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THE BOUNDARIES OF PLEA BARGAINING: NEGOTIATING THE STANDARD OF PROOF

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This Article explores the boundaries of the plea bargaining process and makes a case for extending these boundaries to the criminal standard of proof. It examines the possibility of converting the criminal standard of proof into a default rule, subject to negotiation between the parties. Under current plea bargaining practices, the defendant agrees to plead guilty in exchange for concessions on punishment offered by the prosecutor. According to the model proposed here, the negotiation process would not be limited to the attainment of a full admission of guilt. Rather, the prosecutor would also be able to obtain from the defendant a reduction of the standard of proof required to establish criminal culpability in return for an offer of leniency in sentencing. For instance, the parties could agree that the case will be tried according to the civil standard of proof—the preponderance of the evidence. In exchange for the greater risk of conviction faced by the defendant under a lower standard of proof, the prosecutor would make a partial concession on the sentence in the event of conviction. This Article addresses the viability of this proposed model and advocates its normative desirability.

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I. INTRODUCTION

Ever since the practice of plea bargaining took root in the Anglo-American legal world, the face of the criminal sphere has changed beyond recognition. The public model of criminal procedure, which places the procedural aspects of the process beyond the reach of the defense and the prosecution, has given way to a new model: a semi-private paradigm that acknowledges the right of the parties to wield effective control over the procedural structure of the criminal trial. The adoption of plea bargains expresses a readiness to open the criminal arena to contractual ordering.[1] Many features of the criminal process have turned into default rules and "bargaining chips"[2] in the hands of the defense, including the Fifth Amendment right against self-incrimination,[3] the Sixth Amendment right to a jury trial,[4] and the right to appeal.[5] In exchange for deviation from and waiver of these rights, the defendant may receive various concessions from the prosecution, including mitigation in the charge or the sentence. This allows for the efficient resolution of the criminal case, and enables both prosecutor and defendant to avoid the costs of trial.[6] In addition to their

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[1] *See* Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 219 (1983) (claiming that plea bargaining expresses a "privatization" of the criminal dispute).

[2] *See* Nancy J. King, *Priceless Process: Nonnegotiable Features of Criminal Litigation*, 47 UCLA L. REV. 113, 114-15 (1999) (arguing that almost every procedural characteristic of the criminal trial has become a bargaining chip in the hands of the defendant); *see also* Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 595-96 (2005) (describing a shift from adjudication to negotiation both in the criminal sphere and in the civil procedural landscape).

[3] "[E]ntering into a plea bargain . . . [t]he defendant is essentially waiving many significant rights, including a trial by a jury of peers, the confrontation of witnesses, and the right to challenge the evidence against him . . . ." Brenna K. DeVaney, *The "No-Contact" Rule: Helping or Hurting Criminal Defendants in Plea Negotiations?*, 14 GEO. J. LEGAL ETHICS 933, 942-43 (2001).

[4] Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 801 (2003) (claiming that the right to a jury trial or the right against self-incrimination are routinely bargained away in the criminal arena, in exchange for sentence reduction).

[5] Whitmore v. Arkansas, 495 U.S. 149, 165 (1990). The specific holding in *Whitmore v. Arkansas* relates to the issue of standing, and therefore does not directly address the waivability of appellate review. However, for all practical purposes, the decision is equivalent to the recognition of waiver of the right to appeal, for the only party with standing to challenge the waiver is the defendant himself, who chose to waive it in the first place. Harold J. Krent, *Conditioning the President's Conditional Pardon Power*, 89 CAL. L. REV. 1665, 1692-93 (2001) (arguing that defendants bargain away their right to an appeal through plea bargaining).

[6] The focus of this Article is on the standard of proof, but it is possible to further examine the alienability of additional rights, including the defendant's substantive rights: For example, the defendant's ability to waive his right to raise certain arguments on his behalf,

attributed efficiency, plea bargaining practices can be normatively anchored in the defendant's autonomy of will,[7] and in his right to effective control of his fate.[8]

This Article explores the boundaries of the negotiations under discussion and examines whether the current borderlines, set between alienable procedural rights (which the defendant may waive in exchange for sentence mitigation) and inalienable procedural rights (which may not be waived) can be justified. It makes a case for expanding the range of alienable procedural rights with regard to plea bargaining and for the extension of the boundaries of negotiation in the criminal arena. The test case on which I choose to focus, in order to examine the expansion of the negotiation borderlines, touches on the standard of proof. This Article examines the issue of changing the criminal standard of proof to a default variable from which the prosecution and defense can agree to deviate. According to the model under examination, the prosecutor would be able to "acquire" from the defendant a reduction of the standard of proof required during the criminal trial. The parties could agree that the standard of proof to which the prosecutor must adhere, in order to meet the burden of proof, will be less than "beyond a reasonable doubt." For example, the prosecution would be able to obtain a conviction if it established the case against the defendant in accordance with the civil standard of proof—preponderance of the evidence. The prosecution may also obtain "exemption" from the need to present corroborative evidence, or even reach an agreement for the reversal of the burden of proof between the parties, in which case the defendant takes it upon himself to prove his innocence beyond a reasonable doubt. In exchange for the greater risk of being convicted under a lower standard of proof, the defendant would face a lighter sentence in the event of conviction. The degree to which his sentence is reduced would reflect the extent to which the agreed-upon standard of proof deviated from the negotiable default constituted by the criminal standard of "beyond a reasonable doubt." It should be emphasized that the basis for stipulation and deviation from the standard of criminal

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such as claims of self defense or insanity, in exchange for a reduced sentence in the event of conviction.

[7] Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1978 (1992) (presenting plea bargains as a compromise supported by considerations of autonomy and efficiency); *see also* John G. Douglass, *Fatal Attraction? The Uneasy Courtship of* Brady *and Plea Bargaining*, 50 EMORY L.J. 437, 490 n.231 (2001); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1913 (1992) (claiming that autonomy considerations justify plea bargaining as a manifestation of the defendant's freedom of choice and freedom of contract).

[8] *See* George E. Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 TEX. L. REV. 193, 219 (1977).

proof would be consensual, expressing the mutual wishes of both parties to the judicial process.[9]

Under the current legal regime, the standard of proof is considered a constitutional safeguard of the criminal trial.[10] The fundamental principle, that the prosecution must bear the burden of proving all elements of guilt beyond a reasonable doubt as a prerequisite to conviction, dates back to the eighteenth century[11] and constitutes a "bedrock" principle of American criminal procedure.[12] The Supreme Court explicitly adopted this standard as a constitutional requirement in the 1970 case *In re Winship*.[13] The Court held that the Due Process Clauses of the Fifth and Fourteenth Amendments require the protection of the accused against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[14] Justice Frankfurter lauded the reasonable doubt rule as playing "a vital role in the American scheme of criminal procedure."[15] This quantum of proof is ubiquitous, and applies to every

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[9] The civil process also provides leeway for negotiating the standard of proof. In this connection, one can imagine an agreement to raise the standard of proof from civil to criminal, in exchange for a corresponding increase in recovery in the event of a verdict for the plaintiff. Further, one might imagine a situation where both parties agree to deviate from the existing binary model of "winner takes all" (the "p > 0.5 Rule") to the probabilistic recovery model: The parties could thus decide that the claim would be tried according to the balance of probability to which they adhere (in other words, that in the event the court rules that the plaintiff has proven his case to an 0.6 degree of certitude, he would receive 60% of the value of the claim, and in the event that the court rules that the plaintiff has only proven his case to an 0.3 degree of certainty, he would receive 30% of the value of the claim). *See* ARIEL PORAT & ALEX STEIN, TORT LIABILITY UNDER UNCERTAINTY 23 (2001) (discussing Probabilistic Recoveries).

As indicated previously, this study focuses on the criminal sphere, in light of its inherent public nature and the underlying assumption that the potential problems lurking in the proposed model become even more apparent when dealing with the criminal process. Nevertheless, conclusions can also be drawn in regard to the possibility of negotiating the standard of proof in the civil sphere.

[10] The United States Supreme Court has repeatedly held that the Due Process Clause prohibits the conviction of a defendant except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *See, e.g.*, United States v. Gaudin, 515 U.S. 506, 509-10 (1995).

[11] Bruce A. Antkowiak, *Judicial Nullification*, 38 CREIGHTON L. REV. 545, 560 (2005).

[12] Azhar J. Minhas, *Proof Beyond a Reasonable Doubt: Shifting Sands of a Bedrock?*, 23 N. ILL. U. L. REV. 109, 109 (2003).

[13] Henry D. Gabriel & Katherine A. Barski, *Reasonable Doubt Jury Instructions: The Supreme Court Struggles to Live by its Principles*, 11 ST. JOHN'S J. LEGAL COMMENT. 73, 74 (1995).

[14] *In re* Winship, 397 U.S. 358, 364 (1970) (holding that proof beyond a reasonable doubt is among the essentials of due process, required during the adjudicatory stage when a juvenile is charged with an act which would constitute a crime if committed by an adult).

[15] *Id.* at 363.

criminal trial.[16] Its significance is accentuated when contrasted with other procedural safeguards, such as the right to counsel or jury trial, which are not mandated in every criminal proceeding.[17]

In light of the fact that the standard of proof currently constitutes a nonnegotiable, fixed, and indivisible feature of the criminal process, the prosecution and defense have only two polar options to choose from when bargaining to settle the criminal case. The first is to conduct a full trial, placing the entire burden of proof upon the prosecution. The second is to enter a plea bargain, whereby the prosecution gains full exemption from having to prove its incriminating case. In other words, due to the indivisible, nonnegotiable nature of the criminal standard of proof, the existing model of plea bargaining is based upon self-incrimination by the defendant.[18] Such self-incrimination can relate to all areas of the criminal "dispute" (as occurs in plea bargains of the sentence bargaining[19] type) or, alternatively, it can apply on certain portions only (as occurs in bargains of the charge bargaining[20] type). In this sense, under current plea bargains the prosecution obtains a vertical exemption from the requirements of proof: a full exemption vis-à-vis some component of the factual case against the defendant, or the case in its entirety.

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[16] This standard applies both with respect to misdemeanors and to felonies, at all degrees of offense, and even when the case is tried without a jury. *See* United States v. Randolph, 93 F.3d 656, 660 (9th Cir. 1996).

[17] George M. Dery III, *The Atrophying of the Reasonable Doubt Standard: The United States Supreme Court's Missed Opportunity in* Victor v. Nebraska *and Its Implications in the Courtroom*, 99 DICK. L. REV. 613, 614 (1995).

[18] *See* Albert W. Alschuler, *Plea Bargaining and Its History*, 13 LAW & SOC'Y REV. 211, 213 (1979) (discussing the self-incriminating nature of plea bargains). However, some practices exist whereby the defendant accepts a prearranged sentence, reached by a plea bargain, even in the absence of an admission of guilt. *See* Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of* Alford *and* Nolo Contendere *Pleas*, 88 CORNELL L. REV. 1361 (2003) (discussing plea bargains of the *Alford* and *nolo contendere* types).

[19] Sentence bargaining involves an agreement between the parties as to the defendant's punishment. In such bargains, the defendant admits to the charges made against him in exchange for the imposition of a lighter sentence. *See* Douglas D. Guidorizzi, Comment, *Should We Really "Ban" Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 EMORY L.J. 753, 756 (1998).

[20] Charge bargaining is not explicitly aimed at the sentence a defendant will face (although this concern motivates such bargains). Rather, in plea bargains of this nature, the prosecution agrees to amend the indictment and drop certain charges against the defendant, in exchange for his guilty plea with regard to other charges. *See* Joseph S. Hall, *Rule 11(e)(1)(C) and the Sentencing Guidelines: Bargaining Outside the Heartland?*, 87 IOWA L. REV. 587, 593 (2002); *see also* William W. Wilkins, Jr., *Plea Negotiations, Acceptance of Responsibility, Role of the Offender, and Departures: Policy Decisions in the Promulgation of Federal Sentencing Guidelines*, 23 WAKE FOREST L. REV. 181, 185-86 (1988) (discussing the differences between charge bargaining and sentence bargaining).

The proposed model would enhance the possibilities available to both parties by adding the option of a horizontal exemption from the requirements of proof. In accordance with this alternative option, the defendant would not make a full confession to any single part of the dispute, but would make it possible for the prosecution to reduce the standard of proof necessary for criminal conviction across the board. This new version of plea bargains would enable the prosecution to obtain partial exemption from the burden of proof for the entire dispute. To illustrate a possible implication of the proposed model, let us take a hypothetical rape case and assume significant disparities between the parties' subjective evaluations of its outcome in court. Let us assume the prosecution is of the opinion that under the "beyond a reasonable doubt" rule it has a 40% chance of obtaining a criminal conviction. Let us further assume that the prosecutor estimates that, if convicted, the defendant will be sentenced to twenty years in prison. The defendant, for his part, assesses his chances of being convicted completely differently. In his opinion, the probability of his being convicted under the criminal standard of proof is only 20%, due to an alibi claim he wishes to raise in court. He estimates that, if convicted, he will be sentenced to fifteen years in prison. In order to simplify the argument at this stage, I will focus only on the expected sanction, as perceived by each side, disregarding additional parameters such as the decline or increase in the marginal costs associated with each year of imprisonment over successive years.[21] I will also assume reasonable costs of trial. These issues will be discussed in detail later in the Article.[22]

Under the abovementioned set of assumptions, the lack of congruity between each party's assessment[23] of the expected punishment can stand in the way of reaching a full plea bargain.[24] The prosecutor would offer the defendant a prison term of slightly less than eight years (the length of the expected sentence times the probability of conviction, minus the costs of

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[21] *See* A. Mitchell Polinsky & Steven Shavell, *On the Disutility and Discounting of Imprisonment and the Theory of Deterrence*, 28 J. LEGAL STUD. 1, 3 (1999) (discussing the way by which individuals' disutility from imprisonment varies with the length of the imprisonment term).

[22] *See* discussion *infra* Part II.D.1.a.

[23] This is due to low levels of certainty in the criminal sphere, to information asymmetries, and to various cognitive biases such as over-optimism. *See* Oren Bar-Gill, *The Evolution and Persistence of Optimism in Litigation*, 22 J.L. ECO. & ORG. 490, 491 (2006) (discussing the evolution of an optimism bias, leading to breakdown of pre-trial negotiations).

[24] In situations of risk aversion, a full plea bargain may be struck even though the parties do not agree on the expected punishment. The effects of the defendant's attitude toward risk on the tendencies to reach plea bargains will be discussed in upcoming sections of this Article. *See* discussion *infra* Part II.D.1.b.

trial) in exchange for his self-incriminating guilty plea. The defendant, for his part, would demand that, if convicted, he be sentenced to a maximum of slightly more than three years (the expected punishment, in his opinion, plus costs of trial). Thus, from the point of view of the prosecutor, the reduction in years demanded by the defendant, in exchange for his self-incriminating guilty plea, is too large. But from the defendant's point of view, the prosecution's demand of a full guilty plea is too high a price to pay for saving trial costs. Therefore, in the current situation of a nonnegotiable standard of proof ("beyond a reasonable doubt") the parties will most likely seek the trial option. For such cases, the proposed model can open the door to settlements that would benefit both parties. Let us now introduce a new variable, according to which the defendant can "exchange" concessions in the standard of proof for mitigation of the sanction in case of conviction. Let us further assume that, following the move to a civil standard of proof ("preponderance of the evidence"), the expected sentence envisioned by each of the parties changes as follows: The prosecution calculates that the move to a civil standard of proof will result in a 90% probability of conviction. This is because from the prosecution's point of view the difficulties of proof relate mostly to the elimination of any reasonable doubt. The defendant, for his part, believes that the move to a "preponderance of the evidence" standard of proof will not dramatically aggravate his situation because of the alibi claim that he is keeping under his hat. In his opinion, the likelihood of conviction through the move to a "civil" standard of proof will only increase by 5% (from a 20% to a 25% chance of conviction). In this scenario, the prosecution's proposal to request a ten-year sentence upon conviction, in exchange for moving to a "civil" standard of proof will enable both parties to increase their expected utility.[25] The prosecution's expected sanction will rise to nine years (an improvement on the original option of eight years). The defendant will face an expected sanction of only two-and-a-half years (an improvement on the original option of three years).

As will be demonstrated later, the proposed model can serve as an attractive alternative not only to a full trial, but also to the existing form of plea bargaining.[26] I will also demonstrate that when variables such as litigation costs and attitude toward risk are taken into account, the proposed model can improve both parties' expected utility (in relation to the current plea bargain or to trial according to the criminal standard of proof) even under conditions of full information.[27] At this point, I will only make an

[25] As in the case of plea bargaining, the proposed model will enable both parties, through optimal strategic behavior, to maximize their *expected* utility.

[26] *See* discussion *infra* Part II.D.1.b.

[27] *See* discussion *infra* Part II.D.1.

intuitive claim for the model: the proposed model offers each party the option to "insure" itself partially against the outcome of the criminal trial. Because of the move to a lower standard of proof, the "danger of acquittal" to which the prosecution is exposed is reduced, due to a somewhat increased probability of conviction. However, this risk is not entirely eliminated because the prosecution does not obtain a full guilty plea, as would be the case under the current full plea bargain practice. The defendant, too, is partially insured, because the extent of the sanction he faces upon conviction has diminished, but not to the "maximal" penalty reduction level, as in the current full plea bargain. Of course, the main reason for choosing "partial insurance" (the proposed model) over "full insurance" (the current plea bargain) stems from the costs of each of these policies: Obtaining full insurance against the risk of a criminal conviction entails a high price for each party. In the event that the bargain is accepted, the defendant must relinquish all possibility of acquittal. The prosecution, for its part, must "pay" in maximal sanction reduction. In other words, according to the existing model of plea bargaining (which is subject to the nonnegotiable standard of proof), the degree of risk involved in a criminal proceeding is limited to polarized solutions: carrying the full risk of a legal process under a "beyond a reasonable doubt" standard of proof or comprehensive cancellation of risk by eliminating the need for a fact-finding process. In contrast, the proposed model allows far greater flexibility in the apportionment of risk within the framework of the judicial process, enabling more optimal solutions. It sets the stage for partial diminution of the risks involved in adjudication. Thus, it enables the parties to regulate the degree of risk to which they are willing to expose themselves, on the basis of its inherent cost. Accordingly, the parties can concoct their own mix of optimal risk and cost, unfettered by extreme solutions.[28]

Similar claims can be made for the reduction of the costs of trial. The proposed model does not completely eliminate trial costs, as does the existing plea bargain, but it enables the parties to reallocate costs and lower the overall cost of trial. This point will be analyzed more thoroughly in upcoming sections, which will also be devoted to the question of why partial reduction in trial costs may be more beneficial to the parties, under certain circumstances, than their full elimination.[29] At this point, I will briefly explain the underlying intuition: One can posit a situation where the

[28] This point will be discussed in upcoming sections of the Article. *See* discussion *infra* Part II.D.1

[29] *See* discussion *infra* Part II.D.

task of proving the final X percent[30] of the prosecution's case requires a vast investment in resources on its part, such as the monetary cost of obtaining evidence from out-of-state witnesses, the emotional price paid by child witnesses, or the cost of revealing evidence where the prosecution wants to preserve the cover of police agents. The prosecution may regard this evidence as crucial for proving its case "beyond a reasonable doubt" but find it unnecessary when a move to a lesser standard of proof has been made. The reason for opting for a cheaper judicial process over a full plea bargain (which cuts down on the full costs of trial involved) stems from the differential prices of the two alternatives, in terms of sentence reduction.[31]

The partial reduction of risk and costs vis-à-vis the criminal trial is not unique to the proposed model and is not a novel phenomenon on the criminal procedure scene. There are other cases in which the parties opt to reduce the risks and costs of the judicial process rather than completely eliminate them. One example is the flourishing market of deals to "turn State's evidence" whereby the state's witness submits information incriminating others in exchange for mitigation of his punishment.[32] From the prosecution's point of view, the deal struck with the state's witness is a partial reduction of the risks and costs of the criminal proceeding against the chief defendant. In theory, the prosecution could hammer out a full plea bargain with the chief defendant, thus precluding the risks and costs of a trial. However, from the prosecution's perspective, the price involved (a lenient sentence for the chief defendant) would be too high. Instead, the prosecution prefers to partially reduce its risks and costs by recruiting witnesses on its behalf. In exchange it pays a lower price in the form of sentence mitigation or other benefits bestowed upon the state's witness. Another clear example of reducing the risks and costs of a criminal trial, as distinguished from their complete abrogation, is reflected in agreements whereby the defendant waives his right to appeal his sentence in exchange

[30] This variable can represent the interval between the "beyond a reasonable doubt" standard of proof and the "preponderance of the evidence" standards of proof.

[31] For example, from the prosecution's point of view, the level of reduction in punishment that is required by the defendant in exchange for a full guilty plea may prove to be too high. The prosecution may therefore prefer to conduct a less expensive fact-finding trial rather than bear the cost in punishment mitigation involved in a full plea bargain. This may also hold true for the defendant who, under the present model of plea bargaining, is obliged to bear the price of full waiver of all chance for acquittal. The defendant may also opt for a partial bargain whose inherent costs are lower—in the sense that he still retains a possibility, even at a decreased rate, of being found innocent. These points will be illustrated later on in the Article. *See* discussion *infra* Part II.D

[32] *See* Ian Weinstein, *Regulating the Market for Snitches*, 47 BUFF. L. REV. 563, 563 (1999) (describing the thriving market of defendant cooperation in the federal criminal justice system).

for concessions from the prosecution.[33] The fact that such "partial insurance" mechanisms against the outcome of the trial exist indicates the viability of interim solutions for contending with the risks and costs of criminal proceedings. The changes proposed in this model aim to expand the spectrum of options available to both parties by removing an additional stumbling block from their way—the fixed, indivisible standard of proof.

Concomitant to this discussion, an important point must be clarified: The discussion thus far may have created the false impression that the proposal to change the standard of proof to a negotiable variable is aimed at opening the parties to an endless, sequential continuum of proof standards from among which they can choose—i.e., that in accordance with the proposed model, the parties would be able to contract for a precise degree of probability for conviction, such as 85%, 78%, or 70%, and that this statistical rate could be validated by the courts. This is not the case, for there is indeed room to claim that accurate arithmetic evidentiary standards may not be practically viable. Judicial decisions are not statistical by nature and cannot be quantified accordingly. Courts typically lack the necessary tools and statistical information for precise calculation of the probability of guilt. Instead, courts draw their conclusions from categorical generalizations that transform legal decisions into rough estimates not subject to accurate statistical measurement. Support for this concept can be found in the fact that no exact statistical quantification exists for "reasonable doubt."[34] Since from a practical point of view the exact statistical measure has no concrete significance that can guide the courts (and neither does the transition from "beyond a reasonable doubt" to an 80% standard of proof and thence to a 75% standard of proof), the parties must formulate a standard of evidence that will be widely applicable. This requires the transition to categories such as "preponderance of the evidence" or "clear and convincing evidence." We can assume that under the proposed system, typical agreements will not be based upon shifts of single percentages one way or another in the standard of proof. Rather, these agreements will have the nature of calculable conversions that do not lend themselves to precise quantification, such as the move from the criminal to the civil standard of proof, an agreed-upon waiver of the need for corroborative evidence, or reversal of the burden of proof between defendant and prosecution.

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[33] *See* John C. Keeney, *The Appeal Waiver Controversy Justice Department Memo: Use of Sentencing Appeal Waivers to Reduce the Number of Sentencing Appeals*, 10 FED. SENT'G REP. 209 (1998) (discussing the scope of sentencing appeal waiver provisions).

[34] *See* Henry A. Diamond, Note, *Reasonable Doubt: To Define, or Not to Define*, 90 COLUM. L. REV. 1716, 1717 (1990) (examining the normative desirability of quantifying the "reasonable doubt standard").

The discussion of this Article will be divided into two main parts. The first part will explore the practical viability of the proposed model. The discussion will be devoted to identifying some of the situations where deals to provide concessions in the standard of proof might emerge or are likely to be formulated. The second part of this Article will address the normative desirability of such agreements. The legitimacy of the proposed model will be explored in reference to existing plea bargaining practices. This requires a brief explanation. The adoption of plea bargaining, and the legal regulation to which it is subject,[35] reflect a normative choice, the basis of which will not be re-opened for discussion here. Rather, this choice will be treated as an axiomatic starting point for my argument. The normative examination of the proposed model will focus on locating the points where the model deviates, either qualitatively or quantitatively, from plea bargains in their present form, and on exploring the ramifications of these dissimilarities regarding the proposed model's normative desirability.

II. VIABILITY OF THE PROPOSED MODEL

This Part is dedicated to the claim that the proposed model has practical significance: that, under certain circumstances, the negotiating parties will prefer the interim solutions available due to the implementation of such a model over the existing end results of plea bargains in their present form or full implementation of the judicial apparatus. When examining the viability of the proposed model, one must first ask why the parties choose to engage in plea bargaining in the first place. What utility do they derive from such bargains, and what aims do they seek to advance through them? Against this background one can define those situations in which the proposed model will further each party's attainment of its goals, as compared with the binary end solutions available at present. Therefore, at the outset I will discuss the advantages of plea bargaining, as viewed by both the defendant and the prosecution.

A. ADVANTAGES OF PLEA BARGAINING FOR THE DEFENDANT

The defendant's main motivation for engaging in plea bargains with the prosecution is aimed at reducing the overall costs he faces for allegedly committing an offense. These costs include both the criminal punishment and its accompanying trial costs. Punishment comprises the formal legal sanction imposed on the defendant (e.g., years of imprisonment and/or fines) as well as reputation and opportunity costs (such as loss of income).[36]

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[35] *See* FED. R. CRIM. P. 11.

[36] *See* Shanya M. Sigman, Comment, *An Analysis of Rule 11 Plea Bargain Options*, 66 U. CHI. L. REV. 1317, 1322 (1999).

The trial costs encompass monetary and emotional resources, the time spent in conducting a full trial, and the cost of facing uncertainty (for risk-averse defendants).[37] By negotiating a plea bargain, the defendant can acquire a "discount" in the criminal sanction (conviction for a lesser crime or a lighter sentence), and also avoid the accompanying trial costs.

B. ADVANTAGES OF PLEA BARGAINING FOR THE PROSECUTION

The prosecution is restricted from a budgetary viewpoint.[38] The scope of its resources does not allow it to conduct a full trial with regard to every suspect against whom sufficient evidence has been amassed.[39] Plea bargains enable prosecutors to maintain control over their caseloads by reducing enforcement costs per case[40] and by minimizing the risk of acquittal.[41] Such bargains pave the way for increasing the overall number of offenders prosecuted,[42] thus enabling the prosecution to further its goals of deterrence, incapacitation, and retribution.[43] In addition, plea bargains shorten the period of time between the criminal incident and the act of punishment.[44]

In light of the attempt to increase general enforcement, the prosecution's motives in plea bargaining with a particular defendant can best be described as directed toward maximizing the expected punishment or "cost of offense" borne by the specific defendant (within the limits of the formal legal sanction). The prosecution will agree to enter into a plea

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[37] *See* John P. Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279, 281 (1973) (discussing the effect of the defendant's attitude toward risk on the unexpected cost of the trial option).

[38] Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471, 1495 (1993).

[39] *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 plea bargaining is crucial for processing and prosecuting most criminal offenders).

[40] Put another way, plea bargaining enables the prosecution to obtain the highest marginal return per case, given its budgetary constraint. *See* Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 299 (1983).

[41] Jacqueline E. Ross, *Criminal Law and Procedure: The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 AM. J. COMP. L. Supp. 717, 717 (2006) (claiming that plea bargaining allows the prosecution to dispose of cases efficiently).

[42] F. Andrew Hessick III & Reshma Saujani, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. PUB. L. 189, 191 (2002).

[43] The plea bargain also enables savings in "court time." *See* Santobello v. New York, 404 U.S. 257, 260 (1971) ("If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.").

[44] *See* Douglass, *supra* note 7, at 439 n.6 (quoting *Santobello*, 404 U.S. 257 (1971)).

bargain if the overall expected "price of the offense" paid by the particular defendant exceeds the expected price from alternative defendants through equal investment of resources[45] and also exceeds the expected sentence if the particular defendant is tried, after deduction of the prosecution's trial costs.

C. DEVIATION FROM THE CRIMINAL STANDARD OF PROOF

After defining the goals of both the prosecution and the defendant in the resolution of the criminal case, I will now identify the circumstances under which one can expect the proposed bargain—a horizontal stipulation of the criminal standard of proof—to further these goals (i.e., to offer the parties better options than the ones currently available to them: full plea bargain or full trial according to the "beyond a reasonable doubt" standard of proof). As discussed above, one can define the benefits accruing to the prosecution and the defendant on the basis of two variables: the cost of the offense for the defendant (as defined above) and the effective evidentiary requirements imposed on the prosecution to uphold the burden of persuasion. It may be claimed that the benefits to the prosecution are positively influenced by the cost of the offense and negatively influenced by the effective evidentiary requirements for conviction. Benefits to the defendant, on the other hand, are negatively influenced by the cost of the offense and positively influenced by the proof requirements imposed on the prosecution.

Within the framework of the existing plea bargain, the defendant and prosecutor exchange elimination of proof requirements for maximal punishment mitigation: the plea bargain will be formed when such evidentiary waiver is more valuable, in terms of units of punishment, for the prosecution than it is for the defendant. The proposed model, too, depends on both parties exchanging mitigation in proof requirements for a lighter punishment. The difference between this model and current plea bargains is that the model under discussion is not limited to the exchange of these variables as one indivisible block, but provides for partial and gradual exchange of units of standard of proof for units of punishment. In light of the feasibility of separating the "array of punishment" and the "array of proof standard" into units, one can thus refine the definition of the utility function of both parties in the following manner: the greater the degree of overall punishment and the lower the standard of proof needed to uphold the burden of persuasion, the more benefit accrues to the prosecution—and the reverse applies with regards to the defendant.

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[45] Easterbrook, *supra* note 40, at 308-09.

Because benefits to the parties are influenced by the degree of punishment and the standard of proof, and because the groupings of "punishment mitigation" and "proof standards" can be separated, it thus becomes possible to define specific degrees of exchange—the Marginal Rate of Substitution ("MRS")[46]—for each party between units of punishment and "standard of proof" units. The MRS for the prosecutor measures the number of additional units of punishment which he is prepared to relinquish in exchange for an additional unit of reduction in the standard of proof, in such a way that utility will not be affected. The MRS for the defendant describes the number of units of reduction in the standard of proof that he is willing to forgo in exchange for the reduction of an additional unit of punishment, while maintaining a fixed level of utility. The proposed model is based on the assumption that in some situations the MRS of the parties between units of punishment and units of standard of proof will equalize at an intermediate point set between a full trial (under a "beyond a reasonable doubt" standard) and a full plea bargain. As will be demonstrated in the following Part, under such circumstances both prosecutor and defendant would opt for partial reduction of the standard of proof, in exchange for a lesser sentence, rather than engage in a full plea bargain or conducting a full trial.

D. MARGINAL RATE OF SUBSTITUTION BETWEEN UNITS OF PUNISHMENT AND STANDARDS OF PROOF

The parties' MRS between units of punishment and units of standard of proof are influenced by a range of factors and variables. One such variable, briefly mentioned in the example of the rape case, is each party's subjective assessment of its chances of success at trial under various standards of proof. Although this factor has many practical implications, the proposed model is not limited to conditions of asymmetric information and differential subjective evaluations. Even under conditions of full information, the MRS of both parties may equalize at interim points due to the effect of additional variables, such as the prosecution's marginal cost of gathering evidence and managing the trial, the defendant's attitude toward risk, and the signaling effects of engaging in the proposed bargain. In order to illustrate paradigmatic situations where the proposed model would be viable, I will examine the possible impact of each of these factors on the MRS for the parties, and on the willingness of the prosecutor and the defense to enter into the proposed interim deals.

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[46] The MRS measures the maximum amount of a good an individual is willing to give up in exchange for an additional unit of another good, while maintaining a constant level of utility. *See* ROBERT S. PYNDICK & DANIEL L. RUBINFELD, MICROECONOMICS (6th ed. 2005).

1. The Combination Effect of Trial Costs and the Defendant's Attitude Toward Risk

a. Trial Costs

The prosecution must invest resources in order to win its case in court. Evidence does not appear of itself. Witnesses must be located and coached before they testify. Expert witnesses and capable attorneys must be recruited to conduct the prosecution. Due to the fact that the gathering of evidence bears a price tag for the prosecution, the costs of trial are not exogenous to the proof requirements: The higher the standard of proof required to establish criminal culpability, the more resources must be invested by the prosecution in order to meet the evidentiary demands.[47] In other words, from the prosecution's point of view, the allocation of resources for the management of the trial and for the gathering of evidence is contingent upon the standard of proof necessary for the establishment of a criminal conviction. The move to a lower standard of proof, such as "preponderance of evidence," will reduce the prosecution's cost of trial, but only partially. The "interim" trial under this lower standard of proof will still be more expensive than the full plea bargain, but cheaper than the full trial according to the "beyond a reasonable doubt" standard of proof. The move to a full plea bargain, on the other hand, enables the prosecution to save maximally on case management and evidence-gathering as the cost of trial drops to the minimum, due to the fact that under such bargains the prosecution is effectively exempted from the need to prove its incriminating case. Therefore, maximum savings in trial costs will create an incentive, on behalf of the prosecution, to move towards the end point of full plea bargain.

The defendant, too, faces trial costs: it costs money to gather evidence and to mount a defense. The trial is time-consuming and places emotional burdens on the defendant. It may be claimed that when the evidentiary demands on the defendant are very low (for example, when the

[47] The gathering of some pieces of evidence requires a great investment of resources, while obtaining or presenting other segments of evidence costs considerably less, whether in monetary terms (such as the cost of bringing out-of-state witnesses before the court) or otherwise (such as the emotional price paid by rape victims or children who testify). The contribution of different pieces of evidence to incrimination varies as well. When there is a low standard of proof, the prosecution can utilize the cheapest or most effective segments of evidence at its disposal from an entire array of potential evidence. However, as the evidentiary requirements increase, there is a corresponding decrease in the prosecutor's maneuverability regarding his options, and he is obliged to use larger segments of the corpus of available evidence. This includes more problematic evidence and more expensive pieces of evidence, whose individual contribution to the criminal charges may be significantly smaller.

establishment of reasonable doubt on his part is enough for acquittal), his trial costs will be relatively small. As the requirements of proof placed upon the defendant increase due to the consensual reduction in the standard of proof necessary for conviction, the defendant is obliged to delve more deeply into his array of potential evidence. He may need evidence that is costly to obtain and process (such as putting expert witnesses on the stand) or whose marginal contribution to an acquittal is low. The defendant's cost of trial and of obtaining and processing evidence will steadily increase as the standard of proof placed upon the prosecution decreases. In other words, it may be possible to describe the defendant's allocation of resources for trial management as contingent upon the standard of proof. An alternative way to describe the defendant's allocation of resources for trial is in binary terms of "all or nothing." It may be argued that when a full plea bargain has not been struck and a factual investigation through testimony is conducted to determine the defendant's guilt, the defendant will seek to use all the evidence at his disposal to establish his innocence, irrespective of the standard of proof for conviction. This will be especially true in the frequent instances when the defendant is represented by a public defender or when the defendant's trial expenses are highly subsidized. The proposed model is viable in both situations. The important point for the purpose of the proposed model is that regardless of the defendant's reaction to the standard of proof, maximal savings in the cost of trial will occur only at the point of full plea bargain.

b. Attitude Toward Risk

Unlike the prosecution, however, and despite the prospect of maximal savings in trial costs, the defendant will not always aspire to this end point. The defendant may also be exposed to a counter force which will direct him towards the second extreme—that of conducting a full trial under the "beyond a reasonable doubt" standard (hereinafter "full trial"). This counter vector derives from the defendant's attitude toward risk, or, more specifically, is prevalent in cases where the defendant acts in a risk-seeking manner. Defendants behave as risk seekers in cases where the disutility suffered from each year of imprisonment is expected to decline over successive years in prison.[48] This phenomenon of decreasing marginal

[48] *See* Polinsky & Shavell, *supra* note 21, at 3 (discussing further possible reasons for decreasing disutility with relation to imprisonment years); *see also* Alon Harel & Uzi Segal, *Criminal Law and Behavioral Law and Economics: Observations on the Neglected Role of Uncertainty in Deterring Crime*, 1 AM. L. & ECON. REV. 276, 295-96 (1999) (claiming that another reason for decreasing marginal utility with relation to prison years stems from the fact that the inherent degree of utility derived from a year of freedom at an older age may be lower than the utility the defendant can derive from a year of freedom at a younger age).

disutility may result from a number of factors, such as the defendant's a priori assumption that he will grow accustomed to prison life as time passes, and thus the second year will be more bearable than the first. Another factor is the loss of reputation. The marginal loss of reputation may be greatest at the time of imprisonment, whereas the marginal loss as a result of a longer imprisonment term (two years rather than one) may be substantially lower. Also, the degree of certainty pertaining to the later years of the sentence is lower than that of the earlier years since the defendant is more likely to pass away over a longer time span. When these factors are considered and the marginal cost of the second year is lower than that of the first year, the defendant will prefer to conduct a trial in which he faces a 50% chance of a two-year prison term over the possibility of an agreed sentence term of one year under a plea bargain, and in this sense he may be considered a risk seeker.[49] In other words, the defendant acts as a risk seeker when he prefers a trial over a plea bargain, given an expected punishment in trial, calculated by the probability of conviction multiplied by the sanction imposed upon conviction, which is equal to the certain punishment agreed upon under the plea bargain. The defendant's risk-seeking tendencies will create an incentive on his part to move to the end point of full trial, since the marginal cost of the later years in the potential prison term is lower than the marginal cost of the early years. This vector, directed towards the full trial end point, may be balanced against the opposing forces that work on both the prosecutor and the defendant, leading towards the full plea bargain end point, and which derives from the tendency of both parties to save the costs of trial. In summation, the proposed bargain of horizontal waiver of the standard of proof refers mainly to the category of cases in which the defendant is a risk seeker. In those cases, the defendant will be exposed to two opposing forces—the incentive to cut down on trial costs will work in the direction of a full plea bargain, while his risk-seeking tendencies will create incentives directing him toward the full trial end.

Due to these opposing forces, it becomes possible to posit situations in which both parties would opt for interim solutions of partial reduction in the standard of proof in exchange for a lesser sentence. In light of the above and with the assistance of a hypothetical example, I will demonstrate how each of the parties may prioritize the three alternatives open to them: full

[49] Of course, the converse could also apply: the marginal disutility suffered by the defendant may increase with the sentence length. This model of disutility relates to a defendant for whom each passing year of prison life will become more unbearable than the preceding one or for whom opportunity costs are expected to rise incrementally the longer he is cut off from normal life. This category of cases may refer to repeat offenders, for example.

trial, full plea bargain in its present form, or the proposed interim model. I will begin with situations where, given the choice to engage in the proposed interim bargains, the parties would still opt for end solutions, conducting either a full trial or a full plea bargain. Of course, in such cases the proposed model has no practical ramification. From there I will move to cases where the interim solutions would be preferred over the end options available today—of full trial or full plea bargain.

Let us assume a hypothetical case where the sanction upon conviction is a fifteen-year prison term, and the probability of conviction under a "beyond a reasonable doubt" standard is 20%. Trial costs for the prosecution according to such evidentiary requirements are $1000. Trial costs for the prosecution, according to the more relaxed civil standard of "preponderance of the evidence" would cost only $500, and a full plea bargain would cut trial costs altogether ($0). As for the defendant, the management of his case according to any standard of proof would cost $300, but a plea bargain would reduce trial expenses to zero. Let us further assume that under the "preponderance of the evidence" standard, the probability of conviction will rise to 50%. A final assumption is that, due to the risk-seeking tendencies of the defendant, the expected cost of punishment for the defendant, expressed in monetary terms, is as follows: 20% probability for a fifteen-year term is the least expensive alternative, estimated at $3400; 50% probability for a six-year term is the equivalent of $4000; and a certain three-year term costs $5000. To simplify the presentation, the data are presented in the following table. The prosecution's costs of trial are expressed in row A.

Table 1

Trial Costs Under Criminal and Civil Standards of Proof

	Beyond a Reasonable Doubt 95%	Preponderance of the Evidence 51%	Full Plea Bargain
Prosecution's Trial Costs			
A	1000	500	0
B	4000	3500	0
C	1200	500	0
D	2000	500	0
Defendant's Trial Costs	300	300	0
Expected Punishment	20% x 15 = 3	50% x 6 = 3	100% x 3 = 3
Defendant's Punishment Costs	3400	4000	5000

In such circumstances the move from a criminal standard of proof to the civil standard of proof will save the prosecution $500 ($1000-$500). However, this move will cost the defendant $600 ($4000-$3400) and therefore this bargain will not be struck. In addition, the parties will not engage in a full plea bargain since the move from full trial to full plea bargain will save the prosecution $1000 and cost the defendant $1300 ($1600 costs of punishment minus $300 savings on trial costs). Therefore the parties will opt for the starting point of conducting a full trial under the "beyond a reasonable doubt" standard.

Full plea bargains are entered into in the opposite situation. I will return to the previous example, with a minor change: This time I will assume the prosecution's costs of trial under the "beyond a reasonable doubt" standard are $4000, whereas the costs of trial under the "preponderance of the evidence" standard are $3500. The data are presented in the above table. The prosecution's costs of trial are expressed in row B. In this situation, the transition from a criminal standard of proof to a civil standard of proof will save the prosecution $500, but cost the defendant $600. Therefore, such a transition would not occur. However, a full plea bargain will be struck because the move from full trial to full plea bargain would save the prosecution $4000 in trial costs and would cost the defendant $1300 ($1600 cost of punishment minus $300 savings on trial costs). The range between $1301 and $3999 would enable the prosecution to compensate the defendant, in terms of punishment, in exchange for his guilty plea.

Alongside these situations, one can posit scenarios where the parties will prefer the proposed deal over existing binary solutions. Once again I will illustrate by means of the hypothetical case above. This time I will assume that the prosecution's costs of trial under the "beyond a reasonable doubt" standard stand at $1200, whereas the costs of trial under the "preponderance of evidence" standard are $500. The data are presented in the above table. The prosecution's costs of trial are expressed in row C. Under the abovementioned circumstances, the transition from the criminal standard of proof to the civil standard of proof will save the prosecution $700. Such a transition will cost the defendant $600, and will therefore take place. However, from this point on, the parties will not make any progress towards a full plea bargain because the move from conducting a trial according to the civil standard of proof to a full plea bargain will save the prosecution only $500 and cost the defendant $700 ($1000 in terms of punishment minus $300 in trial costs). Lacking the opportunity to enter into the proposed interim arrangement, the parties will opt for a trial rather than a plea bargain because a full plea bargain will save the prosecution $1200 but cost the defendant $1300 ($1600 punishment costs minus $300

savings on trial costs). However, in this scenario, if the parties had the proposed option of across-the-board stipulation of the standard of proof, they would choose to enter into an interim arrangement whereby the prosecutor could establish criminal culpability by meeting the "preponderance of the evidence" standard of proof and in exchange offer the defendant a reduction of the expected punishment, which has the monetary equivalent of $601-$699. This point represents a compromise in the position of each party, both with respect to the full plea bargain and with respect to a full trial.

There may also be situations where, for lack of opportunity to enter into the proposed interim agreement, the parties would choose to negotiate a full plea bargain, but would also opt for the proposed interim option if one were available. Returning to the previous example, I will make the following set of assumptions: Conducting a full trial in accordance with the "beyond a reasonable doubt" standard will cost the prosecution $2000 and managing a trial under the "preponderance of the evidence" standard costs the prosecution $500. The data are presented in the table above. The prosecution's costs of trial are expressed in row D. As can be seen, the transition from a heightened standard of proof of "beyond a reasonable doubt" to the civil standard of "preponderance of evidence" will save the prosecution $1500. This shift would cost the defendant $600 and will therefore take place. However, from this point on the picture changes: The move to a full plea bargain will not occur because the transition from the civil standard of proof to a full plea bargain will save the prosecution $500 in trial costs but will cost the defendant $700 ($1000 costs of punishment minus $300 savings on trial costs). When the standard of proof is a nonnegotiable variable, and the parties lack the option of engaging in the proposed deal, they would opt for a full plea bargain, which saves the prosecution $2000 and costs the defendant only $1300. However, if the standard of proof becomes negotiable, the parties would choose to engage in the proposed deals. This would enable the prosecutor to establish guilt by meeting the "preponderance of the evidence" standard of proof, and in exchange offer the defendant a reduction of the expected punishment, which is the monetary equivalent of $601-$1499. This interim point improves the situation of each party both vis-à-vis a full trial and vis-à-vis a full plea bargain.

2. The Effects of the Epistemological Assessment of Risk

A further factor, which may affect the parties' tendencies to engage in the proposed deals, rests on their subjective assessments of the chances they face at trial pursuant to various standards of proof. This factor depends upon the existence of information disparities between the parties. The

practical relevance of such considerations may be significant given that in reality laboratory conditions of full information do not exist. In order to isolate the effect of this factor on each party's MRS between levels of punishment and degrees of mitigation in the standard of proof, I will assume at this point that the costs of trial do not depend on the standard of proof necessary for conviction and are extraneous to the evidentiary requirements faced by each side. For example, I will assume that the costs of gathering evidence and managing the trial are negligible. In such a case, the standard of proof that applies at trial will be relevant only with regard to the parties' epistemological assessment of the risk allocation between them and their chances for success.[50]

The effect of the parties' assessments of their chances for success on their willingness to trade reduction in the standard of proof for sentence mitigation is illustrated by the hypothetical rape case referred to above. As I indicated, one need not necessarily assume that by transferring a certain degree of the standard of proof from the prosecution to the defense we have symmetrically altered each party's perception of its success rate. It may be that the prosecutor feels that a 10% reduction in the standard of proof will improve his chances of establishing a conviction by 30%, but the defendant believes that by taking on an additional 10% of the standard of proof he will increase his risk of conviction by a mere 5%. This disparity arises from the fact that the parties are functioning under specific conditions of uncertainty. When dealing with assessment of evidentiary material, the lack of information is two-fold: Not only does each side lack information regarding the strategic use that the opposing party will make of the evidence at his disposal, but his ability to assess the specific value of the evidence he himself possesses is also limited because the value of his evidence is a function of the interaction likely to ensue with the evidentiary version of the opposing party. Even beyond the lack of information regarding the evidentiary material, the entire criminal proceeding is shrouded in uncertainty, beginning with the existence of contradictory judicial precedents and extending to a lack of information at certain points in time as to the identity of the presiding judge or jury. These disparities in each party's evaluation of the chances of success under various standards of proof could lead to situations where the MRS between penalty reduction

[50] Of course, this assumption deviates from the premise underlying the discussion in the previous section, according to which the prosecution will react to the standard of proof in its decision as to the allocation of resources for the management of trial. It is necessary to assume a constant level of resource allocation to the management of the trial, regardless of the standard of proof, in order to isolate the effect of the parties' subjective epistemological assessments of the chances they face at trial on the MRS between the standard of proof and the degree of punishment.

and evidentiary concessions may induce bargains at the interim points in such a way as to improve the position of both parties.

3. The Signaling Effects of the Proposed Bargain

Another consideration that may induce the parties to prefer an interim deal over a full plea bargain touches on the hidden signal conveyed by the very willingness to enter into such bargains. For the defendant, entering into a full plea bargain serves as a signal that he assumes responsibility for the crime. From his point of view, this constitutes a negative signal. However, his willingness to negotiate a reduced standard of proof for a criminal conviction is likely to convey a positive signal. It can be interpreted as a firm belief in his innocence and confidence in his ability to establish his case, even in light of the more severe evidentiary demands that he now faces.[51] The positive signals that he is sending to the prosecutor, the court, and society in general can serve as an additional incentive to opt for an interim deal over a full plea bargain.

The prosecutor is also likely to perceive the expressive significance of an interim deal. Hitherto I have related to the criminal sanction as a whole without analyzing its individual components. However, in certain cases the formal sanction is likely to be of secondary importance, subordinate to the establishment of criminal culpability by the court and to the judicial attachment of a criminal label to the act. In some cases, public opinion may demand a full judicial trial clarifying the question of criminal responsibility, whereby the defendant's conduct will be labeled in light of public standards, morals, and ideals.[52] When judicial clarification proceeding on the question of criminal responsibility constitutes the most important basis for the prosecutor while the punishment is less so, the prosecutor is likely to opt for the proposed deal, whereby a criminal trial is held to determine the question of criminal responsibility.

E. INTERIM SUMMARY

The main considerations that lead the prosecution and the defense to formulate plea bargains arise from their desire to avoid trial costs (costs

[51] Such face-saving considerations on the part of the defendant also form the basis for *nolo contendere* pleas. For further discussion of the *nolo contendere* plea as a face-saving device, see Mark Gurevich, *Justice Department's Policy of Opposing* Nolo Contendere *Pleas: A Justification*, 6 CAL. CRIM. L. REV. 2, 2 (2004).

[52] Of course, there is room to claim that the stigmatizing effect of a conviction governed by a relatively low standard of proof, such as "preponderance of the evidence," is not equivalent to the stigma of conviction according to the higher evidentiary standard of "beyond a reasonable doubt." These expressive issues will be discussed in more detail in upcoming sections. *See* discussion *infra* Part III.B.2.b.ii.

bargaining) and reduce inherent risks of trial (odds bargaining)[53] while maintaining an acceptable and agreed-upon level of punishment. Under the proposed deals for across-the-board stipulation of the standard of proof, the parties cannot expect to fully realize these goals. The interim deals do not obviate the need for a fact-finding proceeding, and consequently, the parties continue to bear the costs and risks of trial. In addition, the expected punishment borne by the defendant remains an open-ended question since the possibility of acquittal remains intact. Given the fact that the proposed model does not fully achieve the basic goals of the criminal negotiation, it may be argued that it cannot constitute a realistic alternative to the existing plea bargain. However, as I have attempted to demonstrate, the proposed arrangement may offer the parties more attractive options for settling the criminal dispute and realizing all of these aims than the existing end solutions.

Underlying the full plea bargain is the assumption that situations may arise where the value of a comprehensive evidentiary exemption transferred from the defendant to the prosecutor, in terms of punishment units, is higher for the prosecutor than it is for the defendant. In these cases, the parties will find it beneficial to engage in a plea bargain whereby the defendant pleads guilty and the sanction imposed upon him is reduced maximally. Underlying the proposed model is the further assumption that the MRS between units of punishment and units of exemption from the standard of proof may equalize at the interim points between a full trial and a full plea bargain. In such cases, a reduction in the standard of proof (as opposed to full exemption) in exchange for a partial reduction in punishment (as opposed to maximal reduction) may improve the position of both parties in relation to the options currently available—either full guilty plea or full trial.

The full plea bargain can indeed eliminate the costs and risks involved in the criminal trial while the proposed model will only have a partial effect, but the cost of such full savings may be too high from the point of view of each party. From the prosecution's perspective, full evidentiary exemption requires maximal concessions on the criminal sanction. In certain circumstances the prosecutor may prefer to shoulder the costs of a cheaper trial over the costs involved with the maximal reduction of the level of punishment. From the defendant's point of view, the full plea bargain entails complete surrender of his prospects for acquittal. In certain circumstances the defendant, too, is likely to prefer bearing the cost of less-

[53] The terminological distinction between "costs bargaining" and "odds bargaining" can be traced to Albert W. Alschuler, *Straining at Gnats and Swallowing Camels: The Selective Morality of Professor Bibas*, 88 CORNELL L. REV. 1412, 1412 (2003).

than-maximal reduction in the sanction over the costs incurred by complete elimination of the prospect of acquittal. The previous discussion was devoted to a description of the circumstances and factors which could pave the way for the proposed interim deals. These factors include the costs of trial, the defendant's attitude toward risk, and the parties' subjective assessments of their prospects in court, pursuant to various degrees of the standard of proof. Another factor relates to the expressive advantages likely to be obtained by both prosecution and defense under the proposed model. One cannot isolate the effect of each factor separately. However, by grouping them together we open the door to a variety of situations and scenarios where the proposed interim bargain could achieve optimum results for each of the parties involved. Elimination of the barriers placed upon stipulation of the criminal standard of proof broadens the spectrum of choices for each party in the criminal negotiation. The proposed model paves the way for a consensual reallocation of the risks and the evidentiary requirements inherent in the criminal trial in a way that creates surplus utility for both the defense and the prosecution.

III. NORMATIVE CONSIDERATIONS

Thus far I have focused on defining situations where the prosecution and defense will be motivated to enter into interim deals for lowering the standard of proof and where such deals will constitute a viable and effective alternative to full plea bargains. In the sections that follow, I will examine the desirability of such interim bargains and question the normative appeal of turning the criminal standard of proof into a negotiable default rule. In order to consider the expansion of the negotiation boundaries between prosecution and defense, I shall begin by reviewing the rationales for and against opening the criminal arena to contractual ordering. This issue is discussed in the literature dealing with plea bargains, a practice which has stirred up one of the most prominent and cardinal polemics in Anglo-American criminal procedure.[54] The main arguments for and against negotiation in the criminal justice field will serve as a general reference point. I will proceed to examine their validity in relation to the criminal standard of proof and to question, in their light, whether it is possible to

[54] Examples of law review articles calling for the abolishment of plea bargaining include Albert W. Alschuler, *Implementing the Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931 (1983); Kenneth Kipnis, *Plea Bargaining: A Critic's Rejoinder*, 13 LAW & SOC'Y REV. 555 (1979); and Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979 (1992). In contrast, articles favoring plea bargains include Guidorizzi, *supra* note 19, at 754; and Robert E. Scott & William J. Stuntz, *A Reply: Imperfect Bargains, Imperfect Trials, and Innocent Defendants*, 101 YALE L.J. 2011, 2015 (1992).

justify the existing dichotomy between negotiable procedural rights and the standard of proof considered nonnegotiable.

A. NORMATIVE EXAMINATION OF EXISTING PLEA BARGAINS

1. Considerations for Plea Bargaining

It is possible to justify plea bargaining and resorting to negotiation in the criminal justice arena on three major grounds—efficiency, autonomy, and distributive justice.[55] I will briefly touch upon each of these considerations. The main reason for opening the criminal justice arena to contractual ordering stems from the conjecture that plea bargains serve as an efficient mechanism for the resolution of the criminal case.[56] Like any other deal, plea bargains are struck because they improve the positions of the parties as compared to the status quo.[57] The assumption is that since the prosecution reflects the public interest[58] and the defense reflects the defendant's interests, voluntary transactions between them represent pareto improvements in the situation of both the defendant and society at large.[59] Another justification for opening the criminal justice arena to negotiation stems from recognition of the defendant's decisional autonomy[60] and his right to exert effective control over the manner in which his fate will be determined.[61] The very exposure to criminal proceedings puts substantial limits on a defendant's range of choices.[62] However, even in light of

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[55] *See* Scott & Stuntz, *supra* note 7 (evaluating plea bargaining on considerations of efficiency, autonomy, and distributive justice); *see also* Easterbrook, *supra* note 7, at 1975.

[56] Easterbrook, *supra* note 7.

[57] *See* Russel L. Christopher, *The Prosecutor's Dilemma: Bargains and Punishments*, 72 FORDHAM L. REV. 93, 116 (2003).

[58] Scott W. Howe, *The Value of Plea Bargaining*, 58 OKLA. L. REV. 599, 604-05 (2005). The agency problems that might arise will be discussed below. *See* discussion *infra* Part III.A.2.

[59] Even among the opponents of plea bargaining, many accept that it is an efficient tool for resolving criminal disputes. *See, e.g.*, Albert W. Alschuler, *Guilty Plea: Plea Bargaining*, *in* 2 ENCYCLOPEDIA OF CRIME AND JUSTICE 829, 834 (Sanford H. Kadish ed., 1983) (stating that "if a plea bargain did not improve the positions of both the defendant and the state, one party or the other would insist upon a trial").

[60] *See* Easterbrook, *supra* note 7, at 1977-78.

[61] *See* Dix, *supra* note 8, at 219 (providing further discussion of the notion of defendant autonomy).

[62] *See* Robert E. Toone, *The Incoherence of Defendant Autonomy*, 83 N.C. L. REV. 621, 656 (2005):

> [T]he looming presence of a pending criminal charge severely constrains the choices a defendant can make in life. At the trial itself . . . the defendant has no ability to "conceive of his own goals and policies and realize them." He is free only to choose among the options that "external

criminal proceedings, the defendant's control over his fate and the freedom to make use of his legal rights, including by way of waiver, must be safeguarded. Finally, one can defend the opening of the criminal arena to contractual arrangements on grounds of distributive justice. It may be claimed that denying defendants the ability to transfer their procedural rights in return for sentence mitigation has a regressive distributive effect. Since defending oneself in a criminal trial is a costly ordeal, the prospects of a defendant from a lower socioeconomic bracket to cast reasonable doubt on the prosecution's case may be significantly lower than those of a wealthier defendant. Unlike his poorer counterpart, the wealthy defendant possesses the resources required to hire the services of a top-notch lawyer or to recruit expert witnesses.[63] As a result, huge disparities may develop between defendants in their ability to make effective use of the "presumption of innocence" and other procedural safeguards to which the trial framework entitles them.[64] Denying plea bargaining puts the poorer defendant in a double bind[65] in this respect: On the one hand, the use he can make of his procedural rights within the trial apparatus is extremely limited in comparison to the wealthier defendant; on the other hand, in a world without plea bargains, where "realization" of these procedural rights is contingent upon entrance to the trial arena, he is prevented from improving his position by "trading" on these rights outside the trial arena.[66] In this sense, it is possible to view the closure of the criminal justice arena to negotiations as a sort of regressive taxation placed upon defendants from a lower socioeconomic bracket, in order to preserve the incommensurability

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forces" afford him, options both created and bounded by the rules of procedure, rules of evidence, and substantive law.

[63] *See* Ellen Kreitzberg, *Death Without Justice*, 35 SANTA CLARA L. REV. 485, 486 (1995) (claiming that insufficient funding contributes to wrongful convictions).

[64] *See* John R. Lott, *Should the Wealthy Be Able to "Buy Justice,"* 95 J. POL. ECON. 1307, 1309-10 (1987) (attempting to justify this phenomenon).

[65] *See also* Margaret J. Radin, *Market Inalienability*, 100 HARV. L. REV. 1849, 1925 (1987) (addressing the issue of market alienability of goods closely connected with personhood, such as sexuality). Professor Radin claims that restricting the commensurability of sexual services may place the seller in a "double bind" situation, if he is not provided with alternative means to obtain the resources necessary for comfortable existence. *Id.*

[66] *See also* Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309 (1981) (claiming that the value of a constitutional right is determined by its alienability). According to Easterbrook, "[a] right that cannot be sold is worth less than an otherwise-identical right that may be sold. Those who believe in the value of constitutional rights should endorse their exercise by sale as well as their exercise by other action." *Id.* at 347.

and the use value of the procedural rights for the general class of defendants.[67]

2. Considerations Against Plea Bargaining

Opposing the normative considerations for opening the criminal justice arena to contractual arrangements is a series of counterarguments aimed at limiting the practice of plea bargaining or even canceling it altogether. From the efficiency perspective, the opening of the criminal arena to contractual ordering may be challenged on the grounds of failures in the market for plea bargains.[68] A major market failure is attributed to principal-agent problems, which arise in plea negotiations.[69] In the spirit of this critique, the criminal procedure is not merely a market institution; rather, it can be seen as a political instrument through which the prosecutor may advance his own private agenda. Such a private agenda is liable to be inconsistent with the public interest and may even collide with it head-on.[70] Thus, for example, the interest of the prosecutor in high conviction rates for professional promotion purposes may clash with the public interest in non-conviction of the innocent. In a full judicial mode, the court can oversee the prosecutor's functioning and limit his ability to grind his own axe in criminal proceedings. In contrast, plea bargains give the prosecutor room to maneuver and reduce court supervision. An additional agency problem that may arise in connection with plea bargains touches upon the tension between the interests of the defendant and his counsel.[71] A combination of the fact that the prosecutor does not fully internalize the public interest in his utility function and the fact that the counsel for the defense may fail to promote the defendant's interests may lead to two types of problematic results. On the one hand, the plea bargaining mechanism paves the way for the conviction of innocent persons,[72] with its accompanying costs and

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[67] I do not wish to claim that the gap between the rich defendant and the poor defendant would be totally eliminated by negotiations outside the courtroom. This gap may be reproduced, to some degree, in the plea bargaining arena, as can be seen in William M. Rhodes, *The Economics of Criminal Courts: A Theoretical and Empirical Investigation*, 5 J. LEGAL STUD. 311, 336 (1976) (establishing the claim that the reduced probability of conviction for wealthy defendants within the judicial system leads prosecutors to offer them lower sentences in the plea negotiation context).

[68] *See, e.g.*, Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43 (1988).

[69] *See* Schulhofer, *supra* note 54, at 1987.

[70] Peter Lewisch, *Criminal Procedure*, *in* 5 ENCYCLOPEDIA OF LAW AND ECONOMICS 241 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000).

[71] *Id.*

[72] *See* Schulhofer, *supra* note 54, at 1984 (discussing the dangers of convicting innocent defendants through plea bargaining).

negative externalities;[73] on the other hand, plea bargains may expose the criminal to a lesser punishment than is desirable from a social perspective. One way or another, plea bargains may impair the goals of criminal justice—the development of a systematic and consistent punishment policy[74]—and the goals of deterrence,[75] retribution, and incapacitation of the guilty.[76]

An additional criticism that can be leveled at the efficiency of the plea bargaining mechanism touches upon the fact that the two sides to the deal are positioned in a bilateral monopoly situation.[77] The defendant is prevented from offering his guilty plea to rival prosecutors in order to obtain a better "price" (in terms of sentence mitigation),[78] and, similarly, the prosecutor can only "purchase" the specific plea of guilt from the particular defendant. The bilateral monopoly situation sets up strategic barriers, resulting in the fact that a perfect market for plea bargains cannot be established.[79] An alternative analysis that also forms a source of opposition

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[73] *See* Bibas, *supra* note 18, at 1386.

[74] A possible reaction to this criticism is that a plea bargain is the typical and prevalent mechanism for solving criminal disputes. Accordingly, one should not dismiss outright the development of a systematic and consistent punishment policy through the plea bargain mechanism. *See* Michael E. Tigar, *Forward: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1, 8 (1970).

[75] In this respect, a possible defense of plea bargaining is that even though agreeing to a plea bargain involves mitigation of sanctions for each individual defendant, it enables the prosecution to deal with a much larger inventory of cases. Accordingly, at the system level, plea bargaining may reduce the severity of the sanctions, but increases the probability of criminal punishment. In other words, the plea bargaining mechanism actually increases the expected punishment for the commission of crime, and therefore promotes deterrence, as compared to the alternative of exhausting the full criminal process with each individual defendant.

[76] The inefficiency of plea bargains may also be attributed to the various cognitive biases of the negotiating parties. Due to systematic deviations from rational behavior, especially by the defendant, one cannot assume efficient results. *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004) (providing a comprehensive discussion of behavioristic biases in plea bargaining).

[77] Eric Rasmusen, Mezzanatto *and the Economics of Self-Incrimination*, 19 CARDOZO L. REV. 1541, 1583 (1998) ("[P]lea bargaining is not a situation of anonymous market competition . . . but the negotiation of a relational contract . . . where two parties are in a bilateral monopoly . . . .").

[78] The prospective criminal may have the option to "forum shop" prior to transgression. At this preliminary stage, he can choose what type of crime to commit and in which jurisdiction to do it. However, as soon as he commits the crime he is bound to negotiate with a particular prosecutor. *See* Easterbrook, *supra* note 40, at 291.

[79] *See* Sigman, *supra* note 36, at 1323 (providing a comprehensive discussion of the bilateral monopoly situation in plea bargains). It would seem that the criticism concerning the strategic barriers resulting from the bilateral monopoly situation blurs the distinction between the existence of obstacles in the way of arriving at a plea bargain, and the claim that the plea agreement, when worked out, will be inefficient. The bilateral monopoly structure

to plea bargaining practices views the prosecution as a monopsonist in this respect—i.e., as sole purchaser of guilty pleas from a multitude of defendants.[80] The fact that the prosecutor deals concurrently with many defendants and conducts a broad inventory of cases allows him to enjoy a great deal of leverage over the defendant, thus enabling the prosecution to obtain exchanges of pleas at sub-competitive prices.[81] The disparate bargaining powers between the parties to the plea negotiation raise the fear that the errors mentioned in the previous paragraph will systematically work to the detriment of the defendant.[82] It is suspected that the defendant will be tempted to confess falsely to committing crimes or to waive his legal rights to the prosecution for too low a "price" because of the prosecutor's exploitation of his better bargaining position.[83]

A related criticism is that negotiations in the criminal arena are coercive by their very nature. This is due to the power disparity between prosecution and defense, the prosecution's monopoly over punishment, and the fact that plea bargains—along with their concomitant concessions—concern the defendant's freedom.[84] Critics argue that as a result of the coerciveness built into criminal justice negotiation, one cannot view it as an expression of the defendant's free will.[85] An opposite criticism that may be generated against contractual arrangements in the criminal arena is that even assuming that plea bargaining embodies the defendant's free will, one

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is indeed liable to affect the ability to arrive at an agreement adversely—although given the high percentage of success of plea bargains, even this argument is dubious. However, as soon as the parties overcome the strategic obstacles in the way of a plea agreement, such a bargain may be efficient. Moreover, even if it were possible to conclude that, given the strategic obstacles standing in the way of plea bargains, their existence has no concrete economic viability, there is nothing in this claim, in and of itself, to justify placing artificial restrictions upon them. Quite the contrary, the only lurking danger, according to this scenario, is the plea agreement being an unusable mechanism. *Cf.* Roy D. Simon, *Lawsuit Syndication: Buying Stock in Justice*, 69 BUS. & SOC'Y REV. 10, 12 (1989) (discussing settlement agreements in civil litigation).

[80] Standen, *supra* note 38, at 1472-74.

[81] *See* Scott & Stuntz, *supra* note 7, at 1921 (providing further discussion of the unconscionability doctrine as an argument for non-enforceability of plea bargains).

[82] Standen, *supra* note 38, at 1472-74.

[83] *Id.* at 1473.

[84] *See* Thomas W. Church, *In Defense of "Bargain Justice,"* 13 LAW & SOC'Y REV. 509, 509 (1979).

[85] *See* Conrad G. Brunk, *The Problem of Voluntariness and Coercion in the Negotiated Plea*, 13 LAW & SOC'Y REV. 527 (1979) (noting problems of duress in plea bargaining); John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3 (1978) (discussing duress-based attacks against plea bargains); *see also* Michael Philips, *The Question of Voluntariness in the Plea Bargaining Controversy: A Philosophical Clarification*, 16 LAW & SOC'Y REV. 207 (1981) (distinguishing between legally invalid plea bargains and bargains which should be abolished for policy considerations).

can strongly object to the moral legitimacy of increasing the defendant's "purchase power" in criminal justice negotiations. One can argue that procedural safeguards and rights touching upon the criminal trial are intended to advance public goals, such as arriving at the truth, and not aimed at leveraging benefits for the defendant.[86] The attempt to turn such rights into bargaining chips for the defendant, in order to bolster his position vis-à-vis the prosecution, is not legitimate.[87] In the spirit of this criticism, it is morally defective to make a contractual arrangement with the defendant and increase his "buying power" by making due process or the right to trial alienable. Finally, it is also possible to attack the opening of the criminal justice arena to contractual arrangements from considerations of distributive justice. In this context the argument has been raised that those who typically suffer from overexposure to criminal punishment in the framework of plea bargaining[88] are indigent and unsophisticated defendants.[89]

In sum, it is not surprising that the practice of plea bargaining has stimulated one of the stormiest controversies in the area of criminal procedure; placing criminal disputes in the hands of prosecutors and defendants, to be settled by contractual means, can be seen as undermining basic concepts in the moral and political philosophy of criminal law.[90] Endless discussions have been dedicated to surveying the plea bargain phenomenon and to the examination of its normative status; yet, in point of fact, the die has already been cast. The fact that plea bargaining has taken root and expanded to its present magnitude indicates a normative choice in the matter.[91] Such reality recognizes the legitimacy, in principle, of plea bargains and prefers the advantages, embodied in the opening of the

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[86] William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761, 785 (1989) (arguing that defendants holding Fourth, Fifth, and Sixth Amendment rights are not meant to maximize their individual enjoyment of these entitlements).

[87] *See* George E. Dix, *Mistake, Ignorance, Expectation of Benefit, and the Modern Law of Confessions*, 1975 WASH. U. L.Q. 275, 335 (1975).

[88] *See* Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652 (1981).

[89] Scott & Stuntz, *supra* note 7, at 1912 ("The unfairness [inherent in the plea bargaining system] disproportionately harms the poor and unsophisticated . . . ."); *see also* Stephen J. Schulhofer, *Due Process of Sentencing*, 128 U. PA. L. REV. 733 (1980).

[90] *See* Alschuler, *supra* note 59, at 830 (claiming that plea bargaining raises fundamental questions of sentencing policy, of the propriety of compromise in the context of determining criminal guilt, and of the use of governmental inducements to secure waivers of constitutional rights); *see also* Arenella, *supra* note 1, at 219 (claiming that plea bargaining privatizes the resolution of the criminal dispute by empowering the parties to resolve it with minimal involvement from the public and the court).

[91] *See* Santobello v. New York, 404 U.S. 257, 261 (1971) (stating that plea bargaining "is not only an essential part of the process but a highly desirable part").

criminal justice arena to contractual ordering, over its disadvantages.[92] In the framework of the current discussion, I shall not open the debate once more, but rather relate to the acceptance of plea bargains as a given. Against this normative background, I shall examine whether one can justify the borderline which currently exists between plea bargains in their present form and the expanded version of plea bargains according to the proposed model.

B. NORMATIVE EXAMINATION OF THE PROPOSED MODEL

Changing the criminal standard of proof to a default rule from which the parties can negotiate deviations can be supported by the same considerations of efficiency, autonomy, and distributive justice that form the basis for recognizing the institution of plea bargaining.[93] Such change is expected to actively expand the parties' range of choice by transforming the strict binary set of options (trial according to the "beyond a reasonable doubt" standard or full plea bargain) currently available to them into a graduated range of possibilities (trial according to the "beyond a reasonable doubt" standard, trial according to the "clear and convincing evidence" standard, trial according to the "preponderance of the evidence" standard, full plea bargain, etc.). Enhancement of the spectrum of choices and the removal of external limitations on the content of their deals will enable the defense and prosecution to reach results better suited to their mutual interests. Both sides will be able to extract the maximum possible benefit from the bargain,[94] especially in those situations where the defense and prosecution are interested in acquiring partial guarantees against the risks and costs involved in the management of the criminal process.

Conversely, due to the considerations previously discussed, one may oppose the conversion of the standard of proof to a default rule, which forms the basis for rejecting the plea bargain institution. It may be claimed that despite the potential for mutual gain, the subordination of the standard of proof to negotiated deviations and its transformation into a bargaining chip held by the defendant poses a threat both to the defendant and to the public interest. As is the case with plea bargains generally, such deals create the risk of diluting the protection offered to the defendant in the

[92] George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 859 (2000) ("Plea bargaining may be, as some chroniclers claim, the invading barbarian. But it has won all the same. The battle has been lost for some time.").

[93] Later in the discussion, I shall elaborate on various objections to this preliminary assumption. *See* discussion *infra* Part III.B.2

[94] Easterbrook, *supra* note 40, at 297.

criminal arena.[95] Furthermore, bargains for lowering the standard of proof, like their plea bargain counterparts, may adversely affect the public interest due to principal-agent problems. In other words, the same criticisms for rejecting plea bargains may be aimed at the proposition to turn the standard of proof into a default rule, which expresses an enhanced version of such deals between the prosecution and the defense.

The fact that many of the criticisms associated with negotiating the standard of proof also arise in the context of general plea bargaining has ramifications for their legitimacy as possible claims against the normative desirability of the proposed model. It is not legitimate to dismiss such considerations in the process of accepting the current form of plea bargaining while simultaneously embracing them as a basis for rejecting a negotiable standard of proof. Therefore, when examining the normative aspects of the proposed model, I will endeavor to isolate those criticisms which are not correspondingly apparent in the general context of plea bargaining and which cannot be formulated against plea bargains in their present form.

At the same time, normative considerations may also apply as a matter of degree. It is possible for a given criticism of the full plea bargain to carry more weight and bear more validity when applied to the proposition of changing the standard of proof to a default rule. One could justify rejection of the proposed model, despite accepting the principle of plea bargaining, if the proposed model proves to incorporate a higher degree of harm to the defendant or to the public interest—if, for example, there proves to be a heightened risk inherent in the proposed model that innocents will be convicted or that it is more coercive for the defendant than the existing plea bargain. In other words, beyond the qualitative differences between the proposed model and plea bargaining, it is possible to conceive of differences that are likely to show up on the quantitative plane and provide reason to oppose a model that greatly facilitates plea bargaining, or that extends existing contractual ordering in the criminal justice arena. In addition, it is possible that certain advantages supportive of the practice of plea bargaining will be weakened in the context of the proposed model. For example, an argument in favor of plea bargains is that they save court time, which is essential given the reality of a heavily burdened judicial system. The curtailing of the duration of the criminal process and the consequent savings in court time may be significantly smaller in the context of bargains for the reduction of the standard of proof. The lower impact of the positive

[95] *See* Carol Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 808 (1997) (discussing the importance of procedural protection in the criminal arena).

influences associated with contractual ordering of the criminal arena in the context of the proposed model may provide yet another reason for rejecting it, despite the acceptance of full plea bargains.

In conclusion, the analysis will be devoted to singling out the specific disadvantages, both qualitative and quantitative, of the proposed model in reference to the classic plea bargaining model. After examining the roots of the distinction between the proposed model and the institution of plea bargaining as currently constituted, I will attempt to clarify whether these differences can justify a legal regime in which the standard of proof remains non-negotiable—in which full plea bargains are recognized but deals to lower the standard of proof in trials are not. The first and largest share of the discussion will be devoted to isolating the qualitative differences.

1. The Root of the Distinction Between the Proposed Model and Existing Plea Bargaining

The root of the distinction between the proposed model and existing plea bargain practices is found in the manner by which the defendant waives the right to have the charges against him proven beyond a reasonable doubt. In the plea bargain context, the de facto waiver of this procedural right is exogenous to the judicial process. The existing plea bargain model eliminates the need for a full factual investigation of the case in order to determine criminal culpability.[96] Under the proposed model, in contrast, the waiver of the right to a "beyond a reasonable doubt" evidentiary standard is incorporated into the judicial process and exposes the criminal trial to structural changes. The court must still establish the factual basis of the case through testimony and cross-examination while the court's decision rules are simultaneously subrogated to the agreement of the parties. In other words, both the present form of plea bargains and the proposed model result in an agreed-upon reallocation of the risks of error associated with the criminal process, as compared to trials conducted under the "beyond a reasonable doubt" standard.[97] The difference is that, under

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[96] Plea bargains are reviewed primarily through a contractual prism. *See* United States v. Sutton, 794 F.2d 1415, 1423 (9th Cir. 1986) (stating plea bargains are "contractual in nature and must be measured by contract law standards"); *see also* United States v. McQueen, 108 F.3d 64, 66 (4th Cir. 1997) ("The interpretation of plea agreements is guided by contract law, and parties to the agreement should receive the benefit of their bargain."); United States v. Krasn, 614 F.2d 1229, 1233 (9th Cir. 1980) ("Although plea bargaining is a matter of criminal jurisprudence, a plea bargain itself is contractual in nature and 'subject to contract-law standards.'"); Derek Teeter, Comment, *A Contracts Analysis of Waivers of the Right to Appeal in Criminal Plea Bargains*, 53 U. KAN. L. REV. 727 (2005).

[97] Alschuler, *supra* note 88, at 690 (relating to plea bargaining from the perspective of litigation and risk allocation); *see* Alex Stein, *The Refoundation of Evidence Law*, 9 CAN.

current plea bargains, this reallocation takes place outside of the trial arena. The plea bargain is a manifestation of the parties' exercise of their prerogative to establish the evidentiary foundation before the court while leaving intact the rules of the game that define how the criminal process is conducted. Under the proposed model, on the other hand, this reallocation of the risk of error is inherent in the judicial process and the parties' agreement alters the rules of the game.

Because the qualitative difference between the proposed model and present plea bargain practices relates to the manner by which the standard of proof is waived (through the judicial apparatus) rather than to the mere fact of its waiver, it follows that the arguments that could be raised against the proposed model must focus on the criminal process itself.

2. Possible Objections That Can Be Directed at the Proposed Model

The following sections will be devoted to the central objections that might[98] be leveled at the proposition to change the criminal standard of proof to a default rule. I will initially examine the connection between the standard of proof and between the functional goals and very nature of the criminal trial.[99] I will then demonstrate how granting the prosecution and the defense the ability to deviate from the criminal standard of proof might adversely affect the essence of the criminal process and the objectives achieved in its framework. The discussion will be divided between the two central paradigms that prevail in criminal justice theory—the deontological paradigm and the utilitarian paradigm.

a. Deontological Objections

According to the Kantian paradigm, the defendant is a subject in the criminal process and does not serve as its object.[100] Accordingly, the only question to be determined in the criminal trial is that of the defendant's guilt—a question that must be answered with the highest possible degree of

J.L. & JURIS. 279, 323-27 (1996) (discussing the connection between risk allocation and rules of evidence).

[98] Since the proposition to change the standard of proof to a negotiable variable has never before been examined, all the criticisms that I will level against it are inherently hypothetical. The references in the footnotes that follow relate to objections raised in relation to tangential, rather than identical, issues.

[99] *See* George S. Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 YALE L.J. 880 (1968) (providing a comprehensive study of the development of proof requirements in the criminal arena and the rationales for the criminal standard of proof).

[100] IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 100 (John Ladd trans., 1965).

certainty. Any lowering of the evidentiary standard that might deliberately and systematically lead to the conviction of an innocent person damages the moral legitimacy of the criminal proceeding.[101] The central objective of criminal procedures and rules of evidence is to protect the innocent from wrongful conviction.[102] Here lies the deontological basis for mandating that proof of culpability in criminal proceedings be set "beyond a reasonable doubt."

In light of the above, the deontological criticism that may be leveled against the proposed model becomes clear: any deviation from the original allocation of risk in the criminal procedure has the effect of deliberately exposing the defendant to wrongful conviction and harms the procedure's legitimacy by turning the defendant into an object, rather than subject, of the procedure.[103] The fact that the lowering of the standard of evidence under the proposed model results from the consent of the defendant and serves his own benefit is immaterial. One cannot use criminal punishment to further external social ends, including the welfare of the defendant.[104]

It is true that the existing model of criminal proceedings is not immune to the possibility of wrongful convictions. However, according to the deontological paradigm, the moral legitimacy of the process is determined by the steps taken to prevent such wrongful convictions and not by the end result. In this sense, the two following scenarios are not tantamount under deontological reasoning: (1) a defendant wrongfully convicted under the existing "beyond a reasonable doubt" standard who faces a ten-year sentence; and (2) a parallel situation under the proposed model, in which ten innocent people are wrongfully convicted under a standard of proof

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[101] Rinat Kitai, *Protecting the Guilty*, 6 BUFF. CRIM. L. REV. 1163, 1186 (2003).

[102] ADRIAN A.S. ZUCKERMAN, THE PRINCIPLES OF CRIMINAL EVIDENCE 125 (1989).

[103] Kyron Huigens, *Punishment and Crime: On Compromise Punishment Theory*, 2005 U. CHI. LEGAL F. 437, 440 (2005) (discussing the deontological approach to criminal punishment, most notably advocated by Immanuel Kant); *see also* Charles H. Koch, Jr., *A Community of Interest in the Due Process Calculus*, 37 HOUS. L. REV. 635, 696 (2000); Erik Lillquist, *Recasting Reasonable Doubt*, 36 U.C. DAVIS L. REV. 85, 140 (2002).

[104] *See* Bibas, *supra* note 18, at 1362, 1384 n.116 ("Unless one 'has committed a crime' and been found guilty and punishable, no amount of benefits can justify punishment."); *see also* Lillquist, *supra* note 103, at 140 ("[A] retributivist might object that no amount of utility or disutility can be attached to an erroneous conviction."). In a similar vein, according to Kant,

> even if civil society were to dissolve itself with the consent of all its members . . . the last murderer in prison would first have to be executed in order that each should receive his deserts and that the people should not bear the guilt of a capital crime through failing to insist on its punishment.

The Metaphysics of Morals, *in* KANT: POLITICAL WRITINGS 131, 156 (Hans Reiss ed., H.B. Nisbet trans., 1991).

based on the "preponderance of the evidence" and sentenced to one year of imprisonment each.[105]

Under the deontological approach, the difference between the two scenarios is apparent even if we assume that the two end results are substantively identical (assuming, for instance, that each defendant incurs zero costs for the stigma of a criminal conviction, ignoring costs of trial for each defendant, and assuming a fixed marginal cost per each year of imprisonment).[106] The material difference between a situation where a defendant is wrongfully convicted according to the maximum evidentiary standard of "beyond a reasonable doubt" (and for which he receives a lengthy sentence) and one in which several innocent people are convicted according to a lower standard of proof (and for which they each receive a more lenient punishment) lies in the fact that the first conviction is not a systematic part of the criminal proceedings, but rather is a regrettable mistake, whereas the latter convictions are built into the process[107] and are the product of deliberate action.[108]

In conclusion, in the spirit of the deontological approach, the criminal process is distinguished from the model of civil litigation. The aim of the criminal process is not to efficiently settle a dispute between the prosecution and the defense. Rather, it is intended to determine the right of the state to label defendants as criminals, to deprive them of their freedom,

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[105] *See* Alschuler, *supra* note 88, at 714 (discussing the claim that it is worse to convict ten innocent defendants and sentence them to one year of imprisonment each following a plea bargain than to convict one innocent defendant mistakenly and sentence him to ten years).

[106] Clearly, a comparison in which one sentence for ten years is considered the equivalent of ten sentences of one year each does not take into account the reputational costs associated with criminal conviction or the different attitudes of defendants regarding risk. A more realistic scenario, which takes these factors into consideration, would change the balance between the two end results. For example, one sentence of ten years might realistically be equivalent to two-and-one-half sentences of one year each. This point, however, is not critical to the structure of the above argument. The claim is that, under the deontological point of view, differences between situations with identical endpoints persist, due to their different starting points.

[107] Bibas, *supra* note 18, at 1384 ("There is something profoundly troubling about knowingly facilitating injustice, more so than inadvertently allowing it to happen.").

[108] Another stratum of Kant's philosophy can also support opposition to the proposed model by considering the systematic dilution of criminal sanctions. According to Kant, not only does guilt present a necessary condition for punishment, it must also be appropriate. Regarding the criminal as a subject and honoring his choice requires that the punishment fit the crime as an outcome of the conviction. It is possible to attack the proposed model from this perspective as well, insofar as the criminal process becomes a tool for the systematic mitigation of criminal sanctions, in such a way as to damage the Kantian principle of equality. *See generally* Thomas E. Hill, Jr., *Kant on Wrongdoing, Desert, and Punishment*, 18 LAW & PHIL. 407 (1999) (discussing Kant's claim).

and to impose suitable criminal sanctions upon them.[109] The basic purpose of the criminal process is to legitimize criminal punishment, not to promote the welfare of the defendant or further social aims. Enhancing the defendant's exposure to risk of wrongful conviction, and placing the procedure in the hands of the prosecution and defense for their own benefit, negates the moral legitimacy of the criminal process and its concomitant punishments. It converts the criminal process and its related sanctions into tools for achieving extraneous goals and, in so doing, harms the human dignity of the defendant.

b. Utilitarian Objections

As mentioned above, the deontological objection that can be raised against the proposed model is that converting the criminal standard of proof into a default rule will cause moral damage which cannot be counterbalanced by its benefits. The utilitarian approach stems from a different underlying assumption, under which the costs involved in applying a lower standard of proof (and the concomitant conviction of innocent people) can and should be balanced against its benefits. The possible utilitarian objection that can be leveled at the proposed model is therefore of a different nature. It will touch upon the claim that the costs involved in lowering the standard of evidence in criminal proceedings are expected to exceed the benefits that will accrue from such a transition.

In order to examine the costs embodied in the transition to a default standard of proof in criminal cases and to formulate the theoretical utilitarian criticism of the proposed model, I shall survey the functional goals that the criminal process is intended to accomplish and show how applying the "beyond a reasonable doubt" standard of proof helps to promote them. The sections that follow will demonstrate how changing the criminal standard of proof to a default variable might adversely affect each of those ends, as well as how such damage is specific to the proposed model and does not exist under current plea bargaining practices.

i. The Object of the Trial in Determining Criminal Culpability

Utilitarianism views punishment in a prospective manner. Punishment of crime is a necessary evil, to be imposed only in situations where it is expected to promote public welfare by furthering deterrence, incapacitation, and rehabilitation.[110] Accuracy in the criminal verdict and in the imposition

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[109] *See* Fletcher, *supra* note 99, at 890.

[110] Tom Stacy, *Changing Paradigms in the Law of Homicide*, 62 OHIO ST. L.J. 1007, 1026 (2001). The utilitarian approach is distinct from the deontological approach, whose point of view is retrospective.

of punishment promotes these social goals,[111] whereas inaccurate verdicts impair them. Thus, wrongful convictions waste limited punitive resources and result in sub-participation in lawful activity, for fear of being nevertheless found guilty. Moreover, exposure to the risk of false conviction diminishes the efficacy of the deterrence model by lowering the marginal cost of choosing to engage in criminal behavior.[112] That is, in situations where innocent people are systematically exposed to the risk of criminal sanctions, the "price" of criminal activity becomes cheaper in relation to non-criminal activity than in situations where the threat of false conviction is not prevalent.[113] Conviction of the innocent will also allow the real offender to continue roaming the streets and, as a byproduct, prevent his rehabilitation. In the spirit of the utilitarian approach, punishment of criminals—and only criminals—is what advances the ideals of deterrence, incapacitation, and rehabilitation.[114] Like wrongful convictions, wrongful acquittals also impair the attainment of the goals upon which criminal punishment is based. False acquittals result in under-deterrence because prospective offenders learn that "crime pays."[115] The continued freedom of criminal offenders exposes the public to danger and prevents the criminals' rehabilitation. All of these outcomes have ramifications for the main goal of the criminal process. Under the utilitarian approach, the criminal trial aims to convict the guilty while acquitting the innocent.[116] In other words, the institutional function fulfilled by the criminal verdict is not the mere allocation of convictions and acquittals. Such a decision must be accurate and must rely upon factual truth in its broadest sense. The connection to actual occurrences constitutes the foundation of the judicial decision. Without this link to the truth, the

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[111] In this sense, accuracy in the judicial outcome contributes to deterrence in the same manner as does increasing criminal sanctions or raising the level of enforcement. *See* Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307, 348 (1994).

[112] *See id.*

[113] Lillquist, *supra* note 103, at 135 (claiming that an erroneous conviction decreases the deterrent effect of the punishment). "If an individual already knows that she will run some chance of being punished regardless of whether or not she engages in the activity, the cost of the sanction decreases." *Id.*

[114] *See* Kitai, *supra* note 101, at 1181.

[115] *See* Kaplow, *supra* note 111, at 348 ("[G]reater accuracy—holding sanctions and enforcement effort constant—increases the likelihood that the guilty are sanctioned rather than mistakenly exonerated. Thus, individuals contemplating whether to act expect the likelihood of sanctions to be higher if they commit the harmful act.").

[116] *See* Jerome Hall, *Objectives of Federal Criminal Procedural Revision*, 51 YALE L.J. 723, 728 (1942) (claiming that criminal procedure is "designed from inception to end, to acquit the innocent as readily, at least, as to convict the guilty" and discussing the inherent tension between these two objectives).

criminal process does not have the power to accomplish its functional goals of deterrence, incapacitation, and rehabilitation.

However, error avoidance constitutes only one component of accurate adjudication. Another crucial variable relates to error allocation.[117] Utilitarian circles assume that the harm inherent in the two types of error—wrongful conviction and undeserved acquittal—is not equivalent. The social cost of the conviction of an innocent person is substantially higher than an undeserved acquittal.[118] The most well-known expression of this maxim is exemplified in the Blackstone Ratio, according to which it is "better that ten guilty persons escape than that one person suffer."[119] In light of this calculation, maximization of social utility requires that these two types of error be allocated in a manner reflective of the specific weight of the harm they embody. The notion of accuracy underlying the "beyond a reasonable doubt" standard is thus aimed at reducing the likelihood of erroneous convictions, even at the cost of increasing the total number of erroneous verdicts.[120] It serves to allocate the risk of error between the defense and prosecution in a manner that promotes errors in favor of the defendant at the expense of errors in favor of the prosecution.[121] In other words, according to the utilitarian approach, the evidentiary standard of "beyond a reasonable doubt" reflects the optimal allocation of these two distinct types of error in the criminal procedure.[122]

Against this backdrop, one can understand the unique harm the proposed model may inflict upon the determination of criminal culpability, which is at the heart of the judicial process. The existing forms of plea bargains render the need for a judicial decision of the question of criminal culpability redundant through the effective elimination of the dialectic clash

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[117] *See* Tom Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 COLUM. L. REV. 1369, 1406-07 (1991) ("[B]ecause no set of procedures can eliminate all erroneous outcomes, any conception of accuracy must also address how errors should be allocated as between erroneous convictions and acquittals.").

[118] *See* Frederick Schauer & Richard Zeckhauser, *On the Degree of Confidence for Adverse Decisions*, 25 J. LEGAL STUD. 27, 34 n.11 (1996).

[119] WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 352 (1769); *see also* Alexander Volokh, n *Guilty Men*, 146 U. PA. L. REV. 173 (1997) (discussing the Blackstone Ratio as well as alternative ratios in the equation of the acquittal of the guilty versus the conviction of the innocent).

[120] Stacy, *supra* note 117, at 1372.

[121] *See* Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 408-17 (1973); *see also* Schauer & Zeckhauser, *supra* note 118, at 34.

[122] Lillquist, *supra* note 103, at 89 (claiming that the traditional justification for the "beyond a reasonable doubt" standard is premised on the utilitarian trade-off between mistaken convictions and erroneous acquittals).

between the versions of the prosecution and defense.[123] Under the proposed bargains for lowering the standard of proof, however, the court is forced to decide between the parties' contradictory versions of the issue of culpability. Additionally, the rules governing the evidentiary standard on which such judicial decision is premised are altered and subjected to the stipulation of the parties. Such negotiated reduction of the standard of proof decreases the risk of false acquittal (considered to be less costly for society) at the expense of raising the risk of false conviction (which entails more substantial social costs).

In addition, it may be argued that the negotiated intervention of the prosecution and defense, in the manner by which criminal culpability is determined, not only raises the probability of false convictions, but also changes the very nature of the judicial verdict. It transforms its basis from a statement about actual events to a statement about the evidence.[124] In his well-known article[125] criticizing the use of statistical evidence, Professor Nesson argued that expressly stating the risk of error by inserting such elements of "probability," "risk," or "luck"[126] into the heart of the judicial decision-making process undermines the behavioral message that the legal verdict imparts. It weakens the link between criminal culpability and actual guilt, thus undermining deterrence and impairing the verdict's capacity to induce individuals to internalize the instruction of the law in their primary

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[123] *See* Edward L. Rubin, *Trial by Battle, Trial by Argument*, 56 ARK. L. REV. 261, 291 (2003) (describing plea bargaining as an alternative to trial by argument).

[124] *See* William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U. L.Q. 279 (1963) (discussing the dangers of conceiving the criminal trial as a probabilistic game); *see also* Robert F. Cochran, *"How Do You Plead, Guilty or Not Guilty?": Does the Plea Inquiry Violate the Defendant's Right to Silence?*, 26 CARDOZO L. REV. 1409, 1412 (2005) (enumerating the negative consequences of plea inquiry and claiming that a false "not guilty" plea may serve as proof "that the criminal trial is merely a game, far removed from concepts of truth and justice. At best, the legal system is an 'Alice in Wonderland' world, where words do not mean what they seem to mean").

[125] *See* Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1359 (1985) (arguing that probability-based verdicts fail to formulate a statement about actual events, and that the criminal trial must be perceived as reflecting factual happenings, in order to further deterrence and gain public acceptance).

[126] *See* Judith Resnik, *Precluding Appeals*, 70 CORNELL L. REV. 603, 610 (1985) (providing a clear example of the penetration of elements of "risk and luck" into judicial decision-making by discussing the case of a New York City judge who flipped a coin in order to determine whether to sentence a defendant to twenty or thirty days in jail); *see also* Omri Ben-Shahar & Alon Harel, *The Economics of the Law of Criminal Attempts: A Victim-Centered Perspective*, 145 U. PA. L. REV. 299, 321 n.49 (1996) (discussing the objection to introducing the element of luck into the criminal process).

activities.[127] When judicial decisions of criminal culpability cease to be linked to factual truth and become instead the result of probabilistic speculation and negotiated risk allocation between the parties, they might render the basic message of deterrence less effective.[128]

ii. The Expressive Task of the Criminal Process

Beyond its task of determining criminal liability for deterrence purposes, the criminal process also serves a communicative function.[129] Expressive theories of law regard the criminal trial as a mechanism for transmitting societal messages.[130] The criminal process embodies the most prominent meeting point between the individual and the State, and between the private voice and the voice of the collective "I."[131] In this sense, criminal law and the criminal trial are natural arenas for clarification of and reflection on the social value scale. Labeling certain behaviors as "criminal" serves to grant one moral approach precedence over contradictory visions of justice. Given the significance of criminal law, criminal conviction also serves an expressive function: it broadcasts a message of moral opprobrium to the wrongdoer himself, on his criminal activity, and on the system of values that such activity represents. The conviction is intended to harness moral condemnation of the offender and to expose him to social sanctions and opportunity costs. The application of the "beyond a reasonable doubt" standard of evidence aids the realization of these expressive purposes of criminal procedures and convictions. The

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[127] *See also* Laurence Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371, 387 (1970) (arguing that compromise-probabilistic verdicts place an explicit tag price on an innocent person's liberty). *But see* Daniel Shaviro, *Statistical-Probability Evidence and the Appearance of Justice*, 103 HARV. L. REV. 530, 553-54 (1990) (making a case for greater reliance on statistical evidence).

[128] *See* Nesson, *supra* note 125, at 1359, 1366.

[129] *See* Martin Sabelli & Stacey Leyton, *Train Wrecks and Freeway Crashes: An Argument for Fairness and Against Self Representation in the Criminal Justice System*, 91 J. CRIM. L. & CRIMINOLOGY 161, 209 (2000).

[130] According to expressive theories, law not only has a deterrent effect but also influences social behavior in an indirect manner: law in general and the legal process specifically transmit messages regarding a community's shared visions of justice. Law crowns and sustains society's normative commitments. In turn, this leads to the reinforcing and shaping of social norms. *See* Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 471 (1997).

[131] Sabelli & Leyton, *supra* note 129, at 209. For further discussion of expressive theories of law, see Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1523-24 (2000); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996); Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649 (2000); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

criminal standard of proof preserves the stigmatizing effect of criminal conviction. It assures maximal exactitude of the criminal conviction as reflecting de facto guilt, and thus preserves the capacity of the criminal trial mechanism to communicate a message of moral blame and to generate feelings of indignation towards a person and behavior defined as "criminal."[132]

Turning the criminal standard of proof into a default rule is liable to impair these expressive goals. It can be expected to dilute and weaken the communicative value of criminal convictions in a way that does not occur under the current plea bargain system. Existing plea bargain practices allow for "acoustic separation"[133] between the public image of the process for achieving criminal conviction and its actual practice. Although most criminal sentences under the existing system are in fact reached outside the courtroom—through plea bargaining—the system does not showcase these situations but rather emphasizes full criminal trials and their tremendous procedural demands. Plea bargains are negotiated between the prosecutor and the defendant, far from public view. Through this acoustic separation, the system is able to continue communicating the message that criminal liability is most reliable and strictly contingent upon proof "beyond a reasonable doubt." That is, the existing plea bargain system makes it possible to preserve the public ethos of criminal process and conviction, in theory, and to achieve a mass of convictions through the loosening of the procedural constraints attached to this process, in practice. The proposed model, on the other hand, eliminates the abovementioned separation. Implementing the proposed deals means positing in the public view a criminal trial in which the question of criminal liability is decided according to a lowered standard of proof. The greater degree of uncertainty with regard to the guilt of the supposed offender will lead to dilution of the criminal conviction and make it a less valuable labeling mechanism. The dilution also stems from epistemological considerations.[134] There is room to claim that human information processing mechanisms are not equipped to deal with "probable truths" or "half-truths." Acceptability of

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[132] The Supreme Court has stated, "It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." *In re* Winship, 397 U.S. 358, 364 (1970); *see also* Steiker, *supra* note 95, at 808.

[133] I borrowed the term "acoustic separation" from Professor Dan-Cohen's well known article which relates to a different divide—that between decision rules and conduct rules. *See* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

[134] *See* F.S.C. Northrop, *The Epistemology of Legal Judgments*, 58 NW. U. L. REV. 732 (1964) (explaining the all-or-nothing principle in legal judgments from an epistemological perspective).

determinations of criminal culpability, for stigmatizing purposes, is conditional upon the court producing binary, clear-cut messages of guilt or innocence. Decisions such as "70% certainty of guilt" or "conviction on the balance of probabilities" are too vague.

In sum, implementing the proposed model, which paves the way for a negotiated reduction in the evidentiary standards, is liable to damage the public ethos of criminal proceedings and consequently to harm the social condemnation associated with criminal culpability. The public may be reluctant to impose various social sanctions upon the wrongdoer and subject him to moral indignation.

iii. The Role of Criminal Proceedings in the Proper Conceptualization of the Judicial Craft

In addition to the objectives discussed above, the criminal process plays an instrumental role in the proper configuration of the craft of judging. In order for courts to fulfill their roles in a liberal society, their work must be properly structured.[135] Judicial decision-making must be conceptualized as searching for truth and justice and must be in line with the criteria of rationality, accuracy, and fairness.[136] The existing practice of plea bargaining does not impair the proper conceptualization of judicial decision-making because the mutual agreements on the question of criminal liability take place outside the courtroom. In this sense, current plea bargaining practices preserve the clear dichotomy between two types of solutions to criminal disputes: the contractual solution, in the form of plea bargains,[137] and the legal-public solution, in the form of criminal trials that reflect judicial decision-making. Due to the existence of such clear boundaries between the "world of agreement" and the "world of justice," the present form of plea bargaining does not "stain" the perception of the

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[135] *See* Lauren K. Robel, *Private Justice and the Federal Bench*, 68 IND. L.J. 891, 901 (1993); *see also* United States v. Mezzanatto, 513 U.S. 196, 204 (1995) ("There may be some evidentiary provisions that are so fundamental to the reliability of the factfinding process that they may never be waived without irreparably 'discrediting the federal courts.'").

[136] *See* United States v. Josefik, 753 F.2d 585, 588 (7th Cir. 1985) ("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 is required by community feeling regardless of what the defendant wants or is willing to accept.").

[137] The contractual solution may also be founded on extra-legal parameters, such as the negotiating skills of the parties involved. *See* Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 GEO. L.J. 2663, 2663 (1995).

craft of judging.[138] The proposed model, on the other hand, might blur the lines between negotiated settlements and "public-regarding justice,"[139] that is, between private and public devices for the resolution of the criminal case. The agreement between the parties regarding the standard of proof changes the judicial decision-making process into a private, local, and decentralized enterprise.[140] Making the court collaborate at the altar of efficiency to sacrifice the precision and fairness of criminal convictions is liable to affect the proper conceptualization of judicial decision-making in a way that harms the system's ability to function properly. In sum, one may reject the proposed model on the basis of the public interest in defending the proper conceptualization of the judicial role.[141] There is room to claim that, in a world where the possibility for negotiated settlement of the criminal case exists, the judicial process must remain a residual normative alternative and be impervious to private stipulations by defense and prosecution.

The case can also be presented from a slightly different perspective: that of public confidence in the judicial system. There is room to claim that public trust is conditional upon conserving the basic outlines of the judicial decision-making process, as aimed at precision and ferreting out the truth.[142] Plea bargaining, in its current form, paves the way for the preservation of this notion. Even though, from a practical standpoint, most plea bargains exhibit a clear inclination on part of the system for efficiency over precision, this preference is not exposed to public scrutiny. Current plea bargains allow for the assumption that the parties have the best access to the information underlying the factual occurrence and, accordingly, that the agreement of criminal liability they reach reflects this truth.[143] The proposed model, on the other hand, may undermine the public image of the criminal trial. Its adoption is a blunt declaration that a judicial decision may well be affected by inaccuracy—that the truth is not the only light held

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[138] Of course, the dichotomy is not complete, in the sense that plea bargains are formulated in the shadow of the criminal trial.

[139] Tracey L. Meares, *What's Wrong with* Gideon, 70 U. CHI. L. REV. 215, 219 (2003).

[140] *See* Menkel-Meadow, *supra* note 137, at 2663.

[141] *See* Dix, *supra* note 8, at 217.

[142] *See* Nesson, *supra* note 125, at 1358 (arguing that a central goal of the criminal procedure is to induce public confidence in the legal system through the formulation of acceptable verdicts aimed at revealing factual happenings); *see also* Thomas Weigend, *Is the Criminal Process About Truth?: A German Perspective*, 26 HARV. J.L. & PUB. POL'Y 157, 172 (2003) (arguing that a judicial system which openly abdicates its claim for truth will lose credibility with the public).

[143] Weigend, *supra* note 142, at 172 ("[L]egal systems that in fact leave the outcome of a case to the unrestricted disposition of the parties cling to the theory (or, indeed, the fiction) that the parties know best about the 'truth,' and that, therefore, whatever they agree upon will be closest to the (substantive) truth.").

up to the court and that it may retreat in the face of agreement between the parties. Exposure of these inherent tensions within the court's rulings may undermine the public's faith in the judicial system. As soon as the conflict between "truth" and "agreement" becomes visible, and the courts are perceived as preferring agreement to truth, public trust in the judiciary may well be lost.

In sum, the utilitarian case that can be made against the alienability of the criminal standard of proof is that changing the standard of proof into a default rule is bound to cause a series of negative externalities.[144] These external influences are distinct from the costs embodied in the mere waiver of the right to have the accusations against the defendant established beyond a reasonable doubt (as exists under the current plea bargain model), and are specific to the waiver of this right via the trial mechanism.[145] A possible utilitarian criticism of the proposed model is that the specific external costs associated with the application of a negotiable standard of proof will be higher than the aggregate benefits generated by such a model.[146]

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[144] *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (providing a classic explanation of inalienability from a negative externalities perspective).

[145] *See* King, *supra* note 2, at 130 (providing a detailed discussion of the effect defendant waivers of trial rights have on third party interests); *see also* Jeffrey L. Kirchmeier, *Let's Make a Deal: Waiving the Eigth Amendment by Selecting a Cruel and Unusual Punishment*, 32 CONN. L. REV. 615, 647 (2000) (providing an analogous claim against waiver of the Eighth Amendment right against brutal punishment).

[146] This utilitarian objection touches upon a broader claim that can be formulated against the proposed model attacking the defendant's "ownership" of the procedural right to a "beyond a reasonable doubt" standard of proof. It may be argued that the procedural features of the criminal trial in general and the standard of proof in particular are designed to protect the public interest and are, therefore, "owned" by the prosecution on behalf of society at large. Accordingly, the defendant is not authorized to waive this evidentiary standard on the public's behalf. This "public-regarding justice" model of the criminal procedure prevailed in the Anglo-American world until the second half of the nineteenth century. *See* Meares, *supra* note 139, at 219. This model highlighted the criminal trial's function as an arena for the settlement of conflicting public interests and as a domain characterized by state coercion. Toone, *supra* note 62, at 644-45. The procedural and evidentiary features of the criminal process were also viewed from a public perspective as designed primarily for protection of social interests in the liberty and well-being of all citizens. These rights were not viewed as belonging to the defendant and his to exercise or forfeit as he deems fit; rather, the defendant's role was reduced to that of a beneficiary of procedural and evidentiary safeguards. *Id.* However, the late nineteenth century marked a turning point in the perception of the criminal procedure. From this point on, we are witness to an ongoing process of individualization of procedural rights. *See* King, *supra* note 2, at 120. The most prevalent manifestation of this transformation is the practice of plea bargaining, which acknowledges the defendant's ability to control and waive the most central procedural rights in the criminal sphere, including the privilege against self-incrimination and the right to a jury trial.

3. Normative Justifications of the Proposed Model

Normative support for the proposed model and possible answers to the objections that I have leveled against it in previous sections are anchored in considerations of efficiency and autonomy. The following discussion will be devoted to each of the arguments. First, I will clarify the argument that changing the criminal standard of proof to a default rule is likely to enhance social benefits and better achieve the goals of the criminal process. In this way, I intend to reply to the utilitarian criticisms presented in the previous sections. The second part of the discussion will contend with deontological criticism, presenting an alternative vision of the defendant's autonomy in the criminal process.

a. Utilitarian Justification

There is room to contest the premise, outlined above, that negotiated deviations from the "beyond a reasonable doubt" standard of proof are necessarily at odds with the realization of the goals of the criminal trial. The following section will be devoted to establishing the claim that lowering the standard of proof is actually compatible with the goals that criminal proceedings must achieve and will increase social welfare. At the outset of the discussion, I will adopt the goals of the criminal process as presented thus far and explain how opening the standard of proof to stipulation by the parties will help realize these goals. In other words, I will demonstrate how applying the proposed model would achieve the object of the judicial process with regard to the determination of criminal liability by enriching the concept of criminal culpability, how this model would fulfill the expressive task of the criminal trial by enhancing the amount of information provided by the criminal conviction, and, finally, how the model would preserve the proper conceptualization of the craft of judging. As a second step, I will attempt to redefine the functional goals of the criminal process in a broader fashion than presented previously. After formulating alternative goals for criminal procedure, I will demonstrate how the proposed model can be expected to help realize them as well.

i. Realizing the Object of the Trial in Determining Criminal Culpability

The question of criminal liability pertains to the most complex and convoluted categories dealt with by law. The imposition of criminal liability requires that a wide variety of variables—evidentiary, legal, moral, and emotional—be evaluated and congregated into a single grouping.[147] The present system dictates that the structure of the criminal verdict reflects

[147] *See* Weigend, *supra* note 142, at 170.

the manifold aspects of criminal liability in strict, binary, one-dimensional terms of full guilt or acquittal. It may be claimed that the conceptualization of criminal liability in binary and dichotomous terms flattens and steamrolls the complexity characteristic of this question at both the normative and evidentiary levels. In contrast, the proposed model paves the way for more complex and sophisticated answers to the question of criminal liability, at least with regard to the evidentiary dimension on which it is based. It enhances the spectrum of standards of criminal liability, beginning with the existing heightened standard of criminal culpability "beyond a reasonable doubt," but adding lower standards of criminal liability, based on "clear and convincing evidence" or on the more lenient standard of "preponderance of the evidence." By creating multiple standards of criminal culpability, this model can accurately reflect all the evidentiary gray areas that characterize criminal acts. In this sense, its establishment enables the question of criminal liability to be transformed from a qualitative question of "yes or no" to a quantitative one of "how much." It is true that this transformation is partial in the sense that it allows for refinement of the judicial verdict and the concept of criminal liability, but only with regard to the underlying evidentiary dimension. The normative aspect of the question of criminal liability remains binary and continues to be conducted between the two poles of full culpability and innocence. In other words, there is indeed a basic distinction between a verdict dealing with (full) criminal liability of partial probability and a verdict that deals with partial criminal liability. The proposed model paves the way for verdicts of the first kind, which depend on an evidentiary base, but this is not sufficient to establish the essential infrastructure for a verdict of the second kind. However, the very conceptualization of criminal liability on a hierarchical scale, even if only in connection with the evidentiary stratum, constitutes the first step towards opening a plural and gradual discourse in relation to the normative question as well. This discourse may ultimately lead to a more sophisticated conceptualization of the question of criminal liability, both at the evidentiary level and on the normative plane; it may lead to verdicts that are fuller and more accurate than the simplistic attempt to present criminal liability in binary terms while creating a clear and unequivocal borderline between guilt and innocence.

One can also refute the criticism against the proposed model by challenging the manner in which the current model of the judicial process fulfills its goal of accuracy in determining criminal liability. At a time when the overwhelming majority of criminal cases are resolved by plea bargaining rather than a full-fledged trial based upon the merits of the

indictment,[148] such deals cannot be regarded as a mere footnote to the criminal justice system. Plea bargains constitute an integral part of the system.[149] In addition, plea bargains are reviewed primarily from a contractual perspective.[150] Judicial review of their evidentiary basis is rather negligible. As a result, under the present system, court decisions regarding criminal liability, which rely primarily on agreements reached between prosecution and defense, are liable to be limited in terms of precision.[151]

ii. Refinement of the Expressive Task of the Criminal Process

As I have described previously, a possible objection to the proposed model touches upon the dilution of the expressive value of criminal culpability under a system which enables negotiated deviations from the "beyond a reasonable doubt" standard of proof.[152] As indicated, a criminal conviction constitutes a valuable social label because of its high degree of certitude. Lowering the evidentiary standard may adversely affect the value of the institution of criminal conviction. Justifying uniform criminal labeling is problematic, however, since it relies on circular reasoning. According to this line of justification, given the high cost and extra severity associated with the criminal label, it should be applied only to those convicted with especially high certitude. At the same time, the heightened

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[148] *See* Oren Bar-Gill & Oren Gazal, *Plea Bargains Only for the Guilty*, 49 J.L. & ECON. 353, 353 (2006) (claiming that approximately 95% of all criminal cases in the United States are secured by guilty pleas, most of them following a bargaining process). Ross, *supra* note 41, at 717 (citing Bureau of Justice Statistics, U.S. Dep't of Justice, *Felony Sentences in State Courts, 2002*, BJS BULL., Dec. 2004, at 1; Admin. Off. of the U.S. Courts, 2004, Statistical Tables for the Federal Judiciary, June 30, 2004), makes a similar claim: "In the criminal justice systems of the 50 states, over 95 percent of all criminal cases are disposed of without a trial, through the entry of a guilty plea. In the federal system the percentage of bargained for convictions is even higher." These statistics include all forms of guilty pleas, not just bargained-for pleas, but nevertheless point to the fact that a great number of criminal cases are not resolved by means of a full trial in which the issue of culpability is in effect contested.

[149] *See* Scott & Stuntz, *supra* note 7, at 1912 ("[Plea bargaining] is not some adjunct to the criminal justice system; it *is* the criminal justice system."); *see also* John Feinblatt et al., *The Future of Problem-Solving Courts*, 15 CT. MANAGER 28, 31 (2000) (describing criminal courts as "plea bargain mills").

[150] Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 1, 3 n.6 (1992).

[151] *See* Andrew M. Siegel, *Moving Down the Wedge of Injustice: A Proposal for a Third Generation of Wrongful Convictions Scholarship and Advocacy*, 42 AM. CRIM. L. REV. 1219, 1225 (2005) ("It is not simply the fact that we live in a world of plea bargaining that has systemic consequences for wrongful convictions, but also the mechanisms and rules that we have adopted for implementing the era of the plea.").

[152] *See* discussion *supra* Part III.B.2.b.ii.

evidentiary standard for conviction is the basis for the heavier stigma costs embodied in criminal branding. Because of this circular structure, the justification for uniformity collapses as soon as one of the basic assumptions on which it is premised is discarded.

Under the proposed model, the concept of criminal liability may be fine-tuned. This model will allow for opening the criminal convictions arena to additional types of convictions with differing values and will facilitate a hierarchy of social sanctions, suited to the various levels of certainty on which the criminal conviction is based. Under these circumstances, the public can regulate social sanctions that are reactive to the type of criminal conviction—that is, to base mild social sanctions on those who are branded under a conviction based on the balance of probabilities and to impose heavier sanctions on those who are labeled criminal on the basis of certainty "beyond a reasonable doubt." Precisely because the value of the criminal label depends on the degree of certainty attributed to it, there is nothing to prevent applying that label along a spectrum of standards of proof with a hierarchy of social sanctions that parallels the types of criminal convictions. This would make for a more exact regulation of social sanctions and thereby improve the expressive function filled by the criminal conviction label.

The objection relating to the dilution of the criminal conviction label can be addressed from an additional perspective. There is room to claim that the devaluation of the "criminal conviction" label has already taken place with plea bargaining becoming the typical mechanism for disposing of criminal cases. In a regime where the overwhelming majority of criminal convictions derive from plea bargains, their stigmatizing effect can no longer be taken at face value.

iii. Preservation of the Proper Conceptualization of the Judicial Craft

As stated earlier, another possible objection that can be raised against the proposed model relates to the impairment of the conceptual structuring of the craft of judging. As previously discussed, under the present system there is an acoustic separation between the agreements of the parties and the judicial decision-making process that enables the conceptual structure of judging to remain intact. The proposed model, on the other hand, turns the courts into active partners in obtaining results reflecting a preference for efficiency over precision, and the model thus impairs the proper structuring of the judicial function. In my opinion, the applicable standard of proof does not define or conceptualize the essence of judicial decision-making. The transformation that occurs under the proposed model is limited to the interface between the parties and to the method by which the risks of error are assigned between them. From the viewpoint of judicial decision-

making, there has been no qualitative change. The decision of the court remains rational, fact-based, and normative in nature. The basis for fact-finding continues to be the evidence, and the verdict continues to rest on the letter of the law. Adjusting the burden of proof downwards to a lower standard of evidence does not change the nature of judicial decision-making, just as it would be inconceivable to claim, that the decision of the judge in a civil trial is qualitatively different from that of his counterpart in a criminal trial.

The objection rooted in the proper conceptualization of the function of judging can also be refuted by attacking its underlying premise that current plea bargaining is completely exogenous to judicial decision-making. At the end of the day, plea bargains and agreements of the parties on criminal liability make their way to court, receive a judicial stamp of approval, and find shelter under the aegis of a judicial decision. Moreover, the claim of acoustic separation ignores the interrelation between the trial arena and the negotiation sphere. The criminal process does not operate in a vacuum. The outlines of judicial decisions in the criminal process derive from the size of the court docket and the workload on the system. If not for the possibility of contractual arrangements in the criminal sphere, the burden on the court would be sevenfold greater and the character of judicial decisions would change accordingly.[153] In that sense, it could be claimed that expanding the scope of agreement in the criminal area would reduce the load on the system and allow judicial decisions to become even more meticulous and painstaking.

The final objection outlined in previous parts referred to the possible damage to public confidence in the judicial system as a result of changing the standard of proof to a default rule.[154] A number of counterarguments can be raised against this criticism. First and foremost, one may question the legitimacy of "public faith" in the system as an intrinsic normative end in itself and worthy of emulation. Public trust can only be granted when the system is commendable of it. The question of public confidence in the system cannot be separated from the question of the judicial system's objective performance. Second, the argument concerning the public's trust in the system is relevant only in relation to the transition from the existing arrangement to the proposed model. Even if one accepts the underlying assumption of deep public commitment to existing practices and presumes that lowering the evidentiary standard will harm public confidence in the system, this does not impede the normative desirability of creating such a legal system *ex nihilo*. In this context, a distinction can be drawn between

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[153] *See also* Scott & Stuntz, *supra* note 7, at 1916.

[154] *See* discussion *supra* Part III.B.2.b.iii.

the initial desirability of a negotiable standard of proof and the normative appeal of converting to this model. Finally, there is room to claim that the intentional dissonance seen in the current regime between how questions of criminal liability are decided in theory (after the prosecution has proved its case beyond a reasonable doubt) and how such questions are determined in practice (through plea bargaining) raises the most powerful public reservations as to the legitimacy of the judicial system. Many have pointed to the hypocrisy of using the highly structured criminal procedure as window dressing while the tasks of the criminal justice system are accomplished through a market-based negotiation process, hidden from public scrutiny.[155] It is precisely the transparency of the proposed bargains and their effect on the court's decision-making process that may actually restore public confidence in the process.

So far I have discussed the claim that opening the standard of proof to negotiation will advance the functional goals of the criminal process as previously defined. To complete the argument regarding the way in which the model may be expected to increase social welfare, I shall discuss the formulation of alternative goals of the criminal process, which deviate from those outlined thus far. I will attempt to show how the promotion of these goals through the proposed model can be expected to enhance social utility.

iv. Integrating the Proposed Model into the Definition of the Judicial Process as a Tool for Resolving Criminal Disputes

When discussing the possible objections to changing the standard of proof to a default rule, I adopted the public model of criminal process and assumed a sharp and clear distinction between the "world of agreement" and the "world of law." The assumption was that, as opposed to the private sphere of agreement, in the public arena it is incontestable that the judicial process holds truth as its ultimate goal. In the spirit of this approach, I defined the quest for truth and accuracy as constituting the solid base of the criminal trial[156] and as a tool for realizing its expressive goals and its aims of deterrence, incapacitation, and rehabilitation. Now I would like to present an alternative, more "private" or "civil" approach, according to which the search for truth is not the be-all and end-all of the criminal process.[157] Rather, the primary purpose of the criminal proceeding is the

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[155] *See, e.g.*, Scott & Stuntz, *supra* note 7, at 1912.

[156] Farkhanda Zia Mansoor, *Reassessing Packer in the Light of International Human Rights Norms*, 4 CONN. PUB. INT'L L.J. 288, 300 (2005) ("One fundamental purpose of the criminal process is to ensure accuracy of outcomes—or what Bentham termed 'rectitude.'").

[157] The private paradigm discussed above deals with retraction of the truth in face of the interests of the parties. This is distinct from retracting the truth in the face of public interests

resolution of criminal disputes—whether defined as disputes between defendant and society or between defense and prosecution.[158] In accordance with such private perception of the criminal proceeding, only when the parties are not in agreement on the factual happenings must the truth-seeking alternative be exhausted—the justification being that in such circumstances truth-seeking is the most effective way to obtain peaceful resolution of the criminal dispute. In this sense, the goal of the criminal process is not accomplished when the truth is revealed: truth is only a way station on the road to the settling of the dispute. The ultimate goal is the agreement, with truth being a means to achieve it.[159] Since truth-seeking is not an end in itself, but rather a means for resolving the issues at stake, truth yields to agreement. Naturally, this "private" or "civil" perception of the criminal process stands in stark opposition to the public paradigm, which views the agreement between the parties on questions of fact merely as a means to discover the truth. Under the public model, where the prosecution and defense agree on facts, they are presumed to reflect the actual happenings.

Clearly, the "private" or "civil" approach to criminal trials conflicts with prevalent criminal theories, according to which the public nature of the criminal process is incontestable and cannot be infiltrated by private notions of justice. In the narrow confines of this Article, there is no room to develop the private paradigm of the criminal process adequately, and this issue will be postponed for future research. All that I wish to add at this point is that the recognition of the central role of agreement in criminal procedures, even overriding truth, is not foreign to the adversarial paradigm.[160] According to the adversarial model, defense and prosecution share the prerogative of laying the whole factual basis before the court and mutually define the limits of the criminal dispute. Their agreement overrides the factual truth and the court is prevented, in principle, from examining it independently. That is, the concept of truth in the adversarial model is relative and plays an instrumental, secondary role. This differs from the inquisitorial model, which relies on an absolutist notion of truth.[161] In light of the instrumental role truth plays in the adversarial model, there is

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underlying marital privileges or the fruit of the poisonous tree doctrine, embodied in the division between "factual truth" and "legal truth."

[158] Alternative approaches, which I will not dwell upon here, might define the dispute as one between victim and offender, at one end of the spectrum, or between the offender and the law, at the other end of the spectrum.

[159] *See* Weigend, *supra* note 142, at 168.

[160] *See* Scott & Stuntz, *supra* note 7, at 1909.

[161] Maximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L.J. 1, 10 (2004).

no wonder that plea bargaining practices began to flourish in this legal climate.

Preference for agreement to solve criminal disputes over truth-seeking is starkly evident in plea bargains of the *Alford* and *nolo contendere* types. In the framework of *nolo contendere* deals, the defendant refuses to admit guilt but accepts punishment as if guilty. In *Alford* pleas, the defendant agrees to be sentenced in consequence of a plea bargain while continuing to protest innocence.[162] Recognition of such deals clearly embodies a relativistic and instrumental approach to the concept of truth, which withdraws in the face of agreement between prosecution and defense.

At the beginning of the previous section the position was presented that in the Anglo-American world, where plea bargains are rooted, the public outlines of the criminal process must be rigorously safeguarded.[163] That is, the very existence of the "negotiation" venue for settling criminal disputes (in the form of plea bargains) intensifies the need to let criminal trials, based on the search for truth and the letter of the law, remain the normative default solution. However, in my opinion, there is room to reject such an approach. The tremendous scope of plea bargains may signal a transition from "status" to "contract" in the criminal sphere.[164] This transition reflects the preference of private and local justice over a more inclusive vision of justice based on a search for literal truth. Plea bargains should not be seen as abnormalities in the criminal sphere. All attempts to create an artificial formal barrier between the world of agreement and the world of truth and law, in this context, ignore the common ideological roots shared by the adversarial paradigm and negotiated resolution of criminal cases. In other words, the institution of plea bargains strengthens the private paradigm in the criminal sphere and enhances the recognition of party control over the criminal case. The very opening of the criminal arena to negotiation expresses a recognition that criminal justice is not only the product of the collective search for truth, but may also be the outcome of private, localized agreements between prosecution and defense.[165] When the functional aims of the judicial process are examined from the perspective of such a private paradigm, it appears that the proposed model

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[162] *See* Bibas, *supra* note 18, at 1372-73 (discussing the characteristics of *nolo contendere* and *Alford* pleas).

[163] *See* discussion *supra* Part III.B.2.b.iii.

[164] *See* Hughes, *supra* note 150, at 3 (claiming that the movement from status to contract has now reached the criminal justice system).

[165] Inga Markovits, *Playing the Opposites Game: On Mirjan Damaska's* The Faces of Justice and State Authority, 41 STAN. L. REV. 1313, 1321 (1989) (stating that plea bargaining expresses an agnostic and private view of criminal justice as an outcome of individual transactions, rather than a collective search for the truth).

can advance the goals of the judicial process beyond that of the existing regime. Converting the standard of proof to a default rule will broaden the negotiation spectrum of the defense and prosecution and is consonant with the purpose of contractual resolution of the criminal case.

b. Considerations of Autonomy

The preceding discussion was devoted to the argument that changing the criminal standard of proof to a negotiable variable will not harm the functional goals of the criminal process, at least in comparison with the existing situation. Now I will focus on an alternative line of reasoning and claim that even if the proposed model were to clash with the public goals of the criminal process, it should be implemented based on considerations rooted in the defendant's autonomy, which bear greater normative weight. The following discussion will be dedicated to an analysis of the proposed model from the perspective of the defendant's autonomy.

As previously explained, it is not possible to resolve a negotiable standard of proof model with the Kantian approach to the criminal process. According to Kant, judicial decisions must stem from a process that is aimed at ascertaining guilt with the maximal certitude rather than at realizing extrinsic ends.[166] Under the proposed model, attributes of the criminal process become trading cards in the hands of the defense and prosecution. They become instruments for realizing external objectives such as decreasing risk or lowering enforcement costs, and they deviate from questions of the defendant's guilt or appropriate punishment. However, the problem with applying the Kantian doctrine to the proposed model is that it equally applies to current plea bargaining practices. Accordingly, it is not possible to employ the Kantian criticism to reject the proposed model without simultaneously rejecting current plea bargains. Instead, one can justify both the classic plea bargain and the proposed model using an alternative vision of autonomy, which deviates from the Kantian paradigm and views the alienability of procedural rights in the criminal trial as a variable that supports autonomy and reflects the recognition of the defendant's human dignity.

i. The Criminal Standard of Proof as Part of the Defendant's Autonomy

Autonomy literally means "self-rule" or "self-government."[167] Although the notion of autonomy takes many forms, it is generally

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[166] KANT, *supra* note 100, at 100.

[167] *See* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 138 (1995) (defining autonomy as an empowerment of individuals to be "authors of the narratives of their own lives").

understood to include the granting of effective choices to individuals.[168] There is room to claim that recognition of the defendant's autonomy includes allowing him to decide how he wishes to exercise his right to have the charges against him proven beyond a reasonable doubt. An individual's choice in these contexts is vital for the control of his destiny;[169] acknowledging this choice reflects recognition of his dignity as a human being. In that sense, implementing the right to a criminal standard of proof is part of the space of autonomy surrounding the defendant. The defendant may choose to waive this procedural right in a variety of ways and for many motives. For example, he may choose to confess to the crime with which he is charged in order to save the costs of going to trial or in order to avoid putting witnesses on the stand.[170] Alternatively, the defendant is entitled to exercise his rights through the judicial mechanism and to impose upon the prosecution the requirement to prove its case beyond a reasonable doubt. Just as the right of the defendant to confess or to proclaim his innocence expresses his autonomy, so does his choice regarding the standard of proof by which he wishes to be judged. All these options stem from the same conceptual root. They are all ways by which the defendant can exercise the right to have the case against him proven beyond a reasonable doubt.

ii. Intervention in the Defendant's Choice to Waive the Right to the Criminal Standard of Proof

Two counterarguments can be raised against the abovementioned claim that the alienability of the right to the criminal standard of proof and the expansion of the spectrum of choice, with regard to the exercise of this right, will facilitate the defendant's autonomy. Both stem from the notion that acknowledging waiver of the right to the criminal standard of proof will, in effect, narrow the array of choices available to the defendant despite the widening of theoretically viable options. According to the first objection, the bargained-for waiver of legal rights typically entails both the expansion of individual autonomy (reflected in the choice to activate the right by way of waiver) and the narrowing of the defendant's space for maneuver (as a result of sacrificing the right waived).[171] If it should transpire that the defendant lacks the ability to fully capture the options from which he must choose or if he fails to understand the implications of his choice, then the paternalistic setting of limits on the alienability of this

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[168] *See* Toone, *supra* note 62, at 655 (discussing the definition of autonomy).

[169] *See id.*

[170] *See* Scott & Stuntz, *supra* note 7, at 1913.

[171] *See* Jessica Wilen Berg, *Understanding Waiver*, 40 HOUS. L. REV. 281, 293 (2003) (claiming that waivers often involve both a gain in autonomy and a loss of autonomy, which must be balanced against each other, in order to maximize the overall autonomy).

procedural right might be justified.[172] The second objection is that converting the standard of proof to a default rule may actually impair the defendant's ability to exercise his right to have the case against him proven in court beyond a reasonable doubt, should he choose this option. I will expand on each of these points.

a. Preservation of the Defendant's Ability to Exercise Self-Rule

Realization of the ideal of autonomy is conditional upon the individual's ability to weigh various alternatives, understand their consequences, rate their costs and benefits, and choose among them. In this context, one may argue that there is a qualitative difference between the choices on which plea bargains, as currently constituted, are based and between the choices that defendants would be required to make under the proposed model. The choice embodied in agreeing to existing plea bargains does not require processing of complex data. The alternative offered to defendants, in exchange for waiving the fact-finding process, is simple and concrete: near-certain conviction and reduced sentencing. In contrast, the choice presented by the proposed model is liable to be much more complex and sophisticated. It requires assessment of the probability of conviction and calculation of the expected punishment under a lower standard of proof. Since this alternative is liable to be less concrete from the viewpoint of the defendant and requires a greater degree of sophistication on his part, and since the typical defendant may lack the necessary resources to reach an informed decision in this matter, one may claim that exercising such a choice is not in line with self-rule—that the possibility of reaching such agreements for lowering the standard of proof would actually impair the defendant's autonomy.

However, in my view, such theoretical objections to the proposed model can be dismissed. Contracting for lowering the standard of proof does not entail the evaluation of factors that are distinctly different from the many types of variables that defendants take into consideration on a daily basis in the course of managing their cases (beginning with waiver of the right to remain silent, through waiving the right to legal counsel, and ending with the choice of witnesses for the defense). Moreover, in the current plea bargain framework, a rational decision as to whether to engage in a plea bargain requires that defendants evaluate their chances of success at trial

[172] Daniel R. Williams, *Mitigation and the Capital Defendant Who Wants to Die: A Study in the Rhetoric of Autonomy and the Hidden Discourse of Collective Responsibility*, 57 HASTINGS L.J. 693, 693 (2006) ("There are instances when the doing of an act in the name of autonomy represents the very negation of it.").

and understand the consequences of waiving their trial rights.[173] In other words, even for existing plea bargain purposes, the defendant must weigh and assess the expected punishment that the court will mete out as a basis for comparison. In light of the fact that within the current plea bargain arena defendants are required to make choices of equal complexity, the paternalistic argument for placing limits on defendants' ability to waive the right to the criminal standard of proof must be rejected. Such claims cannot be argued effectively against the proposed model as a means of protecting defendant autonomy at a time when they are dismissed with regard to existing forms of plea bargaining.

b. Preservation of the Ability to Exercise the Criminal Standard of Proof

One can contest the claim that the alienability of the procedural right to the criminal standard will facilitate defendant autonomy from another perspective. It may be argued that the mere possibility of engaging in agreements for lowering the standard of proof will impair the ability of the potential defendant to exercise his right, that the prosecution prove the case against him beyond a reasonable doubt.[174] This is due to the negative signaling effects which may be associated with "insistence" upon the maximal evidentiary standard, liable to be interpreted as a negative signal that the defendant was involved in the alleged crime. In other words, in a legal climate which allows for stipulation of the standard of proof, refusal to implement a lower standard in a particular trial may be taken as a presumptive sign of guilt. This negative signaling effect does not exist in the current practice of plea bargains. On the contrary, refusal to engage in plea bargaining, within the existing regime, can be interpreted as a *positive* signal that the defendant is sincerely convinced of his innocence. Thus, one might object to the implementation of the proposed model on the grounds that defendants' rights to a "beyond a reasonable doubt" standard of proof will be compromised—i.e., that opening the standard of proof to negotiation will impair the ability of the general class of defendants to exercise the right to the default standard of proof ("beyond reasonable doubt") should they choose to do so—and, in fact, narrow their maneuvering space.[175]

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[173] *See* Teeter, *supra* note 96, at 730 (discussing defendant choice within the plea bargain arena).

[174] *See* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1502 (1989) (arguing that plea bargains alter the incentives to invoke the rights to trial and the privilege against self-incrimination); *see also* Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation*, 68 FORDHAM L. REV. 2011, 2078 (2000).

[175] This objection is distinct from the more general criticism, which could also be leveled against the proposed model, that turning the standard of proof to a negotiable default rule

However, there is room to contest the basic assumption underlying the above criticism that a defendant's rejection of the proposed model conveys a negative signal in relation to his innocence. A defendant's rejection of the prosecution's offer signals, first and foremost, that the offer is not appealing enough in terms of sentence reduction. It may also express a basic distrust of the system. This distrust of the prosecution and the court system crosses all lines and is equally characteristic of completely innocent defendants. There is no reason to assume that refusing to work out an intermediate deal is in itself necessarily a signal of guilt.

In conclusion, previous sections of this Article have attempted to demonstrate that conversion of the criminal standard of proof to a negotiable variable is not expected to harm the public goals that criminal procedures are constructed to achieve (and is even expected to advance them).[176] However, even if the contrary assumption were true, the conclusion to be drawn is that the defendant's choices should not be circumscribed for the sake of these public goals. In the choice between protecting the judicial process and preserving the defendant's dignity, the latter should prevail.[177] Any other approach would render the defendant an object in the grip of the system. The public interest in preserving the status of the judicial system, and in protection of its ethos, must retreat before the interest of the defendant in the outcome of the criminal trial. Moreover, the need to focus attention on the autonomy of defendants, as opposed to the social interests found in the criminal process, is of the essence in light of plea bargaining practices. As soon as we, as a society, have expressed willingness to retreat from the collective interest of not convicting the innocent to acknowledge defendant autonomy (through the adoption of the

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will harm defendants, as a general class, by raising their cumulative expected punishment. Thus, as has been previously demonstrated, adding the ability to enter into deals for lowering the standard of proof is expected to enable the prosecution to dispose of more criminal cases and impose on them, collectively, a higher level of sanction. My disregard of this more general argument is due to the fact that it is not specific to the proposed model. Rather, all forms of plea bargains, by their very nature, enable the prosecution to handle a larger inventory of cases, including cases which otherwise would have escaped trial for lack of resources. *See* Oren Bar-Gill & Omri Ben-Shahar, *The Prisoners' (Plea Bargain) Dilemma* (U. MICH. L. & ECON., Olin Working Paper No. 07-010, N.Y.U. L. & ECON., Research Paper No. 07-22, 2007), *available at* http://ssrn.com/abstract=1000209 (discussing the prisoners' dilemma faced by the general class of defendants in the plea bargain context, which places them collectively in a worse position than the no-plea alternative regime); *see also* RICHARD A. EPSTEIN, BARGAINING WITH THE STATE 79 (1993) (discussing collective action problems as a rationale for interference with individual waivers of constitutional rights).

[176] *See* discussion *supra* Part III.B.3.

[177] The most prominent expression of the defendant autonomy ideal can be found in *Faretta v. California*, 422 U.S. 806 (1975). In *Faretta*, the Court claimed that society's interest in obtaining a just result in the criminal trial did not outweigh the defendant's autonomy interest. *Id.* at 834.

practice of plea bargaining),[178] it follows that the public interest in guarding the character of criminal justice and court proceedings must also retreat before the autonomy of the defendant.[179] The public's interest in the appearance of justice is secondary to its primary interest in pursuing and achieving justice. Given society's readiness to sacrifice the search for justice on the altar of defendant autonomy, it is also possible to rule on the fate of the appearance of justice in this regard.[180] The broad social interest of preserving the autonomy of defendants and their freedom of choice precedes the narrower public interest in preserving the ethos of criminal process. This serves as another consideration in favor of removing obstacles placed upon the alienability of the right to the criminal standard of proof.

C. THE "QUANTITATIVE" ARGUMENT AGAINST THE PROPOSED MODEL

Until now the discussion has focused on isolating "qualitative" differences between the proposed model and the existing plea bargain. However, as I indicated previously,[181] normative considerations may also apply as a matter of degree. It is possible to think of "quantitative" differences, which give reason to reject the extension of plea bargains and

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[178] *See* Minnick v. Mississippi, 498 U.S. 146, 155 (1990) ("Both waiver of rights and admission of guilt are consistent with the affirmation of individual responsibility that is a principle of the criminal justice system.").

[179]

> A defendant who pleads guilty effectively waives at once the privilege against self-incrimination, the right to confrontation, and the right to a jury trial. It is, as one writer put it, "the entire ball game." As plea bargaining emerged as the primary means of resolving criminal charges, courts began to regard concerns about inalienable rights and self-destructive waiver as anachronistic, and asked why they should prevent a defendant from waiving a jury trial if he could relinquish the right to trial altogether.

Toone, *supra* note 62, at 646 (citing Ralph S. Spritzer, *Criminal Waiver, Procedural Default and the Burger Court*, 126 U. PA. L. REV. 473, 476 (1978)).

[180] Clearly, waiving the criminal standard of proof presents only one possible manifestation of the inherent tension springing from adversarial criminal procedures between the autonomy of defendants in their control over their fate and the system's interest in defending the legitimacy and fairness of the judicial process. It is analogous to other situations where defendants' choices clash with the public's interest in fair and accurate procedures. For example, some defendants choose to waive their right to counsel, refrain from pleading not guilty by reason of insanity, or choose not to call upon certain witnesses in their defense (possibly to protect family members from the unpleasantness associated with testifying). *See, e.g.*, Sabelli & Leyton, *supra* note 129, at 165. My claim that one has to give preference to the choice of defendants and their control over procedures is equally valid with regard to these alternate manifestations.

[181] *See supra* Part III.B.

further the contractual ordering in the criminal sphere, by changing the standard of proof to a negotiable variable. Quantitative discussion requires greater in-depth treatment than is possible in this framework and will be surveyed fully in future research. At this time, I will briefly examine the major quantitative case that can be made against the proposed model—namely, the fear of increasing the exposure of innocent persons to criminal convictions beyond what they are currently exposed to under the existing plea bargain model.

The response to this quantitative criticism becomes apparent in light of the discussion hereto. Thus, even if the number of false convictions proliferates under the proposed model, the degree of harm caused by false convictions does not necessarily increase. Another variable that must be taken into account is the type of false conviction in terms of both severity and the cost it entails. Under the proposed model, the specific weight of a conviction, using a low standard of proof, will not be equivalent to that of a conviction based on the "beyond a reasonable doubt" standard. Against the background of the differential labeling and the variable costs (lower in certain circumstances) of criminal convictions that the proposed model would facilitate, one could not invalidate the possibility that the aggregate costs for wrongful convictions might actually be lower than under the existing model, despite the increased number of convictions. That is to say, the issue of degree of exposure to wrongful convictions becomes more refined under the proposed model. It is no longer solely a function of the number of convictions, but it is also a function of the costs of those convictions.

Moreover, there is room to contest the a priori assumption that the per se number of false convictions will necessarily rise under the proposed model. As I have already indicated, the interim bargain is likely to increase both parties' utilities even in situations where, under the current set of available options, both parties would opt for a full plea bargain.[182] That is, the proposed model might be an attractive alternative not only to the pool of cases currently making their way into the court system, but also to the cases in which the question of criminal liability is presently settled outside the courtroom. In this latter class of cases, the negotiation process between the parties and the circumstances surrounding the guilty plea currently remain a black box from the standpoint of the courts. Under the proposed model, on the other hand, if interim deals are struck, the courts will enter into the heart of the case and the evidence in order to decide the issue of criminal liability.

The quantitative attack can take on a different character—advantages associated with the practice of plea bargains may diminish under the

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[182] *See supra* Part II.D.1.

proposed model. A central argument, which may be raised in this respect, is that the practice of plea bargaining was adopted because of its utility in reducing court overload.[183] If turning the standard of proof to a default rule should prove to decrease this benefit significantly, it would be a reason to reject the proposed model, despite the corresponding adoption of full plea bargains. However, trial risks and costs are not inherently binary in the sense of all (trial) or nothing (plea bargain). In accordance with the proposed legal regime, certain judicial procedures will become less costly and less time-consuming, as a result of reallocating the evidentiary burdens between the prosecution and the defense and the lower standard of proof demanded of the prosecution. In that sense, the fact that the proposed model would reduce the number of cases that are today settled by plea bargaining is not the end of the story. It should be remembered that, parallel to this, the proposed deals may be expected to include cases which today are settled by full trial, according to the "beyond a reasonable doubt" standard of proof. In these cases, the alternative of conducting judicial proceedings according to a lower standard of proof may lower the costs of trial to the taxpayer. The issue of how this will affect case load is basically empirical and cannot be predicted. Nevertheless, there is no reason to assume, a priori, that the benefits embedded in contractual arrangements in the area of criminal justice will turn out to be lower under the proposed model than under current practices.

IV. CONCLUSION

This Article examined the possibility of converting the standard of proof in criminal proceedings to a default rule, open to stipulation by the prosecution and defense. According to the proposed model, the defendant could grant the prosecution an across-the-board waiver of the burden of proof by trading the applicable evidentiary standard for a lighter sentence. This possibility comes in addition to the existing vertical waiver system of plea bargaining based on self-incrimination. When viewing all the factors that have been surveyed above, it becomes clear that extending the boundaries of negotiation in criminal cases in the manner described would be both practically viable and normatively desirable.

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[183] Joseph A. Colquitt, *Ad Hoc Plea Bargaining*, 75 TUL. L. REV. 695, 704 (2001) (stating that "some of plea bargaining's most resolute defenders believe that the court system needs plea bargaining in order to avoid a disastrous failure of the system as a result of the overwhelming number of cases that courts otherwise would have to try. However, it is more likely that plea bargaining endures because courts and prosecutors routinely rely on the process to dispose of their caseloads in an efficient and timely fashion."); *see also* Fisher, *supra* note 92, at 893 (explaining plea bargaining as an adjustment to caseload pressures).

This Article defined the range of situations in which the parties would find it beneficial to engage in such deals for reducing the standard of proof in return for sentence mitigation. The relevant situations are those in which the parties' MRS between units of punishment and units of evidentiary waiver equalize at an intermediate point between a full trial and a full plea bargain. In those circumstances, deals for partial conversion of some units of reduction in the evidentiary demands in exchange for some units of punishment are likely to improve the situation of both parties as compared to full conversion (plea bargains) or non-conversion (a full trial according to the "beyond a reasonable doubt" standard).

As has been demonstrated, three possible factors may influence the parties' MRS: the marginal costs to the prosecution of gathering evidence and managing the trial at various levels of proof, the defendant's attitude toward risk, and the subjective assessment of the parties regarding their chances for success according to different standards of proof. In addition, there are signaling advantages latent in the interim deals, from the point of view of both defendant and prosecution, as a result of which both might prefer this bargain over a full plea bargain.

After characterizing the range of situations in which the prosecution and defense are likely to work out a deal for reducing the standard of proof in criminal proceedings, the normative desirability of this type of agreement was examined. In order to consider the expansion of the negotiation boundaries between prosecution and defense, the Article set out by exploring the rationales for and against opening the criminal arena to plea bargaining. It was argued that the thriving institution of plea bargains embodies a normative judgment that recognizes its legitimacy in principle. This normative judgment served as a general reference point: In its light, the Article examined whether the proposed model has any unique disadvantages which do not exist in the current practice of plea bargaining and on whose basis it is possible to reject intermediate arrangements, even if full plea bargaining is considered legitimate.

The underlying distinction between the proposed intermediate arrangement and the full plea bargain was exposed. The Article argued that the difference between existing plea bargains and the proposed model lies not in the waiver of the procedural right that the charge against a defendant be proven by the criminal standard of proof, but in the manner by which this right is waived. Under the existing regime of plea bargains, waivers are exogenous to the judicial process, while the proposed model incorporates the waiver into the system.

From this analysis, conclusions were drawn as to the type of normative arguments that can be leveled against the proposed model. It was claimed that objections should focus on the ramifications of the fact that the waiver

is implemented through the judicial mechanism. Discussion of this criticism of the criminal process revolved around two central theoretical paradigms: the deontological paradigm (the Kantian doctrine) and the utilitarian paradigm.

A possible objection against the proposed model from the Kantian perspective is that the purpose of the criminal process is not the efficient resolution of the criminal dispute—that is, the promotion of external social ends, such as deterrence, or the utility of the defendant—but rather safeguarding the legitimacy of the act of punishment. In accordance with this view, changing the exposure of the defendant to the risk of either wrongful conviction or too light a punishment, as a way of benefiting the defense and the prosecution, negates the moral legitimacy of the criminal trial and impairs the defendant's human dignity.

The Article then evaluated the desirability of the proposed model in light of this theoretical objection. The argument was made that the Kantian criticism "overshoots" since even existing practices of plea bargaining will not pass through its sieve. Against that background, an alternative notion of autonomy was suggested to justify both plea bargaining and the intermediate deal, according to which the defendant waives his procedural right to the criminal standard of proof.

The Article then examined the hypothetical attack on the proposed model from the utilitarian perspective. It showed how the application of a default regime with regard to the standard of proof may harm the functional aims of the criminal trial, including the determination of criminal liability, the expressive functions of the criminal process, and the proper conceptualization of the judicial craft.

However, a careful look at these aims revealed not only that changing the standard of proof into a default variable would not harm them, but that it would actually promote and improve the chances of their realization. The application of the proposed model is likely to enhance the decision on the issue of criminal liability, allowing for the transformation of the question of criminal liability from a qualitative question of "yes or no" to a quantitative question of "how much." In that way, it will properly reflect all the gray areas that characterize the nature of this decision, at least from the evidentiary aspect. The proposed model is also expected to refine the expressive functions of the criminal process and the criminal verdict. Opening the "sentencing market" to additional types of convictions, with varying values to suit the levels of certitude on which the conviction is based, will supply richer and more precise data in regard to criminal labeling. In addition, the proposed model will not materially harm the proper conceptualization of the task of judging.

The next stage of the discussion was devoted to an alternative, more "civil law" approach to the functional goals of the criminal trial, which a default standard of proof can be expected to promote. The conclusion reached in light of the above is that the proposed model is neither more faulty nor costlier than the present system of plea bargaining.

At the margins of the qualitative discussion, the Article dealt with some quantitative objections. It examined whether the proposed model has defects that may not be unique to it but which may be more pronounced than under the existing system of plea bargains, and whether for that reason the proposed model should be rejected, despite the adoption of plea bargaining. In this context, the question of added exposure to wrongful conviction was considered. The Article claimed that exposure to wrongful conviction should be examined, not by quantity, but by level and severity. Given the disparate costs of criminal convictions that the proposed model would facilitate, the aggregate costs of wrongful convictions would not necessarily be higher than under current plea bargain practices, despite the increased number of false convictions.

Finally, the Article contended with the alternative quantitative argument, according to which the reason for rejecting the proposed model is that the advantages supporting the current full plea bargaining system would diminish. The central argument, in this context, touched upon the savings in judicial resources and court administration costs under the existing plea bargaining system, which may be reduced under the proposed model, based on a fact-finding process. As this Article attempted to show, under the proposed legal regime of a negotiable standard of proof, certain judicial trials are expected to consume less court time than parallel trials according to the "beyond a reasonable doubt" standard of proof, as a result of the negotiated re-allocation of evidentiary requirements between the parties. Since the proposed deals may be expected to erode, not only into the pool of cases currently resolved under full plea bargains, but also into the inventory of cases which currently make their way into the court, the issue of how the proposed model will affect case loads is basically empirical and cannot be predicted. However, it was claimed that there is no reason for the a priori assumption that the benefits embedded in existing plea bargaining practices will prove to be lower under the proposed regime.

When all these considerations are combined, the conclusion to be drawn is that objection to deals hinging on the standard of proof can only come from those who challenge the very notion of opening the criminal arena to negotiation. Considering that plea bargaining is recognized and regarded as a legitimate practice, clearly one must accept the proposed model. In this sense, this Article can be read in one of two ways. The first way, advocated throughout this Article, is to view the proposition to change

the standard of proof to a default rule as a practical model, aimed at promoting efficiency in conducting criminal procedures and giving expression to individual autonomy. This would be accomplished by increasing the defendant and prosecution's potential control of criminal procedures and by removing obstacles that limit their maneuverability in their attempts to work out arrangements. The second way to read this Article is as a litmus test for the widespread practice of plea bargaining, a practice by which most criminal cases are currently resolved. In that context, the proposed model sheds light on contractual ordering in the criminal sphere and even, in a broader sense, on the whole adversarial method. Either way, the conclusion is one and the same: It is not possible to justify the existing borderline between alienable procedural rights under the current practice of plea bargains and between the right to the criminal standard of proof, which is considered a nonnegotiable variable of the criminal trial. Wherever plea bargains are accepted, the standard of proof used in criminal procedures should be negotiable and vice versa: rejection of the proposition to convert the standard of proof to a default rule is possible only on the basis of an outright rejection of contractual arrangements in the criminal sphere.