The Case for a Trial Fee: What Money Can Buy in Criminal Process

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Money motivates and regulates criminal process. Conscious of adjudication costs, prosecutors incentivize guilty pleas with the prospect of a “trial penalty”: harsher post-trial sentences. Budgetary considerations motivate revenue-generating enforcement policies and asset forfeitures by law enforcement. States also charge defendants directly for nearly every criminal justice expense through mandatory fees, which can burden decisions to exercise rights. Additionally, defendants can pay for optional advantages. Right-to-counsel doctrine protects the right to pay for more and better legal assistance than the state is obligated to provide. Paying bail yields pretrial liberty. Diversion programs, for a fee, can supplant ordinary prosecution. Some defendants can choose their sentence: a fine or jail. But these opportunities are not available to all; their costs need not match one’s ability to pay.

To examine roles and rules of money in criminal process, this paper considers the case for an optional criminal trial fee. Defendants who pay it would directly cover public litigation costs, which would leave the state indifferent, as a budgetary matter, to the choice between trials and guilty pleas. In return, defendants would get a penalty-free trial limited to the terms of a proffered plea bargain. The fee proves a useful device because its rationale and effects accord with entrenched precedents and policies, not least in how it extends the justice system’s differential treatment based on wealth. Yet the trial fee also promises positive effects. It would reduce prosecutors’ most-criticized bargaining tactics—excessively harsh trial penalties—without undermining bargaining’s important secondary functions, enlisting

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informants to cooperate and rewarding defendants who accept responsibility for their crimes. And even a modest increase in fee-financed trials would yield other benefit, such as citizen participation in applying criminal law and supervising government officials, and more data about “the shadow of trial” in which bargaining takes place.

“There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”

INTRODUCTION

In more ways than one, criminal defendants pay for the right to trial. In plea negotiations, the government can straightforwardly impose a cost on defendants’ decisions to go to trial: a “trial penalty” in the form of greater liability and punishment if convicted. Because governments have a legitimate interest in minimizing the public costs of justice administration, constitutional law permits the trial penalty as a means to reduce demand for trials, much as any price or tax reduces demand for any good or service. Defendants convicted at trial pay in a more familiar way as well, because many states charge a monetary fee to defendants who exercise their right to a jury.

Other components of criminal justice systems are also costly, and, as much as possible, governments make defendants pay for them directly. In all US jurisdictions, defendants incur specific monetary charges for nearly every criminal procedure stage or service. Even before conviction, defendants are charged fees to cover the government’s costs incurred in their arrest, pretrial detention or supervision, court-appointed counsel, court services, probation, and drug treatment or other diversion programs in lieu of prosecution. Through the policy of money bail as a condition for pretrial release, defendants pay both private bail bond firms and local governments for pretrial liberty. After conviction, they incur fees for the costs of their room and board in prison, victim compensation funds, probation supervision, and more. Offenders also contribute to criminal justice budgets—and sometimes budgets for general government operations—through ordinary criminal fines and through forfeiture of property

that represents proceeds of illegal activity.\textsuperscript{5} Behind these lie financial motivations for government officials. They inform prosecutors’ plea-bargaining practices and police agencies’ focus on revenue-generating enforcement practices. They are especially apparent in judges’ imposition of court administration costs and police and prosecutors’ focus on collecting proceeds from asset forfeitures.

Money motivates and regulates criminal process across many domains. In light of what money can buy and the decisions it can incentivize, this Article explores the arguments for permitting defendants to pay the public costs of trial directly, in money, just as they pay for the costs of arrest, detention, diversion programs, legal assistance, probation supervision, court expenses, incarceration, and much else. Defendants would be motivated to do so if the fee eliminated other costs prosecutors and courts ordinarily attach to trials. Properly priced, the fee could cover the state’s cost of trial, thus removing the budgetary motive for plea bargaining. If the fee were optional, it would not infringe the right to trial, nor would it implicate constitutional limits on sanctions against those who are unable to pay court-ordered fees.\textsuperscript{6} And criminal process is replete with features that give advantages to those with money. For example, defendants must routinely choose between staying in jail or paying for a bail bond, and between prosecution or paying for a pretrial diversion program or settlement. Those who can pay do; those who can’t don’t. A trial fee could be structured the same way. It would add another option to the existing choice between a guilty plea with a lesser sentence or a trial that carries the risk of a more severe one. A trial fee would give defendants another option. It would allow them to satisfy the government’s interest in avoiding trial costs by covering the state’s trial costs rather than by forgoing trial.

The following synthesizes and reexamines several bodies of law, doctrine, and policy that expand, integrate, and regulate the role of money in criminal procedure to make the case for adopting a criminal trial fee: a monetary sum that criminal defendants could elect to pay if they want a trial without the plea bargaining’s “trial penalty.” Put differently, the trial fee would give defendants two ways to incur the trial penalty. They could pay it by risking (and usually suffering) greater punishment for a trial conviction, or they could pay a monetary fee before trial to cap their liability exposure according to the terms an earlier

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\textsuperscript{5} \textit{Civil Rights Div., U.S. Dep’t of Justice, Investigation of the Ferguson Police Department} (Mar. 4, 2015) [hereinafter \textit{FERGUSON INVESTIGATION}] (documenting city’s excessive use of criminal fines for general revenue); Sarah Stillman, \textit{Taken: Under Civil Forfeiture, Americans Who Haven’t Been Charged with Wrongdoing can be Stripped of Their Cash, Cars, and Even Homes. Is That All We’re Losing?}, \textsc{New Yorker} (Aug. 5, 2013) https://www.newyorker.com/magazine/2013/08/12/taken [https://perma.cc/JWX8-8XVB] (describing how proceeds from forfeiture fund law enforcement agencies).
\textsuperscript{6} \textit{See Bearden v. Georgia, 461 U.S. 660, 672 (1983). Bearden imposes a limit—but not an absolute prohibition—on jailing individuals who are genuinely unable to pay court-ordered fines and fees. See discussion \textit{infra} Part II.B.2.}
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plea bargain offer. Structured this way, the fee is really a way to buy the right to trial without the risk of a worse sentence upon conviction.

As Parts II and III make clear, a trial fee is wholly consistent with established constitutional doctrines and finds strong support in the judicial logic on which those doctrines rest. Notwithstanding the aphoristic principle that “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has,” constitutional law approves of many ways in which differences in private wealth affect the kind of trial, guilty plea, or punishment a defendant receives. It likewise permits monetary motivations to affect how public officials make policy and exercise discretion in criminal justice. Any doubts about the trial fee’s constitutionality should be put to rest by the plethora of closely analogous “user” fees and litigation-cost policies authorized by state and federal statutes. Likewise, constitutional doctrines, such the right to counsel, permit the quality of legal entitlements and procedural advantages to vary with private wealth.

Adopting a criminal trial fee, moreover, advances larger aims. The first is to use the fee as a device to examine the sincerity and importance of the public resources rationale—the predominant judicial justification—for the trial penalties that prosecutors (with legislative assistance) create in plea negotiations. If the public cost of trials is really the government’s overriding reason for minimizing the number of trials, then the government should be indifferent as between avoiding a trial and having private funds cover its public cost. Properly calibrated, the trial fee means that the defense finances both sides of the litigation along with the court costs; thus the fee would inject more private money into public adjudication. If that is so, then the government (that is, the state writ large, not simply prosecutors) should endorse more fee-financed trials for their long-recognized public benefits, such as citizen participation in applying criminal law and supervising the government officials who run criminal justice. In fact, government interests are more complicated, because plea bargaining is not merely a cost-savings device. For example, in a small but important set of cases, plea bargaining has become a de facto investigatory and evidence-gathering device that prosecutors would be loath to lose even for the tiny percentage of defendants likely, in practice, to pay a trial fee. The state, and presumably the public, also wants to reward defendants who accept responsibility for their crimes, and plea bargains are a primary means of doing that. Part III explains why the trial fee would not undermine these ambitions.

Second and more broadly, the trial fee provides a way to critically examine the role of money in the criminal process and how law regulates that role. Criminal procedure relies on, protects, and aggressively seeks infusions of private money. Part II canvasses disparate examples, including criminal process fees, money bail, asset forfeitures, and the constitutional right to hire privately

financed defense counsel. It also examines the limited ways that constitutional law restricts monetary motivations in judicial decision-making, as well as the state’s authority to demand payments from indigent individuals. At the same time, constitutional law also permits—and statutory law explicitly leverages—financial incentives to play a dominant role in executive-branch policy-making and discretionary action. The trial fee proposal proves to be a trenchant lens through which to assess a range of laws, doctrines, policies, and practices that define how money matters in criminal procedure.

Part I presents the trial fee idea in more detail. As noted, Part II surveys the many parts of the criminal justice system in which money already buys additional benefits, much as the trial fee would. These include plea-bargaining doctrine, right-to-counsel doctrine, criminal process “user” fees, forfeiture policies, and the constitutional strictures on all of the above. All provide useful analogues for the trial fee’s design, effects, or rationale. Part III anticipates objections to the trial fee arising from concerns about fair administration of justice. Part IV makes the case for public benefits we could expect from adoption of an optional trial fee, despite the prospect that only a small percentage of defendants would be expected ever to pay it. Among other virtues, the trial fee holds promise for mitigating the most-criticized, less-justifiable plea-bargaining tactics.

I.
THE CRIMINAL TRIAL FEE

To start, consider the form a trial fee could take. Once formally charged, defendants have familiar options. In some cases, the prosecution and court may offer a pretrial diversion program or a non-prosecution agreement that leads to dismissal of criminal charges in exchange for civil payments or other conditions fulfilled by defendants. Aside from these possibilities for dismissal, defendants have two basic options: to plead guilty and be convicted without trial, or to plead not guilty and go to trial. Defendants may plead guilty unconditionally, but more commonly guilty pleas are the result of a plea agreement between the defense and prosecution that the court must approve. Tacitly or explicitly, the plea agreement represents a better outcome than conviction at trial, either because it enables a defendant to plead guilty to fewer charges, assures—or increases the odds of—a less severe sentence compared to post-trial punishment, or both.

This is where the trial fee comes in. By statute or criminal procedure rule amendment, defendants could be provided the novel option of (a) declining the proffered plea bargain, (b) paying a trial fee, and (c) exercising their right to trial.

8. For a description of diversion programs, see infra Part II.B and accompanying footnotes.
Id.
10. In the federal rules, the logical placement would be in Federal Rules of Criminal Procedure Rule 11.
limited to the charges and sentencing range defined in the plea agreement. A few details are important. First, as a practical matter, the trial fee depends on the prosecution offering plea agreement terms. A defendant would have no reason to pay the fee if it did not buy a trial on the more favorable terms defined by the plea offer. Prosecutors are not required to offer plea bargains to defendants, and nothing about the fee would change that. But prosecutors routinely offer plea agreements for familiar reasons, especially because they offer a much quicker and more certain means of winning convictions compared to trial adjudication. Nothing about the fee provision should change prosecutors’ incentives to offer plea bargains, although it should improve, as a matter of public policy, the plea-bargain terms they offer. Specifically, it should reduce prosecutors’ temptation to create excessive trial penalties.

Second, the plea-offer terms become binding parameters for trial charges and post-trial sentencing once a defendant declines the agreement and opts to pay the trial fee. Because those terms would bind the judge in post-trial sentencing, the judge would have to approve those terms as ones that she would accept to be bound by—that is, ones that she would accept as conditions for a guilty plea. Before any fee payment (and perhaps before judicial approval), the process would be governed by existing law, which allows prosecutors to withdraw a plea offer until a court accepts it or unless a defendant has detrimentally relied on it. Third, once trial begins (and perhaps for some period before if the government has invested in trial preparation), the fee is not refundable upon a defendant’s request. This ensures the government incurs no financial loss from the defendant’s decision to go to or prepare for trial. However, in line with current policies to charge costs of prosecution to losing parties only, the fee would be refunded if the defendant were acquitted after trial. The refund mechanism increases good incentives on both parties. It undermines any temptation for prosecutors to proceed to a “cost-free” trial on

12. In particular, the trial fee should not disrupt use of plea agreements to induce cooperation from some defendants, a point taken up infra Part III.C.
13. See infra Part IV.
14. Not all guilty pleas dictate or greatly constrain judges’ sentencing discretion, and not all jurisdictions’ sentencing laws give judges a lot of discretion. For either reason, judges might have little at stake in reviewing the terms of a plea offer, especially one focused solely on what offenses prosecutors will charge.
15. See United States v. Wessels, 12 F.3d 746, 752–53 (8th Cir. 1993) (holding that a prosecutor can withdraw from plea agreement before defendant takes any action in detrimental reliance); Cooper v. United States, 594 F.2d 12, 16–17 (4th Cir. 1979) (holding that a plea bargain is enforceable against the government before acceptance by a court if defendant performed some act in light of the deal and “relied to his tangible detriment”).
16. See, e.g., United States v. Hiland, 909 F.2d 1114, 1141–42 (8th Cir. 1990) (holding that defendants may not be taxed for costs attributable solely to prosecution of counts on which they were acquitted, nor for unsuccessful prosecution of a codefendant); United States v. Chavez, 627 F.2d 953 (9th Cir. 1980) (holding that a statute that requires ordering convicted defendant to pay for cost of prosecution is constitutional).
charges supported by weak evidence, and it reinforces the incentive for
defendants to pay the fee only when prospects of acquittal are plausible. Even
for the small number of defendants who can afford to pay it—or convince
someone else to pay it for them—the fee reinforces reasons to plead guilty if
they recognize the odds of conviction at trial are high.

Some details, on the other hand, are less critical. Rules could vary on
whether, when, and on what terms defendants could change their minds and seek
a refund of their trial fee (in order either to seek another plea agreement, plead
guilty without an agreement, or go to trial with the standard risk of a worse
outcome upon conviction). Also, precisely how to calculate the fee need not be
settled here. Existing law and practice provide a strong foundation for those
details. In addition to setting fixed fees for various components of criminal
process, US legislatures have long authorized or mandated that courts order
convicted defendants to pay “costs of prosecution,” and have provided criteria
for expenses included in such costs. (The same criteria often apply to court

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17. Third parties—family, friends, or even advocacy groups—should be able to pay trial fees
for defendants, just as they can now pay other fines and fees, or post bail, for defendants.

18. For defendants facing high odds of conviction, the trial fee merely allows them to trade one
cost of trial (harsher sentences) for another (money), thus preserving a substantial disincentive to insist
on trial when odds of conviction are high. The exception might be defendants who are so wealthy that
paying a trial fee is not a significant burden. But this group is vanishingly small. Moreover, as Part II.C.
describes infra, wealthy defendants already have constitutionally protected advantages such as the
ability to (a) buy better defense services and (b) raise the government’s costs of prosecution, which in
turn increases the government’s inclination to settle. Those advantages reduce the risk of a harsher post-
trial punishment.

19. A trial fee could be made nonrefundable, even while defendants retain the option of pleading
guilty with or without a plea agreement. If the fee were otherwise refundable, an exception could provide
bar refunds in cases in which prosecutors can show that they detrimentally relied on the defendant’s
initial payment and, for example, released witnesses or failed to secure trial evidence for charges they
dropped in the plea agreement, preventing them from reinstating original charges.

20. 28 U.S.C. § 1918(b) (2012) (authorizing district courts to tax losing civil and criminal parties
for litigation costs); id. § 1920 (specifying costs for which fees may be charged in orders of payment
attached to final judgments, including fees for court clerks, transcripts, document copies, and services
of experts and interpreters—but not mentioning attorney’s fees); United States v. Dunkel, 900 F.2d 105,
108 (7th Cir. 1990) (applying § 1920 taxable costs when defendants are convicted under statutes
authorizing payment of “costs of prosecution,” and noting that courts use § 1920 to determine costs
absent guidance from other statutes); vacated on other grounds, 498 U.S. 1043 (1991); Hiland, 909 F.2d
at 1142 (holding “discretion granted by § 1918(b) does not authorize federal district courts to order a
criminal defendant to pay costs not enumerated in § 1920’); United States v. DeBrouse, 652 F.2d 383,
391 (4th Cir. 1981) (noting section 18 “authorizes the court to order the defendant to pay the costs of
prosecution when he is convicted” but that it “does not contemplate that a defendant should pay the costs
of prosecution for charges on which he was acquitted”); see also U.S. SENTENCING COMM’N, U.S.
SENTENCING GUIDELINES MANUAL § 5E1.15 (2016) (“Costs of prosecution shall be imposed on a
defendant as required by statute.”). For examples of criminal statutes authorizing or requiring convicted
defendants to pay costs of prosecution, see 7 U.S.C. § 13 (2012) (larceny or embezzlement in
commodity exchanges); 21 U.S.C. § 844 (2012) (for simple possession of controlled substances,
convicted offenders “shall be fined the reasonable costs of the investigation and prosecution of the
offense” unless they lack ability to pay); 26 U.S.C. §§ 7201–03, 7206 (2016) (tax evasion and false-
statement offenses); United States v. McKenna, 791 F. Supp. 1101, 1108–09 (E.D. La. 1992),
(interpreting 26 U.S.C. § 7206(1) to require district courts to charge convicted defendants costs of
orders that tax costs to losing parties in civil litigation.) As a result, courts routinely calculate costs of prosecution and include payment orders in criminal sentencing orders. To be sure, these costs are now calculated after trial, once actual expenses can be documented. In contrast, the trial fee would be charged before trial. Thus, it would largely reflect estimated costs, somewhat like fixed fees now charged for arrest, jail, or court clerk costs, although with more variation in accordance with the type of case, length of trial, nature of evidence, etc. But long experience with assessing prosecution costs nonetheless provides ample data from which to set ex ante trial fees.

The essential point is that the fee must be a fairly realistic estimation of the full public costs of reaching a judgment through a trial rather than a guilty plea or other alternative disposition, as opposed to a nominal fifty- or hundred-dollar charge. That is, the fee should be close enough to the real public costs that the government is indifferent, as a budgetary matter, to whether a defendant pleads guilty or pays for his trial, and consequently whether the number of criminal trials increases due to payment of trial fees. If the trial fee makes the state fiscally indifferent to a defendant’s choice between going to trial and pleading guilty, it will eviscerate the central justifying rationale for plea bargaining: that the state cannot afford to fund trials for more than a small fraction of criminal cases.

It is important to note how criminal justice institutions would adapt, as a practical matter, to such a fee. An optional trial fee should increase the number of cases that go to trial—if only modestly, since few defendants will have means to pay. But that increase should not change the relative burden on prosecution offices and courts. Agencies and policy-makers would soon be able to determine the justice system’s new trial-rate equilibrium. They could then increase judicial and prosecutorial staff and infrastructure proportionately with the revenue provided by fee payments. Additional trials brought on by the trial fee would be at least as predictable for policymakers as current criminal case filings and trial rates. Calculated realistically, trial fees would likely be a more predictable revenue stream for funding adjudication than current sources, such as general tax revenue or criminal fines, that fluctuate for reasons unconnected to the number of criminal trials.

21. See, e.g., Dunkel, 900 F.2d at 108 (affirming order to pay costs); Hiland, 909 F.2d at 1142 (noting costs must be attributable to convicted counts and for specific amounts confirmed by affidavits); DeBrouse, 652 F.2d at 391 (ordering payment of costs for counts of which defendant was convicted).
Several potential objections come to mind. One set emphasizes negative aspects of explicitly pricing and selling an entitlement. For example, the trial fee would too blatantly monetize an aspect of a core constitutional right; at a minimum, it would be inappropriate to “sell” a central feature of plea bargaining—the difference between post-plea and post-trial sentences—to those who can afford it. Moreover, permitting purchase of a trial on more favorable terms realistically will benefit only a small number of defendants who can afford to pay for it. Other objections point to potential conflicts with fair administration of justice. Negotiated guilty pleas are the key means by which we legitimately impose lesser sentences on defendants who accept responsibility for their crimes, and binding prosecutors and judges at trial to the terms of a proposed pretrial bargain eliminates this opportunity. This restriction also leaves courts without a way to sentence defendants more accurately in light of evidentiary details revealed at trial that the court did not know before trial. In addition, the fee might undesirably distort prosecutors’ discretionary charging and bargaining decisions, because they could be tempted to calibrate those decisions to minimize the appeal to defendants of paying the trial fee. Finally, the trial fee could have an important practical drawback if it weakens a key method that prosecutors use to elicit cooperation from defendants in other cases and investigations. The following sections respond to these concerns.

II. MONEY ALREADY MATTERS IN CRIMINAL PROCESS: WHAT YOU CAN BUY NOW

A. Trial costs and monetary motives for plea bargaining

Money is a central justification for plea bargaining—specifically, the lack of public money to fund courts and prosecutors sufficiently to adjudicate more than a small fraction of criminal charges by trial. The US Supreme Court has taken the financial necessity of plea bargaining for granted since it first acknowledged the practice nearly fifty years ago, and few any longer disagree.\footnote{As recently as the 1970s and 1980s, some scholars, judges, prosecutors, and government advisory panels argued (or demonstrated) that plea bargaining was not essential to a well-functioning criminal justice system. See U.S. DEP’T OF JUSTICE, COURTS: NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS 46–49 (1973) (calling for abolition of plea bargaining); Stephen J. Schulhofer, Is Plea Bargaining Inevitable?, 97 Harv. L. Rev. 1037 (1984); Albert Alschuler, Plea Bargaining and its History, 79 Colum. L. Rev. 1, 41–44 (1979); see also Ronald Wright & Marc Miller, The Screening/Bargaining Tradeoff, 55 Stan. L. Rev. 29 (2002) (describing how New Orleans’s district attorney’s office operates without plea bargaining).} The Court describes plea bargaining as “central to” and “an essential component of the administration of justice.”\footnote{Missouri v. Frye, 566 U.S. 134, 143 (2012) (“The reality is that plea bargains have become . . . central to the administration of the criminal justice system.”).} Without negotiated guilty pleas to replace trials for most prosecutions, “the States and the Federal Government

\footnote{Santobello v. New York, 404 U.S. 257, 260 (1971).}
would need to multiply by many times the number of judges and court facilities.”

That would require governments to spend much more for criminal justice administration than the Court (and most others) view as feasible. “[W]e accept plea bargaining because many believe that without it . . . our system of criminal justice would grind to a halt,” and it is uncontroversial that “the prosecutor’s interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty.” This view is shared among virtually all other courts and policymakers. Practical necessity and “the interest of the State in efficient criminal procedure” justify constitutional doctrine that permits policies that “discouraged the assertion of the right to a jury trial by imposing harsher sentences upon those that exercised that right.”

Note the seeming incongruity between policies of charging convicted defendants for the state’s costs of prosecution and the jeremiad that without plea bargaining “our system of criminal justice would grind to a halt.” Roughly nine of every ten trials end in a conviction. If those defendants pay public costs of trials, then the state should have the money to “multiply by many times the number of judges and court facilities.” And yet, it doesn’t work out that way for at least two reasons. First, under many statutes, “costs of prosecution” do not include attorney’s fees to cover prosecutors’ salaries. More significantly,


27. Bordenkircher, 434 U.S. at 364; see also Ruiz v. United States, 536 U.S. 622, 631 (2002) (“[A] constitutional obligation to provide impeachment information during plea bargaining . . . could seriously interfere with the Government’s interest in securing those guilty pleas.”).

28. Corbitt, 439 U.S. at 219 n.9; see id. at 225 (holding constitutional homicide statutes that impose mandatory life imprisonment for a trial conviction of first-degree murder but lesser punishment for defendants who plead guilty or no contest).

29. Lafler, 566 U.S. at 185 (Scalia, J., dissenting).


32. 28 U.S.C. § 1920 (2012) enumerates costs for which losing defendants may be taxed but does not list attorney’s fees, and courts conclude they lack authority to go beyond what § 1918 authorizes. See United States v. Hiland, 909 F.2d 1114, 1142 (8th Cir. 1990) (“[D]iscretion granted by § 1918(b) does not authorize federal district courts to order a criminal defendant to pay costs not enumerated in § 1920.”). But see VA. CODE ANN. § 17.1-275.1 (West 2019) (noting that the mandatory “fixed felony fee” of $375 is allocated among several state entities including commonwealth’s attorney funds).
obligations to pay apply only to those who are able to pay. Many defendants are not, and nearly none can while in prison.

Resources are finite in all domains, and many doctrines are attuned to those limits. But rarely do budget constraints provide a doctrine’s dominant justifying aim to the degree they do with regard to the guilty plea. More explicitly than elsewhere in constitutional criminal procedure, the law of plea bargaining is designed to accommodate public funding limits. That commitment is reflected not only in what the rules permit, but also in how they are derived. Lacking any textual or originalist resources in the Due Process Clause to guide development of plea-bargaining doctrine, the Court identified two alternative approaches for doctrinal development. One option was to elaborate foundational legal principles to devise rules and boundaries for plea bargaining practice; by the 1970s, the touchstone principle was “fundamental fairness.” The other option started from

33. See Fuller v. Oregon, 417 U.S. 40 (1974); see also 21 U.S.C. § 844 (2012) (stating that for the conviction of drug possession, offenders “shall be fined the reasonable costs of the investigation and prosecution of the offense” unless they lack ability to pay).

34. See COUNCIL OF ECONOMIC ADVISERS, FINES, FEES, AND BAIL: PAYMENTS IN THE CRIMINAL JUSTICE SYSTEM THAT DISPROPORTIONATELY IMPACT THE POOR 5 (2015) (citing studies that find states “have faced very low rates of collection” on criminal justice debts, often below twenty percent); CAROLINE WOLF HARLOW, U.S. DEP’T OF JUSTICE, NCJ 179023, DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000) (noting that eighty-two percent of state court felony defendants and sixty-six percent of federal felony defendants were indigent and had counsel provided by the government in 1996); DON K. MURPHY, INST. FOR COURT MTMT, WHY CRIME DOESN’T PAY: EXAMINING FELONY COLLECTIONS (2015) (finding a fourteen percent collection rate in Florida courts).

35. Guilty pleas are unmentioned in the Constitution, and plea bargaining, if not guilty pleas, are unmentioned in the treatises and common law of the founding era. See, e.g., 4 WILLIAM BLACKSTONE, COMMENTARIES *326 (implying defendants might plead guilty—or “confess” in lieu of pleading not guilty—but not mentioning plea bargaining); 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON CRIMINAL LAW 349–50 (1819) (describing guilty pleas); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833) (no mention of guilty pleas). The earliest reported historical evidence of plea bargaining is probably in the early nineteenth century, as reported in George Fisher’s study of Massachusetts courts. See GEORGE FISHER, PLEA BARGAINING’S TRIUMPH (2003).

36. The nineteenth century consensus that defendants lacked the power to waive the jury trial provides an example of the kind of fundamental principle that once set non-consequentialist limits on criminal adjudication. A typical decision of the era reasoned that the right to a jury trial was a non-waivable “imperative provision” because “[l]ife and liberty are too sacred to be placed at the disposal of any one man [i.e., a judge presiding at a bench trial], and always will be so long as man is fallible.” State v. Carman, 18 N.W. 691, 691 (Iowa 1884). This rationale was buttressed by a prudential, paternalistic one that many defendants were incapable of making a wise waiver decision: “The innocent person, unduly influenced by his consciousness of innocence, and placing undue confidence in his evidence, would, when charged with crime, be the one most easily induced to waive his safeguards.” Id. For similar holdings, see Morgan v. People, 26 N.E. 651 (Ill. 1891) (holding jury not waivable), overruled by Swanson v. Fisher, 172 N.E. 722, 728 (Ill. 1930)); Harris v. People, 21 N.E. 563 (Ill. 1889) (same), overruled by Swanson, 172 N.E. at 728; see also Thompson v. Utah, 170 U.S. 343, 353–54 (1898) (holding felony defendants cannot waive Sixth Amendment’s requirement of a twelve-person jury). For treatises confirming that defendants could not waive the right to jury and consent to a bench trial unless waiver was expressly authorized by statute, see JOEL PRENTISS BISHOP, 1 CRIMINAL PROCEDURE § 893 (3d ed. 1880); FRANCIS WHARTON, A TREATISE ON CRIMINAL PLEADING AND PRACTICE § 733 (8th ed. 1880), which are both cited in Moore v. State, 2 S.W. 634 (Tex. App. 1886). Only in the last quarter of the nineteenth century did most jurisdictions—in light of increasing caseloads—abandon this view in favor of a more pragmatic one. See W. F. Elliot, Waiver of Constitutional Rights in Criminal Cases, 6
plea bargaining’s consequentialist rationale—efficiency in light of scarce resources—and built the doctrine from a straightforwardly consequentialist analysis of how to best serve that goal. This approach largely defers to practitioners’—especially prosecutors’—norms, viewing them as products of necessity. Principles such as fairness and voluntariness were defined to accommodate practical limits and necessities of criminal justice administration.

The first, the fundamental-fairness approach, initially played an important role in plea-bargaining jurisprudence, but the doctrine quickly took the second, unambiguously consequentialist orientation. Subconstitutional law and state constitutional law do not meaningfully depart from this premise by, for example, making trials non-waivable for some offenses or regulating plea bargaining practices in ways that might reduce the number of plea agreements. In service of the efficiency demanded by budget constraints, plea bargaining developed a firmly transactional logic; concepts of fairness adapted. Negotiations between

Crim. L. Mag. 182 (1885) (discussing how the public nature of criminal trial rights limits the parties' abilities to waive them and citing cases limiting waiver of criminal jury).

37. See Santobello v. New York, 404 U.S. 257, 261 (1971) (explaining that valid plea bargains “presuppose fairness . . . between an accused and a prosecutor”). In the wake of Santobello, federal appeals courts used the fairness requirement to regulate various plea-bargaining practices. See, e.g., Cooper v. United States, 394 F.2d 12, 15–20 (4th Cir. 1979) (fairness requires enforcement of prosecutor’s plea-bargain offer); United States v. Bowler, 585 F.2d 851, 854 (7th Cir. 1978) (asserting judicial duty to “insure the integrity of the plea bargaining process”); Hayes v. Cowan, 547 F.2d 42, 44–45 (6th Cir. 1976), overruled by Bordenkircher v. Hayes, 434 U.S. 357 (1978); Palermo v. Warden, 545 F.2d 286, 296 (2d Cir. 1976) (“[F]undamental fairness and public confidence in government officials require that prosecutors be held to ‘meticulous standards of both promise and performance.’”).

38. Thirteen years after Santobello, the Court further narrowed fundamental fairness. See Mabry v. Johnson, 467 U.S. 504, 511 (1984) (“[R]espondent was not deprived of his liberty in any fundamentally unfair way. Respondent was fully aware of the likely consequences when he pleaded guilty; it is not unfair to expect him to live with those consequences now.”). For an overview of the evolution of this case law, see Darryl K. Brown, Judicial Power to Regulate Plea Bargaining, 57 WM. & MARY L. REV. 1225, 1268–75 (2016).

39. By contrast, a nineteenth century Texas statute barred jury waivers for all felony trials. See Tex. Code Crim. Proc. art. 23 (1879) (“The defendant to a criminal prosecution for any offense may waive any right secured to him by law, except the right of trial by jury in a felony case.”); see also id. arts. 518, 519, 534 (allowing defendants to plead guilty to felonies “in open court” if a jury is impaneled to assess punishment) (cited in Moore v. State, 2 S.W. 634, 635 (Tex. App. 1886)). The one contemporary exception among US jurisdictions is the military justice system, which mandates a significantly more careful and detailed record on the voluntariness and accuracy of guilty pleas than civilian criminal courts. See Manual for Courts-Martial United States, C.M.R. § 705(c)(1)(B) (2008) (banning sentence agreements and waiver of appellate review); id. § 910(c–e) (requiring a military judge to “address the accused personally and inform the accused of, and determine that the accused understands,” all of the procedural and constitutional rights guaranteed); id. § 910(h)(2) (explaining that a judge must re-open a guilty plea if defendant subsequently makes a statement inconsistent with guilt); United States v. Phillippe, 63 M.J. 307, 308–11 (C.A.A.F. 2006) (setting aside conviction when trial judge failed to re-open providence inquiry in the wake of defendant’s statement at post-plea sentencing suggesting facts that could constitute a defense); United States v. Pinero, 60 M.J. 31, 33 (C.A.A.F. 2004) (“The military justice system takes particular care to test the validity of guilty pleas because the facts and the law are not tested in the crucible of the adversarial process.”); see also Note, Prosecutorial Power and the Legitimacy of the Military Justice System, 123 HARV. L. REV. 937, 951–52 (2010) (describing rigorous “providence inquiry” for guilty pleas).

40. See, e.g., Mabry, 467 U.S. at 509.
prosecutors and defendants over guilty pleas are understood as straightforward exchanges little different from private contracts negotiations.\textsuperscript{41} The law aims to ensure that parties enter into agreements knowingly, not that agreements are substantively fair. Nor does it hold public officials to higher standards of fairness in negotiations than private parties.\textsuperscript{42} As a result, prosecutors are free to add or drop charges, to trigger sentencing requirements through charging decisions,\textsuperscript{43} and to create large differences in punishments for guilty pleas compared to trial convictions.\textsuperscript{44} The last point is important because, as developed below, the trial fee has the potential to regulate prosecutorial plea bargaining incentives in beneficial ways, a task that legal doctrine wholly avoids.

B. User-Financed Justice: Fines, Fees and Charges

The trial fee’s consistency with contemporary criminal justice policy stems from much more than the monetary logic of plea bargaining law. Money is deeply integrated into criminal justice policy in several ways that have drawn sustained attention from scholars and policy-reform advocates. One focus has been on the tremendous increase in “criminal justice debt” or “legal financial obligations” imposed on offenders.\textsuperscript{45} A second topic is continued use of money bail as a condition for pretrial release. Governments’ reliance on private service providers in both domains—especially private probation companies and the bail-bond industry—tends to increase the financial burdens on defendants.\textsuperscript{46} A third

\textsuperscript{41} See, e.g., Puckett v. United States, 556 U.S. 129, 137 (2009) (“[P]lea bargains are essentially contracts.”). The market inspiration for plea bargaining law is explicit in decisions such as United States v. Mezzanatto, 513 U.S. 196, 208 (1995) (“[I]f the prosecutor is interested in ‘buying’ the reliability assurance that accompanies a waiver agreement, then precluding waiver can only stifle the market for plea bargains. A defendant can ‘maximize’ what he has to ‘sell’ only if he is permitted to offer what the prosecutor is most interested in buying.”). For an extended account of this point, see Darryl K. Brown, Free Market Criminal Justice 91–117 (2016).


\textsuperscript{43} See, e.g., 21 U.S.C. § 841 (2012) (mandatory minimum sentences for drug offenses); id. § 851 (no mandatory minimum applies unless prosecutor files an information to trigger its application).

\textsuperscript{44} See, e.g., Mahry, 467 U.S. at 507–09; Bordenkircher v. Hayes, 434 U.S. 357 (1978); Corbitt v. New Jersey, 439 U.S. 212, 213–20, 225 (1978). Courts also do not restrict other pressure tactics, such as threatening to prosecute—or prosecuting more harshly—a defendant’s family members if he does not plead guilty. See Miles v. Dorsey, 61 F.3d 1459, 1468–69 (10th Cir. 1995) (threat to charge defendant’s parents); United States v. Pollard, 959 F.2d 1011, 1021 (D.C. Cir. 1992) (threat to charge defendant’s wife).

\textsuperscript{45} See, e.g., Alicia Bannan et al., Brennan Center for Justice, Criminal Justice Debt: A Barrier to Reentry (2010); Alexes Harris, A Pound of Flesh: Monetary Sanctions as Punishment for the Poor (2016). Cf. King, supra note 2, at 52 (criticizing criminal justice fees as “exacerbat[ing] structural unfairness . . . and . . . degrad[ing] how we conceive of fundamental rights”).

\textsuperscript{46} See Human Rights Watch, Profiting from Probation: America’s ‘Offender-Funded’ Probation Industry (2014) [hereinafter Profiting from Probation],
theme is “policing for profit,” which primarily describes widespread practices of seizing and forfeiting private assets connected to criminal activity, and allowing law enforcement agencies to retain those proceeds.47 Scholars and reform advocates generally focus on the adverse effects of these policies. Excessive criminal justice debt impedes rehabilitation and keeps offenders in the criminal justice system due to their inability to pay.48 Money bail is a barrier for many defendants to avoiding jail detention after arrest (and before guilt has been proven); at a minimum, it increases the financial costs of winning pretrial release.49 And policies that let police departments keep asset-forfeiture proceeds motivate police to pursue property seizures. That sometimes produces unjust results, and it gives executive officials de facto control over the size and allocation of agency budgets—normally a legislative prerogative.50

Drawing attention to these policies here serves different purposes. First, we can situate the trial fee among the kinds of costs routinely imposed on suspects, defendants, probationers, and inmates in the criminal justice system. The fee fits within a strong trend for financing justice administration through “user fees.” Second, many of these policies provide precedents for how some procedural opportunities or advantages—including pretrial release, assistance of counsel, and post-conviction incarceration—are differentially available to defendants depending their ability to pay, a consequence that would follow from the trial fee as well. Third, these policies collectively provide a picture of how money-related policies affect the incentives of criminal justice officials, and how the law limits—and more often permits—money to influence government decision-making. In the remainder of this section, I survey existing fines, fees and optional charges through which defendants buy advantages, summarize the minimal constitutional regulation of these practices, describe the downsides of “profit”

https://www.hrw.org/report/2014/02/05/profiting-probation/americas-offender-funded-probation-industry [https://perma.cc/P7Z2-NMXK].


48. See BANNON ET AL., supra note 45; PROFITING FROM PROBATION, supra note 46; Katherine Beckett & Alexes Harris, On Cash and Conviction: Monetary Sanctions as Misguided Policy, 10 CRIMINOLOGY & PUB. POLICY 509 (2011); Alexes Harris et al., Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States, 115 AM. J. SOC. 1753, 1769–73 (2010).


50. See People v. Ringland, 89 N.E. 3d 735 (ill. 2017) (holding that Illinois prosecutor’s use of forfeiture proceeds to finance “a team of special investigators” exceeded statutory authority); Developments in the Law: Policing, supra note 47, at 1738; Stillman, supra note 5.
incentives that these funding policies create for law enforcement, and conclude that a trial fee, instead of breaking new ground, accords with established principles that justify current practices of paying for legal entitlements.

1. Criminal Justice Fees Are Ubiquitous

The trial fee, simply as a fee, has innumerable predecessors. Every US jurisdiction now charges a wide range of fees to defendants to offset public costs for virtually every stage, service, and component of criminal justice administration.51 As one example, California authorizes more than 3,000 fees and other penalties.52 Some states charge suspects a booking fee immediately upon arrest to cover the costs of their arrest.53 After arrest, defendants in most states are often required to post bail in order not to be detained until their case is resolved.54 Some jurisdictions make release contingent on payment of a bond directly to the court.55 More commonly, defendants rely on private bondsmen


52. Harris et al., supra note 48, at 1759.


54. Under federal law and that of many states, defendants have no right to bail. U.S. CONST. amend. VIII; United States v. Salerno, 481 U.S. 739, 753–54 (1987) (holding no due process or Eighth Amendment right to bail); Bell v. Wolfish, 441 U.S. 520, 531 (1979) (“Government may permissibly incarcerate a person charged with a crime but not yet convicted to ensure his presence at trial.”); Carlson v. Landon, 342 U.S. 524, 545–46 (1952) (same). But some state constitutions provide a right to bail. See WASH. CONST. art. 1 § 20 (“All persons charged with crime shall be bailable by sufficient sureties, except for capital offenses when the proof is evident, or the presumption great.”). And federal and state statutes create limited rights to bail. See, e.g., 18 U.S.C. § 3142(b) & (c)(1)(B) (2012) (requiring release unless a judge “determines that the release . . . will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community,” and requires that judges grant release subject only to “the least restrictive further condition . . . [that] will reasonably assure” those ends); ALASKA STAT. ANN. § 12.30.011(b) (West 2019); CONN. GEN. STAT. §§ 54-63b(b)–64a (2019); D.C. CODE ANN. § 23-1321(c)(1)(B) (West 2019); MAINE REV. STAT. ANN. tit. 15, § 1026 (West 2018); MASS. GEN. LAWS ANN. CH. 276 § 58 (West 2019); NM R. DIST. CT. RCRP R. 5-401 (2019); WASH. SUPER. CT. CRIM. R. 3.2 (2019); see also GA. CODE ANN. § 17-6-1(b)(1) (West 2019) (“[A]t no time . . . shall any person charged with a misdemeanor be refused bail.”).

55. Ferguson, Missouri, followed this practice for minor offenses and arrests for failures to appear at court dates. See FERGUSON INVESTIGATION, supra note 5, at 59 (noting bonds of $100 to $300 for traffic offenses and failure-to-appear charges); id. at 60 (“It is not uncommon for an individual charged with only a minor violation to be arrested on a warrant, be unable to afford bond, and have no recourse but to await release” for up to three days.).
who often charge a fee of ten percent of the bail amount to post a bail bond. Some states attach additional public fees to the bond. They may also have to pay for probation supervision services or electronic monitoring while on pretrial release. These barriers prove substantial: nearly a third of state defendants remain in pretrial detention after their bail is set at $5,000 or less, even though a large majority of pretrial detainees in state jails are considered not dangerous. Those not released on bail instead incur obligations to pay the costs of their detention. Next, even if they qualify for court-appointed counsel, many states charge indigent defendants an initial counsel application fee, and most have statutes authorizing recoupment from convicted offenders for costs of state-provided legal assistance.

Upon conviction, state and federal courts are allowed—and often required—to charge convicted defendants for “costs of prosecution,” such as expenses for transcripts, interpreters, witnesses, jurors, and court clerks and marshals. Courts and agencies additionally charge offenders for nearly every

56. See LA. REV. STAT. ANN. §§ 22-236, 13:1381.5 (2018); Shen, supra note 4 (noting that in New Orleans, ten percent of every bond goes to the bail bondsman; another 1.8 percent goes to the judges; and the sheriff, public defender, and prosecutor each get 0.4 percent); Wiseman, supra note 49.


conceivable state expense of criminal justice administration: arrest warrants, DNA sampling, HIV testing, psychiatric evaluations, extradition, victim compensation, prison medical care, and more. Fees follow from missed court dates and late fine or fee payments. Incarcerated offenders often leave prison with obligations to pay those expenses and with additional debts to cover the costs of prison room and board, plus ongoing fees for probation or parole supervision. State agencies and private contractors such as probation firms often charge substantial interest and late fees on unpaid debts.

All of those fees are mandatory, at least if individuals elect to exercise rights to pretrial release, counsel, and trial. Other fees are nominally optional but are nonetheless prerequisites for valuable procedural opportunities or entitlements. Most notably, in some jurisdictions, access to diversion programs, drug treatment courts, and other routes to resolving criminal cases without conviction require that a suspect pay for drug treatment or diversion program costs and other common requirements for noncriminal disposition, such as restitution or civil fine payments. Like bail and other pretrial-release charges, these kinds of fees plainly function as prices for obtaining advantages in criminal process. Thus, many procedural opportunities are available to some defendants but not others, depending on the private resources each can bring to the criminal

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62. See VA. CODE ANN. §§ 17.1-275.1 to 17.1-275.12 (West 2019) (specifying these charges among others); see also OHIO REV. CODE ANN. § 2947.23(A)(1)(a) (West 2019) (“In all criminal cases, . . . the judge or magistrate shall include in the sentence the costs of prosecution . . . .”); TEX. GOVT. ARTS. 103.0211, 103.0212 (fees for, inter alia, prosecution services, court reporters, DNA testing) (2019); TEX. LOC. GOVT. ART. 133.102 (post-conviction court costs) (2019); WASH. REV. CODE § 36.18.016(b) (2018) (authorizing charges after trial conviction of $125 for a six-person jury and $250 for 12-person jury); TEX. CODE CRIM. PROC. ART. 102.007, 102.011, 102.072 (West 2019) (authorizing various costs for which defendants can be charged after conviction). On medical care charges, see 61 PA. CONS. STAT. ANN. § 3303(a) (2019); FERGUSON INVESTIGATION, supra note 5, at 14 (noting “$50 fee charged each time a person has a pending municipal arrest warrant cleared”); Harris et al., supra note 48, at 1784 (“I didn’t dare see the doctor . . . because that would cost me another $10 for the doctor visit.”).

63. See FERGUSON INVESTIGATION, supra note 5, at 14 (noting fines for failure to appear at court dates in Ferguson, Mo., which increase with each additional non-appearance or failure to pay); id. at 59 (noting $100 failure-to-appear charge); Rhonda Cook, Dirty License Plate Leads to $1,590 Traffic Fine, ATLANTA JOURNAL-CONSTITUTION (June 1, 2016), https://www.ajc.com/news/local/dirty-license-plate-leads-590-traffic-fine/3zbFwsbLudQopPe9N [https://perma.cc/7W76-A3SP] (describing $720 fines and fees for out-of-date decal on car license plate that increased to $1590 because of defendant’s delay in paying).

64. See PROFITING FROM PROBATION, supra note 46; Bannon et al., supra note 45; Beckett & Harris, supra note 48; Harris et al., supra note 48, at 1759.

65. Harris et al., supra note 48, at 1759–60.

process. The trial fee shares this key characteristic. But compared to other policies, it has a few advantages. The trial fee merely provides an alternative means to exercise the jury trial entitlement. Defendants unable to pay money can still go to trial, albeit at the risk of paying in the form of greater sanctions and cost-of-prosecution charges. And as described further below, defendants who pay the trial fee may provide some second-order benefits for other, non-fee-paying defendants.

2. The Paucity of Constitutional Regulation of Criminal Process Fees

The Constitution only lightly regulates fines, optional fees, and mandatory charges. The Excessive Fines Clause regulates only “fines”—charges intended as punishment rather than as compensation for fees-for-service—and forbids only those found to be grossly disproportional. The Bail Clause prohibits bail set at an amount that is “excessive,” as assessed in relation to the defendant’s flight risk, not the defendant’s income of financial resources. States must provide defense counsel to indigent defendants when they are charged, although they are free to try to recoup costs of that assistance from convicted defendants who subsequently gain the financial ability to pay. And for mandatory charges to cover state criminal justice costs (as opposed to optional charges, such as bail and diversion-program fees), the Supreme Court held in Nelson v. Colorado that state procedures cannot be unduly burdensome for refunding advance payments made by defendants whose charges are resolved without a conviction.

The most significant regulation is grounded in due process and equal protection. On those grounds, Bearden v. Georgia limits decisions to revoke probation or incarcerate an offender for failure to pay if the offender’s failure was solely due to an inability to pay fines, fees, or restitution.

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67. Slightly indirectly, the same is true of the right to privately retained counsel. See infra Part II.C.
69. United States v. Salerno, 481 U.S. 739, 754 (1987) (“[T]o determine whether the Government’s response is excessive, we must compare that response against the interest the Government seeks to protect...[B]ail must be set by a court at a sum designed to ensure that goal, and no more.”); Stack v. Boyle, 342 U.S. 1, 5 (1951) (“Bail set at a figure higher than an amount reasonably calculated to fulfill [its] purpose is ‘excessive’” because “bail for any individual defendant must be based upon standards relevant to the purpose”).
71. Nelson v. Colorado, 137 S. Ct. 1249 (2017) (stating that due process requires a reasonable refund process for defendants who paid fees but were not later convicted; further stating that defendants cannot be required to file a civil claim and prove their innocence by clear and convincing evidence). A logical inference of Nelson is that mandatory fees to cover criminal justice costs can be charged only to convicted defendants.
courts to “inquire into the reasons for the failure to pay” prior to adverse decisions for failures to pay, although states can place the burden on defendants to show their financial default was not willful. And even when a court finds a defendant made “bona fide efforts to acquire the resources” to pay, incarceration is still permissible—at least for failures to pay fines as opposed to costs—if a judge determines that “alternative measures are not adequate to meet the State’s interests in punishment and deterrence.”

Bearden has proved a weak constraint on incarceration for inability to pay fines and fees. It has also not been extended to other judicial decisions that permit those with sufficient wealth to pay fines and avoid jail. In some cases, pursuant to statutory authorization, judges give convicted defendants a choice between alternative punishments. Typically, they give defendants the option of either paying a fine, spending time in jail, or serving a term of probation conditioned on either community service or paying installments on a fine. Wealthier defendants can pay fines while poor defendants must bear restrictions on liberty. Bearden has not been extended to regulate this practice. It requires a hearing on a defendant’s failure to pay a fine imposed in an earlier sentence, but it does not bar sentencing a defendant to probation or jail if the defendant is unable to pay a fine instead.

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73. *Id.; see also* Pugh v. Rainwater, 572 F.2d 1053, 1057 (5th Cir. 1978) (en banc) (concluding incarceration of individuals unable to meet the payment requirements of a fixed bond schedule “without meaningful consideration of other possible alternatives” violates due process and equal protection).


75. *Bearden*, 461 U.S. at 672. Bearden and other decisions that define this body of law are ambiguous as to whether involuntary failures to pay court costs and fees, as opposed to fines, are grounds for imprisonment. Bearden expressly permits incarceration for non-willful failures to pay only “to meet the State’s interests in punishment and deterrence.” *Id.* at 672 (emphasis added). Arguably those interests do not justify imprisonment for not paying fees that are administrative rather than punitive in nature. And Bearden reaffirms that “nothing in our decision today precludes imprisonment for willful refusal to pay . . . court costs.” *Id.* at 668 (quoting Williams v. Illinois, 399 U.S. 235, 242 n.19 (1970)) (emphasis added). But that leaves open the possibility that involuntary failures to pay court costs is not sufficient grounds for imprisonment, especially given that Bearden’s facts involved a failure to pay a criminal fine as well as court-ordered restitution. On the other hand, at least some states may create a basis for imprisonment for failures to pay court fees by specifying in statutes that those fees have a punitive as well as a budgetary or taxation purpose. *See* Harris, supra note 45, at 18–22.

76. *Bearden* is weak in good part because courts disregard it. *See* FERGUSON INVESTIGATION, supra note 5, at 57–58 (describing Ferguson municipal court practices as “directly at odds” with Bearden); Beckett & Harris, supra note 48, at 505–09; Eisen, supra note 59; Stillman, supra note 57.

77. For a recent example, *see* Shanklin, 211 So. 3d 757.

78. A similar dynamic also occurs in the context of corporate crime, although in that context most offenders have sufficient wealth to make payments to avoid other outcomes. The US Justice Department in the last decade has increasingly resolved investigations of corporate wrongdoing with deferred- and non-prosecution agreements. Those agreements typically require the offending firm to pay large civil or criminal penalties, and often to pay also for an independent monitor to oversee its compliance for a period of years. *See generally* BRANDON L. GARRETT, TOO BIG TO JAIL (2014) (describing numerous cases involving deferred-prosecution and non-prosecution agreements).

79. *See* Developments in the Law: Policing, supra note 47, at 1740–41 (suggesting extension of Bearden’s rationale to similar scenarios).
With regard to the trial fee, the point is simply that nothing in constitutional law remotely constrains optional fee payments or other private expenditures to gain procedural advantages. Due process and equal protection doctrines somewhat limit sanctions on those unable to pay court-ordered obligations, but they have almost nothing to say about policies that enable disparate procedural treatment—or punitive consequences—based on private financial resources. By offering different opportunities to those who can pay for them, the trial fee looks no different from money bail or sentence orders that provide for fine-or-jail alternatives.

3. Profit Incentives in Criminal Law Enforcement

Intentionally or not, many of the fees that US justice systems impose do what prices always do: they affect purchaser incentives and regulate demand for goods or services. Quite intentionally, the trial penalty that characterizes plea bargaining does the same; it depresses demand for trials. Charges attached to pretrial release, diversion programs, legal assistance, and jury trials affect individuals’ decisions whether to “purchase” those entitlements, whether they are mandatory or contingent upon conviction. Those decisions, in turn, affect substantive outcomes. That consequence is readily apparent when posting bail is a condition of pretrial release, or when a diversion or drug-treatment program is a defendant’s only way to avoid prosecution and conviction.80 Strong evidence indicates that pretrial detention leads to worse liability and sentencing dispositions for defendants compared to defendants who gain pretrial release.81

Money also incentivizes government officials and policies. The critical label “policing for profit” indicates recognition of this fact with respect to two contentious policy models in particular. One is the practice of some municipalities of using criminal law enforcement to generate fine and fee revenue that does not simply cover costs of criminal justice administration but

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80. In some jurisdictions, diversion is a route to avoiding prosecution in a significant portion of cases. See Ben Grunwald, The Fragile Promise of Open-File Discovery, 49 CONN. L. REV. 771, 816 (2017) (“In Texas, a substantial fraction of felony cases are disposed by a deferred adjudication, which allows first-time offenders to enter a guilty plea and receive probation without a criminal conviction.”) (citing TEX. CODE CRIM. PROC. ANN. art. 42.12 § 5 (West 2019) and data from the Texas Judicial Branch’s Trial Court Activity Database, TXCOURTS, http://www.txcourts.gov/statistics/court-activity-database [https://perma.cc/UA63-BCWF]).

also provides a large portion of general revenue. Ferguson, Missouri, is the most notorious example but hardly the only one. In its investigation of Ferguson’s practices, the US Justice Department found:

The City budgets for sizeable increases in municipal fines and fees each year [and] exhorts police and court staff to deliver those revenue increases. . . . City officials routinely urge [Police] Chief Jackson to generate more revenue through enforcement . . . . Ferguson police officers from all ranks told us that revenue generation is stressed heavily within the police department . . . .

This policy had “a profound effect on [the Ferguson Police Department’s] approach to law enforcement,” and it “fundamentally compromise[d] the role of Ferguson’s municipal court.”

Officer evaluations and promotions depend to an inordinate degree on “productivity,” meaning the number of citations issued. . . . [M]any officers appear to see some residents less as constituents to be protected than as potential offenders and sources of revenue, . . . . The municipal court does not act as a neutral arbiter of the law or a check on unlawful police conduct. Instead, the court primarily uses its judicial authority as the means to compel the payment of fines and fees that advance the City’s financial interests.

The Justice Department concluded that these incentives contributed to unconstitutional practices by Ferguson’s police officers and judicial system. Notably, however, it was not the structure of financial motivations per se that was unconstitutional but other practices, such as racially motivated and unjustified traffic stops. That is because due process prohibitions on financial conflicts of interest are relatively narrow. Under Tumey v. Ohio, judges cannot personally profit by retaining a portion of fines they impose in cases they adjudicate. Under Ward v. Village of Monroeville, the same official cannot simultaneously act as a municipal judge and also have responsibility for managing municipal finances.

82. Ferguson Investigation, supra note 5, at 2.
83. Id. at 2–3.
84. Id. at 2–3; see also id. at 55 (“The Ferguson Municipal Court Uses Arrest Warrants Primarily as a Means of Securing Payment: Ferguson uses its police department in large part as a collection agency for its municipal court.”).
85. Id. at 16–17, 70 (describing police stops without probable cause or reasonable suspicion and motivated by race); id. at 3 (noting that court practices “violate the Fourteenth Amendment’s due process and equal protection requirements”); id. at 44 (finding evidence of “substantial deficiencies in the manner in which the court conducts trials”).
86. See Tumey v. Ohio, 273 U.S. 510, 523 (1927) (overturning conviction as violation of due process because village mayor, acting as municipal court judge, kept twelve dollars of each fine he imposed and thus had a “direct, personal, substantial, pecuniary interest” in each case he adjudicated).
87. See Ward v. Village of Monroeville, 409 U.S. 57, 6062 (1972) (finding a due process violation when town mayor acted as judge to impose conviction and fine because, while he did not personally gain from fines imposed, he managed town’s finances). If the notorious system of using criminal fines for city revenue in Ferguson, Missouri, avoided this limitation, it was because the same
Further, due process doctrine leaves virtually untouched the other set of “policing for profit” policies that intentionally put strong financial incentives on law enforcement officials. Federal and state laws allow police departments to keep forfeiture proceeds from any property they seize that has a sufficient relation to criminal conduct. These policies avoid *Tumey* because, even if *Tumey* extended beyond officials acting in a judicial capacity, police officers’ pay is not directly tied to each property seizure they accomplish. Whether *Ward* restricts these forfeiture practices might be a closer question. Under these policies, police agencies both decide which forfeitures to pursue and play a role in managing their own budgets by retaining forfeiture proceeds. But no court has found these policies unconstitutional, and both state and federal forfeiture laws continue to adhere to this financial-motivation model. The federal program that facilitates “equitable sharing” of forfeiture proceeds between federal and state agencies mandates this incentive; states can participate in the program only if they allocate forfeiture proceeds to their law enforcement agencies.

4. Paying for Legal Entitlements Is Nothing New

In sum, monetary interests are deeply entwined in US criminal justice policies. Fee policies attempt to fund justice administration as much as possible from the pockets of suspects, defendants, and ex-offenders. Some governments take these policies further and gain as much of their general operating revenue as possible from fines, fees, and forfeitures. As a result, entitlements and advantages in the criminal process vary in significant ways according to person did not act as municipal judge and city manager. See *Ferguson Investigation*, supra note 5, at 42 n.20 (citing *Ward* and suggesting that “[t]he influence of revenue on the court . . . may itself be unlawful”) (emphasis added).

88. A number of states recently have enacted legislation that directs some or all forfeiture proceeds to the state’s general fund or to budget items (such as education) other than law enforcement agencies. Many also have restricted forfeitures in various ways, and three states have abolished civil forfeiture entirely. See U.S. Dep’t of Justice, EQUITABLE SHARING WIRE: STATE FORFEITURE LEGISLATION (2017) [hereinafter STATE FORFEITURE LEGISLATION], https://www.justice.gov/criminal-mlars/page/file/973546/download [https://perma.cc/CTB3-PAEM] (citing recent legislation in Arizona, California, Colorado, District of Columbia, Maryland, Nebraska, New Mexico, and Ohio); Anne Teigen & Lucia Bragg, Evolving Civil Asset Forfeiture Laws, Nat’l Conf. State Legislators LEGISBRIEF (Feb. 2018); C.J. Ciaramella, Arkansas Legislature Effectively Votes To Abolish Civil Asset Forfeiture, REASON.COM (Mar. 14, 2019), https://reason.com/2019/03/14/arkansas-legislature-unanimously-votes-to-abolish-civil-asset-forfeiture [https://perma.cc/GES2-96K4].

89. See *Developments in the Law: Policing*, supra note 47, at 1738 (suggesting that due process “might also forbid combining the executive function of prosecution with the legislative function of budget management”).

individual ability to pay. Decisions of both defendants and public officials are affected, sometimes strongly, by monetary considerations. As long as revenue from forfeitures, misdemeanor fines, court fees flows directly into the budgets of police, prosecutors, and courts, rules can limit only modestly monetary motivations of officials in these agencies. And those rules are consistent with plea bargaining doctrine, which approves executive discretion motivated by reducing expenditures that strain public budgets. Constraints on sanctions against individuals who fail to fulfill financial obligations are similarly modest, especially in practice.

Given all this, an optional, upfront fee for criminal trials looks familiar in several ways. The fee creates incentives for both public officials and defendants, but they are innocuous compared to those of existing fees. In light of bail, fees for pretrial monitoring, and diversion-program charges, the trial fee hardly stands out as a price for a benefit that some defendants can afford but others cannot. The costs of optional opportunities or services need not be waived for indigent individuals, and many jurisdictions opt not to do so as a matter of policy. Moreover, numerous fees and charges set precedents for monetizing valuable legal entitlements, including the right to trial. Ordering convicted offenders to pay for the costs of prosecution, for example, rationally affects decisions whether to go to trial. The prospect of paying those costs—discounted by the odds of conviction and the prospect that one will be found to have the ability to pay—discourages defendants from exercising the right to trial. For these reasons, any objections one has to the trial fee should extend as well to other fees already imposed throughout criminal justice administration. Those criticisms would apply as well constitutional doctrines that authorize many fee practices, including Sixth Amendment right-to-counsel doctrine.

C. Public and Private Funding for the Costs of Counsel

Two doctrines defining constitutional rights to counsel provide other examples of how constitutional law permits procedural entitlements and advantages to vary according to a defendant’s ability to pay. The “harsh reality that the quality of a criminal defendant’s representation frequently may turn on his ability to retain the best counsel money can buy” is news to no one. The right to privately retain counsel of one’s choice—as opposed to the right of indigent defendants to counsel at public expense—is an example of a core procedural right that is not priced by the state but nonetheless turns on ability to pay. It illustrates another way in which the law permits the quality of criminal process to vary with defendants’ private resources.

91. Part IV infra argues that the trial fee’s incentives result in public-regarding benefits.
The most familiar strand of right-to-counsel doctrine, defined initially by the Supreme Court in Gideon v. Wainwright, requires the state to provide counsel to defendants who cannot afford to hire their own lawyer and are charged with any crime for which they could receive a jail sentence.93 Grounded in the right to a fair trial,94 the entitlement to appointed counsel recognizes that, to function reliably and fairly, the common law model of adversarial litigation depends on both parties investing their own resources in the process. The right to appointed counsel mandates a public subsidy that compensates for indigent individuals’ lack of private resources to invest in their own defense.

A separate strand of right-to-counsel doctrine protects the distinct interests of non-indigent defendants to choose their own attorneys. While “[a] defendant has no right to choose counsel he cannot afford,”95 those with sufficient private means have the “right to select counsel of one’s choice”—that is, a right to use their own money to contract for the services of any qualified lawyer they choose without undue state interference.97 In United States v. Gonzalez-Lopez, the Court sharply distinguished “the right to counsel of choice—which is the right to a particular lawyer regardless of comparative effectiveness—with the right to effective counsel” for indigent defendants.98 Unlike the latter, the counsel-of-choice right “has never been derived from the Sixth Amendment’s purpose of ensuring a fair trial.”99 Instead, it is “regarded as the root meaning of the constitutional guarantee,”100 which justifies a doctrine under which violations are easier to prove. To win a claim that a defendant was denied the right to

93. See Gideon v. Wainwright, 372 U.S. 335 (1963). Earlier decisions defined a more limited right to appointed counsel for the indigent. See Betts v. Brady, 316 U.S. 455 (1942) (finding a right to counsel only when circumstances would make absence of counsel a violation of fundamental fairness); Powell v. Alabama, 287 U.S. 45 (1932) (addressing due process right to counsel in capital cases); see also Argersinger v. Hamlin, 407 U.S. 25 (1972) (holding that a right to appointed counsel extends to defendants charged with misdemeanors that carry possibility of jail sentence).

94. United States v. Gonzalez-Lopez, 548 U.S. 140, 147 (2006) (“[O]ur recognition of the right to effective counsel within the Sixth Amendment was a consequence of our perception that representation by counsel ‘is critical to the ability of the adversarial system to produce just results.’”) (quoting Strickland v. Washington, 466 U.S. 668, 684–85 (1984)); United States v. Cronic, 466 U.S. 648, 659 (1984) (“The presumption that counsel’s assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage” or “if counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing . . . [because] that makes the adversary process itself presumptively unreliable.”). Cj. Mickens v. Taylor, 535 U.S. 162, 166 (2002) (holding that, to prove a Sixth Amendment violation based on trial court’s failure to inquire into a potential conflict of interest, defendant must show that his lawyer’s conflict of interest adversely affected the lawyer’s performance, since right to counsel “has been accorded . . . not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial”) (internal quotation marks omitted).


96. Gonzalez-Lopez, 548 U.S. at 151 (“[T]he right to counsel of choice does not extend to defendants who require counsel to be appointed for them.”).

97. Id. at 147; id. at 146 (“[T]he Sixth Amendment right to counsel of choice . . . commands, not that a trial be fair, but that . . . the accused be defended by the counsel he believes to be best.”).

98. Id. at 148.

99. Id. at 147.

100. Id. at 147–48.
appointed counsel, the defendant must prove either that their “counsel entirely fail[ed] to subject the prosecution’s case to meaningful adversarial testing”\textsuperscript{101} or that the lawyer’s performance was so poor that it likely affected the outcome.\textsuperscript{102} Defendants who pay for their own attorneys enjoy the same right against ineffective representation.\textsuperscript{103} But separately, a “choice-of-counsel violation occurs \textit{whenever} the defendant’s choice is wrongfully denied,” without regard to the quality or effect of representation.\textsuperscript{104} In this respect, the Sixth Amendment provides an additional dimension of protection for privately retained counsel compared to appointed counsel. But that additional right, of course, is available only to those with sufficient private wealth. Thus, while money bail can mean that defendants’ opportunity for pretrial release depends on their private ability to pay, the opportunity to have counsel in some form is assured regardless of ability to pay. However, the nature and quality of representation—and whether the attorney is the one the defendant wants—can turn on differences in private wealth.\textsuperscript{105}

This is true not only for the identity of the attorney but for the scope of the right to counsel and the resources that defense counsel can bring to a client’s case. \textit{Gideon} in effect expanded the right “to have the assistance of counsel” from merely a right to hire an attorney if you can afford one to an entitlement to state-provided counsel if you cannot.\textsuperscript{106} But the right to hire an attorney remains broader than the right to appointed counsel. The latter attaches only once a defendant has been formally charged by the state.\textsuperscript{107} As a result, defendants often have no lawyer at their first bail hearing, or at pre-indictment events such as

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\item United States v. Cronic, 466 U.S. 648, 659 (1984) (finding a violation also for “the complete denial of counsel”).
\item Cuyler v. Sullivan, 446 U.S. 335, 344–45 (1980) (holding that the \textit{Strickland} ineffectiveness standard applies to privately retained counsel).
\item Gonzalez-Lopez, 548 U.S. at 150 (emphasis in original); \textit{see also} id. (noting that consequences of “erroneous deprivation of the right to counsel of choice . . . are necessarily unquantifiable and indeterminate . . . .”); \textit{id}. at 148 (“Deprivation of the right is ‘complete’ when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received.”). On appellate review, interference in a defendant’s private counsel of choice is deemed structural error that requires reversal without any showing that the violation affected the outcome. \textit{id}. at 150.
\item To push the point further, treating counsel-of-choice violations as structural error requires the state to spend more of its scarce resources to redress these violations than if that right—like ineffectiveness claims—required proof of adverse effects for the violation and were subject to harmless error analysis. Rights that are easier to win on appeal make reversal—and state expenditures for retrials—more likely.
\item Cuyler, 446 U.S. at 351.
\item \textit{See} Rothgery v. Gillespie County, 554 U.S. 191 (2008). More precisely, the Sixth Amendment right to counsel may also attach before a prosecutor files charges if a defendant has an “initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction,” because that event “marks the start of adversary judicial proceedings.” \textit{id}. at 213. Separately, as part of the right against self-incrimination, defendants have a right to counsel during any post-arrest interrogation. \textit{See} Miranda v. Arizona, 384 U.S. 436 (1966).
\end{enumerate}
\end{footnotesize}
identification line-ups. But those who can afford it can still have assistance of privately retained counsel at these events. The same is true in the appellate context. Due process guarantees appointed counsel only for a first direct appeal-of-right, not for subsequent discretionary appeals or collateral challenges to convictions. But defendants may privately retain attorneys for all of these proceedings and gain the advantages that skilled counsel provides.

Much the same is true regarding other defense resources. Due process requires the state, in some circumstances, to subsidize investigation assistance or expert analysis if they are essential to an effective defense. For indigent defendants, the court determines whether they get such assistance by weighing “the probable value of [expert] assistance” against “the risk of error” without it only defendants who can show that such assistance goes to a “substantial” or “significant factor” in the case are entitled to it. But those who can fund their own investigators and forensic analysis may do so without regard to such criteria. In these ways the law permits defendants with enough money to get a different “kind of trial”—or investigation, plea negotiation, or appeal—from those limited to publicly provided assistance.

Across all these contexts, the law implicitly permits private wealth to buy procedural advantages; in the right-to-counsel context, it explicitly protects the right to do so. Constitutional law—and, for the most part, statutory law—does little to contain or mitigate differences in procedural opportunities and substantive outcomes that stem from differences in wealth. Instead, the law aims to assure a minimal standard of fairness regardless of income, and then permits

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108. See Kirby v. Illinois, 406 U.S. 682 (1972) (holding no right to counsel at identification line-ups conducted by police before suspect is indicted). On the right to counsel for post-indictment identification procedures, see United States v. Wade, 388 U.S. 218 (1967) (Sixth Amendment right to counsel applies to post-indictment line-up and show-up identifications conducted by law enforcement); Gilbert v. California, 388 U.S. 263, 272–73 (1967) (holding that exclusion is the remedy for Wade violation); Stovall v. Denno, 388 U.S. 293 (1967) (finding that the same rule applies to post-indictment “show-up” identifications).

109. See Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) (noting that the Court has “never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions” because “the right to appointed counsel extends to the first appeal of right, and no further” (citing Johnson v. Avery, 393 U.S. 483, 488 (1969))); Douglas v. California, 372 U.S. 353 (1963) (upholding right to counsel on first direct appeal); see also Murray v. Giarratano, 492 U.S. 1, 10 (1989) (plurality) (holding that there is no right to habeas counsel in capital cases); Daniel Givelber, The Right to Counsel in Collateral, Post-Conviction Proceedings, 58 MD. L. REV. 1393 (1999); Eve Brensike Primus, The Illusory Right to Counsel, 37 OHIO N.U. L. REV. 598 (2011).


111. Ake, 470 U.S. at 72, 86–83.

112. For a study of the limited number of jurisdictions that provide appointed counsel for initial bail hearings, see Douglas L. Colbert, Thirty-Five Years after Gideon: The Illusory Right to Counsel at Bail Proceedings, 1998 U. ILL. L. REV. 1, 8–10 (reporting that only eight states and the District of Columbia provide counsel to defendants at their first appearance for bail; also describing much variation in local practices in other states).
those with private resources to pay for better process. A trial fee would be a wholly consistent and unexceptional feature in this legal framework.

III. NON-MONETARY ADMINISTRATION-OF-JUSTICE CONCERNS

Even though the trial fee would break no new ground in monetizing procedure and allowing private wealth to buy advantages in criminal adjudication, potential objections remain on other grounds. One is that, by limiting a defendant’s liability after trial to the plea-bargain terms, we may force courts to disregard information revealed at trial that justifies a harsher sentence. Another is that the fee limits prosecutors’ capacity to substitute the certainty of guilty-plea dispositions for the uncertainties of an imperfect trial process. A final concern is that the trial fee might undercut the government’s ability to negotiate crucial assistance from cooperating defendants in other cases. This Part addresses these possibilities in turn. The first two are problems that US justice systems have already chosen to tolerate as a consequence of other procedural practices, and that a trial fee would hardly aggravate. As with worries that a trial fee too bluntly monetizes criminal process, the fee’s effects on these concerns are no different from the effects of existing practices. As for cooperation agreements, the final section explains why the trial fee should have little effect on them.

A. Trial Facts, Culpability, and Acceptance of Responsibility

One criticism of the trial fee could be that it deprives the court system of means to take full account of information on which sentences should be based. Two arguments could support this claim. First, trials often provide sentencing judges with more detailed information about criminal conduct and surrounding circumstances than was known before trial at a guilty plea hearing. Because the trial fee binds the judge to any sentencing terms specified in the earlier plea-agreement offer, it could require judges, when entering a sentence order, to ignore facts proven at trial that show the defendant to be more culpable than was known earlier and that justify a harsher sentence. Second, the trial fee arguably deprives the court of a basis for distinguishing sentences on the basis of whether defendants accepted responsibility for their crimes. Ordinarily, courts require such acceptance, at a minimum, to take the form of a guilty plea.

The response to the first point is that both the prosecution and the court were willing to eschew greater knowledge of a defendant’s culpability by

113. Courts have recognized this problem in deciding the proper remedy for a defendant who was wrongfully denied an opportunity to accept a plea bargain and was subsequently convicted at trial. See Lafler v. Cooper, 566 U.S. 156, 171–72 (2012) (discussing remedy alternatives and declining to decide whether at resentencing judge must “disregard any information concerning the crime that was discovered after the plea offer was made”) (internal punctuation omitted).

114. See, e.g., U.S. SENTENCING COMM’N, supra note 20 § 3E1.1.
forgoing trial and sentencing the defendant based on a guilty plea. Working from an insufficiently fine-grained factual account of conduct is surely a routine consequence of guilty pleas. Both prosecutors and defense attorneys, after all, often reach plea agreements with much less factual knowledge and preparation than they would have at trial. And standard practices of encouraging early-stage plea agreements with limited discovery, followed by limited judicial inquiry into their factual basis, hardly suggest officials place a high value on grounding dispositions on a full factual record. By their nearly unanimous embrace of this mode of adjudication, American prosecutors and judges have forfeited any right to complain about the inability to adjust sentences in the wake of a trial for which the defendant paid a substantial fee but that cost the state nothing. Instead, the gap in factual knowledge between plea hearings and trials that this scenario would reveal is another benefit of fee-paid trials: they add transparency about what our criminal justice system frequently gets wrong by its near-total turn toward plea bargaining.

The response to the second point—that the trial fee disrupts sentence discounts for acceptance of responsibility—has some merit, but not much. It is true that a defendant who puts the state to its proof—and perhaps denies responsibility in trial testimony—would, if convicted, be sentenced with the terms of the plea offer, which commonly reflect some discount for forthrightly admitting guilt. But that defendant would have paid a considerable cost for that unearned discount—literally. The defendant therefore hardly ends up in the same position as an equivalent offender who pled guilty to the same crime on the same

118. Such cases might also support claims that it is defendants who get a bargain—meaning undue leniency—in plea agreements rather than suffering a “trial penalty.” In fact, both can be true. Some defendants can suffer a Bordenkircher-type trial penalty while others reap a discount measured in light of their true culpability because the state was uninformed of some factual details at the time of their pleas.
plea-bargain terms. Second, as explained in Part IV.a, the trial fee should help improve the consistency with which plea bargains accurately reflect acceptance of responsibility, by counteracting dynamics that now undermine the proportional alignment of punishments with moral desert.

B. State Interests in Certainty and the Imperfections of Trial Process

One reason prosecutors like guilty pleas is that trials are imperfect. Sometimes, for reasons having nothing to do with a defendant’s culpability or the prosecutor’s diligence, the available evidence to prove guilt is marginal; it is strong enough that the prosecutor is confident of the defendant’s guilt but weak enough that a jury may well acquit. Critical witnesses might be unavailable, physical evidence may be scant, or some probative sources might be inadmissible. Plus, trials put real burdens on many of those involved, especially certain kinds of victims. One might criticize the trial fee, then, for reducing (if only modestly) prosecutors’ power to substitute guilty pleas for trials.

If admissible evidence is clearly insufficient, prosecutors should elect not to file charges, rather than seek a conviction through plea bargaining. But cases based on marginally sufficient evidence provide a standard scenario and justification for plea bargains—they allow the parties to avoid the uncertainty of trial through the certainty of an agreement. Would the trial fee disrupt this dynamic? Would it diminish, in undesirable ways, the state’s ability to negotiate guilty pleas from the guilty when its evidence is only marginally adequate? In all likelihood, it would do so only modestly. Because the fee eliminates the risk of a trial outcome that is worse than a plea-bargain outcome, defendants who can pay it should do so precisely in these kinds of cases—those strong enough that the state will not drop the charges, but weak enough that acquittal is a real possibility. The trial fee should thus reduce the portion of such cases in which prosecutors can replace trial uncertainty with plea agreements, but that’s a desirable outcome, or at least one to which we should be indifferent as a policy matter. For one, trials purportedly have independent value that is lost in the plea process. On top of that, it is far from clear that the criminal justice system should incentivize defendants to plead guilty in cases in which they have, say, a forty or fifty percent chance of acquittal, at least when defendants make the state financially indifferent to disposition by trial or plea. Trial adjudication provides an imperfect baseline for knowing who is really guilty and deserves punishment, but it is at least as good as the baseline provided by what prosecutors conclude they “know” about guilt through their own unchecked assessments.

119. And if government pretrial disclosure and defense investigation are adequate, the defense should recognize weak cases and decline to plead guilty given the low odds of conviction at trial.
120. See discussion infra Part IV.B.
121. Prosecutors’ good faith judgments about guilt are vulnerable to a couple of distortions. One is “tunnel vision” that skews assessments of evidence. Another is the difficulty of accepting an acquittal as the right or just outcome because the state’s best evidence simply did not convince a jury. It can be
The story would be similar if the trial fee were employed to take cases to trial that prosecutors could avoid through plea agreements because, despite strong evidence, the government’s cases would be costly to present and burdensome to witnesses such as police officers and forensic analysts. Few defendants would likely find it worthwhile to put the state to its proof in such cases. First, the trial costs—depending on how closely they track the true costs of prosecution—would be higher in such cases. Second, the costs of defending such cases at trial would be higher. And by hypothesis, these are cases in which the state has strong evidence of guilt. The one scenario in which normative arguments against the trial fee gain weight is that in which the prosecutor prefers a plea bargain primarily to spare vulnerable victims or witnesses from painful obligations to testify. A defendant might pay the trial fee in hopes that a victim would refuse to testify, for example. But some victims would surely call the defendant’s bluff and testify anyway, and again this would be a case in which the state’s evidence is fairly or very strong. The trial fee here may increase the number of cases in which victims go through a painful testimonial experience, but it should have little effect on the public goal of winning convictions in such cases when evidence of guilt is strong. Moreover, the problem of victims having to testify is hardly attributable to the trial fee; it follows from the fundamental principle that the state must prove guilt in public trials where defendants have a chance to confront the witnesses against them.122

C. Plea Bargains for Government Cooperation

The most substantial concern regarding the trial fee is that it undermines the government’s use of plea bargains to induce cooperation from defendants who can provide valuable assistance to law enforcement about other offenders and criminal organizations. Indicted defendants (or arrested suspects who know they can be charged) act as informants or government witnesses in a small but important subset of prosecutions, frequently involving serious crimes. Arrested offenders who cooperate with the government are often important—sometimes essential, in the view of prosecutors—to investigating and prosecuting criminal organizations and networks.123 And the primary reason defendants agree to cooperate is that prosecutors threaten harsher charges or sentences if they don’t cooperate but significant leniency if they do. The standard practice is that exceedingly hard for attorneys in an adversary system to internalize the idea that the judgment of the jury is justice, after having invested considerable effort in the belief that the opposite outcome was the proper one. On the problem of prosecutor tunnel vision, see Susan Bandes, *Loyalty to One’s Convictions: The Prosecutor and Tunnel Vision*, 49 HOWARD L.J. 475 (2006); Jon B. Gould, et al., *Predicting Erroneous Convictions: A Social Science Approach to Miscarriages of Justice* xxi-xxii, 15–16, 84–88 (Univ. San Francisco Law Research Paper No. 201320, 2013), https://ssrn.com/abstract=2231777 [https://perma.cc/8FHE-JPA5].

122. See U.S. CONST. amend. VI.

defendants must disclose useful information, do undercover work, testify, or otherwise assist law enforcement in order to reap the benefit of a plea agreement. The main benefit of this enforcement mechanism for defendants, at least in federal court, is most often realized at the sentencing stage, where defendants receive reduced sentences once prosecutors confirm that they cooperated fully. In some cases, prosecutors can reinstate harsher charges against those whose cooperation is deemed insufficient.

At first blush, the trial fee might seem disastrous to this government strategy for gaining hard-to-obtain knowledge about conspiracies, gangs, and ongoing crimes. But in fact, adverse effects of the trial fee on cooperation practice should be negligible. First of all, law enforcement officials have tools other than plea bargains to obtain cooperation from suspects. For some cooperating suspects, prosecutors dismiss all charges or provide formal immunity. More importantly, plea agreements that include cooperation components differ from ordinary agreements in a critical way. Cooperating defendants take on two distinct commitments: to plead guilty and to provide information or services, such as testimony. In the ordinary plea agreement, defendants agree only to the first. The value of that commitment is easily priced; it is the public costs of trial. The trial fee allows defendants to “buy back” the public value of the guilty plea and still retain the government’s commitment to leniency, because they have not deprived the government of the benefit of the

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124. See FED. R. CRIM. P. 35(b) (“Upon the government’s motion made within one year of sentencing, the court may reduce a sentence if the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person.”); U.S. SENTENCING COMM’N, supra note 20 § 5K1.1; (permitting sentence discount only “[u]pon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person”); Daniel C. Richman, Cooperating Clients, 56 Ohio St. L.J. 69, 94–101 (1995) (explaining that “the government will seek to keep the payout” of sentencing leniency “as uncertain as it can” to incentivize full cooperation, in part because it is hard determine whether a cooperator has fully cooperated and revealed everything he knows).

125. It is worth noting that the broad value of insiders’ cooperation is hard to assess, even though it is clearly critical to successful enforcement in some cases. Cooperators’ assistance is not essential in every case in which prosecutors enlist it. Sometimes cooperation serves primarily to save the government time and effort obtaining information that it could get through other investigative tactics such as wiretaps, undercover agents, and surveillance. And it is clearly true that some government use of cooperators has significant public costs, notably jailhouse “snitches” who provide unreliable testimony, and harms that befall some suspects recruited to work in undercover operations. On snitches, see ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE (2009); Russell D. Covey, Abolishing Jailhouse Snitch Testimony, 49 WAKE FOREST L. REV. 1375 (2014). On danger to informants, see Sarah Stillman, The Throwaways: Police Enlist Young Offenders as Confidential Informants. But the Work is High-Risk, Largely Unregulated, and Sometimes Fatal., NEW YORKER (Sept. 3, 2012), https://www.newyorker.com/magazine/2012/09/03/the-throwaways [https://perma.cc/C294-77HJ].


127. See FED. R. CRIM. P. 11 (b)(1) (listing rights judge must ensure defendant knowingly waives). Frequently, defendants also waive other rights in plea agreements, such as the right to appeal. See Klein, supra note 116 at 83–87.
bargain. But the same is not true for the promise to assist the government in exchange for leniency. A defendant’s valuable information or testimony has no monetary equivalent; the government cannot always simply buy that assistance someplace else. Information and money are not fungible; trials and money are—or at least that is the government’s premise in plea bargaining, which the law of plea bargaining fully endorses. Perhaps more to the point, prosecutors would not negotiate cooperation agreements that defendants could simply buy their way out of, because money is not a substitute for the value they obtain in such deals. All of this simply reiterates that the trial fee should be understood for what it is: reimbursement only for the government’s trial litigation costs, not for other public benefits the government has bargained for in a plea agreement.

This does not necessarily mean that the trial fee would never be an option for defendants entering pleas agreements with cooperation obligations. But a trial fee would likely be viable only for the minority of defendants who could provide their cooperation to the government’s satisfaction before their guilty plea or trial. At that point, the plea agreement would look like an ordinary one—a trade of trial rights for leniency—to which the trial fee applies. The trial fee may well affect negotiations in cooperation contexts in other ways as well. To the extent prosecutors still prefer guilty pleas over fee-funded trials, they might push for cooperation components in more defendants’ plea deals, as a way to remove the fee option. Or, when prosecutors have several options for potential cooperating suspects inside criminal organizations, for example, they might start to weigh suspects’ relative abilities to pay trial fees in choosing with whom to cooperate. Regardless of those possibilities, the key point is that the trial fee would not undermine the government’s ability to obtain cooperation from defendants with valuable information. And all this is relevant only to the small proportion of plea deals that include cooperation agreements; especially in state justice systems, most do not.

IV. PUBLIC BENEFITS OF THE TRIAL FEE

The previous two Parts defended the trial fee by establishing that, as a policy that gives money an important role in criminal justice administration, it is banal. In allowing wealthier defendants to purchase a procedural advantage that others cannot, it joins a long list of policies well entrenched in federal constitutional law and the statutory law of every state. Its other, non-monetary

128. For an explanation of why cooperation is not finalized before a defendant’s sentencing in most cases, see Richman, supra note 124, at 94–101 (describing reasons prosecutors delay final disposition of cooperators’ cases until they have assessed performance).

129. Once a defendant has detrimentally relied on the prosecution’s promises in a proposed plea agreement—as he would if he divulged incriminating information as part of his cooperation—the government is bound by the terms of the agreement. See Cooper v. United States, 594 F.2d 12, 15–17 (4th Cir. 1979).
effects are, upon examination, largely innocuous. This Part switches from
defense to advocacy and outlines some affirmative benefits of adopting the trial
fee. Section A explains the salutary effects that trial fees would have in reducing
the most-criticized aspect of plea-bargaining practice: excessive trial penalties.
Section B elaborates other benefits of the trial fee, such as clarifying the link
between culpability and sentencing, perhaps moderating prosecutors’ plea
discounts, and generating a few more trials. This last development would provide
a bigger “shadow of trial” for plea negotiations as well as the public goods that
our legal tradition has long recognized.

A. Trial Fees Mitigate Plea Bargaining’s Most-Criticized Feature

1. Excessive Trial Penalties

The trial fee holds some promise for addressing two central criticisms of
plea bargaining: that steep plea discounts (or steep trial penalties) coerce some
defendants into pleading guilty, and that plea bargaining obscures, if not severs,
the relationship between responsibility for wrongdoing and appropriate
punishment.130

The primary mode of plea bargaining—at least in American
districts131—is that, through their charging discretion, prosecutors create a
choice for defendants between greater liability and punishment if they exercise
their right to trial, and lesser punishment if they don’t. In many prosecutions, this
differential—either a trial penalty or plea discount—is relatively modest,
although average discounts, even for specific crimes or jurisdictions, are hard to
measure; estimates differ significantly.132 But clearly in at least some serious

130. See Paul H. Robinson & Michael T. Cahill, Law Without Justice: Why Criminal

131. In England and Wales, rewards for pleading guilty nominally occur through judicial
sentencing guidelines, which authorize judges to reduce a defendant’s sentence by up to one-third from
the sentence that would be imposed after a trial conviction. See Criminal Justice Act of 2003, c. 44 § 172
(Eng, & Wales); Sentencing Council, Reduction in Sentence for a Guilty Plea: Definitive
Guideline 5, 7, 9–10 (2017); Attorney General’s Reference Nos. 14 & 15 (Tanya French & Alan
Webster), [2006] EWCA (Crim) 1335 (appeal taken from Eng.) (noting the guidelines “do no more than
provide guidance” to judges, and “[t]here may well be circumstances which justify awarding less than a
discount of one third where a plea of guilty has been made at the first opportunity”).

Prosecutors Force Drug Defendants to Plead Guilty (2013) [hereinafter HRW Report],
defendants-plead [https://perma.cc/XX3J-T6JR] (analyzing 2012 data and reporting average sentences
for federal felony drug offenders were three times longer for trial convictions than guilty pleas—16 years
versus 5.3 years); U.S. Sentencing Comm’n, Supplemental Report on Initial Sentencing
Guidelines and Policy Statements 48 (1987) (estimating sentence discounts for guilty pleas in
federal courts at thirty to forty percent); Andrew Chongseh Kim, Underestimating the Trial Penalty: An
Empirical Analysis of the Federal Trial Penalty and Critique of the Abrams Study, 84 Miss. L.J. 1195,
1243 (2015) (finding that after a trial conviction, average federal defendants receive sentences 64 percent
longer than if they had pled guilty); Jeffrey T. Ulmer et al., Trial Penalties in Federal Sentencing: Extra-
cases, the trial penalty is large, sometimes shockingly so. Bordenkircher v. Hayes is a standard example of the extreme. A Kentucky prosecutor charged Hayes with forgery that carried a sentence range of two to ten years, offered a plea deal with a five-year sentence, and warned that if Hayes refused the deal he would amend the indictment to include (in light of Hayes’s criminal record) a habitual-offender count that carried a mandatory life sentence. 133 More recently, in 2012, federal prosecutors charged Internet activist Aaron Swartz with thirteen felonies for allegedly downloading millions of academic articles without authorization. Those charges potentially exposed Swartz to a thirty-five year maximum sentence (although a shorter sentence was likely under sentencing guidelines). Prosecutors then offered Swartz at least two plea bargains pursuant to which most charges would be dropped and he would serve only three to six months in prison. 134 Those examples are neither typical nor unique. 135

Two objections to this exercise of prosecutorial discretion are familiar. First, such dramatic differentials unduly pressure—if not effectively compel—many defendants to plead guilty and avoid the risk of a dramatically worse post-trial sentence. 136 At the extreme, this can compel innocent defendants to plead guilty. 137 Short of that injustice, one can take the view that such pressure is an unfair burden on exercising fundamental rights. 138 Second, aside from its effect on defendants’ decisions, positing such starkly different sanctions for the same conduct—five years versus life for Hayes; three months versus possibly decades for Swartz—muddies the correlation between criminal punishment and what offenders deserve for their wrongdoings. In each case, one of those outcomes, as

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a normative matter, is wrong. Either Hayes’s third theft conviction merits a five-year sentence or it merits a life sentence, but no theory of criminal responsibility would say either sentence is as appropriate as the other. Translating retributivist principles and assessments of moral desert into specific sanctions is woefully imprecise. Sentencing theory lacks baselines from which to define precise incarceration terms. Some reduction in punishment (if not liability) can be a defensible response to an offender’s acceptance of responsibility, of which guilty pleas can be significant evidence, but not to that extent. A reasonable person’s assessments of deserved punishment for the same case do not vary by factors of five or ten. Prosecutors sometimes concede as much. In the Swartz prosecution, Attorney General Eric Holder rebutted allegations that prosecutors had filed “disproportionate” charges “inappropriately to try to bully someone into pleading guilty,” by arguing, in effect, that a just outcome was available to a defendant who pled guilty. Since the plea-bargain disposition that prosecutors sought was appropriate, the much harsher charged offenses and potential post-trial punishment didn’t matter. Yet that concedes that the occasional defendants who do accept the plea-bargain offer are sentenced unjustly.

139. William Stuntz made this point well. See Stuntz, supra note 136.

140. See PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY (Andrew Ashworth et al. eds., 3d ed. 2009).

141. The federal sentencing guidelines authorize an acceptance-of-responsibility reduction of two or three offense levels. See U.S. SENTENCING COMM’N, supra note 20 § 3E1.1; see also id. cmt. n.1–2 (“Conviction by trial, however, does not automatically preclude a defendant from consideration for such a reduction. In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial . . . . Entry of a plea of guilty prior to the commencement of trial . . . will constitute significant evidence of acceptance of responsibility . . . .”). Cf. Michael A. Simons, Retribution for Rats: Cooperation, Punishment, and Atonement, 56 VAND. L. REV. 1 (2003) (developing retributive arguments for sentencing discounts for cooperating offenders). In the United Kingdom, sentencing guidelines for England and Wales authorize a guilty-plea discount of up to one-third less than what the sentence would be in the wake of a trial conviction. See SENTENCING COUNCIL, supra note 131, at 5, 7, 9–10.

142. For evidence from survey responses about appropriate punishments that suggests some broad consensus for many specific cases, see PAUL H. ROBINSON, WOULD YOU CONVICT?: SEVENTEEN CASES THAT CHALLENGED THE LAW (1999).

143. Gerstein, supra note 134 (quoting Sen. John Cornyn). Occasionally it is the reverse—the bargain represents unjust leniency, although usually for more compelling reasons of necessity, such as the state’s lack of admissible proof or need for the defendant’s assistance against a worse offender.

144. See Chozick & Savage, supra note 134; Gerstein, supra note 134. For examples of federal prosecutors making similar arguments in other cases, see United States v. Kupa, 976 F. Supp. 2d 417, 432–41 (E.D.N.Y. 2013) (documenting examples).

145. Paul Hayes is one example. See Bordenkircher v. Hayes, 434 U.S. 357 (1978). For other examples of defendants facing harsher sentences for rejecting initial plea-bargain offers, see Kupa, 976 F. Supp. 2d at 436 (also recounting prosecution’s explanations for their need to maintain credibility of promises to bring harsher charges against defendants who decline plea-bargain offers).
Many prosecutors share Holder’s view that such wide differentials between plea and trial outcomes are ethical and appropriate.\textsuperscript{146} Statutory and constitutional law put no real limits on the magnitude of plea/trial differentials.\textsuperscript{147} No meaningful judicial power exists to police the fairness of prosecutors creating such choices for defendants, nor, for the most part, the fairness of the outcome.\textsuperscript{148} An important side effect of the trial fee, however, could be its influence on prosecutorial discretion in plea bargaining. The trial fee creates an incentive for prosecutors to reduce trial penalties.\textsuperscript{149}

2. The Trial Fee’s Effect on Prosecutors’ Trial Penalties

This potential effect of the trial fee follows from the difference between what the trial fee prices and what defendants want to buy with the fee. The fee is calculated to cover the state’s costs of trial adjudication. But defendants would pay the fee in order to buy the plea-bargain discount—the guarantee that the trial charges and sentence would be limited by the more favorable terms of the proffered plea bargain. The fee is insurance against the contingency that the trial outcome could be worse than the plea bargain; defendants pay the fee to

\textsuperscript{146} Many judges implicitly approve as well. For notable exceptions in which judges (powerlessly) object to prosecutors’ plea-bargaining tactics, see \textit{Kupa}, 976 F. Supp. 2d at 459 (Gleeson, J.); United States v. Young, 960 F. Supp. 2d 881, 905–08 (N.D. Iowa 2013) (Bennett, J.).

\textsuperscript{147} The only constraints are the offenses and sentences defined in criminal codes, which are expansive. See William J. Stuntz, \textit{The Pathological Politics of Criminal Law}, 100 Mich. L. Rev. 505, 519–23 (2001). Constitutional law has adopted thin notions of coercion and voluntary choice in plea bargaining. \textit{See, e.g.}, Corbitt v. New Jersey, 439 U.S. 212, 213–20, 225 (1978) (demonstrating how prosecutor use of plea discounts or trial penalties lawfully “encourage[s]” voluntary guilty pleas; it does not unlawfully “coerce” involuntary ones); North Carolina v. Alford, 400 U.S. 25, 31 (1970) (“[T]he plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.”). Various tactics to encourage guilty pleas have also been held not to make a defendant’s decision involuntary. \textit{See, e.g.}, Miles v. Dorsey, 61 F.3d 1459, 1468–69 (10th Cir. 1995) (holding plea voluntary despite threats to charge defendant’s parents); United States v. Pollard, 959 F.2d 1011, 1020–21 (D.C. Cir. 1992) (holding plea to life sentence voluntary despite threats to charge defendant’s wife).

\textsuperscript{148} Judges have limited power to ensure just outcomes in plea bargaining. They can reject a proposed plea bargain, but effectively only if they conclude that it is too lenient in light of what the prosecutor initially charged. \textit{See, e.g.}, State v. Conger, 797 N.W.2d 341, 353–54 (Wis. 2010) (rejecting a proposed plea agreement as inconsistent with public interest and describing factors judges may consider in rejecting such proposals). They have little real power if they deem the prosecutor’s initial charging decision to be too lenient or too harsh. At best, they might have modest persuasive influence over how prosecutors exercise their discretion. See Nancy J. King & Ronald F. Wright, \textit{The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Plea Negotiations}, 95 Tex. L. Rev. 325, 356 (2016) (describing examples of state judges informally influencing prosecutorial discretion during pretrial stage). For examples of judges frustrated by their lack of power to prevent what they view as unjust uses of prosecutorial discretion, see \textit{Kupa}, 976 F. Supp. 2d at 456; United States v. Angelos, 345 F. Supp. 2d 1227, 1261 (D. Utah 2004).

\textsuperscript{149} This is so, assuming prosecutors continue to prefer the certainty of a guilty plea to the relative uncertainty of going to trial. What prosecutors “maximize” remains a topic of debate, but surely high on the list are convictions in the cases they choose to prosecute. At the same time, individual prosecutors may prefer, for various personal reasons (like fun, challenge, or career advancement, for instance), to litigate more trials. \textit{See generally} Richard T. Boylan, \textit{What Do Prosecutors Maximize? Evidence from the Careers of U.S. Attorneys}, 7 Am. L. Econ. Rev. 379 (2005); Sanford C. Gordon & Gregory A. Huber, \textit{The Political Economy of Prosecution}, 5 Ann. Rev. L. & Soc. Sci. 135 (2009).
eliminate the risk of a harsher trial disposition. What that risk is worth to them, in monetary terms, may be very different from the trial fee amount.

This should affect prosecutors’ decisions about the specific terms of plea-bargain offers and the charges they would press at trial. More specifically, prosecutors should be tempted to reduce the value of the plea discount—which is what defendants really purchase—to something less than the value of the trial fee. After all, prosecutors can control the value of the guilty-plea discount, but they cannot manipulate the public costs of trial and thus the amount of the trial fee. By offering more modest plea discounts, prosecutors would discourage some defendants from paying the trial fee; some would conclude they would not get sufficient value for the price. This would be a welcome incentive for prosecutorial discretion where that discretion matters most: in extreme cases with huge plea/trial differentials. The fee discourages prosecutors from dictating large differences between plea-bargain and trial-conviction outcomes as in *Bordenkircher* and *Swartz*, because those choices would give defendants more reason to pay the fee. In those scenarios, fee-paying defendants would get more for their money. One can imagine some defendants working harder to raise trial-fee funds from family members or other sources in those cases, especially if they had more-than-negligible odds of some success at trial. (Private-sector initiatives might even evolve to help fund trial-fee payments as they have for other criminal justice costs.)

In sum, the trial fee discourages the most extreme, least justifiable plea-bargaining tactics, while it also preserves the justice system’s capacity to provide a modest reward for guilty pleas—a reward that much more closely

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150. To be clear, prosecutors can manipulate trial costs somewhat but not much, depending on how those costs are calculated and how closely the trial fee is based on actual costs. On how prosecution costs can be calculated, see *supra* Part I.

151. The disincentive to design severe trial penalties could gain force from some defendants’ willingness to pay a trial fee. A trial fee increases in value as the trial penalty becomes more severe. The more severe the trial penalty, the more defendants will want to pay the trial fee. Bail provides a model for how this might play out among low-income defendants. One can imagine a private lending market emerging for trial fees, or nonprofit financiers on the model of community bail funds or groups that assist ex-offenders in paying their outstanding fees. See, e.g., *The Fountain Fund*, https://www.fountainfund.org [https://perma.cc/4RFU-9C5V]. Another possibility is the model of defendants without personal assets who are able to recruit resources from friends and family to make bail. Surely, however, defendants will be less successful at turning to others for a trial fee. Bail entails only a modest cost (a bondman’s fee) or none at all (for a property bond) if the defendant returns to court, while the benefit (pretrial liberty) is certain. The trial fee, on the other hand, is a substantial cost for the uncertain benefit of going to trial. On bail generally and community bail funds specifically, see *JUSTICE POLICY INSTITUTE, supra* note 49; *Simonson, supra* note 49; *Alysia Santo, Bail Reformers Aren’t Waiting for Bail Reform: They’re Using Charity to Set Poor Defendants Free, THE MARSHALL PROJECT* (Aug. 23, 2016), https://www.themarshallproject.org/2016/08/23/bail-reformers-aren-t-waiting-for-bail-reform [https://perma.cc/SA9B-M3C5].

152. The trial fee may create a modest practical limit on plea discounts at the low-end as well. If prosecutors offer only slightly better terms for guilty pleas than defendants would get after a trial conviction (or no discount at all), fewer defendants will elect to plead guilty, because a trial conviction would hardly be worse than a guilty-plea outcome *even without paying the fee*. But it bears note that modest plea discounts still prompt many defendants to plead guilty (especially when the government’s
approximates appropriate sentencing responses for timely acceptance of responsibility.\textsuperscript{153} Faced with a plea deal for a five-year sentence, Paul Hayes should be sorely tempted to pay a trial fee to eliminate the risk of a life sentence. On the other hand, a defendant like Hayes who faced the risk of a post-trial sentence of seven or eight years—roughly one-third harsher than the plea offer—might conclude that paying a substantial trial fee isn’t worth it.

\textit{B. Other Trial-Fee Benefits: Sentencing Clarity, Bargaining Baselines, and Maybe More Trials}

On top of this laudable effect and in part because of it, the trial fee’s effects on prosecutorial discretion should also help to reduce the ambiguity about whether the plea bargain or the trial outcome is the appropriate, deserved disposition for an offender. From the outside, one cannot tell whether the first is a discount from the deserved sentence, or the latter is a penalty, on top of the deserved sentence, for insisting on trial. But if the trial fee enables some defendants to take the harsher outcome off the table, prosecutors might be clearer that (as Holder argued for the \textit{Swartz} case) the plea offer is usually the just disposition. That is surely the disposition prosecutors want left after defendants buy out the harsher trial disposition.\textsuperscript{154} At least incrementally, this could help clarify that a plea-bargain sentence normally is appropriate given an offender’s moral desert.

In addition, second-order effects could extend these benefits to defendants whom prosecutors recognize have no capacity to pay a trial fee. If only a small portion of defendants paid the fee, that change could have a broader effect on prosecutorial charging and bargaining norms. The moderate plea-bargain discounts that become the prosecutorial norm in the shadow of the trial fee may lead to prosecutors offering equivalent discounts in all similar cases. The trial fee, in other words, could change the baseline for plea-bargain tactics more generally, if only because many prosecutors would be uncomfortable treating similar defendants differently based on apparent differences in ability to pay.

Finally, the trial fee may have other public benefits. If the trial fee increases the number of trials, those additional trials give prosecutors, defense attorneys, and judges more information about the kinds of evidence that suffice for a jury conviction. In doing so, it clarifies the “the shadow of trial” in which parties plea

\textsuperscript{153} See U.S. SENTENCING COMM’N, supra note 20 § 3E1.1 (defining sentence discount for acceptance of responsibility). For plea-discount policy in England and Wales, see SENTENCING COUNCIL, supra note 131, at 5, 7, 9–10 (guilty-plea discount up to one-third less than post-trial sentence).

\textsuperscript{154} To the degree that judges have discretion over sentencing—and in giving sentence indications during plea negotiations—the fee should have a similarly clarifying effect on their decisions.
bargain, and could prompt adjustments in prosecutorial discretion. This redounds to the benefit even of defendants who lack the means to pay trial fees, both because prosecutors should strive to keep their exercises of discretion consistent across cases regardless of defendants’ ability to pay trial fees, and because better information for the defense bar is available to fee-paying and non-fee-paying defendants alike. Additionally, any increase in jury trials brings with it the traditional public benefits attributed to the jury, including democratic supervision of criminal justice administration, citizen education regarding the justice system, and lay decision-making about evidence and the meaning of qualitative legal terms such as “reasonableness,” “recklessness,” and “imminence.” And finally, it ought to count as a public benefit that the trial fee would make the role that money plays in criminal justice administration even more apparent, and politically salient, than it is now in light of existing fee policies. At best, that might facilitate a broader reevaluation of the wide-ranging ways that legal burdens and entitlements are tied to individual ability to pay.

CONCLUSION

More than one reader of earlier drafts wondered whether this Article was intended as satire. The uncertainty is telling. Look closely at the role of money in criminal justice, in light of equal justice principles, and the system seems nearly to parody itself. Money permeates criminal procedure. As a result, concerns about money permeate criminal procedure—who has it, what it buys, whether there is too little or too much of it, and whether its influence is corrupting, benign, or salutary. Laws intervene at some points to mitigate the worst effects poverty could have in criminal justice, notably through provision of defense counsel and limits on incarceration for failures to pay. At the same time, law plainly allows, facilitates, and even safeguards means by which private wealth can affect the most important components of the criminal process and the substantive outcomes it produces. Put differently, the law unabashedly permits real disadvantages in criminal justice administration to follow from poverty. At

155. See Grunwald, supra note 80, at 782–85 (discussing “the shadow of trial” concept developed by scholars of civil and criminal law). Note that the new cases that go to trial due to the trial fee are likely to be unrepresentative in as much as they will involve much wealthier-than-average defendants with money. How that will affect the “shadow” they create for plea bargaining is uncertain, but one possibility is that these cases will be better litigated because of defendants’ ability to fund their own defense. There is some virtue in having the trial-case baseline set by cases that are disproportionately well-litigated.

several points in the process, defendants with means can choose between paying money and going to jail. At the same time, several bodies of law, including those around plea bargaining and asset forfeiture, give public officials wide leeway in managing criminal justice expenditures and targeting revenue sources. In combination, these bodies of law that mediate the role of money in criminal process help to define relationships between individuals and the state, and to specify priorities among criminal procedure’s competing normative values. They define monetary values for criminal procedure entitlements and at the same time shape the public values and principles that animate criminal justice administration. They dictate what money can buy, what the state must pay for, and how the state gets the money to do so.

Monetary interests are inevitable in criminal justice, and so are laws to govern them. But US criminal procedure amplifies and embeds those interests more thoroughly, and sometimes more eagerly, than is necessary. In this setting, permitting some defendants to pay a fee for a criminal trial free of the costs the state otherwise would impose would, at a minimum, have a clarifying effect. It would be an open concession of the instrumental concerns on which plea bargaining, our dominant mode of adjudication, is built. At the same time, it would amplify the premises and principles regarding money’s role in criminal process that shape much of criminal procedure law and policy.