prosecutorial discretion, particularly as found in charging and plea bargaining decisions.\textsuperscript{78} Vorenberg's proposals emphasized controls over prosecutors coming from legislatures, sentencing judges, and defense lawyers.\textsuperscript{79}

These early works presented later scholars with two important choices. In both cases, the later writers chose the wrong path. The first choice involved the most important source of controls over prosecutorial choices. Should those controls come from within the prosecutor's office or from other institutions?

Frase concentrated on the internal controls, suggesting that prosecutors study their existing patterns of declinations and the reasons given for those
refusals to prosecute, and then develop internal guidance to build on that experience. Vorenberg tilted more decisively toward the external controls. Sentencing judges, he suggested, could constrain plea bargaining through granting a uniform discount for defendants who waive their trial rights. Legislatures could limit prosecutorial authority through reform of the substantive criminal code, revising it to be more precise and to allow less judgment.

More recent scholarship follows the path that Vorenberg marked, unfortunately choosing the external over the internal controls. While external controls might be useful and relevant, they are decidedly limited. Experience here is telling: It has proven almost impossible to convince judges or legislatures to create meaningful limits on the screening decisions of prosecutors.

The early screening literature made a second choice concerning the most important purpose for controls on prosecutorial discretion to serve. Vorenberg and Davis (and to a lesser extent, Abrams) worry that some prosecutors select

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80. Frase, supra note 8, at 292-99.
81. Vorenberg, supra note 73, at 1571-72.
82. Id. at 1567. Vorenberg’s call for code revision came at precisely the point when federal code revision efforts had died and sentencing reform efforts had been put forward as an alternative. Vorenberg also advocated a set of procedural innovations to allow outside scrutiny of specific discretionary decisions, including “screening conferences” where defense lawyers could participate, and requirements that prosecutors generate a “record of decisions.” Id. at 1565. Davis and Abrams were more equivocal about internal versus external controls. Each encouraged prosecutors to develop and announce substantive guidelines to direct their discretionary choices. Davis, supra note 73, at 225; Abrams, supra note 73, at 53-57. But Abrams also believed that most of the existing guidance was worthless. It dealt more with procedure than substantive criteria for selecting cases. He therefore found it necessary to suggest ways for judges and legislatures to replace or reinforce the policymaking power of prosecutors. Abrams, supra note 73, at 7-9, 35-53. Davis also suggested the possibility of broader judicial review under administrative law principles. Davis, supra note 73, at 209-12. But see Ronald J. Allen, The Police and Substantive Rulemaking: Reconciling Principle and Expediency, 125 U. Pa. L. Rev. 62, 67 (1976) (“unequivocally reject[ing] the suggestion that the police should engage in rulemaking”).


84. Legislatures have passed very few statutes that have directly resulted in a meaningful change in prosecutorial charging decisions. See generally Norm Maleng, Charging and Sentencing: Where Prosecutors’ Guidelines Help Both Sides, Crim. Just., Winter 1987, at 6. However, Daniel Richman has begun to explore in more detail how legislative choices about funding and office structure can change the charging patterns. See generally Daniel C. Richman, Federal Criminal Law, Congressional Delegation, and Enforcement Discretion, 46 UCLA L. Rev. 757 (1999) [hereinafter Richman, Federal Criminal Law]; Daniel C. Richman, “Project Exile” and the Allocation of Federal Law Enforcement Authority, 43 Ariz. L. Rev. 369 (2001).
targets on the basis of invidious motives such as racial or gender bias. Their proposed controls on prosecutorial discretion aim, above all, to stop discrimination in individual cases.

More recent legal scholarship on the question of prosecutorial discretion retains this focus on discrimination. Today it is hard to find a spirited defense of prosecutorial discretion. Most authors see only the bad effects of discretion: biased prosecutions that systematically harm defendants from particular demographic groups, or random prosecutions that apply the state’s coercive power in unprincipled and arbitrary ways.

We agree with these arguments, as far as they go. The threat of unequal treatment for individual defendants is real, and offers one powerful reason to monitor the charging discretion of the individual prosecutor. But this view also misses a major opportunity; it misses the potential benefits of screening for an entire justice system. Prosecutors can use their screening practices not just to prevent unequal treatment in individual cases, but to shift the method of disposing of all cases. Prosecutors can use screening principles to eliminate some plea bargains and to allocate office resources toward priority crimes or defendants. Screening principles can reveal otherwise hidden choices about the allocation of resources, creating a system that is more transparent to the public.

Several empirical studies of prosecutorial discretion from the 1960s glimpsed the possibilities. The very earliest work on prosecutorial charging decisions catalogued the sorts of factors that might convince a prosecutor to charge or not to charge in a particular case: strength of the evidence, seriousness of the offense, and so forth. The next wave of scholarship in the 1970s began to measure how often various factors mattered to the prosecutor.

85. Davis, supra note 73, at 22; Vorenberg, supra note 73, at 1539-43.
From the outset, those studying prosecutorial charging in the field noticed that office resources figured into the charge decision.\textsuperscript{90}

We believe the virtues of screening reach much further. Prosecutors can use screening principles to achieve purposes far beyond balancing existing resources. Sometimes prosecutors change screening practices deliberately as a way to alter the overall mix of crimes prosecuted and types of dispositions.

C. Setting Prosecutorial Goals from the Inside

Legal scholars rarely discuss the internal administration of justice agencies. The reasons for this unsatisfactory coverage are familiar to any close reader of criminal procedure literature. First, these issues are not framed in constitutional terms, and judges do not resolve them. This deprives legal scholars of their traditional window on the law. Second, good information about the operation of prosecutors' offices is hard to find or collect. Third, jurisdictions vary, offices within jurisdictions vary, individual offices vary over time, and individual prosecutors vary in their approaches. These multiple levels of variation make it hard to evaluate and generalize about prosecutorial policies and practices, including screening. Whatever the reason for the failure, scholars overlook central features of the American criminal justice system when they fail to consider the values that agencies might seek and how they might achieve those goals through internal rules.\textsuperscript{91}

Many goals could guide the development of internal rules, procedures, and habits. Prosecutors need to allocate their limited resources.\textsuperscript{92} But what values will inform those guidelines and rules, made necessary by limited funds?

\textsuperscript{90} Some noticed that prosecutors sometimes shifted their charging decisions systematically to preserve an equilibrium in resources. For instance, if conviction rates dropped for a particular crime, prosecutors shifted to other crimes as a way of preserving resources. \textit{Kathleen Brosi, U.S. Dep't. of Justice, A Cross-City Comparison of Felony Case Processing} 47 (1979); Robert L. Rabin, \textit{Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion}, 24 \textit{Stan. L. Rev.} 1036, 1047-52 (1972). Such studies of charging practices have gone out of fashion today. The Brosi and Boland studies, part of a series sponsored by the Bureau of Justice Statistics ("BJS"), are no longer published. Although BJS tracks some of the same processing statistics in its regular reports on large urban jurisdictions, it does not regularly report on declinations of matters received in prosecutors' offices. Instead, the reports begin when the prosecutor files the case.

\textsuperscript{91} Occasionally legislatures or courts will impose priorities on prosecutors from the outside. \textit{See, e.g., State v. Lagares}, 601 A.2d 698 (N.J. 1992) (requesting Attorney General to draft guidelines for prosecutorial decisionmaking with regards to enhanced sentences); Richman, \textit{Federal Criminal Law}, supra note 84, at 789-90. But priorities more often come from within each prosecutor's office.

\textsuperscript{92} Funding of many prosecutors' offices is often quite modest and the average tenure of prosecutors quite short. The sense in most prosecutors' offices is that every decision to investigate or charge draws on limited resources and implies a decision not to investigate or prosecute in some other cases. \textit{See Joan E. Jacoby, Case Evaluation: Quantifying Prosecutorial Policy}, 58 \textit{Judicature} 486, 487 (1975).
Principles favoring the prosecution of "stronger" over "weaker" cases beg the question: Is a "stronger" case one where conviction is more certain at trial, where a plea is likely, or where the interests served by criminal prosecution (deterrence, retribution, and so forth) are strongest?93

A prosecutor might show a concern for equal treatment. Elected state prosecutors might handle with special care any cases that could catch the attention of the media or voters.94 Their concerns might focus on individual notorious cases or on categories of cases that provoke heightened public interest (such as homicides, drug crimes, sexual assault, or domestic abuse).

Once a lead prosecutor settles on a particular goal, there are many ways to implement it. In smaller offices, and for many minor policies, the policies may never receive formal expression. They are passed from one attorney to the next through informal training and experience.95 Elsewhere, the supervising prosecutors might state the policies (and even the goals) explicitly. The statement might take the form of written rules or announcements during office meetings.96

Various kinds of supervision can determine whether the other attorneys in the office are in fact following the policy. These include training programs, the designation of special units to handle particular functions (say, bail), or types of cases (say, domestic violence), or requiring approval of supervisors for some types of decisions.97 A less familiar mechanism for implementing office

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93. See Leonard R. Mellon, Joan E. Jacoby & Marion A. Brewer, The Prosecutor Constrained by His Environment: A New Look at Discretionary Justice in the United States, 72 J. CRIM. L. & CRIMINOLOGY 52, 77 (1981) (noting that "serious" crimes garner the "most attention and . . . have the largest dedication of resources").

94. See, e.g., STUART A. SCHEINGOLD, THE POLITICS OF STREET CRIME: CRIMINAL PROCESS AND CULTURAL OBSESSION 123 (1991); Worden, supra note 13, at 338 (noting the strong effect of crime rate in jurisdiction on decision by prosecutor to establish office policy restricting plea bargaining).


97. See Mario Merola, Modern Prosecutorial Techniques, 16 CRIM. L. BULL. 232, 237-38, 251-55 (1980) (example of procedural guidelines). Some policy choices will, at first glance, appear to be entirely procedural. However, procedural choices such as supervisory review or required consultation with crime victims will reflect underlying policy choices. The pliability of the procedure-substance line is one of the staples of the academic literature.
policies is the collection of data about prosecutorial decisionmaking. Offices may use computer programs and standardized forms to keep track of the workload, productivity, and successes of different prosecutors.\textsuperscript{98}

The sum of written and unwritten rules, procedures, and habits, combined with the mechanisms for implementation and enforcement, together reflect a "governing law" of prosecutorial discretion. That is, these choices change and constrain the behavior of individual prosecutors. These internal policies have far more impact on the kinds of cases prosecutors select than most rules of constitutional criminal procedure.

D. \textit{Internal Prosecutorial Responses to Plea Bargaining}

Suppose a chief prosecutor wants to eliminate or minimize plea bargaining. What kinds of internal administrative rules in a prosecutor's office might support such a policy goal? A prosecutor might simply announce that attorneys in the office will no longer engage in plea bargaining. Office policy might require that all dismissals, reductions in charges, or sentence recommendations be documented and approved.\textsuperscript{99}

But simple plea bans seem to fail, sooner rather than later.\textsuperscript{100} A better administrative strategy assumes that the critical decision about whether the state can prove its case cannot—and more to the point, should not—wait until adjudication. Instead, the office invests substantial resources in making the initial screening decision.

The prosecutor might envision this alternative as a tradeoff. A collection of hard screening policies can weaken the power of negotiated pleas; the more the office can implement the screening policies, the fewer negotiated pleas will occur. The tradeoff, however, can operate only under certain conditions.

First, the screening attorney must carefully evaluate the witnesses and other evidence, the legal arguments the defendant might raise, and the likely response of the jury or judge at trial. Without a thorough early evaluation of cases, later changes in the charges will prove hard to resist. Second, the chief prosecutor must explicitly link the screening policies to a set of practices that


\textsuperscript{99} Vorenberg offered many suggestions for limiting prosecutorial discretion. His first suggestion was to reduce the impact of a plea bargain on the sentence, though he had little to say about how to reduce such leverage beyond "a relatively modest, prescribed sentencing concession of ten or twenty percent" to induce pleas. Vorenberg, supra note 73, at 1561. Vorenberg also supported the use of "screening conferences" between prosecutors and defense counsel to discuss charges and possible dispositions. Id. at 1565.

\textsuperscript{100} See supra text accompanying note 56 (recounting El Paso experiment with eradicating plea bargaining cases).
strongly discourage negotiated pleas. Without this linkage, the office will reduce its usual charges once at the screening stage and once again during later negotiations.

Despite the wealth of literature on plea bargaining, we do not believe that scholars or prosecutors have recognized the important tradeoff between the use of plea bargains versus screening to sort out cases. We believe this screening/bargaining tradeoff offers substantial hope for curing one of the most troubling aspects of American criminal justice systems.

To this point, we follow in a long tradition of legal scholars who offer reform proposals without exploring whether their ideas could actually work. We break with this tradition in the next Part, where we describe in detail a jurisdiction that claims to implement the sort of screening/bargaining tradeoff we have described.

III. THE SCREENING/BARGAINING TRADEOFF IN PRACTICE: NODA DATA

A chief prosecutor attempting to change plea practices faces both administrative and political hurdles. Will her proposed policy actually change the use of negotiated guilty pleas? If so, can the office sustain it over the long haul? We do not believe that plea bargaining is inevitable, but plea bargaining surely is pervasive and deeply entrenched. Any effort to limit plea bargaining must confront the habits and relationships of prosecutors and defense attorneys.

Reform efforts emerging voluntarily from within one criminal justice institution may have a greater chance to succeed than reforms imposed externally. A single institution can set up review and reward systems, allowing for more supervision—and, we believe, more consistency—than external constraints can provide. Among the many virtues we see in the screening/bargaining tradeoff described in this paper is the authority of a chief prosecutor, acting alone, to set this change in motion.

What should we expect to happen when a prosecutor decides to shift the screening/bargaining tradeoff in the direction of screening? As for changes in case processing, the most direct effect should be measurable: fewer plea bargains. The kinds of plea bargains that are easiest to track are charge reductions after cases are filed. A jurisdiction with hard screening practices

101. A single system might be followed over time to measure case dispositions before and after a prosecutor changes office screening policy. But measuring charge reductions over time will often prove difficult. Comparable data might not be available for the two different time periods because a change in screening policies also calls for improvements in data collection and monitoring.

It also might be possible to compare one jurisdiction with principled screening policies to another that relies on more traditional bargaining. Once again though, it might be difficult to compare different jurisdictions. The different jurisdictions might not maintain or report comparable statistics. Local practices other than screening policies might explain especially high or low reductions in charges. But even after acknowledging these obstacles, it should be possible to compare jurisdictions in a rough way, without putting too much weight on
should produce fewer and smaller charge reductions than a jurisdiction with weaker screening practices.

A second measurable impact of screening policies might be a smaller number of charges dismissed (whether mandated by judges or voluntarily entered by prosecutors) because the prosecutors should remove weaker cases from the system early. We might also expect higher levels of declination and perhaps greater use of diversion programs.\textsuperscript{102} Traditional assumptions about the plea bargain/trial tradeoff would predict an increase in trials from a decrease in plea bargains, but we have shown the traditional assumptions are misguided, and the actual effect on trial rates of implementing the screening/bargaining tradeoff is hard to predict.\textsuperscript{103}

Speculation about the effects of principled screening could go on indefinitely. In this Part, we test the plausibility of the screening/bargaining tradeoff using previously unstudied and unreported data about one major urban prosecutor's office: the New Orleans District Attorney's Office, or NODA. This data exists because the District Attorney for Orleans Parish, Harry Connick,\textsuperscript{104} has remained committed to principled screening throughout his long term in office.

The city of New Orleans would probably not appear at the top of most lists of progressive criminal justice systems. When the system has received national attention, it has been for alleged police corruption, including instances of officers killing people for profit.\textsuperscript{105} Criminal justice in Louisiana makes national news for gambling charges against notorious figures such as former Governor Edwin Edwards, not for any causes dear to reformers.\textsuperscript{106} Locally, the

\begin{footnotesize}
\begin{itemize}
\item \ref{footnote:102} Other implications might include the kinds of reasons offered for any charge reductions: In a screening system, we would expect reductions to be based on information not available at the time of screening. We would also expect less charge adjustment in the least complex cases, where most of the information will be available for early and close examination. Perhaps hard screening systems will produce higher levels of sentence negotiations. This may lead defense attorneys to meet more often with prosecutors before initial charges are filed.
\item \ref{footnote:103} We discuss the impact of the screening/bargaining tradeoff in New Orleans infra Part III.B.
\item \ref{footnote:104} Connick is the father of the musician and actor, Harry Connick, Jr. The senior Connick also sings and plays piano, and performs periodically in the French Quarter. See HARRY CONNICK, SR., NEW ORLEANS . . . MY HOME TOWN (Studio A Productions 1998).
\item \ref{footnote:106} Manuel Roig-Franzia, Anatomy of a Case, TIMES-PICAYUNE (New Orleans), Oct. 17, 1998, at A10. Outside the criminal justice arena, the legal system in Louisiana is as likely to elicit laughs as praise. For example, the decision by the Louisiana Supreme Court
\end{itemize}
\end{footnotesize}
large and stressed NODA office has received criticism for its discovery practices and its aggressive use of habitual felon laws.107

But all of this turbulence on the surface of New Orleans criminal justice obscures a deeper reality about the local system. The New Orleans District Attorney’s Office follows principled screening practices that make it one of the most interesting prosecutor’s offices in the country. Those aspects of the NODA office deserve widespread attention from other prosecutors and scholars.108

In Part III.A, we describe the system that prosecutors, defense attorneys and judges believe is operating in the New Orleans District Attorney’s office. Then, in Part III.B, we turn to case processing statistics to determine whether the system in fact operates in the way those actors believe it does. The NODA data show that a deliberate tradeoff between screening practices and negotiated pleas can remain stable and effective for many years.109

A. Harry Connick Sings a Reform Tune

Harry Connick was elected as the District Attorney for Orleans Parish in 1974. He has remained in that office for the past twenty-eight years. Connick first ran for office in 1969 against incumbent Jim Garrison, the flamboyant District Attorney made famous in the film JFK.110 His first unsuccessful campaign did not focus on plea bargaining. He promised faster prosecution and better tracking of defendants who failed to appear for trial.111 His 1973

to squash all legal activities of the nationally renowned environmental clinic at Tulane is widely considered among the most outrageous and unwise decisions by a state court in recent memory. See Katherine S. Mangan, Law Students Lose Bid to Aid Indigent Groups, CHRON. OF HIGHER EDUC., Nov. 30, 2001, at 21. On the other side of the ledger, that same court, in about the same era, has received some attention and praise for progressive decisions regarding provision of competent criminal defense counsel to the indigent. See Marc Miller, Wise Masters, 51 STAN. L. REV. 1751, 1791-95 (1999).

107. Interview with Numa Bertel, Director, Orleans Indigent Defender Program, in New Orleans, La. (Jan. 6, 1995); see infra Part III.B.4. (discussing habitual felon laws).

108. Our point is not that every decision by the New Orleans District Attorney’s Office is wise or fair. We do not have the information that would let us make that kind of assessment. Our point has to do with institutional decisions, in the face of the limited resources of a large urban criminal justice system, that put the office in the position to assess and regularize its decisions. The New Orleans District Attorney’s Office and Connick deserve national attention and praise for their vision and deliberation about the office as part of a larger whole.

109. The data file from NODA is huge. It contains detailed information on around 430,000 charges and about 280,000 cases (involving 145,000 defendants), filed or adjudicated between 1988 and 1999.


campaign began with a similar emphasis on swift prosecution. As the campaign wore on, however, Connick’s speeches began to feature attacks on plea bargaining.

At first he criticized reduced charges for murder cases and later expanded the critique to other crimes. He complained that the part-time prosecutors in the office used plea bargaining solely to “move” cases and avoid trial. Connick told voters that widespread plea bargaining was wrong; years later, he explained that victims were right to resent it when cases were bargained away simply because of a “lazy” prosecutor. He promised to eliminate “baseless” plea bargaining and to hire full-time prosecutors who would not use plea bargains just to move cases from the docket.

As in other American cities, the criminal courts in New Orleans deal with enormous volume. In the face of this large urban caseload, Connick needed a strategy to carry out his campaign statements about plea bargaining. During the weeks between his election victory and taking office, he started speaking publicly about a plan with two central components. First, Connick planned to devote expertise and resources to screening. He proposed a screening procedure that “would weed out those cases really not worthy of being on the criminal docket, so more courtroom emphasis can be devoted to the violent offender.” Second, he instructed his prosecutors not to engage in plea

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116. JACOBY, THE AMERICAN PROSECUTOR, supra note 95, at 219; Blum, supra note 57; Connick, supra note 115; Demos Will Cast Ballots Saturday for Four Offices, Garrison-Connick Battle to Steal Show, TIMES-PICAYUNE (New Orleans), Dec. 9, 1973, at A26; Chris Segura, Connick’s Shifting into Gear for Drive Against N.O. Crime, TIMES-PICAYUNE (New Orleans), Mar. 13, 1974, at A1.

117. The state courts in the parish currently dispose of more than 10,000 cases per year (mostly felonies), including about 900 trials per year. The NODA office handles all felony prosecutions. The City Attorney prosecutes most misdemeanors in Municipal Court, but the District Attorney does select a few higher priority misdemeanors to charge in the Magistrate Division of the state’s District Court. Interview with Bari Burns and Joel Loeffelholz, Criminal Division of City Attorney’s Office, in New Orleans, La. (Jan. 3, 2002). The Municipal Court handles an estimated 70,000 cases per year. Interview with Judge John Shea, Municipal Court, in New Orleans, La. (Jan. 3, 2002).

bargaining—particularly charge bargaining—except under very limited circumstances. In other words, Connick recognized and tried to implement the screening/bargaining tradeoff.

Connick bolstered this policy change by assigning some of his more senior trial attorneys into the screening office and by instituting a variety of procedures to monitor and reinforce screening norms. Furthermore, Connick recognized that the huge flow of cases, the large staff, high staff turnover, and the inevitable pressures for bargaining would hinder this plan. Thus, he developed data and information systems that allowed him to review and guide the work of his staff, and to defend the work of the office to the legislature and the public.

The distinctiveness of the screening process in the NODA office is apparent from a closer examination of the path each new case takes through the system. Police officers develop a case folder after they complete an investigation and file charges with the magistrate. The first stop for the case folder in the NODA office is the Magistrate Section, where the least experienced assistants work. They typically have logged six months or fewer on the job. The ADA from the Magistrate Section appears for the state at the first appearance and bail hearing before the magistrate. A public defender is also present for the first appearance, but the case is reassigned immediately after the hearing and there is typically no further defense presence or participation in the case until after the DA files an information or obtains an indictment.

After any proceedings in the Magistrate Division, the folder moves to the Screening Section of the NODA office. Connick devotes extraordinary resources to this operation. For instance, in the late 1990s, about fifteen of the
eighty-five attorneys in the office worked in Screening. The Screening Section is no political backwater within the office: The last two First Assistants in the office moved up to that position after serving as head of the Screening Section. All attorneys in the Screening Section served previously (usually a couple of years) in the Trial Section. This level of experience comes at a premium in New Orleans, where the turnover among prosecuting attorneys is quite high. The average tenure of an ADA in the NODA office is around two years.

Within the Screening Section, designated cases such as homicide or rape get assigned to screeners with special expertise. Drug cases and a few other high-volume cases go to a subgroup known as Expedited Screening. Ordinary cases go to the Screening Attorney on duty for that day. The screener reviews the investigation file, speaks to all the key witnesses and the victims (often by telephone, but sometimes in person), and generally gauges the strength of the case. If the police report neglects to mention a factual issue that is likely to arise at trial, the screening attorney will speak directly with the police officer to resolve it. There is a powerful office expectation that the Screening Attorney will make a decision within ten days of receiving the folder.

NODA instituted a variety of measures to ensure reasonable uniformity in screening decisions. Connick committed his screening principles to writing in an office policy manual. The general office policy is to charge the most serious crime the facts will support at trial. The policy does not, on its face, allow individual prosecutors to consider for themselves the equities in the case when selecting the charge. By the same token, however, Connick insists that
overcharging is unacceptable, because the charges chosen for the information will stay in place through the trial. If screening prosecutors overcharge cases too often, the Chief of the Trial Section might send the screening attorney back into the courtroom on at least one of those overcharged matters to “get his teeth kicked in.”

Supervisors review all refusals to charge. Attorneys say they often compare notes, especially in early morning discussions, and this helps to educate and develop shared charging norms in the office. Office policy discourages refusal for select categories of crimes, notably domestic violence cases. For the most serious crimes, including rape and homicide, the office conducts “charge conferences” with senior prosecutors and police present to discuss the facts and potential charges.

Neither Connick nor any attorneys in his office claim to have abolished plea bargaining entirely from the New Orleans system. Prosecutors in the office acknowledge that sometimes new information appears and changes the value of a case. Witnesses leave town, victims decide not to testify, new witnesses appear, and investigators find new evidence. On occasion, the screening attorney makes a bad judgment and overcharges, and a plea could save the case.

Nevertheless, office policy tries to keep these changes in charges to a minimum. A supervisor must approve any decision to drop or change charges after the information is filed. The attorney requesting the change must complete a special form naming the screening and trial attorneys, and explaining the reason for the decision, drawing from a list of acceptable reasons. The ADAs believe there is a “stigma” involved in reducing charges, however strong the reasons for a reduction might be.

\[\text{supra note 124; Interview with Richard Olivier, supra note 126; cf. UNITED STATES ATTORNEYS' MANUAL (2002) (requiring prosecutors to charge the most serious readily provable offense). Joan Jacoby characterizes this screening policy as a “trial sufficiency” policy, which she calls “less commonly used.” JACOBY, THE AMERICAN PROSECUTOR, supra note 95, at 204-06.}\]

129. Interview with Richard Olivier, supra note 126. The prohibition on overcharging was part of Connick’s policy from the beginning. See JACOBY, THE AMERICAN PROSECUTOR, supra note 95, at 219.

130. Interview with Camille Buras, supra note 124; Interview with Melanie Talia, supra note 123.

131. They never made such a claim during our interviews. However, attorneys in the office are occasionally quoted in the newspaper speaking loosely of a ban on plea bargaining. Michael Perlstein, By Whatever Name, Deals Get Made, TIMES-PICAYUNE (New Orleans), May 29, 1996, at A6.


133. Interview with Camille Buras, supra note 124; Interview with Richard Olivier, supra note 126; Interview with Melanie Talia, supra note 123.

134. Telephone Interview with Dwight Doskey, criminal defense attorney (Mar. 6,
Attorneys from the NODA office believe that they decline to prosecute an exceptional number of cases. They view this as a necessary part of training police officers to investigate more thoroughly. The relatively high rate of declination also created a political challenge for Connick over the years. During each of his reelection campaigns—in 1978, 1984, 1990, and 1996—Connick’s challengers criticized the number of cases that the NODA office declined to prosecute. As his opponent Morris Reed put it in many public debates, “the PD arrests them and the DA turns them loose.” Connick had several replies. Poor police work made declinations necessary. Further, he pointed to specific examples of how his office dealt severely with defendants once they were charged. Connick also explicitly linked his screening policies to his plea bargaining policies: Tough screening, he said, made it possible to keep plea bargaining at low levels.

Connick drew on case data to make specific claims about low rates of plea bargaining in the office: He asserted that plea bargaining in Jim Garrison’s day reached 60 to 70%, but fell to 7 or 8% of all cases filed under his office policy. He also routinely mentioned the high number of trials in New Orleans compared to other Louisiana jurisdictions. In addition, Connick pointed to his routine use of the habitual felon law to enhance sentences. By the end of each of the four reelection campaigns, Connick convinced the voters that it was possible both to decline many cases and to run a tough prosecutor’s office at the same time.

Connick’s hope to minimize plea bargaining and the screening techniques he chose to pursue that goal would by themselves make NODA practices an important case study. But Connick added another critical tool to his administrative kit. From the earliest times, he relied on computerized information systems. Connick often invoked the slogan, “If you can’t
measure it, you can’t manage it.” During his first term in office, he combined this interest in data with his commitment to screening cases and suppressing negotiated guilty pleas.

This data system operates primarily as an internal office management tool. The office does not issue standard public reports based on the data. The system collects details about each step of the process, from intake through final disposition. It identifies both the decisionmaker (such as the screening attorney) and the reasons for each processing decision along the way. A standardized set of codes capture the reasons attorneys invoke most frequently to explain their choices.

Data systems are not cheap. In addition to the costs of hardware, software, and expertise to run the system, Connick employs as many as five people to enter data. Why would a prosecutor in an environment with sharply limited resources invest in data systems?

Information systems respond to limited resources and rapid turnover of lawyers since they make it easier to supervise the constant stream of new attorneys. In part because the NODA data system operates for internal administration purposes, it provides reliable information to test the claims of the office. The attorneys fill out the required forms and staff members enter the data routinely, at the same time that their cases unfold. Line attorneys know that their supervisors will summarize and review the data, and monitor the quality of the data they enter. Although Connick refers occasionally to summary statistics, no detailed reports go to the public regarding particular cases or particular units of the office. The system exists more for management than for public relations purposes. Thus, there is little temptation to obscure important decisions in the data. The next section of this Part describes some of the initial findings from this internal data.

144. Interview with Harry Connick, supra note 125; Interview with Tim McElroy, supra note 124.
145. See Grady, supra note 120.
147. The support staff who enter data from the standard forms that the attorneys complete also receive standard training and supervisors review their work periodically.
B. What a Difference a Trade Makes

The data from New Orleans portray a high volume operation like those in other major cities. In 1997, the NODA office received recommendations for criminal charges against 16,502 suspects. After indictment or information, 4780 defendants pled guilty. The Trial Section attorneys dismissed all charges against 540 defendants, conducted 543 jury trials (obtaining 341 convictions) and 385 bench trials (obtaining 253 convictions). As in most larger prosecutors’ offices, the attorneys in the NODA office devoted major resources to the most serious and violent offenses. They disposed of 152 homicide defendants (78 through jury trials), and conducted jury trials in 35 sex offenses and 68 robberies.149

The key test of the screening/bargaining tradeoff is simple: Are there fewer charge bargains and more open pleas after the implementation of new screening practices? A jurisdiction with principled screening practices also should produce distinctive patterns in its initial charging decisions. The prosecutors should decline or divert more cases, and perhaps engage in less overcharging. Judges and prosecutors are also likely to dismiss fewer cases after the initial charges are filed.

One test would compare case processing at two different times—before and after the start of a new set of policies in the prosecutor’s office. Unfortunately, such a comparison is not possible based on the New Orleans data. During the entire period covered in the database, 1988-1999, Connick’s basic policies on screening and his efforts to discourage charge bargains remained in effect. This was a mature and stable system throughout the entire period.150 Thus, we compare the pattern of case dispositions in New Orleans to patterns in other cities and states. Differences in the court systems and police practices in different jurisdictions prevent precise comparisons. Nevertheless, we should get some indications of whether the NODA office handles cases differently from prosecutors’ offices elsewhere.


150. In newspaper interviews and public debates, Connick periodically estimated the level of plea bargaining in his predecessor’s office. He claimed that Garrison’s office negotiated pleas in 40 to 60% of all cases. Connick, supra note 115 (60% plea bargaining rate in Garrison’s office); D.A. Opponents Attack Each Other in Debate, supra note 114 (40%); Mongelluzzo, supra note 114 (60% for murder cases, 50% for rape cases).

Based on office practices in 1976, Joan Jacoby estimated that negotiated pleas had dropped from 85% during Garrison’s tenure to less than 10% under Connick. Jacoby, The American Prosecutor, supra note 95, at 220. It is not clear what indicator Connick or Jacoby used to estimate the number of negotiated pleas.
1. **Direct evidence of open pleas, clues about charge bargains.**

There is direct and indirect evidence in the New Orleans data about the success of the screening/bargaining tradeoff. The direct evidence points to the proportion of cases resolved in a manner where plea bargains are unlikely; the remainder of the cases describe the pool where plea bargains are more likely.

The NODA office received around 430,000 charge recommendations in around 280,000 cases between 1988 and 1999. Plea bargains are unlikely (though not impossible) for all cases resolved through trial. Of the cases filed in state court, 74% were resolved through pleas and 13% through trials.

Charge bargaining is also unlikely for cases where the defendant pleads guilty as charged. Of the 74% of cases filed that are resolved through guilty pleas, the first direct indication of the absence of charge bargaining appears in the category “pled guilty as charged.” As summarized in Figure 1, the plea was guilty as charged in 65% of all cases filed.

Combining the proportion of all filed cases resolved through trials (13%) and through pleas of guilty as charged (65%), 78% of all cases filed are resolved in a manner consistent with the goals of the screening/bargaining tradeoff, and inconsistent with charge bargaining. This is the strongest direct statistical evidence in support of the viability of the screening/bargaining hypothesis.

What does the data show about charge bargaining? Since 78% of all cases filed are resolved in a manner inconsistent with charge bargaining, at most 22% of all cases fall in categories that may reflect charge bargaining. The closeness of the link between the remaining categories and charge bargaining varies greatly, and provides clues rather than direct evidence.

The search for traces of charge bargaining begins at two different points in the New Orleans data. The system records when a defendant pleads guilty to a lesser charge. In only 9% of the cases filed did the defendant plead guilty to a lesser charge than the prosecutor filed. This is the data category most likely

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151. The NODA office converted to new hardware and software in 1988 and did not preserve the data from earlier years. The screening dates begin in 1983 for a few cases resolved after 1988, but daily entry of screening choices begins in January 1988. The data available to us extends to November 1999. We excluded from Figure 1 any cases pending or data entry anomalies (such as cases re-opened with complete processing information under a new control number), giving us about 240,000 cases.

152. Plea bargains are possible after trial because of the special multiple billing provisions in Louisiana, which allow a prosecutor to file for an enhanced minimum and maximum sentence based on an offender’s prior record. The implications of the multiple billing provisions for the screening/bargaining tradeoff are discussed infra notes 201-05 and accompanying text.

153. Again, multiple billing after entry of a plea might reflect a form of plea bargaining not easily captured in the present analysis. See supra note 152.

154. The totals in Figure 1 are all rounded to the nearest 100.

155. A more accurate figure would probably be lower. We included in the category “pled guilty to lesser charge” a number of subcategories where the meaning is unclear. Most
to reflect charge bargaining. The percentages are about the same whether the analysis is done based on total charges or based on cases. While these "lesser charge" cases are the most clear evidence of outright charge bargaining, not all of these "lesser charge" cases result from negotiations between prosecution and defense counsel. Some might result from a new evaluation of the case based on facts not known at the time of the screening investigation.

But pleading guilty to a lesser charge is not the only data category that might reflect bargaining between prosecution and defense. It is also possible that at least some of the dismissals of cases or charges by prosecutors (and perhaps a few of the dismissals by judges) result from negotiations with the defendant. In both of these categories—pleading guilty to lesser charges and dismissals—New Orleans records fewer cases than some other cities. It appears that Connick's policies have indeed reduced charge bargaining over the long haul.

The proportion of guilty pleas to a lesser charge in New Orleans—9% of all cases filed—is lower than figures found elsewhere. The academic literature virtually never tracks this figure, an unfortunate byproduct of the view that

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important, of the 10,600 cases we placed in this category, about 1700 were "informally adjusted" and another 600 were "stipulated in need of care." Using only the cases that certainly qualify for this category, the rate is about 7.4% of all cases filed.

156. The New Orleans database separately tracks charges and cases. A single case combines any charges against a single defendant based on a single "incident," E-mail from Susan Rossi (Feb. 25, 2000). As with the cases, about 9% of the charges filed resulted in a plea of guilty to lesser charges.

There is some variation in the figure from year to year. In 1997, 6% of defendants whose cases were accepted pleaded guilty to a lesser charge. BOLLMAN ET AL., supra note 149, at 3, 18.


Some articles containing court processing data use categories that are close, but not identical to the figure for pleading guilty to a lesser charge. See H. Joo Shin, Do Lesser Pleas Pay? Accommodations in the Sentencing and Parole Processes, 1 J. CRIM. JUST. 27, 32, 35 (1973) (noting that 20% of first-degree robbery indictments resulted in guilty pleas to misdemeanors). Data from Washington, D.C., in the mid-1970s classify about 16% of all guilty pleas as pleas to a lesser charge. The comparable figure in New Orleans (percent of guilty pleas that are pleas to lesser crimes) is 13%. See William M. Rhodes, Plea Bargaining: Its Effect on Sentencing and Convictions in the District of Columbia, 70 J. CRIM. L. & CRIMINOLOGY 360, 371 tbl.7 (1979) (figures aggregated).

Data from Pennsylvania report a different but related figure: the percent of convictions obtained through "negotiated" and "non-negotiated" pleas. Pennsylvania judges during 1998 reported that 73% of the 64,928 convictions statewide came from negotiated pleas, and 22% from non-negotiated pleas. The 73% figure is much higher than the 10% of "lesser offense" pleas in New Orleans. The Pennsylvania figure apparently includes both charge bargains and sentence bargains known to the sentencing judge. See also Springer, supra note 32, at 162 (reporting a study of three California counties during the late 1970s, which found that at least 88% of guilty pleas were negotiated, while 12% were open pleas).

For related figures from the 1960s, see James Klonoski, Charles Mitchell & Edward Gallagher, Plea Bargaining in Oregon: An Exploratory Study, 50 OR. L. REV. 114, 118-19
open pleas and negotiated pleas are interchangeable. Nevertheless, court processing statistics in some jurisdictions do count separately the cases where the defendant pleads guilty to a lesser charge. Data from North Carolina in fiscal year 2000-2001 classified 12% of all felony case dispositions as pleas to a lesser charge,\textsuperscript{158} higher than the 9% rate found in New Orleans.\textsuperscript{159}

\textsuperscript{158} N.C. ADMIN. OFFICE OF THE COURTS, REPORT ON SUPERIOR COURT DISPOSITIONS, FY 2000-2001 (2001). There were 55,955 guilty pleas entered in felony cases in Superior Court, with 10,955 of those listed as pleas to a lesser charge. The Superior Courts in the state disposed of 92,730 felony cases filed during fiscal year 2001.

\textsuperscript{159} In Raleigh (Wake County), a city comparable in population to New Orleans, the “plea to lesser charge” rate for felonies was 12%. In Charlotte (Mecklenberg County), the largest city in the state, the rate was 8%. \textit{Id}. The District Attorney in Charlotte devotes more resources to early screening of cases than the District Attorney in Raleigh. Interview with Colin Willoughby, District Attorney, Wake County, in Raleigh, N.C. (Feb. 18, 2000).
FIGURE 1
Case Disposition Summary
NODA, 1988-1999

<table>
<thead>
<tr>
<th>Category</th>
<th>Cases</th>
<th>Percentage of Cases Received</th>
<th>Charges</th>
<th>Percentage of Charges Received</th>
</tr>
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<tbody>
<tr>
<td>Total Recommended</td>
<td>239,500</td>
<td>39%</td>
<td>432,600</td>
<td>52%</td>
</tr>
<tr>
<td>Diverted &amp; Referred</td>
<td>35,100</td>
<td>15%</td>
<td>45,800</td>
<td>11%</td>
</tr>
<tr>
<td>Guilty Pleas</td>
<td>81,700</td>
<td>74%</td>
<td>114,900</td>
<td>71%</td>
</tr>
<tr>
<td>Trials</td>
<td>13,800</td>
<td>13%</td>
<td>20,600</td>
<td>13%</td>
</tr>
<tr>
<td>Total Accepted &amp; Filed</td>
<td>111,000</td>
<td>46%</td>
<td>161,800</td>
<td>37%</td>
</tr>
<tr>
<td>Extradition</td>
<td>1300</td>
<td>1%</td>
<td>1600</td>
<td>1%</td>
</tr>
<tr>
<td>Dismissals</td>
<td>14,100</td>
<td>13%</td>
<td>23,900</td>
<td>15%</td>
</tr>
<tr>
<td>Pled to Lesser Charge</td>
<td>9900</td>
<td>9%</td>
<td>13,200</td>
<td>8%</td>
</tr>
<tr>
<td>Pled Guilty as Charged</td>
<td>71,900</td>
<td>65%</td>
<td>101,700</td>
<td>63%</td>
</tr>
<tr>
<td>Jury Trial</td>
<td>4300</td>
<td>4%</td>
<td>6300</td>
<td>4%</td>
</tr>
<tr>
<td>Bench Trial</td>
<td>9500</td>
<td>9%</td>
<td>14,300</td>
<td>9%</td>
</tr>
<tr>
<td>Nolle Pros</td>
<td>12,900</td>
<td>12%</td>
<td>22,300</td>
<td>14%</td>
</tr>
<tr>
<td>Dismissed by Judge</td>
<td>1300</td>
<td>1%</td>
<td>2400</td>
<td>2%</td>
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</tbody>
</table>
Dismissals of an entire case offer a highly imperfect proxy for negotiated pleas. Not all dismissals are the product of negotiation. The prosecutor might become convinced that the original evidence (or new evidence) is too weak to sustain a conviction in the case at all. Or the evidence for one count in a multi-count case might be shaky. The judge could reach the same conclusion and dismiss a case or a charge over the prosecutor's objection. These new evaluations of the evidence sometimes happen without any discussions or agreements between the prosecutor and the defense counsel.

On the other hand, dismissals may result from negotiation with defense counsel. Perhaps the prosecutor agrees to dismiss one set of charges in exchange for a guilty plea in some unconsolidated case against the same defendant. Maybe the defendant agrees to cooperate in another investigation or prosecution. Or the defendant might convince the prosecutor to dismiss the felony charges and to file misdemeanor charges (in Municipal Court) instead.160 Dismissals of a single charge could also offer a rough proxy for negotiated pleas. The most common form of charge bargaining is the prosecutor's agreement to dismiss one or more charges in a multi-count indictment in exchange for a guilty plea on the remaining count or counts.161

The database shows that the prosecutors in New Orleans dismissed around 12% of all cases filed and 14% of all charges filed (a "nolle pros" in the argot of the trade). A nolle pros is more likely to reflect some bargain between the parties than a dismissal by the judge. However, for purposes of comparison with other jurisdictions that combine all dismissals into a single figure, we add in the judicial dismissals. This gives us a total dismissal figure of 13% of all cases filed, and 15% of all charges filed.

Keeping in mind that only a few of these dismissals qualify as hidden forms of charge bargaining, these numbers allow us to construct a "combined estimate" of potential charge bargain cases. The combination of dismissed cases and pleas to lesser charges offers a rough (and overly generous) measure of the amount of charge bargaining at work.162 In New Orleans, a combined estimate for potential charge bargain cases would be 22% of all cases initially filed (13% dismissed and 9% pleading guilty to lesser charges).

In North Carolina, both the dismissals and the combined estimates are notably higher. About 35% of the felony cases resolved after filing in fiscal year 2000-2001 were dismissed.163 This is about three times the dismissal rate

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160. The New Orleans database accounts separately for this disposition, so we would not expect many of the dismissals to be explained on this ground.
161. See, e.g., FED. R. CRIM. P. 11(e)(1)(A). In New Orleans, however, we believe that most of the straightforward dismissals of single charges would enter the database as "pled guilty to lesser charge" if they were the product of negotiation.
162. The nolle pros rate plus the plea to lesser offense rate offers a better estimate. But the nolle pros rate is more difficult to compare across jurisdictions than the total number of dismissals, both judicial and prosecutorial.
163. The superior courts in the state resolved a total of 92,730 felony cases in 2000-
in New Orleans. In Charlotte, the rate of felonies dismissed after filing was even higher, about 49%.\textsuperscript{164} The rate in Raleigh was lower, at 27%, but still twice as high as New Orleans.\textsuperscript{165} When added to the rates of pleading guilty to lesser offenses, the combined estimate for North Carolina is 48%. The combined estimates for Charlotte and Raleigh are 57% and 38%, respectively.\textsuperscript{166} Again, this is markedly higher than the 22% combined estimate from New Orleans.

Statistics are more widely available for dismissals after the filing of cases than for guilty pleas to lesser charges. Nationwide surveys from the Bureau of Justice Statistics show an average dismissal rate of 27%.\textsuperscript{167} Of the cities routinely surveyed, few show lower rates of dismissal than New Orleans.

2001. Of these, 4,547 were dismissed with leave; 28,202 were dismissed without leave; and 416 were dismissed based on a deferred prosecution. See \textit{N.C. ADMIN. OFFICE OF THE COURTS, supra} note 158.

\textsuperscript{164} The Superior Courts in Charlotte (Mecklenburg County) resolved a total of 9,166 felony cases. Of these, 419 were dismissed with leave; 4,009 were dismissed without leave; and 93 were dismissed based on a deferred prosecution. See \textit{id}.

\textsuperscript{165} The Superior Courts in Raleigh (Wake County) resolved a total of 3,163 felony cases. Of these, 200 were dismissed with leave; 642 were dismissed without leave. See \textit{id}.

\textsuperscript{166} See also Goldsmith, \textit{supra} note 27, at 257 (showing that rates of “reduction of charges” in district courts are 40%, 33%, 30%, 24%, 15%, and 14% of cases filed, with separate figures for abandonment of charges at 41%, 30%, 27%, 25%, 19%, and 13%).


\textsuperscript{168} The “Felony Arrests” studies from the 1980s offer more detail about dismissals than the current series available from the Bureau of Justice Statistics. The 1988 study shows the following dismissal rates of cases filed as felonies or misdemeanors: 42% in Manhattan, 31% in Washington, D.C., 18% in Los Angeles, 15% in Denver, and 14% in New Orleans. BOLAND ET AL., 1988, supra note 167, at 6, 24-29 tbl.2.

New Orleans is not alone in using strong screening practices to reduce its level of dismissals. In California, the statewide rate of cases dismissed in 1999 was about 14%. California in 1999 reported 228,882 court dispositions; 31,334 dismissals; 3961 diversions; 709 acquittals; and 192,878 convictions. Because the California statistics do not track separately the guilty pleas as charged, we do not construct a combined estimate for the state. See \textit{CAL. DEP’T OF JUSTICE, FINAL LAW ENFORCEMENT, PROSECUTION AND COURT DISPOSITIONS OF ADULT FELONY ARRESTS BY TYPE OF DISPOSITION STATEWIDE, available at} http://justice.hdcdojnet.state.ca.us/cjsc_stats/prof00/00/6.htm (last visited Mar. 7, 2002).

Various cities reporting their criminal dispositions to the Court Statistics Project (CSP) show dismissal rates ranging from 2% (in Ventura, California) to 26% (in Washington,
Based on our limited information about rates of pleas to lesser charges, New Orleans appears to be one of the few jurisdictions that combines low rates in both indicators of potential charge bargaining.\textsuperscript{169} Even though only part of the category of dismissed cases should be attributed to charge bargaining, these figures do suggest that much less charge bargaining occurs in New Orleans than elsewhere. Together, the two central statistics (guilty pleas to a lesser charge plus nolle pros after filing of case) provide the key empirical evidence of the screening/bargaining tradeoff at work. By this measure, New Orleans looks different from some other jurisdictions. The data suggest an unusually high level of open pleas in the New Orleans criminal justice system, a strong sign of success.

2. \textit{Secondary clues about the tradeoff.}

The screening/bargaining tradeoff should affect both the selection and the disposition of cases. It seems obvious that screening policies in a prosecutor’s office will increase the number of declinations, and perhaps change the type of declinations. It is also possible that a hard screening policy will produce too many declinations. Prosecutors might decline to prosecute some cases where a defendant who committed the crime would plead guilty to that crime in a bargain-centered system.

Yet the proof of a connection between a screening policy and changes in declination practices is elusive. The number of cases declined depends on the number and quality of cases that the police or other investigators recommend. If the police anticipate the requirements of the prosecutor, they might recommend fewer cases after a change in screening policies, leaving the declination rate unchanged. Thus, the declination rate is not a reliable method of comparing the effects of screening policies in different jurisdictions.

With this caution in mind, we consider briefly the declination rates in New Orleans and elsewhere. According to Figure 1, the NODA office filed criminal charges in 46\% of all cases recommended to them. They filed 37\% of all charges recommend to them. The prosecutors declined prosecution in 39\% of all cases received (or 52\% of all charges), and referred approximately 15\% of all cases (and 11\% of all charges) to another court or to a pretrial diversion program. Therefore, the NODA office rejects for prosecution in state felony court 52\% of all cases and 63\% of all charges.

Compared to the best-known studies of declination, these declination and diversion rates are not especially high. The studies of declinations typically assess declination policies in terms of "matters" or cases rather than charges. While estimates vary depending upon jurisdiction, year, and the base of "matters" considered, estimates of declination in other state systems generally fall within the range of 25% to 50% of cases referred to the office.\footnote{Definitional matters (such as focusing only on felony arrests, or the precise definition of what it means to decline a case) can have a large impact on the figures. \textit{See}, \textit{e.g.}, BRIAN A. REAVES \& PHENY Z. SMITH, \textsc{Bureau of Justice Statistics, U.S. Dep't of Justice, Felony Defendants in Large Urban Counties}, 1992, at 26 tbl.21 (1995); \textit{Vera Inst. of Justice, Felony Arrests: Their Prosecution and Disposition in New York City's Courts} (Malcolm Feeley ed., rev. ed. 1980); Donald M. McIntyre \& David Lippmann, \textit{Prosecutors and Early Disposition of Felony Cases}, 56 A.B.A. J. 1154, 1156-57 (1970).} Studies of federal prosecution show even higher declination rates.\footnote{The best scholarly survey of federal declination levels was written by Professor Richard Frase, who found declination levels as high as 80% in some federal districts when minor matters were included. Frase, \textit{supra} note 8, at 252. Later studies of federal declination, finding somewhat lower levels, typically do not include minor matters occupying less than one hour of the prosecutor's time in their calculations. \textit{See}, \textit{e.g.}, \textsc{Bureau of Justice Statistics, Compendium of Federal Justice Statistics}, 1993, at 16 tbl.1.2, (1996) (stating that in 1993, federal prosecutors filed charges in 59% of the "criminal matters" referred to them, declined to prosecute in 31%, and referred 10% of suspects to federal magistrates). The best-known debate over declination policy occurred in the late 1970s when a General Accounting Office report "revealed" declination levels as high as 64% in the federal system. \textit{See GEN. ACCOUNTING OFFICE, U.S. ATTORNEYS DO NOT PROSECUTE MANY SUSPECTED VIOLATORS OF FEDERAL LAWS} 7 (1978).}

Given the different interaction between investigators and prosecutors in different jurisdictions, comparisons of declination rates have limited value. This is one area where a "before and after" study in a single jurisdiction would have the most value. A study of the Alaska plea ban from the 1970s and 1980s does suggest that screening policies increased the number of cases declined. The number of cases declined went from 8% before the bargaining ban to 30% after the ban.\footnote{It does appear that the proportion of cases declined may have gone down since the early days of Connick's tenure. \textit{See JACOBY, THE AMERICAN PROSECUTOR}, \textit{supra} note 95, at 222 (stating that 44% of total cases were declined).} Unfortunately, the limits of the extant data in New Orleans make it impossible to compare declination rates before and after the creation of Connick's screening policies.\footnote{See Carns \& Kruse, \textit{supra} note 46, at 43.}

While it is reasonable to surmise that hard screening policies will produce some increase in the declination rate, the impact of such a system on trial rates is harder to guess. Perhaps unwillingness on the part of prosecutors to negotiate over charges will lead more defendants to insist on a trial. But the decision to go to trial is not only a function of the prosecutor's willingness to bargain over charges; there are some benefits to pleading guilty that a prosecutor cannot control. The plea benefit (or trial penalty) could shift in
response to a hard screening system in ways that would make trials either more or less likely.¹⁷⁴

Of the cases filed in state court, 74% were resolved through pleas and 13% through trials. (In the terms of the more popular but less revealing base of cases adjudicated, which excludes dismissals after filing, guilty pleas made up 86% of the total, and trials constituted 14%).¹⁷⁵ In New Orleans, it is clear that the trial rate increased after Connick took office and instituted his screening policies. Garrison's office tried 190 cases during his last year in office. That number increased to 1069 by 1976, Connick's third year in office.¹⁷⁶

Despite this early and sharp increase, in 1997, twenty years later, the number of trials remained around the same level of up to 1000 per year. This suggests a fairly substantial decrease in the trial rate over the long haul, given the growth in the total number of cases.¹⁷⁷ Nonetheless, the current New Orleans data on the method of conviction reveal a somewhat higher trial rate than the national average. Of the trials, 31% were jury trials and 69% were bench trials.¹⁷⁸ In both jury and bench trials, defendants were convicted in approximately 70% of the cases and acquitted in about 30% of the cases.

Given the focus in the academic literature on trial rates, we know much more about trial rates than we do about open pleas, dismissals, or declinations. Some jurisdictions have much lower trial rates than the 14% found in New Orleans. North Carolina Superior Courts in fiscal year 2000-2001 adjudicated 58,135 felony cases, whether through guilty plea or trial. About 3.7% of the cases went to trial.¹⁷⁹ In Charlotte, the trial rate was a bit higher, at 4.6%; the Raleigh rate also was 4.6%.¹⁸⁰ Thus, the trial rate in New Orleans is three to five times the trial rate in North Carolina. In the jurisdictions reporting to the

¹⁷⁴. If judges continue to apply a constant plea benefit after screening begins, then the trial rate would depend on how accurately prosecutors predict which charges will lead to a conviction at trial, whether defense attorneys and defendants agree with those judgments, and how much flexibility remains in occasional charge reductions or sentencing accommodations.

¹⁷⁵. We encourage scholars, prosecutors, and reformers to discuss case processing in light of the disposition of charges filed rather than convictions or cases adjudicated. Dismissals by prosecutors and judges can be a significant portion of dispositions and can hide or reveal critical aspects of each justice system.

¹⁷⁶. See Jacoby, The American Prosecutor, supra note 95, at 226.

¹⁷⁷. Bollman et al., supra note 149, at 5, 12 (928 trials).

¹⁷⁸. Perhaps this interesting mix of bench trials and jury trials is a legacy of Louisiana's civil law background.

¹⁷⁹. See N.C. Admin. Office of the Courts, supra note 158.

¹⁸⁰. Superior Courts in Charlotte (Mecklenburg County) for 2000-2001 conducted 210 felony trials, while disposing of 4370 guilty pleas and 9166 cases overall. The Superior Courts in Raleigh (Wake County) completed 107 trials, while disposing of 2182 felony guilty pleas and 3163 felony cases overall. See N.C. Admin. Office of the Courts, supra note 158.

HeinOnline -- 55 Stan. L. Rev. 76 2002-2003
Court Statistics Project, an average of about 5% of the adjudicated cases went to trial.\textsuperscript{181}

On the other hand, there are other jurisdictions with rates of trial higher than in New Orleans. We have already discussed the extraordinarily high rates in Philadelphia, where about 30% of adjudicated felonies go to trial.\textsuperscript{182} Similar high rates have occurred in Detroit and Baltimore.\textsuperscript{183}

The data on the trial rates do not provide decisive evidence for or against the screening/bargaining thesis. The trial rate in New Orleans is higher than usual; perhaps harder screens and less charge bargaining leads some defendants at the margins to prefer trials. However, information on the plea benefit or trial penalty would be necessary to fully explain decisions to go to trial.

We must tread gently when comparing statistics reported from courts in different jurisdictions. The precise definition of a concept such as “guilty as charged” or “dismissed” might be different, or it might be measured at different times from place to place. The mix of offenses and defendants might also look very different in some places than it does in New Orleans. The general picture, however, is convincing. The numbers from other locations, such as Charlotte, suggest that the rate of open pleas in New Orleans is higher than in places that use more traditional charge selection and charge bargaining. Charge bargains are less common in New Orleans than in other locations. Dismissals in New Orleans are slightly lower than the norm, although there are many places with fewer cases dismissed after filing. Each of these patterns is what Connick might have expected to achieve when he established the NODA office policy on screening and consistency in charging. The distinctive screening and charging policy, it appears, does create a distinctive and predictable set of outcomes.

3. Precharge bargaining?

While the NODA data tell us that prosecutors do not often change a charge after filing, prosecutors and defense attorneys could negotiate the charges before the initial filing. A ban on plea negotiations in one environment might simply shift the negotiations to some other forum, usually an earlier stage in the

\textsuperscript{181} NAT’L CTR. FOR STATE COURTS, \textit{supra} note 168; see also BUREAU OF JUSTICE STATISTICS, \textit{supra} note 167, at 24 tbl.23. In the federal system, the trial rate has declined steadily for the last 30 years, and has now dropped to 5% in felony cases. See U.S. DEP’T OF JUSTICE, FEDERAL JUSTICE STATISTICS RESOURCE CENTER, \textit{available at} http://fjsrc.urban.org (last visited Mar. 2, 2002). During the plea ban in Alaska, the trial rate went up from 7% to 10%. Cams & Kruse, \textit{supra} note 46, at 43; see also Schulhofer, \textit{supra} note 55, at 140 (citing trial rates ranging from 8 to 15%).

\textsuperscript{182} See Pennsylvania Comm’n on Sentencing, \textit{available at} http://pcs.la.psu.edu (last visited Mar. 7, 2002). In 1998, Philadelphia County obtained 21% of convictions through bench trial and 3% through jury trials. In 1997, 27% came from bench trials and 3% from jury trial. In 1996, 25% came from bench trials and 4% from jury trials.

\textsuperscript{183} See McIntyre & Lippman, \textit{supra} note 170, at 1156.
Prosecutors may even prefer to negotiate earlier in the process when their choices receive less scrutiny. Certainly in the federal system there is evidence of precharge negotiations between prosecutors and defense attorneys.

However, nothing of the sort is happening in New Orleans. With rare exceptions, defense attorneys do not contact the prosecutor before the filing of the initial charge to influence the selection of that charge.

The prosecutors we asked about precharge bargaining gave a consistent reply: Defense attorneys contact them before the filing of charges only in extraordinary cases. This same reaction came from attorneys in the screening division and the trial division, from supervising attorneys and from line attorneys. The reaction was consistent in interviews over a seven-year period. The prosecutors recognized that a defense attorney might have reason to discuss a case before the screening attorney made any decision. The NODA office has no rule or custom that discourages such conversations. But NODA prosecutors say defense attorneys simply are not part of the screening decision in a routine case. The screening attorney speaks with investigating officers and potential witnesses, but not with defendants or defense attorneys.

Defense attorneys offered the same view: Precharge negotiations are rare events. We heard this assessment both from private defense attorneys and from those working in the Orleans Indigent Defender Program (OIDP). Some contrasted the practice in Louisiana District Court with the practice in federal district court, where charge bargaining (and precharge bargaining) is central to the system.

184. For instance, a ban on plea bargaining in Superior Court will simply force the parties to negotiate earlier in the process, before the case leaves misdemeanor court on a felony indictment. See CANDACE MCCOY & ROBERT TILLMAN, CONTROLLING FELONY PLEA BARGAINING IN CALIFORNIA: THE IMPACT OF THE “VICTIMS’ BILL OF RIGHTS” 24 (1986) (noting that plea negotiations shifted to misdemeanor court after ban on bargaining in felony court took effect).

185. George Fisher’s history of the emergence of plea bargaining in Massachusetts finds prosecutors pushing bargaining to the period before the initial charge because of the institutional advantages, such as lack of oversight and no need to “drop” charges. Fisher, supra note 3, at 864-66.

186. See Taha, supra note 60, at 252.

187. Interview with Margaret Hay, supra note 122; Interview with Tim McElroy, supra note 124; Interview with Richard Olivier, supra note 126.

188. Interview with Bruce Ashley, supra note 135; Interview with Camille Buras, supra note 124; Interview with Melanie Talia, supra note 123. Jacoby reported “a lot of communication” between defense lawyers and screening attorneys in 1976, but offered no specific numbers. JACOBY, THE AMERICAN PROSECUTOR, supra note 95, at 223-24.

189. Interview with Bruce Ashley, supra note 135; Interview with Judith DeFraites, criminal defense attorney, in New Orleans, La. (Jan. 3, 2002); Telephone Interview with Dwight Doskey, supra note 134. Some private defense attorneys point with satisfaction to memorable cases when they convinced the screening attorney to reduce charges before the initial filing or to decline cases altogether. But they also recognize that these cases are memorable and satisfying precisely because they are so unusual.
The primary reason for the lack of precharge bargaining in state court grows out of the system for assigning attorneys to cases. At OIDP, a defense attorney is available for defendants at the bail hearing, before the screening attorney at the NODA office makes any choices. Then the OIDP assigns a trial attorney to the case after arraignment. In the interim—the critical period for declination and selection of charges—no defense attorney is assigned to the case. The same is largely true for private defense attorneys. Defendants typically devote their early attention to getting released from jail. Then, through a combination of wishful thinking and ignorance, they usually do not hire a defense attorney until arraignment.

4. The role of sentence bargains.

The NODA system limits charge bargains, but what about sentence bargains? Does it simply convert charge bargains into sentence bargains? Although defendants in New Orleans do receive concessions in their sentences for waiving their jury trials, they do not bargain with prosecutors over what sentence the prosecuting attorney will recommend to the judge. Instead, the defendant receives information directly from the judge about the likely sentence if he pleads guilty.

Again, the various actors in District Court in New Orleans told consistent stories. Prosecutors from the trial and screening divisions both said that prosecutors do not typically bargain over a recommended sentence. Defense attorneys, both from private practice and from the OIDP, said they do not bother to negotiate with prosecutors about what to say at sentencing.

The practice they described matches the policy that Connick announced consistently through the years. Office policy instructs trial attorneys not to negotiate with defendants about any recommendation of a proper sentence to the judge. In interviews with local news reporters, Connick emphasized control of charge bargains whenever he spoke of his efforts to control plea bargaining.

190. Interview with Numa Bertel, supra note 107; Interview with Tilden Greenbaum, supra note 123.
191. Interview with Bruce Ashley, supra note 135.
193. Telephone Interview with Dwight Doskey, supra note 134; Interview with Tilden Greenbaum, supra note 123.
194. Interview with Bruce Ashley, supra note 135; Telephone Interview with Judge Raymond Bigelow, Louisiana District Court (Mar. 5, 2002).
195. Perlstein, supra note 132 (reporting that Connick refuses to call exchange of guilty plea for sentence concessions plea bargains). While Connick acknowledges that
In New Orleans, defense attorneys obtain specific sentencing information directly from the judge. Sometimes these conversations occur during pretrial conferences in the judge’s chambers, while in other cases they happen in open court, during motions hearings. During the conferences, the prosecuting attorney summarizes any relevant facts about the alleged crime and the defendant’s personal background. The defense attorney identifies any factual disputes that might arise at trial, and sometimes suggests a sentence. The judge then announces a particular sentence that the defendant will receive after a guilty plea. On occasion, the defense attorney tries to persuade the judge to endorse a different sentence. These conversations are not necessary in every case, since the customary sentence for certain types of cases is so clear. But the judge signals his or her plans for the sentence in a great number of cases.

Judges gave similar accounts of these pretrial conferences. Indeed, most of the judges declared that they discourage prosecutors from expressing any opinion at all about the proper sentence. Even if the prosecutor were to recommend a sentence, it would not carry much weight with the judge. Custom dictates the sentence more than the arguments of counsel do. The judge selects the sentence from a statutory range that is reasonably broad; no sentencing guidelines constrain the judge’s choice. However, all twelve District Court judges in the parish operate in the same building and are aware of the sentencing habits of their colleagues. This setting keeps the judges aware of the “going rate” for various crimes committed by various types of offenders. In the opinion of defense attorneys and prosecutors, the variation in sentences within the courthouse is not very large.

The limited sentence discussions that occur in New Orleans are not the sort of plea bargains that dominate criminal practice in much of this country. Precious little negotiation ever happens. The important interaction occurs between the defense attorney and the judge, with the prosecutor standing to the side.

This arrangement holds more promise for defendants than a system where prosecutors routinely negotiate over the sentences they will recommend.

judges inform defendants about the specific sentence they plan to impose based on a guilty plea, he does not include that practice as plea “bargaining.” His office exercises no control over those judicial decisions. See Filosa, supra note 192 (noting Connick’s complaints after judge gave defendant a fifteen-year sentence for attempted murder of a police officer).

196. Two of the twelve district court judges only give ranges rather than specific terms. Interview with Tilden Greenbaum, supra note 123.

197. Telephone Interview with Judge Raymond Bigelow, supra note 194; Telephone Interview with Judge Leon Cannizarro, Louisiana District Court (Mar. 6, 2002); Telephone Interview with Dwight Doskey, supra note 134.

198. Telephone Interview with Judge Raymond Bigelow, supra note 194; Interview with Camille Buras, supra note 124; Telephone Interview with Judge Leon Cannizarro, supra note 197; Telephone Interview with Judge Dennis Waldron, Louisiana District Court (Mar. 7, 2002).

199. Interview with Bruce Ashley, supra note 135.
Judges pose less of a risk of imposing arbitrary sentences than prosecutors do. In theory, sentencing guidelines could limit the sentences that judges impose more easily than legislative guidelines could influence what sentences a prosecutor might recommend. There are no meaningful sentencing guidelines in Louisiana. But peer pressure among judges in this setting, not to mention judicial elections, serve much the same purpose.200

There is another form of sentence bargaining, however, that casts more serious doubt on the screening/bargaining tradeoff in New Orleans. Louisiana law provides enhanced sentences for habitual felons. The "multiple bill" law allows the prosecutor, after conviction for a felony, to file for an enhanced sentence if the defendant has been convicted of certain prior felonies. For defendants with a single previous felony, the prosecutor's filing forces the judge to select a sentence at least half of the statutory maximum for the underlying crime; the maximum allowable sentence doubles. When the prosecutor files a "triple bill" (against a defendant with two qualifying prior convictions) the mandatory minimum sentence is set at two-thirds of the original maximum for the crime.201

Connick lobbied the legislature over the years for expansions in the multiple bill law, and believes his attorneys should use it often. Longstanding office policy in New Orleans requires trial attorneys to request a multiple bill whenever a defendant qualifies.202 However, Connick and the supervising trial attorneys do allow some exceptions. Sometimes the prosecutor will not file a multiple bill when it is available, or will file a double bill when a triple bill is available. The defense attorney and the prosecutor discuss this issue directly with one another. The multiple bill also figures into conversations with the judges about the sentences they plan to impose in a given case.

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200. Perhaps this unusual level of involvement by judges means that in other jurisdictions a screening/bargaining tradeoff would take different forms. Courthouse actors will find it necessary to offer defendants some inducements for pleading guilty. If the judge cannot or will not make the offer directly, perhaps the prosecutor must offer the inducement.

Such sentence bargains with the prosecutor, however, do not trouble us to the same degree as charge bargains. A chief prosecutor can easily limit the impact of sentence bargains. For instance, a chief prosecutor might empower the trial attorneys only to agree to stand silent in some cases. Or the chief could limit the size of the discounts or create an internal review process to constrain the size of offers. We return in Part V to the distinction between charge and sentence bargains.

201. LA. REV. STAT. ANN. § 529.1 (West 2001). A "quad bill," available for defendants with three qualifying previous convictions, sets the available sentence range at 20 years to life. Louisiana operates a parole system, so the defendant would usually not serve the full minimum sentence in multiple bill cases.

202. Telephone Interview with Dwight Doskey, supra note 134; Telephone Interview with Judge Dennis Waldron, supra note 198. The policy originates from the earliest period in Connick's tenure. See JACOBY, THE AMERICAN PROSECUTOR, supra note 95, at 219 (stating that the 1975 office report lists swift prosecution, limited plea bargaining, and multiple bills as three key office policies).
This form of bargaining shares some features with both sentence bargaining and charge bargaining in the classic sense. Multiple bill negotiations resemble sentence bargains because the conversation relates directly to the sentence rather than the crime of conviction. The timing of the prosecutor’s action also creates a parallel with sentence bargains. In each case, the prosecutor commits to take some action at the sentencing hearing and not earlier. Multiple bill agreements also allow the prosecutor to send a consistent message to the court and to the public: There is no need to revise the charges already filed.

On the other hand, multiple bill agreements also share a crucial feature with charge bargains. The prosecutor acting alone can shift the range of sentences available to the judge, even though the judge remains free to choose within that range. This unilateral feature of multiple bill negotiation makes it just as potent and dangerous as charge bargaining.

How often do multiple bill agreements occur in New Orleans? It is more difficult to construct such an estimate than to track straightforward charge bargaining, using pleas of guilt to lesser charges. The base of defendants eligible for multiple bills is tricky to calculate. The age and type of convictions are relevant variables. Furthermore, the state legislature amended the law over the years. Nevertheless, some rough estimates are possible. Participants in New Orleans District Court estimate that multiple bill agreements occur about as often as negotiated pleas to a lesser charge. Multiple bill reductions occur, they say, for roughly ten percent of all defendants.203

These multiple bill agreements add significantly to the amount of plea bargaining in the New Orleans system. The NODA office still hems in the trial attorneys’ discretion on this issue. Supervisors must authorize any decision not to file the highest available level of multiple bill.204 But the stigma that attaches to charge reductions does not apply fully to multiple bills. Office practice requires less documentation for a multiple bill reduction, and office reports do not monitor the practice as closely as charge reductions.205 Multiple bills represent the weakest point in the implementation of Connick’s policies on screening and bargaining.

C. Potential Unseen Effects of the Tradeoff

Like any dramatic change in complex social systems—such as the provision of defense counsel to the indigent or the implementation of sentencing guidelines—a shift towards hard screening is like the first shot in a

203. Telephone Interview with Judge Dennis Waldron, supra note 198 (estimating 40% of defendants eligible and 20% to 30% of those eligible cases reduced).


205. See BOLLMAN, ET AL., supra note 149.
The screening/bargaining tradeoff

game of pool: It creates many effects simultaneously. Some of the effects (those reviewed in Part III.B) are visible in the prosecutor’s database. Other effects of hard screening are harder to confirm through the statistics. In the paragraphs that follow, we review two of the most important unknown effects. They provide caveats to the lessons that can be drawn from the hard screening practices we have described.

Under the right circumstances, open pleas can be more desirable than either sentence bargains or charge bargains. But the advantage of open pleas over negotiated pleas starts to disappear as the amount of the “plea benefit” or “trial penalty” increases. One of the key reasons for a defendant to plead guilty is to receive a discount in the sentence. When the prosecutor adopts policies that make charge bargains harder to use, judges who want to move their crowded dockets might increase the customary discount to prevent large increases in the trial rate. If the customary discount becomes too large, defendants might enter an open plea even when the charges are marginal—perhaps not provable at trial. Thus, trial penalties that are too large undermine the honesty of charges and of the entire system.

Based on what we have seen so far, we do not know how the trial penalty is interacting with the NODA screening policies. The judges in New Orleans say that they guard against any trial penalty. They say they only increase (or decrease) a sentence after trial if the trial uncovers some important fact in the case that the judge did not know when announcing a proposed sentence before trial. Indeed, more strikingly, several New Orleans judges say they tell each defendant that he or she will receive the same (promised) sentence after trial, absent important new evidence. The judges also say that such new information is a rare occurrence.

We do not know if the charging data in New Orleans confirms what the judges believe about the size of the trial penalty, or how it compares to the penalty elsewhere. We cannot even be sure yet whether hard screening policies lead to smaller or larger trial penalties. Judges might respond to the


207. Massive plea benefits can also be seen in a logical mirror as a massive penalty for going to trial. At some point, a large trial penalty should raise constitutional concerns, since it would not only weaken but also effectively eliminate access to the host of individual and public constitutional trial rights. See Joseph L. Hoffmann, Marcy L. Kahn & Steven W. Fisher, Plea Bargaining in the Shadow of Death, 69 FORDHAM L. REV. 2313 (2001).

208. These public statements asserting the absence of a trial penalty may help to explain the relatively high trial rates in New Orleans. Where defendants believe the state cannot prove its case, they may have less to lose than in most jurisdictions where the trial penalty (or plea benefit) is never stated and may vary by judge and by case.

209. Telephone Interview with Judge Leon Cannizarro, supra note 197; Telephone Interview with Judge Dennis Waldron, supra note 198.
unwillingness of the district attorney to enter charge bargains by reducing the trial penalty, recognizing that defendants have fewer incentives to plead guilty and in all fairness should not pay as heavily for going to trial.

There is reason to believe that the trial penalty will not grow exceptionally large. In most systems, one of the most powerful regulators of the plea benefit is the charge to which the defendant pleads guilty. Thus, a hard screening system will give prosecutors somewhat less control over the plea benefit compared to systems where initial charges are less consistently reviewed or where charging occurs with a lower standard of proof. A system with hard screening may be easier for prosecutors and judges to adjust in ways that will reduce the plea benefit, thus encouraging more trials.

Our description of screening practices in New Orleans has remained at the aggregate level. We have not asked here whether screening practices changed over time. Nor have we looked separately at the screening of particular types of crimes (such as violent crimes, property crimes, sexual violence cases, and so forth). The aggregate data also smooth out any potential differences among individual screening attorneys in the office. The success and wisdom of the screening/bargaining tradeoff turns on the idea that prosecutors can set up thoughtful and reasonably consistent internal decisionmaking processes. The value of the system might be undermined if closer examination revealed substantial variation across individual prosecutors assessing similar cases.210

IV. THE MORE HONEST AND ACCESSIBLE OPTION

In Part II, we sketched the hard screening policies that might produce a realistic alternative to plea bargaining. And in Part III, the screening alternative passed one of its most difficult tests: The screening policies at work over many years in New Orleans confirm that such a system is viable. In this Part, we ask whether screening policies are more desirable than plea bargaining.

We believe that hard screening policies are more attractive than plea bargaining on a number of fronts. In particular, we believe that screening improves the honesty and accessibility of criminal justice. The vices of plea bargaining are legion; many of them, however, grow from the fact that prosecutors who decide to file charges can send false signals about the value of a case. Indeed, prosecutors can send false signals multiple times. A properly functioning policy of hard screening forces the prosecutor to send a single consistent signal about the case. It allows the defendant and the public to see more clearly how the prosecutor's office uses limited resources. When prosecutors screen effectively enough to make plea negotiations uncommon,

210. Differences among crime types and among individual attorneys call for closer scrutiny. These more detailed inquiries will add some nuance to the story that the aggregate data tell. But we save this finer resolution of the picture for another day.
they combine many (but not all) of the virtues not only of bargain-centered systems, but also of trials.

A. Remedy for Prosecutors' Bluffing

Some of the most eloquent attacks on plea bargaining point out the incentives for a prosecutor to “overcharge” a case. In a trial-centered world, the prosecutor must file charges that have some realistic chance of producing a conviction at trial. But if the prosecutor knows that most cases will end in a negotiated plea, there is every temptation to file more serious charges than the evidence can support. The prosecutor can hope that a defendant will be risk averse and will accept a plea to charges greater than the case’s true value simply to avoid the remote chance of a conviction on far more serious charges. Similarly (although it may occur less frequently), a prosecutor might believe that a defendant will be uninformed about the weaknesses of the case and will plead guilty to more than the true value of the case. Supporters of plea bargaining, such as Frank Easterbrook, concede that prosecutors might try this gambit from time to time, but counter that it is unlikely to work.

211. Albert Alschuler found evidence of overcharging among prosecutors in his classic 1968 article on the prosecutor’s role in plea bargaining, an article that launched his decades-long campaign against plea bargaining. Alschuler, supra note 12. Based on interviews in ten cities, Alschuler described several common forms of overcharging. “Horizontal” overcharging involves multiplying the charges against a defendant beyond what would normally be the basis for a conviction for that criminal conduct. “Vertical” overcharging means charging a single offense at a higher level than the circumstances seem to warrant.

212. While the prosecutor could have many reasons to “play it safe” and overcharge, the intent is often to convince the defendant to plead guilty in exchange for dismissal of some charges. Id. at 85-105. In the federal system, charge bargaining is most likely to happen in areas where the prosecutor could charge the defendant under a statute with a mandatory minimum sentence, especially in drug and weapons cases. See Stephen J. Schulhofer & Ilene H. Nagel, Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post-Mistretta Period, 91 NW. U. L. REV. 1284, 1285, 1293 (1997).

213. The “true value” of the case might be judged by the most serious charges that would likely result in conviction after trial, or by the most serious charges that a prosecutor would typically file when expecting to take the case to trial. See Tracey L. Meares, Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives, 64 FORDHAM L. REV. 851, 853, 862-73 (1995) (discussing institutional incentives for overcharging); Vetri, supra note 18, at 905 (stating that 55% of prosecutors in national survey say they draft indictment in expectation of events during plea bargaining).

214. Easterbrook, supra note 3, at 308-09; William F. McDonald, James A. Cramer & Henry H. Rossman, Prosecutorial Bluffing and the Case Against Plea Bargaining, in PLEA BARGAINING, supra note 56, at 1, 21-22. The defense attorney, who should know more about the case than any judge or jury, can prevent the defendant from accepting overvalued charges. In theory, negotiated pleas should normally mirror (with a discount) what would have happened at trial. Church, supra note 5, at 515; Emmelman, supra note 15; Milton Heumann, A Note on Plea Bargaining and Case Pressure, 9 LAW & SOC’Y REV. 515, 526 (1975). While this answer might suffice for the defendant who accepts the inflated charges based on ignorance about the true value of the case, it does not answer the problem of the
A parallel effect of plea bargaining on prosecutors is the temptation to accept too little from the defendant in exchange for avoiding the trial. The problem is sometimes cast in terms of agency costs: The agent (the prosecutor) might sell the case to the defendant too cheaply while the principal (the public) is not paying attention. Chief prosecutors who limit the bargaining authority of their line prosecutors express this fear. They worry that their assistants will negotiate poorly because the job becomes easier when the prosecutor avoids trials. Unfortunately, it can be difficult to judge whether a trial prosecutor has granted too great a discount in the charges. Some discounts are necessary because the government’s evidence of more serious crimes is truly weak; other discounts occur because of the prosecuting attorney’s self-interested desire to avoid difficult litigation.

A final claim about the effects of plea bargaining develops further this idea of improper prosecutorial motives for discounting charges. The line prosecutor might charge or settle cases selectively, giving unduly generous treatment to some defendants but not to other similar defendants. This selective treatment could be based on unsavory factors such as conscious or unconscious race or gender bias.

A big increase in the trial rate is not necessary to squelch these negative effects. A hard screening system can prevent prosecutorial overcharging just as well as a system with a high rate of trial. In a prosecutor’s office that screens out weaker cases and prevents adjustments to charges after they are filed, it becomes costly to choose unrealistically high charges. Any initial misstatements about the worth of a case become more visible and more difficult to correct. The need to economize on the prosecutor’s time, not to mention professional pride, will keep the charges more realistic. Thus, screening prevents overcharging better than a bargain-centered system, and perhaps as well as a major increase in the trial rate.

If prosecutors do overcharge but are limited by office policy in their ability to amend the charges later, the result will be more trials and more acquittals. Selective overcharging might still tempt prosecutors to offer a few bargains to

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risk-averse defendant who sees that the prosecutor is asking an inflated price, but is unwilling to risk the outcome at trial even if the odds look good for an acquittal. See Conrad G. Brunk, *The Problem of Voluntariness and Coercion in the Negotiated Plea*, 13 LAW & SOC’Y REV. 527 (1979) (noting that full trial option and minimal sentence differential are necessary conditions to voluntary plea).

215. **See LAFAVE ET AL., supra note 22, § 21.1(d).** Several different agency relationships are at work here. Prosecutors serve as agents for the public; victims of crimes also come to think of prosecutors as their agents. And trial attorneys serve as agents for the chief elected prosecutor.

216. **See Kuh, supra note 54. But cf. Worden, supra note 13, at 335-36, 339 (finding no correlation between close supervisory style and adoption of policies limiting plea bargains).**

217. **See Davis, supra note 86; McAdams, supra note 86; Developments in the Law—Race and the Criminal Process, 101 HARV. L. REV. 1473, 1520-57 (1988); supra Part II.**
fix screening errors, but if plea bargains become rare, those that do occur can
attract more attention from supervisors in prosecutors’ offices and from the
public.

The risk of undercharging, or bargains intended simply to maintain high
conviction rates, also diminishes in a world of intensive screening. The
prosecutor in a bargain-centered world might charge less than a case is worth
and get an easy conviction. A negotiated plea is less publicly visible than a
trial on the original charges, and it takes some effort for a supervisor in the
prosecutor’s office to determine whether the trial attorney set too low a value
for a case.

But a screening system is more accessible and therefore is more likely to
expose a prosecutor who is undercharging to supervisors, colleagues, and
victims. A commitment to principled screening in a prosecutor’s office
produces criteria for all screening attorneys to apply as they select charges. It
also calls for supervisors to review the work of the screeners routinely. The
unduly generous prosecutor will attract attention within the office in the routine
course of business.

The public is also more likely to notice when a prosecutor is selling cases
too cheaply in a screening-centered system. In a negotiated plea, the public
receives two estimates of a case’s value, the “asking” price and the “sale” price,
but it receives few particulars about the evidence. The public cannot very well
decide which of the competing estimates is more accurate. In a screening
system, the prosecutor’s value estimate (the original charge) stays in place
throughout the process, without any confusing shifts. When the defendant
pleads guilty as charged, there are no disputes about the facts or the
applicability of the charges. The relatively rare changes in charges attract more
public attention because of their novelty.

Thus, the public receives clear signals about the level of prosecutorial
enforcement it has purchased with its tax dollars. With this information in
hand, the public can hold prosecutors accountable for their choices. The public
responds positively to sentencing rules that offer “truth in sentencing.” A hard
screening system offers to the public a similar benefit, one we might call “truth
in charging.”

Is a screening system as honest and accessible as a criminal trial? In some
ways screening systems are not as accessible as trials since key decisions will
still be made by prosecutors acting out of the limelight, not subject to testing by
defense attorneys, juries, and judges. Trials enable the media and the general
public to watch the mechanisms of justice at work. However, trials are also
very complex affairs, and they are complex in ways that hurt their accessibility.
Many of the decisions played out at trial, such as the choice of witnesses and
evidence the government will use, have been settled off stage. It may
sometimes be easier for the public to understand the single fact that a defendant
pled guilty to the charges originally filed by the government. In any case, the
proper basis for comparison is not the rare trial, but the common bargain. In
that comparison, a screening-intensive system wins the accessibility debate hands down.

Overall, the prosecutor’s gain in efficiency in a bargain-centered system looks far less impressive when negotiated pleas are compared to rigorous screening controls. Experience in many jurisdictions shows that prosecutors in these two types of systems can handle similar caseloads. The screening alternative also gives prosecutors control over trial risks similar to what they enjoy in a system centered on plea bargains. If the prosecutor charges only the strongest cases and predictably induces many defendants to plead guilty as charged, the level of trial risk remains almost as low as when prosecutors negotiate most guilty pleas.

B. Cure for Judges’ Complicity

A plea bargaining system leaves few openings for the judge to change an outcome. The parties can restrict the range of sentences on the judge’s menu. The judge might refuse to accept the plea of guilty if the charges do not adequately reflect the conduct, but the judge cannot force the prosecutor to file any different charges. And the judge usually must trust the judgment of the parties, who know more of the details of the case. Moreover, in an adversary system, judges will naturally be inclined to assume the competing interests of the government and the citizen are fully reflected in any bargain.

If the parties reach a sentencing agreement instead, the judge has slightly more authority. In some jurisdictions, the judge might have the power to accept a plea of guilty and impose a sentence other than the one the parties recommend. In others, the rules allow the defendant to withdraw a guilty plea if the judge does not accept the agreed-upon sentence. But whatever the rules in the jurisdiction, most judges in most cases will have every reason to accept the recommendation from the parties to move the case along. The judge is complicit with the parties after they reach a plea agreement.

In some jurisdictions, procedural rules about plea negotiations reinforce the judge’s place on the sidelines. In these places, various statutes and ethical rules limit the involvement of judges in direct discussions with a defendant before entry of the guilty plea. The theory is that the judge—who will in theory try the case and who makes the ultimate decision on sentence whether after trial or a guilty plea—will coerce a defendant to accept the proposed deal.

218. See supra Part I.B.1.
220. See Stafford, supra note 30.
221. See, e.g., FED. R. CRIM. P. 11(e)(1)(B).
222. See, e.g., ARIZ. R. CRIM. P. 17.4(e).
223. See COLO. REV. STAT. ANN. § 16-7-302 (West 2001); S.D. CODIFIED LAWS § 23 A-7-8 (Michie 2001); WASH. REV. CODE ANN. § 9.94A.421 (West 2002); ARK. R. CRIM. P. 25.3(a) (“judge shall not participate in plea discussions”); DEL. CT. C.P. CRIM. R. 11(e)(1);
On the other hand, the sentencing judge can offer defendants some of the most reliable information about the bottom line issue in the criminal proceedings: the sentence to be imposed. To give defendants more complete and reliable information, a growing number of states encourage rather than forbid judicial involvement in plea discussions.224

How would a prosecutor’s shift to principled screening change the judge’s role? If increased screening results in more trials, judges will bear some additional burden. Even a modest increase in trial rates can have substantial impacts on judicial time and resources. But the cases that come to trial in a system of hard screening should be the cases most appropriate for trial, where it is not clear to the parties whether the prosecutor can prove her case. Judges should see fewer cases where they suspect padded charges and counts.

D.C. SUPER. CT. CRIM. R. 11(e)(1); GA. UNIF. SUPER. CT. R. 33.5(a); MAINE R. CRIM. P. 11A(a) (“court shall not participate in the negotiation of the specific terms of the plea agreement”); MASS. R. CRIM. P. 12(b) (reporter’s notes); MISS. CIR. CT. R. 8.04(B)(4); N.M. DIST. CT. R. CRIM. P. 5-304(A)(1); N.D. R. CRIM. P. 11(d)(1); TENN. R. CRIM. P. 11(e)(1); VA. SUP. CT. R. 3A:8(c)(1); W. VA. R. CRIM. P. 11(e)(1); Peter W. Agnes, Jr., Some Observations and Suggestions Regarding the Settlement Activities of Massachusetts Trial Judges, 31 SUFFOLK U. L. REV. 263, 307 (1997); Norman Lefstein, Plea Bargaining and the Trial Judge, the New ABA Standards, and the Need to Control Judicial Discretion, 59 N.C. L. REV. 477, 507 (1981); Standen, supra note 15, at 1501-02 (restriction of judicial involvement in plea bargaining under federal sentencing guidelines). One potential answer to these concerns would be to assign the oversight of plea negotiations to a judge other than the trial judge or sentencing judge. In the civil litigation setting, mediators accomplish much the same purpose.

One alleged event in New Orleans illustrates how judges might become entangled in the ordinary dynamics of a negotiation, but with very different consequences than a prosecutor. A defense attorney reported to us that one especially stubborn defendant refused to accept several “offers” from the judge and sent the defense attorney back to the judge for better offers three times. The judge called the defendant into the courtroom and said to him, “Fuck you, fuck you, and fuck your mother.” The defendant immediately asked his attorney about taking the most recent offer to avoid going to trial in front of that judge.

224. See N.C. GEN. STAT. § 15A-1021(a) (2000); OR. REV. STAT. ANN. § 135.432 (1999) (trial judge shall not participate in plea discussions generally but may participate in tentative plea agreement; any other judge may participate at the request of both parties or at the direction of the court); ARIZ. R. CRIM. P. 17.4(a) (“At the request of either party or sua sponte, the court may in its sole discretion, participate in settlement discussions . . . .”); HAW. R. PEN. P. 11(e) (“The court may participate in discussions leading to such plea agreements and may agree to be bound thereby.”); IDAHO R. CRIM. P. 11(d)(1)(D) (“The court may participate in such [plea] discussions.”); ILL. SUP. CT. R. 402(d) (trial judge shall not initiate plea discussions, but discretion rests with judge to be advised of agreement and indicate whether he concurs); MO. R. CRIM. P. 24.02(d) (after parties reach agreement, court may discuss acceptable alternatives); UTAH R. CRIM. P. 11(h)(1) (participation after tentative agreement reached); VT. R. CRIM. P. 11(e)(1) (“The court shall not participate in any such discussions, unless the proceedings are taken down by a court reporter or recording equipment.”); State v. Warner, 762 So. 2d 507, 514 (Fla. 2000) (once involved in plea bargaining process, the court may actively discuss potential sentences and comment on proposed plea agreements); John Paul Ryan & James J. Alfini, Trial Judges’ Participation in Plea Bargaining: An Empirical Perspective, 13 LAW & SOC’Y REV. 479 (1979).
If the prosecutor’s office screens aggressively and discourages its trial attorneys from reducing charges, defense attorneys will look to the judge for assurances about the sentence that he or she would impose after a guilty plea. In systems that allow or even encourage the judge to participate in plea negotiations, the judge might become central to any discussion about sentencing ranges and relevant sentencing facts before a defendant offers an open plea.225

This describes the remarkable practices of judges in the District Court in New Orleans. The judge communicates directly with defense counsel about the sentence he or she plans to impose if the defendant pleads guilty to the charges. The state statutes and rules in Louisiana remain silent on the judge’s participation in plea negotiations.226 Such communication might not be necessary in many straightforward cases.227 But for defendants with a criminal record or a crime involving special circumstances, some assurance from the judge is critical. The sentencing signals the defendants receive from judges convince many of them to plead guilty as charged, without reaching any agreement with the prosecutor.

Is such active judicial involvement necessary for an attractive screening policy to operate? Certainly, some open guilty pleas are more appealing than others. A defendant might face a steep penalty at sentencing for insisting on a trial.228 Such a defendant might also receive no sentencing information from the judge, and might have no legal right to withdraw a guilty plea if the judge imposes an unexpected sentence. Defendants in this situation are powerless and in the dark. They must simply throw themselves on the mercy of the court, and hope for no aberrationally harsh sentence from the judge. Such a system approaches lawlessness. It depends on the uneven preferences of different

225. In jurisdictions where the law prevents the judge from participating in plea negotiations, screening might have less of an impact on the judge’s role. But see Alschuler, supra note 192, at 1061-74 (tracing effects of judges on bargaining dynamics even in jurisdictions that nominally prohibit judicial involvement in plea bargaining). It might also be difficult for judges in larger jurisdictions to play an active role in encouraging open pleas because the judges form a less coherent group and will know less about sentencing practices in other parts of the jurisdiction.

226. LA. CODE CRIM. PROC. ANN. art. 552-61 (West 2001).
227. Telephone Interview with Judge Dennis Waldron, supra note 198.
judges, and improves only modestly on a system that depends on the uneven bargaining preferences of different prosecutors.

On the other hand, the open pleas produced in some screening systems can improve significantly on plea bargains. The defendant benefits when information about the sentence comes from the judge on the public record rather than from an adversarial prosecutor off the record. And if the trial judge tends not to impose a heavy penalty at sentencing on those defendants who go to trial, even a risk-averse defendant can judge whether the trial is a risk worth taking.

While judicial signals about sentences are useful to reinforce a prosecutor's screening policies, they are not essential in every jurisdiction. Sentencing rules or strong sentencing cultures can accomplish much the same as a message from the judge. Like an explicit message, sentencing guidelines or a clear practice of all judges in the jurisdiction can assure the defendant that he or she will not be singled out for harsh treatment after a guilty plea.

C. Combating Defense Attorneys' Resigned Cynicism

Those who are most optimistic about plea bargaining believe that the defense lawyer adds more value in plea bargaining than at trial. During plea negotiations, the defense lawyer tests the prosecutor's claims about the facts and the applicable law, and adds further information that is only available to the defendant.\textsuperscript{229} In this view, the defense counsel makes possible an outcome that best fits the facts known to both sides in the litigation.\textsuperscript{230} Others frame the benefits to the defendant in moral terms: Plea bargaining treats the defendant with the respect that an autonomous human being deserves, leaving more control over the defendant's fate in his own hands.\textsuperscript{231}

Many have questioned whether the theoretical benefits that the defense attorney might contribute at the negotiation stage are real. Arrangements in the real world conspire to make most defense attorneys fail at this job.\textsuperscript{232} For

\textsuperscript{229} Frank Easterbrook likens the plea negotiation process to the operation of a free market system, allowing the parties with the most knowledge about their own priorities to reach an outcome that creates the most possible social benefits. Easterbrook, supra note 3; Frank H. Easterbrook, \textit{Plea Bargaining as Compromise}, 101 YALE L.J. 1969 (1992).


\textsuperscript{232} Stephen Schulhofer, among others, has pointed out many ways that the defense attorney will imperfectly represent the client's interests during negotiations. Stephen J. Schulhofer, \textit{Criminal Justice Discretion as a Regulatory System}, 17 J. LEGAL STUD. 43, 53-
instance, the defense attorney acts on imperfect information, because the
criminal discovery process is limited and is often not complete during plea
negotiations.233

Like the prosecutor, the defense attorney also must contend with self-
interest that calls for settlement on unfavorable terms for the client. In some
jurisdictions, the fee arrangements compensate pretrial work more highly than
trial work, giving the defense attorney a financial incentive to give too much
ground during plea negotiations.234 The defense attorney might also cooperate
with prosecutors, to the detriment of the client, because a cooperative posture
makes the working environment more tolerable.235

The defense lawyer also relies on plea bargaining to make “client
management” easier. In those cases where a defense at trial is nearly hopeless,
the lawyer must find some other way to convince the client that she has earned
her fee. When negotiated pleas are the norm, the lawyer can always point to
reduced charges or a specific sentence concession. It may be true that the final
outcome is entirely ordinary (the same “discount” off the “list price” that every
other defendant receives), but plea negotiations give the defense attorney an
illusion to sell to the client.236 For the critics of plea bargaining, a defendant
gets more genuine benefits from a defense attorney at trial, where the attorney
can test the government’s case, and at sentencing, where far greater nuance in
assessing the offense and the offender becomes possible.

Intensive screening would make the defense lawyer’s job harder, in a
sense, than a bargain-centered system. It would become harder because the
typical measure of negotiating success—the claim that the attorney obtained
some reduction in charges in exchange for the plea—would largely disappear.
That negotiating success, however, comes at great moral and professional cost.
Defense attorneys may take those successes because they believe the bargains
are in their client’s interest.237 But reflective defense attorneys recognize the

60 (1988); Schulhofer, supra note 6, at 1988-91.
235. HEUMANN, supra note 19, at 69; Abraham S. Blumberg, The Practice of Law as Confidence Game: Organizational Cooptation of a Profession, 1 LAW & SOC’Y REV. 15, 26 (1967) (attorney’s desire to maximize his or her income); Anthony Platt & Randi Pollock, Channeling Lawyers: The Careers of Public Defenders, 9 ISSUE CRIMINOLOGY 1, 15 (1974) (political cooptation); David Sudnow, Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office, 12 SOC. PROBS. 255, 262 (1965) (noting that because of their cooperative relationship with other members of the court system, public defenders habitually and unscrupulously plea bargain cases).
237. Telling a client to plead guilty to a crime the client does not believe he committed
raises some ethical problem areas for defense counsel to navigate. See MODEL RULES OF

HeinOnline -- 55 Stan. L. Rev. 92 2002-2003
game-like nature of the deal. Sophisticated clients also understand that the defense attorney often can do little for them.

A screening system would present defense attorneys and their clients with fewer charges and less severe charges as an initial matter. Some defendants who might have been prosecuted in a bargain-centered system would now have their cases declined. The defense attorney would participate less in the selection of charges (although there is some prospect for precharge negotiations). When a defendant is charged, the attorney’s primary function would be to predict an outcome at trial and at sentencing, not to predict how much ground the prosecutor might give up during negotiations. The attorney and client would discuss the strengths of the defendant’s case, the personal costs of trial, and any remaining plea benefit. So long as prosecutors are not systematically missing the mark, defense lawyers could do this without much threat to their financial self-interest. The defense attorney would have an active role in sentencing. These, rather than any spurious and routine “discount” in the charge, are the accomplishments that an attorney could show a client.

In New Orleans, the defense attorneys rarely engage in precharge negotiations.238 The New Orleans indigent defense system, like most systems of public defense, has serious funding troubles.239 Indeed, in a noteworthy 1993 decision, State v. Peart,240 the Louisiana Supreme Court found that indigent defense in Orleans Criminal Court was “in many respects so lacking that defendants who must depend on it are not likely to receive” and “are generally not provided with” effective assistance of counsel.241

Although the Louisiana legislature increased funding for indigent defense in the years immediately following Peart, and subsequently organized and funded a new Indigent Defense Assistance Board,242 the experience in Louisiana raises the question whether the virtues of a hard screening system are strongest only where defense counsel (or defense resources) are weakest. Put another way, if defenders were funded the way they should be, would the virtues of screening recede, and the ability of defenders to shape wise bargains increase?

The lack of precharge bargaining by defense counsel in New Orleans appears to be a fact, but we do not view it as either a virtue or a vice. The

238. See supra Part III.B.3.
239. See All Things Considered: Pair Spends Years in Louisiana Jail Without Convictions (NPR radio broadcast, Oct. 15, 1995) (recounting how Louisiana is “infamous for stiffing the poor” on criminal defense); CCLU Suit Lays Bare A Public Defense System In Crisis, HARTFORD COURANT, Jan. 9, 1995, at A1 (quoting New Orleans Chief Public Defender Numa Bertel stating that “[w]e have been at the crisis stage many, many times, both financially and in caseload”).
240. 621 So. 2d 780 (La. 1993).
241. Id. at 790-91.
242. See Miller, supra note 106, at 1795.
centrality of the prosecutor and the judge in the New Orleans system gives it a more inquisitorial and less adversarial flavor.²⁴³ Perhaps in the absence of sufficient defense resources, the screening system offers additional advantages because its outcomes depend less on defense counsel. But even in a jurisdiction with a well-funded defense system, prosecutors who engage in hard screening should be reaching similar charging decisions, based on more intense examination of each case. There is everything right with a well-funded defense system, and there is nothing wrong with a defense lawyer providing additional information to prosecutors before initial charging decisions are made. But negotiations before charging, like negotiations for plea bargains after charging, risk more inconsistent treatment across similar defendants. If prosecutors do make substantially different charging decisions in light of precharge conversations with defense counsel (including well-funded defense counsel), then prosecutors were not engaging in sufficiently hard screening in the first place.

In addition to creating a more honest role for the defense attorney, hard screening policies can also improve on the experience of the criminal defendant himself. One urgent problem discussed in the literature on plea bargains (and we believe it is a substantial problem in fact) is the innocent defendant. Some defendants plead guilty even though they have committed no crime, or have committed some crime less serious or substantially different from the one charged.²⁴⁴ One might explain such bargains on the ground that the defense attorney cannot perfectly represent the interest of the defendant. However, a lawyer may be perfectly representing her client when she advises him to plead guilty even in the face of assertions of innocence. Courts recognize such a dilemma openly to the extent that they allow Alford pleas.²⁴⁵

²⁴³ See generally William T. Pizzi, Trials Without Truth: Why Our System Has Become an Expensive Failure and What We Need to Do to Rebuild It (1999); Matthew T. King, Security, Scale, Form, and Function: The Search for Truth and the Exclusion of Evidence in Adversarial and Inquisitorial Justice Systems, 12 INT’L LEGAL PERSP. 185 (2002). Systems with or without well-funded defense counsel, and with or without open file or “two way” discovery rules, might be described as using the tools of game theory. Where defenders and prosecutors talk with each other before the initial charge the parties would be engaged in “signalling;” where they do not, the game might be described as a “screening” game where the uninformed party tries to infer information about the other party. See generally Eric Rasmusen, Games and Information: An Introduction to Game Theory (3d ed. 2000) (discussing both screening and signalling bargaining games).


While some scholars point to this coercion problem as a reason to abolish plea bargaining, a larger number accept negotiated pleas as the norm but try to identify the exceptional cases when a guilty plea is likely to be coerced and not reflect the facts as they truly happened. Some of the earliest efforts in this vein were various model codes appearing in the 1970s, all focusing on giving a defendant full information about the likely sentence and other consequences of a guilty plea.

A strong screening system looks better than a trial-centered system as a method of identifying truly innocent defendants. First, prosecutors will look more closely at cases when the evidence is still fresh. At this point, before they have made any public statements about the case, prosecutors might be more willing to take seriously any claims of innocence. Second, where prosecutors charge crimes in cases of true innocence, the pressure on defendants to plead guilty will be greatly reduced. The defendant's inducement to plead guilty will remain small because prosecutorial office policy prevents a reduction in the charges. Only the more constrained benefits of a sentence bargain (or a sentence concession from the judge even without the prosecutor's blessing) are possible. Thus, cases of true innocence are more likely to be tested at trial. Errors will still happen, but we can hope for fewer errors.

The effects of plea bargains reach both guilty and innocent defendants. Where the outcome always turns on negotiations, some postulate that

246. See Bruce A. Green, "Package" Plea Bargaining and the Prosecutor's Duty of Good Faith, 25 CRIM. L. BULL. 507 (1989) (noting coercive effects of plea agreements linking outcomes for different defendants). Robert Scott and William Stuntz have used economic reasoning and contract law to add a sophisticated twist to the coercion debate. They do not single out a particular category of case that presents the greatest risk of a wrongful conviction. They turn instead to the tools available to the parties in all cases to signal innocence and undo any erroneous convictions. Innocent defendants, who are more risk-averse than guilty defendants, need more power to bind the judge to an attractive sentencing deal, and more power to renege on a bargain entered by an incompetent defense attorney. Scott & Stuntz, supra note 4, at 1947-57. Reforms such as these would give innocent defendants more tools to signal their innocence and to take advantage of the largest discounts that the prosecutor or judge might offer. But Scott and Stuntz are equally clear that their proposals aim for exceptional cases where plea bargaining suffers by comparison to the trial as a method of sorting the guilty from the innocent. In most cases, they say, "the basic soundness of the bargaining regime is clear." Robert E. Scott & William Stuntz, A Reply: Imperfect Bargains, Imperfect Trials, and Innocent Defendants, 101 YALE L.J. 2011, 2015 (1992). Scott and Stuntz compare their reforms of plea bargaining to a world featuring trials. They believe that an improved plea bargaining process is superior to criminal trials as a method for sorting the innocent from the guilty. If a jurisdiction were to abolish plea bargains, the necessary increase in trials would "necessarily involve economizing on the process," which "logically implies increasing the rate of error." Scott & Stuntz, supra note 4, at 1932.

247. See Daniel L. Rotenberg, The Progress of Plea Bargaining: The ABA Standards and Beyond, 8 CONN. L. REV. 44, 68 (1975); H. Richard Uviller, Pleading Guilty: A Critique of Four Models, 41 LAW & CONTEMP. PROBS. 102, 125 (1977). The limited efforts by courts to require a "factual basis" for every guilty plea gives the judge enough information to block conviction of the truly innocent in only a few cases.
defendants become cynical. They believe that they have "cheated justice," thanks to the persuasive skills or personal connections of their lawyer.248 Conversely, a defendant might believe herself to be one of the unlucky ones who could not receive a personal favor from the prosecutor because of a lack of connections or resources. This frame of mind corrodes efforts at rehabilitation and respect for the law.

Once again, we believe that a screening system improves on a bargain-centered world, much as an increase in the trial rate would. In a system where prosecutors ordinarily do not change the charges, the defendant does not point to off-the-record negotiations between the defense lawyer and the prosecutor as the reason for the conviction and sentence. Instead, the evidence and the defendant's own personal background explain the outcome.

D. Therapy for the Public's Learned Helplessness

The public, the police, and crime victims are no friends of plea bargaining. For each of these groups, plea bargains create disappointment and a sense of helplessness.249 The problem can arise when the prosecutor sets expectations through the initial charges. After reducing and dropping charges during negotiations, the prosecutor must explain why the public, along with the investigators and the victims of the alleged crime, should accept something less than originally announced.250 The prosecutor sometimes agrees to punishments that the public has not authorized by law.251 The public also loses confidence in criminal justice when it appears that some innocent defendants are pleading guilty.252 Furthermore, the public might mistrust a criminal justice process that allows the defendant to waive procedures that are considered the bare minimum for a civilized system of justice.253

251. Colquitt, supra note 4.
253. See United States v. Mezzanatto, 513 U.S. 196, 204 (1995) ("'No doubt there are limits to waiver; if the parties stipulated to trial by 12 orangutans the defendant's conviction would be invalid notwithstanding his consent, because some minimum of civilized procedure
A jurisdiction that tries most criminal cases would avoid these problems: Some acquittals might be unhappy events for police officers and victims, but the public would accept a few acquittals as a sign of a healthy system. A screening jurisdiction, on the other hand, faces a larger challenge. To avoid the sort of disappointment that is endemic to negotiated pleas, prosecutors must explain to the public (and, more particularly, to the police) why they are declining to charge a larger number of suspected violators. The level of public acceptance will turn on how well the prosecutor selects and explains the cases to decline. Thus, a screening system improves on widespread bargaining only when the screening decisions are principled and visible to the public.

Hard screening policies might also improve on the relationship between the prosecutor's office and the police department, although there is some risk involved. A common complaint of police officers in many urban jurisdictions is that prosecutors refuse to prosecute good cases—they throw away good police work—and then bargain away other good cases. A shift towards hard screening in prosecutor's offices is likely to produce higher levels of declination, but lower levels of charge bargains. This sends a mixed message to police officers. A prosecutor who shifts to stronger screening risks more strained relations with the local police.

The leadership in police departments can reinforce, modify, and perhaps initiate the shift from traditional, bargain-oriented systems to screening-focused systems. Police in a hard screening system, asked to do more, better, and earlier work, should insist on more complete and systematic feedback from the prosecutor's office both during and after the screening process. If police officers are delivering cases with fatal evidentiary flaws, they must learn about the exact nature of the problems, identify any patterns in the problem cases, and change their investigations accordingly. The police might also participate in the screening decisions on important cases, such as murders, armed robberies, or serious assaults. As prosecutors discuss the potential problems with the case, police officers learn about pitfalls to avoid in the future. Thus, an intense screening policy should encourage better police work.

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256. The story of the relationship between prosecutors and police in New Orleans is mixed. Early assessments described the posting of police investigators in the New Orleans District Attorney's office, and weekly meetings between top prosecutors and police brass.
On a policy level, police can insist that any painful increases in declination produce a payoff in reduced charge bargaining. Their inquiries and opinions can help the chief prosecutor enforce any policy that discourages charge bargains. If the elected prosecutor plans to emphasize certain types of crimes and to devalue others, police departments might shift their resources in that direction. If the police continue to pursue cases that the prosecutor would rather see less often, they may waste public resources. But an intense prosecutorial screening system also provides a two-way street: the police department has substantial control over which cases are sent to the district attorney’s office, and police can raise the political cost for recalcitrant prosecutors who continue to decline cases that the police give a high priority.257

E. Comparing Screening Rules in the Federal System

Close observers of the federal criminal justice system258 might think that federal prosecutors have, for the past twenty years, both tested and refuted the screening/bargaining tradeoff thesis. They would point to the series of charging and plea bargaining polices that the United States Department of Justice issued between 1980 and 1994. Since the Department’s new rules addressed plea bargaining, we might expect the federal system to produce few charge bargains.

Critics could argue that if the screening/bargaining thesis is correct, the federal system since the late 1980s should show more guilty pleas “as charged,” and perhaps somewhat higher trial rates. But that has not happened. Instead, plea bargaining rates in the federal system have been climbing for thirty years, to a point where the federal system has one of the highest plea rates (and lowest trial rates) among all U.S. criminal justice systems. Taken together, they would argue, these facts show that the screening/bargaining thesis must be wrong.

See Jacoby, The American Prosecutor, supra note 95, at 217. Our interviews suggest the relationship may have become more distant over the past twenty years.

257. The findings about the screening/bargaining tradeoff for prosecutors suggest, at least initially, that police departments should consider their own screening and review mechanisms for the cases they send and recommendations they make to prosecutors. If anything, there is even less known about police screening than about prosecutorial screening. Joan E. Jacoby, Basic Issues in Prosecution and Public Defender Performance 25-30 (1982); Phila. Police Dep’t, Directive 50, reprinted in Miller & Wright, supra note 70, at 154-55; Houston Police Dep’t, General Order 500-7, reprinted in Miller & Wright, supra note 70, at 154-56.

258. Both legal scholarship and law school criminal procedure courses typically focus on the federal system, and within that system, primarily on constraints imposed by the Supreme Court of the United States under the U.S. Constitution and Bill of Rights. See Robert Weisberg, A New Legal Realism for Criminal Procedure, 49 Buff. L. Rev. 909 (2001).
The federal system, however, does not undermine the screening/bargaining tradeoff thesis. The federal system offers a poor test of the capacity of prosecutors elsewhere to change outcomes through screening standards, because the Department of Justice is so decentralized. The system includes ninety-four different districts, with widely varying caseloads and sizes, each under the direction of its own U.S. Attorney. Many line prosecutors are career employees, while only a few senior political appointments change with each administration. The federal system has a long tradition of substantial local independence.

There is a second reason that the federal system does not refute the possible tradeoff between screening and bargaining: The creators of charging policies in the Department never aimed to decrease charge bargains. It is a mistake to believe that all hard screening rules, regardless of their purpose, will have similar effects.

In 1980, a highly publicized report by the General Accounting Office discovered—much like Captain Renault in *Casablanca*—that there were shockingly high levels of declination in the federal system. In reply, the Department of Justice issued the *Principles of Federal Prosecution*. The *Principles* were “intended to promote the reasoned exercise of prosecutorial discretion” by federal prosecutors “with respect to initiating and declining prosecution,” “selecting charges,” and “entering plea agreements.”

The *Principles* included both substantive and procedural limitations on federal charging practices. Substantively, they directed federal prosecutors, in cases not declined or diverted, to charge “the most serious offense that is consistent with the nature of the defendant’s conduct, and that is likely to result in a sustainable conviction.” On the procedural side, the *Principles* required that each office should have procedures “to ensure” that prosecutors with supervisory authority review important charging and plea decisions.

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260. See *Gen. Accounting Office*, *supra* note 171, at i (describing 62% federal declination rate); *Heymann* statement, *supra* note 254.

261. *Casablanca* (Warner Brothers-First National 1942). Captain Renault closes Rick’s Café Americain and declares himself “shocked, shocked to find gambling” going on in the Café, just as a waiter delivers the Captain’s winnings from the evening.


264. They recognized the appropriateness of declining prosecution for reasons including “law enforcement priorities” and “the nature and seriousness of the offense.” *Id.* at pt. B, § 3.

265. *Id.* at pt. C, § 1.

266. *Id.* at pt. A, § 2.
As for plea bargaining, the *Principles* explicitly recognized the validity of different sorts of bargains, including charge bargains.\(^{267}\) The *Principles* allowed prosecutors to enter a plea bargain only when the charge bore "a reasonable relationship to the nature and extent of his criminal conduct" and had "an adequate factual basis."\(^{268}\) On their face, the *Principles* did not aim to diminish plea bargains generally, or charge bargains in particular. Instead, the *Principles* were promulgated to assure the public that federal prosecutors would exercise their enormous discretion consistently and within principled bounds.\(^{269}\)

A series of modifications of the *Principles* between 1987 and 1993 placed stronger limits on plea bargains, but only on certain types. On November 1, 1987, the date the new federal sentencing guidelines took effect, the Department of Justice modified the sections of the *Principles* dealing with charging and plea agreements in a document known as the Redbook.\(^{270}\) At the same time, Stephen Trott, the Assistant Attorney General in charge of the Criminal Division, issued a separate memorandum to Assistant United States Attorneys, explaining how to use (and how not to use) the new sentencing guidelines.\(^{271}\)

In these two documents, the Department of Justice tried to adjust the charging and plea practices of federal prosecutors to fit the new sentencing system. Although the Sentencing Commission itself left room for federal prosecutors to "depart" from the sentencing guidelines in many negotiated plea cases, the Department rejected this offer of discretion.\(^{272}\) Both the Redbook

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\(^{267}\) *Id.* at pt. D, § 2.

\(^{268}\) *Id.* at pt. D, § 3.

\(^{269}\) The commentary to the *Principles* justified their promulgation as follows:

> Since federal prosecutors have great latitude in making crucial decisions concerning enforcement of a nationwide system of criminal justice, it is desirable, in the interest of fair and effective administration of justice in the federal system, that all federal prosecutors be guided by a general statement of principles that summarizes appropriate considerations to be weighed, and desirable practices to be followed, in discharging their prosecutorial responsibilities.

*Id.* at pt. A, § 1, cmt.


\(^{272}\) The Sentencing Commission declared in a policy statement that courts could accept charge bargains if the remaining charges "adequately reflect the seriousness of the actual offense behavior and that accepting the agreement will not undermine the statutory purposes of sentencing." U.S. SENTENCING GUIDELINES MANUAL § 6B1.2(a) (policy statement). For sentence bargains (binding or nonbinding), the Commission's policy statement allowed the court to accept the bargain if it produces a sentence within the guideline range or departs from that range "for justifiable reasons." *Id.* § 6B1.2(b) & (c). The Department of Justice took the position that these were "very loose standards" that
and the Trott Memorandum restricted charging and plea discretion through a combination of new substantive standards and internal office procedures.273

The Redbook and the Trott Memorandum did not hide their principal purpose: uniformity of sentences. With regard to plea policies, the Redbook stated that “[t]he overriding principle governing the conduct of plea negotiations is that plea agreements should not be used to circumvent the guidelines.”274 The Trott Memorandum made the same point.275

Equally important, the Redbook and Trott Memorandum actually encouraged plea bargains. The Redbook strongly favored the use of charge bargains over sentence bargains, noting that charge bargaining “appears to afford the prosecutor the greatest degree of latitude permissible under the [statute].”276 The Redbook limited charge bargains only by stating that prosecutors should not bargain away “readily provable serious charges.” But it conceded that “the prosecutor is in the best position to assess the strength of the government’s case and enjoys broad discretion in making judgments as to which charges are most likely to result in conviction on the basis of the available evidence.”277

The Redbook bolstered this policy with a constitutional and historical varnish: “[P]rosecutorial... discretion is at its zenith when prosecutors exercise the core function of determining the applicable charges to be brought.”278 Far from limiting plea bargaining, the Redbook concluded that “prosecutors may wish to give greater consideration to charge bargaining under the SRA than in the past.”279 The 1987 amendments encouraged a shift from sentence bargains to charge bargains. They offered no reason to expect less plea bargaining overall.

Fewer than two years later, the Department of Justice clamped down once again on perceived manipulation by line attorneys. In March of 1989, shortly

“seem practically to remove plea negotiations from the operations of the guidelines.” See REDBOOK, supra note 270, at pt. IV (criticizing the “quite liberal policy statements on sentence bargaining”).

273. An example of substantive standards would be the limitations on including sentencing facts in indictments, while encouraging fact stipulations with pleas. REDBOOK, supra note 270, at 335-36, 340. An example of an internal office policy would be supervisory review for departures other than those based on substantial assistance to the government. See TROTT MEMORANDUM, supra note 271, at 344.

274. REDBOOK, supra note 270, at pt. IV.

275. “The overriding principle governing the conduct of plea negotiations is that plea agreements should not be used to circumvent the Guidelines.” TROTT MEMORANDUM, supra note 271, at 342.

276. REDBOOK, supra note 270, at pt. IV. Since the prosecutor decides which offense a defendant “commits,” there is no presumptive guideline sentence attached to the uncharged or dismissed conduct, and therefore the statutory departure limits of 18 U.S.C. § 3553(b) do not similarly limit the Department’s plea choices.

277. Id.

278. Id.

279. Id.
after the Supreme Court affirmed the constitutionality of the Sentencing Commission, Attorney General Richard Thornburgh issued a memorandum revising the plea policies for federal prosecutors. The Thornburgh Memorandum discouraged certain plea bargains, especially preindictment bargains and charge bargains. The Attorney General now viewed these as a source of manipulation.

Even while criticizing some plea bargains, the memorandum recognized new grounds for dropping charges. These included occasions when “the United States Attorney’s office is particularly overburdened, the case would be time-consuming to try, and proceeding to trial would significantly reduce the total number of cases disposed of by the office.” Of course these are traditional prosecutorial grounds for justifying plea bargains. Thus, the Thornburgh Memorandum continued to emphasize goals other than the reduction in the number of plea bargains, and it continued to embrace charge bargaining over sentence bargaining.

The lesson from this review of federal prosecutorial policies is that purposes matter. Prosecutors might implement screening rules and

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282. The Department asserted it would now “monitor, together with the Sentencing Commission, plea bargaining, and the Department will expect plea bargains to support, not undermine, the guidelines.” Id.
283. THORNBURGH MEMORANDUM, supra note 281, at 348.
284. See James, supra note 96, at 22 (summarizing standards from ABA and NDAA).
285. In 1992, Acting Deputy Attorney General George Terwilliger issued a further clarification of the plea policies. U.S. DEP’T OF JUSTICE, BLUESHEET ON PLEA BARGAINING: INDICTMENT AND PLEA PROCEDURES UNDER GUIDELINE SENTENCING (1992) [hereinafter TERWILLIGER MEMORANDUM], reprinted in 6 FED. SENTENCING REP. 350 (1994). Again, the new Terwilliger policy reflected both substantial irritation with line prosecutors and a desire to stamp out sentencing manipulation. In this policy, the Department recognized the futility of controlling line prosecutors through substantive standards, and instead ordered restrictive processes to govern plea bargains. All negotiated plea agreements to felonies or to misdemeanors negotiated from felonies “shall be in writing and filed with the court.” Moreover, the new policy directed each office to establish “a formal system for approval of negotiated pleas,” including review by senior prosecutors. Id.
286. Does the federal experience show that prosecutors cannot shift line behavior on a large scale through internal guidelines, regardless of the chosen objective? We do not think so. While the progression of increasingly tough charging and plea standards suggests frustration on the part of senior Department of Justice officials, the new policies may have partially succeeded. Scholars and defense lawyers perceived a more rigid, severe prosecutorial and sentencing system after the guidelines than before 1987. See generally KATE STITH & JOSE A. CABRANES, FEAR OF JUSTICE (1999). Given the canvas on which the
processes to reduce plea bargains (as in New Orleans) or to produce consistent and severe sentences (as in the federal system), or for other goals entirely.\textsuperscript{287} Prosecutors can use screening to achieve a variety of office-specific aims.

V. IMPLICATIONS OF THE SCREENING/BARGAINING TRADEOFF

The first four Parts of this Article developed the screening/bargaining tradeoff hypothesis, illustrated its viability in New Orleans, and discussed its relative virtues of honesty and accessibility compared to bargain-centered systems. But the attractiveness and viability of the screening/bargaining tradeoff does not make it an easy concept to implement. The screening/bargaining alternative presents significant challenges to life as usual in most prosecutors' offices around the United States.

Can other offices replicate the experience in New Orleans? We believe they can. Indeed, a few jurisdictions already do so, at least to some extent.\textsuperscript{288} The sort of tradeoff at work in New Orleans may not require a complete about face in current practices, but it does call for a significant shift in priorities. Most prosecutors will need to screen far more deliberately and to create and enforce limits on bargaining.

This Part considers some of the implications of the screening/bargaining tradeoff theory and the New Orleans case study for prosecutors. The first section of this Part flags some of the key challenges for prosecutors who wish to implement the screening/bargaining tradeoff. The second section of this Part emphasizes the importance of controlling charge bargains first, and suggests a hierarchy of preferred dispositions. We argue that prosecutors are deeply

Department painted its policies—the size, variation and dispersed structure of the prosecutors' offices, and the severity of the new sentencing guidelines—the Department may have achieved more internal uniformity than would have otherwise been the case. To the extent the federal system has failed to achieve these goals, that appears to be a product of a system so severe that line prosecutors will work around their own agency rules (with the cooperation of judges) to moderate severe sentencing choices. \textit{See generally} Frank Bowman & Michael Heise, \textit{Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences}, 86 Iowa L. Rev. 1043 (2001).

The steady increase in the federal plea bargaining rate over the last thirty years poses its own challenge for the screening/bargaining hypothesis. At what point does a justice system so firmly adopt plea bargaining as the mode of adjudication that prosecutors would be unable, on their own, to return to trials? With sufficient pressures from the bench, defense counsel, the public, and legislators, the prosecutor's ability to refuse to enter bargains would be an ability in name only. We do not know if the federal system is beyond salvation in this regard.

\textsuperscript{287} For example, many prosecutors have developed hard screening rules and procedures for specific crimes, notably for domestic assaults. \textit{See} MILLER & WRIGHT, \textit{supra} note 70, at 181-90. Prosecutors might implement screening rules to maximize the number of convictions or the deterrent or rehabilitative effects of the criminal law.

\textsuperscript{288} Some jurisdictions have adopted parts of the screening/bargaining tradeoff, with either more intensive screening practices or at least partial plea bans. \textit{See supra} Part I.B. In those jurisdictions the full screening/bargaining tradeoff may be easier to implement.
misguided when they favor the use of charge bargains over other kinds of bargains. The third section of this Part considers the implications of the screening/bargaining tradeoff for the public's assessment of prosecutors in the political arena, and concludes with a simple and powerful test of prosecutorial virtue.

A. Changing Legal Culture

District and county attorneys and attorneys general should consider the viability of the screening/bargaining tradeoff, especially in jurisdictions with extremely high negotiated plea rates and very low trial rates. The basic policy decision to move from a bargain-based to a screening-based system—to opt for the screening/bargaining tradeoff—may be easy to announce. However, the tradeoff is difficult to implement.

A decision by a prosecutor to adopt the tradeoff will run against deep-seated habits and traditions of prosecutors, and conflict with established expectations of other actors. New Orleans offers a number of possible lessons here, but there are many possible ways to achieve the screening/bargaining tradeoff. We attempt here to identify the common components of successful strategies. Prosecutors will face challenges when they implement each of the four key features of the screening/bargaining tradeoff: early assessment, reasoned selection, plea bargain barriers, and enforcement.

Early assessment. Early assessment is critical. In a typical system, prosecutors receive files from the police recommending initial charges shortly after the criminal incident occurs. The officer bases her recommendation on direct observations and on conversations with victims and witnesses. In a few cases, investigators from the police department will delay the recommendation until they receive information from a laboratory or complete other investigative work.

What sources will the prosecutor consult during the early assessment, and what standards will apply? If the screening prosecutor simply reads the police file and relies on the officer's evaluation of the witnesses and the evidence, too many initial charges will be inaccurate. The prosecutor must contact witnesses and test the other sources of evidence before filing the charges. The screening attorney needs some confidence that the trial attorney holds the basic materials for a successful trial.

289. See EISENSTEIN & JACOBS, supra note 38, at 288-90; HEUMANN, supra note 19, at 92-95; WALKER, supra note 36, at 89.

290. In some systems, the same attorney screens and tries (or negotiates) the case, but the point is the same: At the time of screening, the attorney should have confidence in the evidence should the case be tried.
The formal legal burden on the prosecutor at charging is low. To obtain an 
indictment or to survive a motion to dismiss, the prosecutor must show 
probable cause.\textsuperscript{291} The formal legal burden, however, has nothing to do with 
the kind of early assessment necessary for a hard screening system. Instead, 
prosecutors should assess each case file to determine whether it supports the 
belief that prosecution is desirable and that conviction after trial would be 
highly likely on each possible charge.\textsuperscript{292} Using this standard, a screening 
attorney should select the number and severity of charges that fairly capture the 
offense behavior.

\textit{Reasoned evaluation.} The goal of reasoned evaluation goes beyond the 
search for every provable charge. A lead prosecutor’s screening principles 
must direct attorneys to select charges that deserve prosecution and 
punishment, and those important enough to justify spending the resources to try 
the case if the defendant does not plead guilty. A charge does not deserve 
prosecution if another court can handle the incident better.\textsuperscript{293} Nor should 
prosecutors file charges if a noncriminal or quasi-criminal response, including a 
diversion or forfeiture program, is adequate.

A decision to decline a case raises some of the most difficult questions 
about the fair and wise use of prosecutorial powers. The strongest general 
attack on declinations questions whether that power should exist at all. If a 
citizen violates the law, and the prosecutor can prove it, why should the 
government ever decline to file charges? But this attack quickly fades under 
the reality of a legal system that criminalizes a very wide range of behavior,\textsuperscript{294} 
and where crime definitions often lack precision.\textsuperscript{295} In a system with broad 
criminal liability, screeners are \textit{necessarily} lawmakers. The exercise of 
substantial prosecutorial discretion is an inevitable consequence of the way 
criminal codes are structured, and that is true whether that discretion is 
exercised through hard screening at charging, or through later plea negotiations. 
In addition, prosecutors are never faced with the pool of all possible offenders; 
government agents make choices that bring some cases to light while missing

\textsuperscript{291} \textsc{Charles Whitebread \& Christopher Slobogin, Criminal Procedure: An 

\textsuperscript{292} Cf. \textsc{Joan E. Jacoby, The Charging Policies of Prosecutors, in The 
Prosecutor 75 (William F. McDonald ed., 1979) (creating typology of charging practices); James, supra 
note 96, at 22, 25-28 (surveying different charging models).}

\textsuperscript{293} \textit{A related question is whether a prosecutor should decline to prosecute a case that 
would be better prosecuted in another court, but where the prosecutor for that court will not 
commit to handling the case. A special set of issues arise in the allocation of offense 
between federal and state courts, given the substantial and increasing overlap in federal and 
state jurisdiction, especially for large categories of offenses. See Task Force on 
Federalization of Criminal Law, ABA, The Federalization of Criminal Law (1998).}

\textsuperscript{294} \textit{See William Stuntz, The Uneasy Relationship Between Criminal Procedure and 
Criminal Justice, 107 Yale L.J. 1, 55-59 (1997).}

ordinance on vagueness grounds).}
other similar cases. In the face of the immense breadth of the criminal law, and the intentional and random variation in investigations that leaves some criminal behavior out of sight, we believe the power to decline even provable cases is essential.

The fact that the declination power exists hardly settles the problem of how to sort cases wisely. Prosecutors will succeed most often if they articulate the range of sorting principles they use. Fine grades of detail are possible. For example, sorting principles could address the relevance of offender characteristics such as a prior criminal record, drug or alcohol dependency, and assistance to the government in the investigation of other cases. The principles could also address offense characteristics, including the harm a defendant causes, the defendant’s role in a group enterprise, the use of a weapon, or the presence of especially vulnerable victims. They must account for institutional and community features, such as available resources, community sentiment, and the emergence of crime patterns.

Prosecutors may also set up deliberative processes that will encourage wise and consistent charging decisions. For example, a prosecutor might require supervisory review of all decisions to decline charges or dismiss charges after they are filed. Another office might make charging decisions in small work groups that can reinforce norms and goals. Since substantive sorting principles may be very hard to specify and may change over time, process-oriented policies might allow for a “common law of screening” to emerge within the office. The process can assure the sharing of information needed to check for improper use of plea bargains and for excessive variation in charge selection.

296. See, e.g., Baluyut v. Superior Court, 911 P.2d 1 (Cal. 1996). We do not believe society would be better off if the resources existed to ferret out and prosecute all violations of the criminal law. More limited and precisely drafted criminal codes would not entirely relieve our concerns.


298. For example, looking at criminal records, for both prosecutors and sentencers, systems should consider the relevance of first time offenses, offenses by people with exemplary civic records, such as prior military service, and career offenders, to name only a few possible subcategories.

299. If these questions resemble those highlighted by recent structured sentencing reforms, that is no surprise. Similar questions arise for actors at each stage of the criminal process, although the appropriate answer to those questions will vary by actor, by jurisdiction, and over time. See MILLER & WRIGHT, supra note 70, at 799-917. Given the dominant role of guilty pleas as the process for adjudication, and the close link in some systems between the offense of conviction and acknowledged facts and the presumptive sentence, the questions for prosecutors and sentencers look similar. In these systems, the prosecutors are, to a substantial extent, the sentencers.

300. While the current study details the amount of declination that has reduced the system’s reliance on negotiated pleas in New Orleans, we have devoted less attention to the quality of the decision to decline prosecution or to divert a case into some other system. We know that Connick deliberately devotes serious resources to the screening effort—both in the
Sound screening principles address four special challenges. They should tell the screening attorneys how to avoid or minimize overcharging, how to handle weak cases, how to account for office resource constraints, and how to alleviate concerns about equal treatment of offenders.

In many offices, prosecutors put all colorable charges into the indictment or information, including weak charges. This strategy anticipates later plea bargains, along with further investigation and discovery that could lead to additional evidence. Prosecutors argue that this is not overcharging. That term, they say, is best limited to the filing of charges when there is not likely to be sufficient proof to convict a defendant of the charges by the time of trial.

Why should prosecutors not charge offenses they believe to be true, but for which there might be problems of proof at trial? Why shouldn't the prosecutor file such charges as an opening bid in negotiations? A prosecutor who files such charges is probably not acting unethically. However, we believe the filing of such charges is a first cousin to overcharging, and has the effect of encouraging charge bargains.

It is one thing for a prosecutor to bring a charge in a close case that may be difficult to prove at trial. This is consistent with principled screening, so long as the prosecutor fully intends to take the charge to trial, and to refuse to bargain the charge away as part of a plea. But in our view, prosecutors should never file tenuous charges with the purpose or expectation that they will be bargained away. Only by filing cases with a purpose to avoid bargains can the prosecutor achieve the screening/bargaining tradeoff.

quantity and quality of legal talent available to his office. The general criteria used by the screening attorneys include prohibitions on overcharging and on charging a less serious crime than the facts could sustain based on some sense of the equities in the case. Beyond this, evaluation of the quality of declinations must await later study.


302. See ABA, STANDARDS FOR CRIMINAL JUSTICE 3-3.9 (3d ed. 1993) (advising prosecutors against bringing charges greater than necessary “to reflect the gravity of the offense” or where there is not “sufficient admissible evidence to support a conviction”).

303. In light of the prosecutor’s power under criminal codes to file multiple counts in many factual situations, prosecutors must always assess whether the total collection of charges fairly describe the offense behavior. The ability of prosecutors to multiply charges—to file one count, or fifty, based on the same underlying behavior—is especially acute in conspiracies, which occur over both time and space, and (by definition) involve more than one person, and often many more. See generally Paul Marcus, Criminal Conspiracy Law: Time to Turn Back from an Ever Expanding, Ever More Troubling Area, 1 WM. & MARY BILL OF RTS J. 1 (1992). This is no technical legal judgment about possible proof, but instead a judgment about what is right and fair. Courts have rejected any but the most limited kinds of external review of charging decisions, especially decisions about how many different charges are filed at one time. See, e.g., State v. Smith, 864 P.2d 709, 713 (Kan. 1993). The goal for prosecutors should be to determine what number and type of
The question for prosecutors in bargain-driven systems is not whether the charge is strong enough to be tried, but whether it is plausible enough to serve as the basis for a bargain. As with probable cause, a minimum standard based on possible negotiations—whether a charge might in fact lead to a charge bargain—is an insufficient charging standard.

To what extent should limited resources determine the charges that the prosecutor’s office will file? One of the traditional justifications for the dominant use of plea bargains is that it allows a prosecutor to handle many more cases. Perhaps the strongest critique of a screening/bargaining system is that it might be less efficient and would handle fewer cases.

We do not have a precise sense of the relative cost of bargain-centered and screening-centered systems. It may turn out that the time and effort saved by dramatically reducing the negotiation of pleas in each case covers the additional cost of early assessment and small increases in trials.

But even if the screening system is somewhat more expensive (or somewhat less efficient), it may nonetheless be worth the cost. There are values at stake in criminal justice systems beyond simple efficiency. If maximizing the number of convictions, or the conviction rate, was the only goal a prosecutor had, then filing only easy cases, or undercharging, or granting excessive bargains would all be more common. Even in bargain-centered systems, prosecutors pursue values other than mere efficiency.

We believe that screening attorneys give proper weight to prosecutorial resources when they only file cases (and charges) that the office is willing to try. The point here is not that the office should only charge as many cases as it can try. Many defendants will enter open pleas. Feedback from the trial attorneys will keep the screeners informed about trial calendars; the strength or type of cases that the office is willing to try should adjust in light of that feedback.

One final challenge for a prosecutor implementing new screening policies might be to prevent screening attorneys from discriminating among similarly situated defendants. This discrimination might escape any adversary or judicial oversight.

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304. Compelled interrogations might be efficient, in terms of solving more cases and producing more convictions, yet they are forbidden in United States criminal justice systems. Brown v. Mississippi, 297 U.S. 278 (1936).


306. These issues of equal treatment exist in traditional, bargaining-oriented systems. The relatively public plea-bargain process does not have any inherent limits on unequal treatment of similarly situated defendants. Even a full trial and posttrial sentencing process includes no additional doctrinal or procedural safeguards against inconsistent treatment. Dramatic differences in the treatment of co-defendants in the same case have generally been refused as a basis for sentencing adjustments, much less review of the prosecutorial choices.
A hard screening system will centralize the sorting decisions in one unit. Legitimate concerns with disparate treatment can perhaps better be addressed in such a system. Prosecutors can require line assistants to record reasons for their decisions in data systems for later review. Supervisors can check for consistency across cases, across prosecutors, and across time. Systems that place cases in a larger context and reveal patterns, used within an institution that can effectively punish deviations, are more likely to stop improper bias than any case-specific challenge presented to a judge.307

Plea bargain barriers. Hard screening systems are no more likely to reduce the proportion or kind of plea bargains than traditional systems unless prosecutors articulate the goal of limiting plea bargains and specify rules consistent with that goal. Prosecutors do not necessarily need to issue plea bargain bans, which have an absolute quality that may be inconsistent with the realities of case processing. Thus, instead of referring to plea bargaining bans, we believe that prosecutors need to erect plea bargaining barriers. Plea bargain barriers can take both substantive and procedural forms, and should restrict various kinds of bargaining.308 The chief prosecutor should make the barrier rules explicit and explain that the purpose of the rules is to limit plea bargains.

Plea bargain barriers should have the secondary effect of limiting overcharging. If a prosecutor overcharges in the face of a plea bargain ban, and especially a charge bargain ban, then she will have to face the greater likelihood of losing at trial, at least on some of the excessive or weak charges. She will also face the obloquy of her supervisor and her colleagues, since trying excessive or weak charges will be costly. To the extent that judges or sentencing rules discount the impact of multiple charges, as is common, the cost of trying excess charges produces little benefit.309

that produced the disparate treatment. See United States v. Bonnet-Grullon, 212 F.3d 692, 705-08 (2d Cir. 2000) (finding no power in district court to depart based on lower sentences or different treatment of similar cases in other federal districts). This is a much larger problem than scholars and critics have recognized. The problem of sentencing disparity reflects a more general issue about prosecutorial consistency. See Anne Bowen Poulin, Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight, 89 CAL. L. REV. 1423 (2001).

307. One current illustration of the possibility of institutional responses to claims of discrimination in the administration of criminal justice appears though the contrast of the difficulty of making judicial claims of biased “driving while black” (‘"DWB"”) automobile stops and searches versus the systematic police and legislative reform policies regarding DWB recently introduced by Congress and in several state legislatures. See David A. Harris, “Driving While Black” and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544 (1997); David A. Harris, The Stories, the Statistics, and the Law: Why “Driving While Black” Matters, 84 MINN. L. REV. 265 (1999); cf. PETER VERNIERO & PAUL H. ZOUBECK, N.J. ATTORNEY GEN., INTERIM REPORT OF THE STATE POLICE REVIEW TEAM REGARDING ALLEGATIONS OF RACIAL PROFILING (1999).

308. Barriers to charge bargains should be the highest. See infra notes 316-21 and accompanying text (explaining a process hierarchy with charge bargains highly disfavored).

309. See, e.g., N.C. GEN. STAT. § 14A-1340.15 (2000) (providing that judge has discretion to choose between concurrent and consecutive sentences for multiple counts);
Enforcement. No amount of exhortation alone can substantially reduce the use of plea bargains. In large urban systems, with many prosecutors and a torrent of cases, the risk of leaks—that is, individual bargains that seem justified as a resolution for individual cases—may be overwhelming, unless there are enforcement mechanisms in place.

The New Orleans experience suggests that an effective screening policy requires several overlapping enforcement mechanisms. Special reports are required for every decision to dismiss charges after they are filed. Formal and informal sanctions are in place for screeners who overcharge. Special review groups deal with the most serious cases. Screening attorneys are among the most senior staff members.

In smaller systems, enforcement mechanisms may include clear plea bargain barriers combined with supervisory review and special reporting rules for decisions to dismiss charges after they are filed in any case. In both small and large systems, training and reinforcement of norms and procedures may also help achieve the screening/bargaining tradeoff. But in larger systems we believe that information systems and regular statistical reports may be essential to bolster the other efforts to construct a screening-oriented system. In larger systems, the critical difference between open pleas and plea bargains may be obscured. Only careful recordkeeping and systematized review of each stage of the process will reveal that difference in practice.³¹⁰

Information systems of the kind that we suggest are difficult to design and require a commitment of resources and a commitment to fully utilize the system.³¹¹ Nonetheless, we believe that the administrative and political virtues of detailed information systems designed to review and assess prosecutorial decisions outweigh the costs.³¹²

³¹¹ Prosecutors often keep track of information about the office, but that information is typically oriented towards measuring caseloads and convictions, or to ensuring that cases do not fall through the cracks due to procedural error. Prosecutors adopting the screening/bargaining tradeoff need to convert their information systems to focus on measurement and review of charging decisions.
³¹² State legislatures and local funding agencies can make it easier for prosecutors to achieve the fair and tough decisions about screening and plea bargains revealed in this study. Their best contribution takes the form of data systems and reports. Legislative bodies could require prosecutors to track separately the declinations, diversions, open pleas, charge bargains, and sentence recommendations from their offices. Such numbers might appear in an annual report to the public. Consistent statewide numbers of this sort make it possible to compare the quality of prosecutors in different cities. Transparent processing numbers open the gates for public debates.
B. Control Charge Bargains First

In the previous Part, we advised prosecutors to discourage plea bargaining explicitly. But a message that discourages all "plea bargaining" is a blunderbuss. Veteran attorneys in the office understand that not all guilty pleas are equal. The chief prosecutor can recognize this reality by ranking and announcing the "preferred dispositions" for cases.

Honesty and accessibility can serve as the guiding virtues in this ranking. Jury trial should appear at the top of the list, followed by bench trial. These two methods of resolving cases produce the greatest assurance to the public that convictions and punishments are based on reliable evidence and consistent prosecutorial evaluation of that evidence.

Open pleas appear next to trials as the most desirable method of disposing of cases, at least where the prosecutor's office devotes enough resources to the case to prevent overcharging and to produce a reasonable fit between the charges and the facts. Open pleas become less appealing when they are based not on reliable charge selection but on the size of the plea discount. Sentence bargains fall into the midrange of this hierarchy, since they require no self-contradiction from the prosecutor and allow the judge and other actors a significant voice in the final sentence. At the bottom of the scale are charge bargains and fact bargains. Each involves some effort to obscure the events of a case or the ultimate value of a case for negotiation purposes.

According to this ranking, lead prosecutors should worry more about fact and charge bargains than about sentence bargains. To the extent that an office can shift sentence bargains further up the scale into open pleas and trials, that is positive movement. But first things first: Lead prosecutors should begin by reducing the charge and fact bargains because they are the least honest and accessible dispositions in this ranking.

Our endorsement of charge bargains as the best starting point for internal regulation runs counter to most thinking on this subject. Many prosecutors in the field who ban or reduce plea bargaining show more tenacity when it comes to sentence bargains. Some do not try to reach charge bargains at all; others concede that front more quickly than for sentence bargains. As we have seen, federal prosecutors have placed the strongest limits on sentence bargains, while leaving prosecutors more power to enter charge bargains. In the Alaska plea ban, charge bargains returned more quickly, while prosecutors kept sentence bargains under control for much longer. The Manhattan prosecutor's plea

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313. See Terwilliger Memorandum, supra note 285; Thornburgh Memorandum, supra note 281.

policies explicitly aimed for sentence bargains, while leaving charge bargains in place.315

Prosecutors and scholars argue that this emphasis on controlling sentence bargains is inevitable and proper.316 Their reasoning relies on separation of powers ideas: Legislatures, sentencing commissions, and judges have a legitimate role in sentencing, while other branches leave the prosecutors more complete control over charging. Out of respect for the judicial and legislative roles in sentencing, prosecutors should show special reticence to bargain over sentences. On the other hand, they reason, limits on charging will be impossible for other institutions to enforce.

In our view, however, prosecutors ought to reverse this priority. Sentence bargains do less harm than charge bargains because sentencing decisions necessarily involve many actors. Judges, legislatures, and sentencing commissions play an active part in determining the sentencing options available and the sentence imposed. Thus, any prosecutorial agreement to recommend a particular sentence will become known and could well provoke a veto or modification from one of those other actors. Any concessions to the defendant at sentencing remain in the control of the judge, who explains her decision on the public record. Legislatures or sentencing commissions can limit sentencing ranges through amended rules.317

With charge bargaining, on the other hand, the prosecutor acts with more unilateral authority and less scrutiny. This form of discretion is subject to less external control. Lead prosecutors should work hardest to limit the choices of their trial attorneys where other institutions are least likely to intervene. Limits on charge bargains should take the highest internal priority for supervising prosecutors.

Limits on charge bargains also contribute more directly to the touchstone values of honesty and accessibility. A charge bargain requires a prosecutor to change public declarations about the case: “Yesterday it was an aggravated assault, today it is a simple assault.” A sentence bargain, however, still only calls for a single consistent announcement from the prosecutor. Because the

315. Kuh, supra note 54, at 51; Merola, supra note 97, at 251-57.
316. See ZEISEL, supra note 301, at 37-44 (sentence bargains allow guilty defendants to lessen punishment); cf. STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY §§ 14-1.8(a), 14-3.1(a), 14-3.3(b) (2d ed. 1982) (permitting prosecutors to make charge bargaining concessions; not addressing sentence bargains). Many scholars have treated charge and sentence bargains as interchangeable. See, e.g., Heumann & Loftin, supra note 39, at 394. Only a few have argued that charge bargaining is more harmful. See Alschuler, supra note 192, at 1136-46; Richard Frase, Defining the Limits of Crime Control, 73 CAL. L. REV. 212, 230-33 (1985).
317. Indeed, the Louisiana legislature enacted sentencing guidelines; those guidelines loosely constrained the sentencing options available to the judge and the attorneys negotiating a guilty plea. Those guidelines are no longer binding on sentencing judges. Interview with Bruce Ashley, supra note 135; Telephone Interview with Dwight Doskey, supra note 134.
prosecutor does not have to stake out a public position about the proper sentence at the start of a case (unlike the necessary public announcement of the charge), the public does not receive mixed signals. There is less opportunity for public confusion or cynicism in a world of sentence bargains than in a world of charge bargains.

Our preference for controlling charge bargains depends on prosecutors to regulate themselves in an area where other institutions traditionally take no action. For reasons we have explained, lead prosecutors have the incentives to create and enforce this internal regulation. These are real and sustainable limits on prosecutorial behavior. And because screening policies do not require coordination or cooperation from other actors, a prosecutor can make progress acting alone.

C. Election Rhetoric

If prosecutors decide to change their screening practices as a way to decrease charge bargains, it will change their rhetoric during election seasons. Hard screening practices may open prosecutors to new political challenges and new political opportunities. On the other hand, inaction could also carry a cost. If prosecutors do not change their screening practices, the voting public (and the media, and opposing candidates) should start to ask why not. Although the tradeoff comes from within the prosecutor’s office, the public can spur the prosecutor to act.

Both the amount and the quality of the decisions by screening attorneys to decline prosecution have great political urgency for a district attorney. Any lead prosecutor who devotes resources to screening will likely increase the amount of charges declined and will need to explain to the public the tradeoff between those cases lost on the front end versus the values that could be lost later in the process during plea negotiations. The strength of the reasons for declining cases must be easy to defend in public debate, particularly during a reelection campaign.

A staple of prosecutorial election debate today is the “conviction rate.” Of course, the outcomes in particular high-profile cases often figure into the campaign. But the most salient political fact about overall office performance is the number of acquittals that defendants achieve, expressed as a percentage of all cases going to trial, or (more commonly) as a percentage of convictions

318. One exception occurs in murder cases, when the prosecutor declares early whether the office will seek the death penalty.

The more acquittals a prosecutor’s office suffers, the greater the political opportunity for a challenger. This political dynamic can encourage plea bargains in cases that might be lost at trial or that should not have been brought in the first place.

The incumbent’s standard reply to a challenger who points to a low conviction rate (that is, to a high proportion of acquittals) takes this form: Acquittals are a necessary and healthy byproduct when prosecutors are willing to take some chances. If conviction rates stay too high, they show prosecutors who are too timid, who never take a risky case to the jury because they fear a politically damaging acquittal.

We believe that prosecutors should not be afraid to suffer some acquittals and should bring charges in some cases where the outcome is in doubt. But if the question is whether prosecutors are taking appropriate risks, the conviction rate is beside the point. A low number of acquittals is an extremely poor indicator of whether prosecutors are too timid. In a jurisdiction that screens haphazardly and uses charge bargains freely, the most risky cases will end in dismissals or in convictions for lesser charges after guilty pleas. These convictions will give plenty of ground to defendants; in some cases, the prosecutor might give too much ground. But in current political terms, a conviction is a conviction. There is little electoral accountability for prosecutors who discount too heavily during plea bargaining to keep their conviction rates high.

We propose that prosecutors’ political campaigns focus on the “as charged conviction rate.” Rather than claiming to have obtained convictions in ninety-five percent “of all cases” (meaning all cases tried plus all guilty pleas), prosecutors or their opponents would calculate the ratio of convictions as charged to overall convictions. This ratio best captures for public debate the virtues of a system that makes its charging decisions consistently and in full public view.

A ratio near one-to-one—where most convictions are “as charged”—is the best sign of an honest and tough system. Whether these convictions occur after a trial or after the defendant pleads guilty, they reflect the prosecutor’s consistent judgment about the value of the case. The lower the ratio of the “as charged convictions” to the “convictions” (approaching zero), the more suspicious the voters should become. A low as-charged conviction ratio signals a system where the prosecutor might be tolerating inaccurate charges in both directions. Some charges might be above the going rate, but a few defendants accept them because they are especially risk averse or especially ignorant.

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321. Our proposal shares important features with a scheme proposed by Tracey Meares. *Cf.* Meares, *supra* note 213, at 879-89 (proposing financial incentives for prosecutors to obtain convictions for crimes as originally charged).
Some charges might be too low, but the prosecutor accepts the deal and moves on. Voters should not tolerate this sort of prosecutorial obfuscation.

There might be political advantages to incumbent prosecutors who adopt a hard screening system, but such a substantial shift away from traditional prosecutorial practices will not explain itself. Harry Connick was reelected district attorney in New Orleans four times. In those elections, challengers questioned both the declination decisions of the New Orleans District Attorney’s Office and acquittals after trial. Connick mastered the art of both negative and positive responses. On the negative side, he claimed that high declinations were the product of sloppy police work. Connick also took a positive tack, highlighting his sharp limits on plea bargains, along with positive outcomes in particular cases, showing that his office was tough on crime.

Given Connick’s successful twenty-eight-year run as the lead prosecutor in a major city, it may seem surprising that the general policies of the NODA office have not become more widespread. If these policies pack political punch, then other prosecutors and challengers might be expected to try them. If other candidates use these electoral themes and fail to win elections, then Connick’s political success might be attributed to his other political strengths, and not his screening policies.

There are many reasons why other jurisdictions and prosecutors might not yet have followed in Connick’s path. While reported in New Orleans, especially during election seasons, Connick’s policies have not before received wide national attention. The central role of plea bargaining to prosecutorial administration, and the equally central role of conviction rates to a prosecutor’s political success, are both deep-seated practices. It should hardly seem surprising that a better idea alone would not create change in many places, at least not before it was thoroughly documented, tested, and widely discussed.

Where prosecutors do not take the lead, voters may not see for themselves the virtues of a hard screening system and demand such a system from candidates. Even where prosecutors try to make the case for the screening/bargaining tradeoff, the prosecutor will expose a political flank. However, voters also overwhelmingly dislike plea bargaining.

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322. Connick was first elected in 1973 and was reelected in 1978, 1984, 1990, and 1996.
323. See supra notes 136-37 and accompanying text.
324. See supra note 138 and accompanying text.
325. See supra note 142 and accompanying text.
326. For example, Connick’s substantial charisma might have endeared him to New Orleans voters in spite of his policies. Another local explanation might be the particular funding and political support Connick received, such as support from popular New Orleans Mayor Marc Morial in Connick’s 1996 reelection bid. See Connick’s Tough Re-Election Road, TIMES-PICAYUNE (New Orleans), Aug. 22, 1996, at B7; cf. Reed’s Troops Question Connick’s Squad Motives, TIMES-PICAYUNE (New Orleans), Oct. 11, 1996, at B2 (reporting that the Police Association of New Orleans endorsed Connick’s 1996 runoff opponent).
327. See supra note 250 and accompanying text. The tradition in elections for district
should counter arguments about increased declinations and higher acquittal rates by highlighting the more honest, open system and substantially reduced plea bargains under a hard screening regime.

Incumbent prosecutors and voters are not the only participants in the politics of local prosecution races. Defense lawyers and defender organizations are unlikely to take the lead in proposing a shift to hard screening. Scholars and reporters, however, can introduce the screening/bargaining tradeoff. Using the “as-charged conviction rate”—or the failure of prosecutors to keep track of this information or provide it to the press—reporters will now have a new tool to describe and critique the quality of prosecutorial decisionmaking. Thoughtful candidates challenging an incumbent can treat the “as-charged conviction rate” as a political opportunity.

CONCLUSION

All of the actors in the criminal justice system have something to gain from plea bargaining, and only a few have openly or aggressively challenged its role. Prosecutors and judges often repeat the mantra that if plea bargaining stops, American criminal justice systems will collapse.

Citizens, when asked, tend to view plea bargaining cynically. But citizens care less about plea bargaining than about future crime rates. While citizens often rank crime among the most serious problems facing our society, they do not often associate the problem of crime in America with plea bargaining. United States citizens despise plea bargaining but are cynically resigned to follow the lead of judges and prosecutors who call it a necessary evil.

Scholars bear substantial responsibility for the widespread belief that plea bargaining is inevitable. By contrasting plea bargains only with trials, they have limited our options to more trials and quicker trials. They have ignored or dismissed efforts to restrict plea bargaining, even in the face of substantial evidence of success, when trial rates have not changed to the extent that scholars hope or predict.

It is time for this collective complacency to end. Plea bargains are not the same as guilty pleas, and bargains are not inevitable. This study has revealed that there are many policies that can restrict plea bargains even though such policies might not replace plea bargains with trials. The option we believe to

attorney of focusing on conviction rates—even if conviction rates are a poor measure of prosecutorial success or toughness—suggests a willingness on the part of voters across jurisdictions to think in systematic terms and about patterns of decisionmaking and patterns of outcomes. This tradition makes prosecutors unique among elected officials at all levels of government: For no other office does the political conversation typically turn on systematic measures of performance. This tradition opens the door to systematic and data-driven explanations and even championing of hard screening systems in ways that might be foolhardy for candidates seeking offices contested around rhetoric, style, and an always-changing smorgasbord of issues.
be most promising is the substitution of hard prosecutorial screening practices for the use of plea bargains. On the whole, we believe hard screening practices are a positive move and that prosecutors should embrace them. A shift from traditional bargain-dominated systems towards hard screening should produce a system that is more honest, accessible, and just. It may also be more efficient.

The screening/bargaining tradeoff is not only a good idea; it is also a plausible idea. New Orleans is an unlikely place to test and confirm the possibility of barriers to plea bargaining. But if a system as underfunded and overloaded as New Orleans's can make a substantial change, the possibility of such change elsewhere becomes that much more likely.

The data mostly support District Attorney Harry Connick's claims to have implemented a screening/bargaining tradeoff over the last thirty years. Several kinds of information bolster that judgment, but the most substantial and useful by far is the data that Connick has kept to assist in his administration of the office. New Orleans shows that the screening/bargaining tradeoff does not necessarily lead to a disabling number of trials. The office also shows that a committed prosecutor can implement the screening/bargaining tradeoff even without the conscious support of other actors in the system. While prosecutors can take the lead, wider recognition of the screening/bargaining tradeoff might lead observers, critics, and funders of district attorneys and their offices to push for such a change.

The implications of this study for scholars and commentators should be substantial. We have explained why the substantial literature on plea bargaining and the more limited literature on prosecutorial screening need to be reconsidered. Scholars need to devote far more attention to internal prosecutorial screening principles and practices. They need to address declination rates and open pleas with the same intensity currently reserved for discussions of trial rates. Perhaps scholars should spend less time agitating for judicial supervision of prosecutors, given the continued failure of courts to heed those calls. Scholars should see that internal executive branch rules and policies are genuine parts of the legal system, and far more important to daily practice and decisionmaking, than the abstract and rarely applied constraints of federal and state constitutions.

Perhaps this Article helps to reveal deeper cultural blinders among legal scholars. How could so fundamental an aspect of the criminal justice system as plea bargains remain so essentially unexplored, and so misunderstood? Perhaps the problem stems from American legal scholars' obsession with doctrine and the decisions in individual cases rather than the study of legal institutions and the processing of many cases. Perhaps the lack of insight stems in part from the legal academy's reluctance to collect and use empirical information, or from its obsessive focus on federal law, operating in ignorance of the wondrous variation in state and local systems.

328. This study affirms the value of even rough empiricism. By rough empiricism we
Whether or not scholars see the light and expand their vision, prosecutors can move ahead and adopt this reform now. Plea bargaining's triumph, and the cynical products of that triumph, are simply not as absolute as a century of practice and study suggest.

After this article was accepted for publication, Harry Connick announced in March 2002 that he would not run for a sixth term.†

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mean the search for some quantitative information to back up assertions or test questions about the behavior of individuals, institutions, or their surroundings and devices. Cf. David A. Strauss, Common Law Constitutional Interpretation, 63 U. CHI. L. REV. 877, 892 (1996) (describing “traditionalism” in common law notions of constitutional interpretation as reflecting “a kind of rough empiricism: they do not rest just on theoretical premises; rather, they have been tested over time, in a variety of circumstances, and have been found to be at least good enough”).

329. See generally MILLER & WRIGHT, supra note 70, at xxxi (noting importance of studying “competing rules from the federal and state systems”); Weisberg, supra note 258, at 909 (suggesting that criminal procedure casebooks depart “from the conventional model” of focusing on federal or constitutional cases).

† After 29 Years and Five Terms as Orleans Parish District Attorney, Harry Connick, Sr., 76, Decides to Close His Briefcase, TIMES-PICAYUNE (New Orleans), Mar. 28, 2002, at A1; Connick Sings Swan Song to 28 Years As Prosecutor, BATON ROUGE ADVOC., Mar. 28, 2002, at 3B.