In the last three decades, plea bargaining and other mechanisms to impose criminal convictions without trial have spread around the world.\(^1\) In previous work, I have argued that the common thread among these mechanisms is that they have brought an administratization of criminal convictions in two regards.\(^2\) First, the adoption of these mechanisms has implied a shift of authority and de facto power to decide who gets convicted and for which crime, from judges and juries to prosecutors, the police, and other administrative agencies. Second, prosecutors, the police, and other administrative agencies make these decisions in proceedings and settings that are typically not open and transparent to the public, in which the defendant waives the rights traditionally associated with criminal adjudication, and in which there is no trial to test the elements of proof that are the basis for her/his/their conviction. In this sense, the proceedings have an administrative character or flavor.

The spread of plea bargaining and equivalent mechanisms has thus implied the spread of an administrative model of criminal adjudication around the world. In this chapter, I would like to explore two questions concerning this phenomenon.

First, I would like to argue that one central feature of plea bargaining and other trial-avoiding conviction mechanisms is that they are second-best criminal adjudication. Most legal systems around the world still assume that the trial is the default and best way to adjudicate criminal cases, and thus understand plea bargaining and equivalent mechanisms as a second-best alternative. In addition, for reasons that I discuss, these mechanisms are indeed second-best criminal adjudication because, everything else being equal, they present more challenges than trials to advance most of the goals of the criminal process, such as identifying those who commit criminal offenses so that the criminal law can be appropriately applied to them, while preventing wrongful convictions, treating defendants fairly and equally, using criminal law only as a last resort, and enabling the penal system to be transparent and render accounts to society.

\(^\ast\) Thank you to Mike McConville, Luke Marsh, and Mariano Sicardi for their comments and edits on this chapter.


\(^2\) Langer (2004) (n 1), Langer (2021) (n 1) and Langer (2023) (n 1).
Second, these mechanisms to reach criminal convictions without trial require a rethinking of criminal procedure and its safeguards and of how the criminal process may advance its goals. The argument here is that criminal procedure thought, regulations, and safeguards are still built upon the assumption that trials are the main form of criminal adjudication, that the back-and-forth of criminal litigation in individual cases is the main form to advance the goals of the criminal process, and that deficiencies or errors in the process may be cured on appeal. My argument here is that since these assumptions do not apply any more to most criminal cases in many legal systems due to the spread of trial-avoiding conviction mechanisms, we should rethink criminal procedure and its safeguards. In this regard, I argue that 1) criminal procedure codes and regulations should assume that trial-avoiding conviction mechanisms are the rule, not the exception; 2) the prosecutor should be reframed as a de facto adjudicator of the criminal case; 3) legal regulations, institutions, and individual actors should be skeptical regarding the reliability and fairness of the defendant’s consent as a way to legitimate plea bargaining and other trial-avoiding conviction mechanisms; 4) legal regulations, institutions, and individual actors should counterbalance the potential perverse incentives that plea bargaining and other trial-avoiding conviction mechanisms generate; and 5) due process should be thought of not only as an individual right, but as a systemic feature of the criminal process.

II. Trial-Avoiding Conviction Mechanisms as Second-Best Criminal Adjudication

About forty years ago, American commentators argued that plea bargaining was unique to or at least very distinctive of U.S. law and practice. Though there were commentators who rightly challenged this characterization at the time, a recent survey of sixty jurisdictions included in this Handbook has showed that only a minority of jurisdictions around the world had ways to reach criminal convictions without a trial by the late 1970s and even during the 1980s. In the last three decades, this situation has changed substantially. Out of sixty studied jurisdictions, ninety five percent have now at least one way to reach a criminal conviction without a trial. Over two thirds of them have adopted these mechanisms for the first time in the last three decades.

These mechanisms enable the penal system to reach criminal convictions without a trial or with very abbreviated and formal trials. These convictions are deemed acceptable because defendants must formally consent to the application of one of these mechanisms to their cases and, typically, must also admit their guilt. Since these mechanisms require the defendant’s consent, they have been considered part of a global trend towards criminal adjudication by consent.

5 Langer (2021) (n 1) and Langer (2023) (n 1).
However, plea bargaining and other trial avoiding conviction mechanisms are not any kind of justice by consent. Unlike diversion, mediation, conciliation, reparation, and others, that generally do not end in a criminal conviction, plea bargaining and related mechanisms typically do. Since they are a way to reach a criminal conviction, these mechanisms are used to adjudicate criminal cases in a way that publicly communicates that a person has committed a criminal offense, that enables the application of formal punishment (imprisonment, fines, death penalty, etc.), that allows for the imposition of forfeiture of property connected to the crime and collateral consequences, and that creates a criminal record.\(^7\) Also, the role of consent should not be exaggerated since, as I will discuss in more detail later, the practice of these mechanisms often conditions or directly impairs the defendant’s intelligence—i.e., understanding of the consequences—and voluntariness of her/his/their consent and admission of guilt. In other words, these mechanisms are often *criminal adjudication by consent* only in form, not in substance.

The spread of these mechanisms to reach criminal convictions without a trial have often brought with them negotiated justice since the defense and other actors of the criminal process—such as prosecutors, judges, and alleged crime victims—can discuss and agree upon factual allegations, the charges, and the sentence against the defendant.\(^8\) In that sense, the spread of these mechanisms is partially a spread of *criminal adjudication by negotiation* around the world. However, it is important to notice that a considerable number of these mechanisms—such as penal orders in many jurisdictions and many English and Welsh and Hongkongers’ guilty pleas where sentencing discounts are established by statute—do not include these negotiations.\(^9\)

The practice of these mechanisms also often includes the use of coercion to improperly force defendants to formally consent to their application to their cases.\(^10\) In that regard, their global spread has partially meant the spreading of *criminal adjudication by coercion*. However, it is also important to notice that unless we equate coercion with any use of force, including legitimate use of force, or with any choice between two undesirable alternatives—e.g., pleading guilty or exposing oneself to a higher but still fair sentence after trial—the use of these mechanisms does not necessarily entail coercive threats such as a disproportionate punishment for those defendants that opt to go to trial.\(^11\)

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\(^7\) Langer (2021) (n 1) and Langer (2023) (n 1).
\(^9\) See, e.g., Samantha Joy Cheesman, ‘A socio-legal analysis of the impact of the EctHR caselaw on the development of an abbreviated trial system in Hungary’ in this Handbook (pointing out that the practice of one of the two trial-avoiding conviction mechanisms in Hungary does not include negotiations); Langer (2021) (n 1, 394), and Langer (2023) (n 1).
\(^11\) Langer (n 10); Langer (2021) (n 1); Langer (2023) (n 1); and Máximo Langer and Máximo Sozzo, ‘Plea Bargaining in Latin America’, in this Handbook (discussing the issue and citing empirical studies on Latin American jurisdictions).
I have argued elsewhere that the common thread of these mechanisms around the world is that they have brought an ‘administratization’ of criminal convictions. In other words, these mechanisms bring with them an administratized criminal adjudication. Criminal convictions have been administratized because these mechanisms shift authority and de facto power from judges and juries to prosecutors, the police, and other administrative agencies, in deciding who gets convicted, for which crime, and even for which sentence. \(^{12}\) Criminal convictions have also been administratized because prosecutors, the police, and other administrative agencies make these decisions in proceedings that are typically not public and transparent to the wider community, where defendants waive the rights typically associated with the criminal process—such as the right against compulsory self-incrimination, to proof beyond a reasonable doubt, to confront the witnesses against them, to compulsory process, etc.—and where there is no trial to test the elements of proof that are the basis for their criminal conviction. \(^{13}\) Various chapters of this Handbook document the power that prosecutors have through these trial-avoiding conviction mechanisms to adjudicate or otherwise dispose of criminal cases. \(^{14}\)

This account of administratized criminal adjudication acknowledges that prosecutors, the police, and other administrative agencies and the proceedings they use are not alike across jurisdictions. For instance, in adversary systems, prosecutors tend to be conceived of as parties who are adversaries to the defense, while in inquisitorial systems prosecutors tend to be conceived of as impartial magistrates who have to look for both inculpatory and exculpatory elements of proof and whose role is providing a formal check and counterbalance to the authority and power of investigating judges. \(^{15}\) Similarly, in adversarial systems the police tend to be conceived of as an assistant of the prosecution whose investigation mainly feeds the prosecution case, while in inquisitorial systems the police tend to be conceived of as an impartial official whose investigation

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\(^{12}\) I say “even” for which sentence because the authority and de facto power of prosecutors to set the sentence of a case depends on the sentencing regulations of each jurisdiction. For instance, in those jurisdictions in which the judge may not impose a sentence higher than the one requested by the prosecutor in plea agreements or equivalent mechanisms, the prosecutor sets the highest possible sentence with her/his/sentencing request. In jurisdictions that use sentencing guidelines, the prosecutor may be able to determine with her/his/sentencing decision in an even more precise manner which sentence applies to the defendant. But there are other jurisdictions where prosecutors do not propose a sentence and judges have the authority over it, or where the sentence proposed by the prosecutor does not set an upper or lower sentence limit for the judge.

\(^{13}\) Langer (2021) (n 1) and Langer (2023) (n 1).

\(^{14}\) See, e.g., Salim Farrar, ‘Negotiated Criminal Justice in the Islamic Law of Modern Muslim States: The Rise of the Political Plea Bargaining’, in this Handbook (referring to powers that where once in the judiciary have now shifted to public prosecutors); Guyun (n 10) (referring to the expanded role of the procuratorate vis-à-vis judges); Brian D. Johnson & Sean Houlihan, ‘Criminological Approaches to Plea Bargaining’, Chapter 25 of this Handbook (referring to prosecutors as the dominant actors in the plea process); Langer & Sozzo (n 11) (explaining how plea bargaining has given more power to the prosecutor to de facto adjudicate and sentence criminal cases); Matt Thomason, ‘Bargaining the Rules of Evidence’, in this Handbook (referring to reforms that significantly altered the bargaining power of the parties and increased the bargaining power of prosecutors over the defense).

is part of the unitary investigation to which all procedural actors—prosecutors, judges, defendants, defense attorneys, victim’s attorneys, and others—contribute to and participate in.\textsuperscript{16}

Prosecutor and police offices also vary in their institutional affiliations. For instance, in some countries, the office of the prosecutor is part of the ministry or department of justice within the executive branch; in others, part of the judiciary; still in others, an extra branch of government different from the legislative, executive and judicial branches.\textsuperscript{17} Prosecutors also vary in the way they are appointed with different degrees of participation by the executive branch, the legislature, prosecutor and judicial councils, and the citizenship in the appointment process of rank-and-file prosecutors and the head of the prosecutor’s office.\textsuperscript{18}

Offices of the prosecutor and police departments also vary in their size. For instance, in some countries like France, there is a single office of the prosecutor and a few police forces in the whole country.\textsuperscript{19} While in federal systems, like Argentina, each federal unit may have their own office of the prosecutor and police forces. In other jurisdictions, most offices of the prosecutor and police departments are local institutions and can be found in the thousands as in the United States.\textsuperscript{20}

Offices of the prosecutor and police departments also vary in many other regards such as the qualifications they require of their personnel; the level of training their personnel receive; their level of professionalism; their degree of individual and institutional autonomy and independence, and their relationship with the political system; their resources; what functions other than criminal process functions they play; the gender, racial, ethnic, class, sexual orientation, and political composition of their members; how democratic or authoritarian, accountable or unaccountable to the public, rule-bound or arbitrary, unbribable or bribable they are; with which type of criminality they deal; in which type of social, economic and political context they operate; and more.\textsuperscript{21}

\begin{footnotesize}


\footnotesub{18} ibid.


\end{footnotesize}
The administratization of criminal adjudication is thus a phenomenon that presents a common core but that is not cut equally across jurisdictions since it interacts with varying features of prosecutors, police offices, and other administrative agencies, their broader context, and the work they do.

However, despite these differences, prosecutors and the police do present several features in common. Everywhere the police have a role in preventing and investigating crime and are typically the first responders regarding street crime. Everywhere prosecutors have a role in the criminal process as a material or formal opponent to the defense and are not considered the formal adjudicators of criminal cases since that task is reserved for judges and jurors. Prosecutors are also often mediating figures between, among other organizational and conceptual divides, the police and the courts, and the goals of law enforcement and impartial investigation and adjudication.\(^{22}\)

The common feature I want to highlight in this chapter, because it is helpful to further elaborate on the phenomenon of administratization of criminal convictions, is that prosecutors and police officers can be understood as what Michael Lipsky termed “street-level bureaucrats” since 1) they are public workers who interact directly with citizens and have degrees of discretion in the allocation of public sanctions and 2) their jobs often cannot be performed according to the highest standards of the law and their professional roles because of the real or perceived assumption that they often “lacked the time, information, or other resources necessary to respond properly to the individual case.”\(^{23}\) Consequently, they manage their jobs “by developing routines of practice and psychologically simplifying their clientele and environment in ways that strongly influence the outcomes of their efforts.”\(^{24}\)

Let’s briefly unpack these ideas in relation to police officers and prosecutors, and criminal adjudication.\(^{25}\)

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\(^{22}\) On the mediating role of prosecutors, see David Alan Sklansky, ‘Unpacking the Relationship between Prosecutors and Democracy in the United States’, in Langer and Sklansky (n 17).


\(^{24}\) Ibid at xii.

Regarding discretion, police officers around the world have de facto if not de jure broad discretion to decide which conducts and subjects they surveil; whether to arrest, summon, or let given subjects go; how to build a case against a given person; and even for which offense they refer a case to prosecutors and judges.\textsuperscript{26} As for prosecutors, even if different legal systems formally give them different degrees of discretion, they often have de jure or de facto discretion to decide which cases to charge and press forward, for which charges, and which sentence they recommend for the case. Trial-avoiding conviction mechanisms give police officers and prosecutors more authority and power because these cases are not decided by judges or jurors after a trial. Consequently, the decisions that police officers and prosecutors make on these cases have more influence on how the cases get decided and are often final since the trial never comes as an instance in which the elements of proof collected by the police and prosecutors are tested. For instance, if someone is arrested by a police officer and then charged by a prosecutor for loitering or theft, these decisions typically have more influence on how the case gets decided and are often final if the case is disposed through a trial-avoiding conviction mechanism like plea bargaining because judges and juries will have a smaller, if any, role in adjudicating the case than if the case goes to trial.

Regarding the second dimension that Lipsky identifies for street-bureaucrats, the highest standard of the law to adjudicate criminal cases in most legal systems around the world is a public and oral trial—in many jurisdictions by a jury\textsuperscript{27}—in which defendants may have their “day in court” and exercise a range of criminal procedure rights such as the right to confront the witnesses against them, the right to cross-examination, the right to compulsory process, the right against compulsory self-incrimination, and the right not to be convicted without proof beyond a reasonable doubt. Human rights instruments, constitutions, and criminal procedure codes express this understanding of the oral and public trial as the ideal way to adjudicate criminal cases.\textsuperscript{28} This trial sets the highest standard to adjudicate criminal cases because, for reasons I discuss in the next section, everything else being equal, it is the best known way to enforce criminal law, while reducing the risk of wrongful convictions, applying the law equally, allowing for the exercise of constitutional rights by defendants (and victims in many legal systems), and adjudicating the case in a way that is not corrupt and is transparent and that makes the criminal process accountable to the public.

In contrast, plea bargaining and other trial-avoiding conviction mechanisms do not meet or meet to a much lower degree these highest standards of the law. Human rights instruments and most constitutions do not even mention them.\textsuperscript{29} For reasons I discuss in detail in the next section, they are also second-best criminal adjudication because these mechanisms are less equipped than trials to advance most of the goals of the criminal process. Plea bargaining and equivalent

\textsuperscript{28} See, e.g., Universal Declaration of Human Rights, Art. 10; International Covenant on Civil and Political Rights, Art. 14; African Charter on Human and Peoples’ Rights, Art. 7; American Convention on Human Rights, Art. 8; ASEAN Human Rights Declaration, Art. 20; European Convention on Human Rights, Art. 6; Constitution of the United States, Art. III and Amendment VI.
\textsuperscript{29} For analysis of the caselaw of the European Court of Human Rights on trial-avoiding conviction mechanisms despite the silence of the European Convention of Human Rights about them, see, e.g., Lorena Bachmaier, ‘\textit{Quo vadis, negotiated justice? A success story or a coercion model?}, in this Handbook.
mechanisms are also second-best criminal adjudication because the roles that judges, prosecutors, and defense attorneys play in them are different than in trials and do not meet the ideals of these professions either. Instead of adjudicating the case, the role of the judge is often limited to checking whether the defendant voluntarily consents to the application of the mechanism to their case and whether a few other requirements such as “factual basis” are met. Instead of presenting the case or participating in the presentation of the case to adjudicators, the prosecutors often de facto adjudicate the case and set its sentence with their charging decision and their sentencing request, often without even being aware or acknowledging that they play such roles. As for the role of defense attorneys in these mechanisms, it is not only or mainly testing the case of the state but often collaborating and coordinating with prosecutors and judges in the resolution of the case. And in many cases, all or some of the professional actors involved are negotiators of the case—not a role that it is associated with accurate and fair adjudication.

Like other street-level bureaucrats and the real or apparent obstacles they face to meet the highest standards of their professions, legislatures, prosecutors, judges, and others have often argued that the use of plea bargaining and related mechanisms is necessary because the penal system does not have sufficient resources to bring to trial every case that may appropriately end up producing a criminal conviction.

Also, like other street-level bureaucrats, prosecutors and police officers receive a set of public policies from the legislature—through criminal law and criminal procedure codes and other statutes—and convert them in concrete policies in concrete cases. In this context, since they often must process cases en masse, prosecutors and police officers are pulled in two opposite directions. On the one hand, they have the professional duty to do justice in each individual case they deal with, as required by the ideals of their professions. On the other hand, they receive pressures and have incentives to uniformize cases and to provide standardized responses to standardized features of the cases. The use of mechanisms to impose convictions without trial is thus pulled in these opposite directions. In theory, despite their limitations as adjudicatory processes, prosecutors could use them to deliver individualized justice. For instance, prosecutors may dismiss cases when there is not enough evidence of a defendant’s guilt or when justice and other considerations would counsel against criminal prosecution; investigate the case and adjust the charges to do justice to it; and ask for a sentence that fits the crime. In practice, prosecutors often use these mechanisms to give standardized responses without paying sufficient attention to the individual characteristics of the case, leading to punishment without guilt, prosecuting cases that should not be prosecuted even


31 For arguments in this direction in different national contexts, see, e.g., Michael Conklin, ‘Defences for Plea Bargaining’, in this Handbook (on the United States); Patrick S. Günsberg, ‘The Increasing Reach of Negotiated Justice in Nordic Countries’, in this Handbook (on Finland and Sweden); Mrinal Satish, ‘Plea Bargaining in India’ (2023) in this Handbook (citing the reduction of the “back breaking burden of court cases” as one of the justifications for the introduction of plea bargaining in India); Thomason (n 14) (on managerial pressures in England and Wales).

32 See, e.g., Conklin (n 31).
if the defendant may be guilty, charging more or differently than what should be charged, and
asking for sentences that are not proportionate to the crime.33

III. The Challenges for Trial-Avoiding Conviction Mechanisms to Advance the Goals of
the Criminal Process and the Limits of the Traditional Safeguards of Criminal
Procedure

The previous section has explained that plea bargaining and other trial-avoiding conviction
mechanisms may be used to do justice in individual cases, even if these mechanisms are not the
preferred adjudication mechanisms according to constitutions, human rights instruments, and other
repositories of criminal adjudication and legal professional ideals, and even if prosecutors and
other professional actors of the penal system often receive pressures and have incentives to
uniformize cases and to provide standardized responses to standardized features of the cases. In
this section, I explain that these mechanisms are also second-best criminal adjudication because
they face challenges to advance most of the goals of the criminal process and because the
traditional safeguards of criminal procedure—such as defendants’ rights and the back-and-forth of
litigation—do not work or only partially work in this context.

To analyze this issue, it is necessary to articulate the goals that the criminal process must
advance to do justice in individual cases and be legitimate more generally. The most basic goal of
criminal adjudication is 1) identifying those who committed criminal offenses to apply criminal
law to individual cases, while preventing wrongful convictions. But the criminal process also has
other goals that it is supposed to advance, including 2) treating defendants fairly; 3) treating
defendants equally; 4) using criminal law only as a last resort; 5) making an efficient and non-
corrupt use of its limited public resources; and 6) enabling the penal system to be transparent and
render accounts to society.

The main justification for the use of trial avoiding mechanisms is that they enable a more
efficient use of its limited resources by reducing the time that it takes to adjudicate criminal cases,
thus saving human and economic resources that can be spent on other issues, including other cases.
And there is no question that these mechanisms have the capacity to advance this goal. But
efficiency is not a first-order goal. In other words, efficiency is not a goal in itself but an
instrumental goal to advance other goals.34 For instance, in the case of the criminal process,
efficiency is an instrumental goal to save resources that can then be spent in identifying the guilty
while minimizing the risk of criminal convictions in other cases. And regarding all the other goals
identified above, everything else being equal, trials are better situated than trial-avoiding
conviction mechanisms to advance them.

33 See, e.g., Malcolm Feeley, The Process is the Punishment: Handling Cases in a Lower Criminal Court (Russell
Sage Foundation, 1979); Issa Kohler-Hausmann, Misdemeanorland: Criminal Courts and Social Control in an Age
of Broken Windows Policing (Princeton University Press, 2018); Langer (n 10); Alexandra Natapoff, Punishment
Without Crime: How Our Massive Misdemeanor System Traps the Innocent and Makes America More Unequal (Basic
34 For further discussion on this issue in the context of England and Wales where a heavy focus on efficiency has
been used to legitimate major procedural reforms, see Luke Marsh, ‘Leveson’s narrow pursuit of justice: Efficiency
Trials may test in adversarial, inquisitorial, or other fashion the police and pretrial investigation, and determine whether the defendant is guilty and for which offense. There are multiple reasons why, everything else being equal, trials can make these determinations more reliably than their alternatives. First, the role of judges and jurors includes adjudicating criminal cases in an impartial fashion. Judges and jurors typically do not participate in police and pretrial investigation, which gives them psychological and often institutional distance from police and pretrial investigation, enabling them to be unbiased towards the case and reducing the chance that psychological biases like tunnel vision affect their decision-making process. Second, at trial, the elements of proof gathered during police and pretrial investigation have to be presented before these adjudicators—as required by the right to confrontation and the civil law principle of immediacy—giving them first-hand contact with these elements, and thus enabling them to test the previous investigation. Third, defendants at trial are often assisted by a defense attorney whose professional role includes testing and challenging the case against the defendant through litigation. Fourth, at trial, the defendant may exercise other procedural rights besides the right to counsel that may also contribute to avoid wrongful convictions and to be treated fairly and equally, such as his right to remain silent, to confront the witnesses against him, to cross-examine or otherwise pose questions to them, to compulsory process, and not to be convicted without proof beyond a reasonable doubt. Fifth, since trials are oral hearings held in public and are thus more transparent than their alternatives and trial verdicts are often appealed, trials reduce the room for arbitrary, discriminatory, and corrupt decisions, and for sloppy work, and encourage adjudicators, prosecutors, and defense attorney to correctly apply existing law and to meet the litigation ideals of their legally and ethically stated roles.

None of these safeguards that are conducive to avoiding wrongful convictions, to treating defendants fairly and equally, and to making the penal system transparent and accountable to society operate in trial-avoiding conviction mechanisms. First, juries do not participate in the adjudication of these cases. Professional judges do. But their role typically consists of checking that the defendant understands the consequences and voluntarily consents to the application of the trial-avoiding conviction mechanism to her/his/their case and admits her/his/their guilt, and that a few other requirements are met, rather than adjudicating the case on its merits—and they often fail to exercise even this task. Second, judges do not have first-hand contact with the evidence that is the basis for conviction without trial since limited, if any, live evidence is presented before them. In addition, in trial-avoiding conviction mechanisms, professional judges have incentives to agree with the adjudication of the case through one of these mechanisms since this enables them to

37 See, e.g., Lorena Bachmaier Winter and Stephen C. Thaman (eds), A Comparative View of the Right to Counsel and the Protection of Attorney-Client Communications (Springer, 2020). This remains true, notwithstanding the deficiencies, individual or systemic, that may occur in the delivery of defender-systems in observed instances: Mike McConville et al, Standing Accused (1994: OUP).
38 On the epistemological function of criminal procedure rights, see Luigi Ferrajoli, Diritto e ragione. Teoria del garantismo penale (Editori Laterza, 1989).
39 See, e.g., Mauricio Duce, ‘Plea bargaining and the risk of wrongful convictions: a comparative overview’ in this Handbook; Feeley (n 33).
manage and reduce their work, thus generating the risk that judges be biased towards conviction and towards the offenses charged. In fact, in plea bargaining and equivalent mechanisms, judges are often members—together with prosecutors and defense attorneys—of a courtroom workgroup that rather than contesting and checking each other’s work, often works in a collaborative fashion towards the adjudication of cases. 40 Third, and for the same reasons, defense attorneys in trial-avoiding conviction mechanism proceedings also receive pressures and have incentives not to test and challenge the case against the defendant, and rather work cooperatively with prosecutors and judges to reach an agreement about the case. 41 Fourth, defendants do not exercise most of their rights since they must waive them to have their case disposed through these mechanisms. Fifth, since most of the proceedings in trial-avoiding conviction mechanisms take place behind closed doors or through other close communications, they are less transparent to society and render lesser accounts to the public. 42 This limited transparency and the fact that convictions reached through trial-avoiding mechanisms are rarely appealed also leaves more room for arbitrary, discriminatory, and corrupt decisions, and for sloppy work. 43 Relatedly, trial-avoiding conviction mechanisms often include negotiations that may encompass agreements to disregard existing law—e.g., agreements on charges in systems that only allow for sentencing bargaining, or agreements reached on certain crimes or at a stage of the proceedings that are off limits for agreements under existing law. 44

Trials are also a better way to respect the ultima ratio or last resort principle—under which criminal law should be used only when there are no other less burdensome ways to advance the goals of criminal law such as addressing harmful behavior— 45 for logistical reasons. Getting to the trial stage and holding a trial require spending more human and economic resources than using plea bargaining or equivalent mechanisms to reach a criminal conviction and punishment. This means that everything else being equal, the availability of plea bargaining and equivalent mechanisms make it more likely that the criminal process will address a case with a criminal conviction and punishment than with an alternative to them in violation of the last resort principle. 46


44 See, e.g., Langer & Sozzo (n 11) (describing examples of these phenomena in Latin America); Thomason (n 14) (showing how rules of evidence are bypassed by English barristers).


46 On the relationship between plea bargaining and equivalent mechanisms and higher punitiveness, see, e.g., Albert W. Alschuler, ‘Plea Bargaining and Mass Incarceration’ (2021) 76 New York University Annual Survey of American
The defendant’s guilty plea—including here the consent to the application of a trial-avoiding conviction mechanism to her/his/their case and her/his/their admission of guilt—is supposed to make up for most of these shortcomings of plea bargaining and equivalent mechanisms in advancing most of the goals of the criminal process. The reasoning behind it is that if this consent is based on an understanding of its consequences and is voluntary, it is unlikely that innocent defendants would consent to be convicted through one of these mechanisms, thus achieving the goal of convicting the guilty while reducing the probability of wrongful convictions. In addition, if the defendant waives his due process rights with an understanding of the consequences of such a waiver and voluntarily does so, he would be treated fairly and equally.

But for multiple reasons the defendant’s consent is often insufficient to truly address the shortcomings of these trial-avoiding conviction mechanisms to advance most of the goals of the criminal process.

First, it is important to notice, that consent does not address the limitations just discussed regarding transparency and accountability, the last resort principle, and even the risk of corruption.

Second, many decisions to consent and admit responsibility/plead guilty by defendants are not truly intelligent because defendants do not understand their options and their consequences due to their lack of familiarity with legal language and proceedings, to their background (in terms of their young age, national origin and local language skills, intellectual capacity, and so on), or to non-existing or inadequate legal counsel.47

Third, many decisions to consent and admit responsibility/plead guilty by defendants are not truly voluntary since the prosecutor improperly threatens the defendant with harsher charges than would be appropriate for their case, with a disproportional sentence after trial, or with improperly keeping the defendant in pretrial detention unless they consent/plead guilty, etc.48

Fourth, even when the prosecutor does not improperly threaten the defendant, defendants often receive “offers they cannot refuse.”49 For instance, as chapters of this Handbook have discussed, research has shown that if defendants are (even properly) held in pretrial detention and are offered to be released in exchange for consenting to the application of the trial-avoiding conviction mechanism to their case, even innocent defendants may find this offer irresistible and would

Law 205; Astrid Liliana Sánchez Mejía, ‘Mujeres, delitos de drogas, preacuerdos y aceptaciones de cargo en Colombia’ in Máximo Langer and Máximo Sozzo (eds), Justicia penal y mecanismos de condena sin juicio. Estudios sobre América Latina (Marcial Pons, forthcoming 2023); Angela Zorro, ‘Una Evaluación Experimental de los Acuerdos Penales en Colombia’ in Máximo Langer and Máximo Sozzo (eds), Justicia penal y mecanismos de condena sin juicio. Estudios sobre América Latina (Marcial Pons, forthcoming 2023). The situation may be different when companies or their executive are charged. See Alex Palmer and Nic Ryder, ‘Somebody’s got to be summonsed, said Mother.” Deferred Prosecutions and Justice – a whodunit?, in this Handbook (highlighting the opposite trend regarding companies and deferred prosecution agreements).

47 See, e.g., Allison Redlich and Alicia Summers, ‘Self-reported false confessions and guilty pleas among offenders with mental illness’ (2009) 34 Law & Human Behavior 79; Allison Redlich and Reveka Shteynberg, ‘To plead or not to plead: a comparison of juvenile and adult true and false plea decisions’ (2016) 40 Law and Human Behavior 611.
48 Langer (n 11).
49 Duce (n 39).
consent/plead guilty.50 If this consent is not conditioned by an improper threat by prosecutors or
others, this consent is in a sense voluntary.51 But the point is that the “diagnosticity” of this consent
to tell guilty and innocent apart and avoid wrongful convictions is low.52 It is thus not surprising
that there has been a substantial number of wrongful convictions in cases adjudicated through trial-
avoiding conviction mechanisms.53

IV. Plea Bargaining and the Need to Revise Criminal Procedure Thought

How can penal systems that reach a substantial number of criminal convictions through trial-
avoiding conviction mechanisms advance the goals of criminal procedure of effectively enforcing
existing law in a way that minimizes the risk of wrongful convictions, is fair and equal, uses
criminal law as a last resort, is not corrupt, and is transparent and renders accounts to society? This
is a complex issue that should be discussed within the context of each specific jurisdiction since
proposals that make sense or may work in one jurisdiction may not work in others.

My goal in this section is making two points.

The first point is showing that many of the regulations and reforms that have often been
proposed and adopted to address the shortcomings of plea bargaining and other trial-avoiding
conviction mechanisms are important, but they often fall short because they share two assumptions
of traditional criminal procedure thought that do not work in the context of trial-avoiding
conviction mechanisms. The first assumption is that the oral and public trial is still the default
adjudication mechanism that is available to any defendant who chooses it. This is often an
unrealistic assumption for the same reasons that it is often unrealistic to assume that the
defendant’s consent is truly intelligent and voluntary, as I discussed in the previous section. The
second assumption is that any shortcomings of criminal procedure may be cured through the back-
and-forth of litigation in individual cases, and that any deficiencies or errors in the process may be
cured on appeal. In adversarial systems, this would include the back-and-forth between the
prosecutor and the defense attorney. In inquisitorial systems, it would include the back-and-forth
between the investigating court, and the checks that the prosecutor and the defense attorney would
exercise over it. However, in either system this is an unrealistic assumption because there is no
such litigation in most cases that are adjudicated through trial-avoiding conviction mechanisms.
In addition, in most cases adjudicated through plea bargaining and other trial-avoiding conviction
mechanisms, the parties have no incentives or no room to appeal.

If this diagnosis is correct, the second point I would like to make in this section is that we need
to move beyond traditional criminal procedure thought and its assumptions to address the

50 See, e.g., Carissa Byrne Hessic, Punishment without trial: why plea bargaining is a bad deal (Abrams, 2021), at 61
and at 61-84; Asher Flynn and Arie Freiberg, Plea negotiations: pragmatic justice in an imperfect world (Palgrave
Macmillan, 2018), at 30; Rebecca K. Helm & Bethany Growns, ‘Metholodogical and analytical strategies in guilty
plea research: Combatting myths and informing evidence-based procedure’, in this Handbook. See also Lucian E.
51 Langer (n 11).
52 Helm & Growns (n 50).
53 Duce (n 39).
shortcomings that often prevent trial-avoiding conviction mechanisms from doing justice in individual cases and from advancing the goals of the criminal process. I will flesh out this point by making various concrete proposals.

A. Proposals and Requirements under Traditional Criminal Procedure Thought Are Still Important

In the previous section, I have discussed the challenges of trial-avoiding conviction mechanisms to advance the goals of the criminal process. To address these problems, traditional criminal procedure approaches have suggested a range of measures to try to ensure the intelligence—i.e., understanding of the consequences—and voluntariness of the defendant’s consent/guilty plea such as: not allowing prosecutors to threaten defendants with improper consequences if they do not consent/plead guilty;\(^{54}\) giving defendants adequate legal representation;\(^{55}\) giving the defense access to the elements of proof in the hands of the prosecution;\(^{56}\) revising the process that determines whether a defendant is granted bail or subject to pretrial detention;\(^{57}\) giving more certainty to defendants about the consequences of their guilty plea so that their decisions are informed;\(^{58}\) allowing courts to be involved in plea negotiations;\(^{59}\) and making judges take the plea colloquy or equivalent seriously, and check defendants understand their options and that their guilty plea is voluntary.\(^{60}\)

\(^{54}\) See, e.g., American Bar Association, Criminal Justice Standards for the Prosecution Function (Fourth Edition, 2017), Standard 3-4.3 Minimum Requirements for Filing and Maintaining Criminal Charges, Standard 3-4.4 Discretion in Filing, Declining, Maintaining, and Dismissing Criminal Charges, Standard 3.5.6 Conduct of Negotiated Disposition Discussions, Standard 3-5.7 Establishing and Fulfilling Conditions of Negotiated Dispositions, Standard 3-5.8 Waiver of Rights as Condition of Disposition Agreements, https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/ (accessed February 27, 2023). See also Asaala (n 8) (stating that in Kenya and South Africa the existence of this type of threats is likely to render a plea involuntary and thus invalid).


\(^{56}\) Ed Johnston, ‘The Tentacles of State Case Management: ‘Cooperative’ lawyering and ‘efficient’ disclosure in the context of plea determination’ in this Handbook; Langer and Sozzo (n 11) (describing this requirement in virtually all Latin American jurisdictions); Thaman (n 8).

\(^{57}\) Berdejó (n 43).

\(^{58}\) Asaala (n 8) (explaining that since the judge has the authority to go above the sentence agreed upon by the parties, defendants may not make an informed decision).

\(^{59}\) Asaala (n 8) (arguing that courts must be involved in negotiations between the parties).

\(^{60}\) See, e.g., ABA Standards of Criminal Justice: Pleas of Guilty (3d ed., 1999), Standard 14-1.4 Defendant to be advised, Standard 14-1.5 Determining voluntariness of plea, Standard 14-1.6, https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standa rds_guiltypleas_blk/ (accessed February 27, 2023). See also Cheesman (n 9) (praising this requirement under Hungarian law); Salim Farrar (n 13) (the likelihood of coerced bargains is mitigated by the absolute requirement, irrespective of the type of crime, that a confession (al-iqrar) be voluntary and that it be repeated before a judge, recorded, witnessed and signed by the clerk).
These measures are important since they may contribute to make the defendant’s consent more informed and voluntary in individual cases. These measures also set ideals that legal actors should strive for as part of their professional roles in trial-avoiding conviction mechanisms. After all, many prosecutors, judges, and defense attorney around the world try to do their jobs well, just because it is part of their professional identity and the right thing to do.

But these types of measures also present substantial limitations because they assume that prosecutors, judges, and defense attorneys mostly abide by their professional roles in ways they often do not in the context of plea bargaining and other trial-avoiding conviction mechanisms. This is the case because in the setting of plea bargaining and other trial-avoiding conviction mechanisms, all professional actors have incentives to use them since they take less of their time than trials, reduce their caseloads, and, in the case of prosecutors, ensure the defendant gets convicted. In addition, the back-and-forth of litigation often does not work to enforce existing rules and professional standards in this context because there is often no litigation.

For instance, in most legal systems, judges already have the responsibility of checking the intelligence and voluntariness of the defendant’s guilty plea or equivalent and that there is some factual basis for a criminal conviction. However, empirical studies suggest that judges often do not meet these responsibilities. This is not surprising. Since judges have incentives in disposing of criminal cases through guilty pleas and equivalent, the judge of the individual case may not check these intelligence, voluntariness, and factual basis requirements adequately. And if she does not, neither the prosecutor, nor the defense attorney may have incentives to call the judge on it since they also often have their own incentives and interests aligned with those of the judge to dispose of the case through these mechanisms.

Another example is the doctrine of ineffective assistance of counsel that the Supreme Court of the United States has applied in the guilty-plea and plea-bargaining context when defense attorneys do not meet their professional standards. Important as it is as an aspiration, this doctrine has limited potential in practice since the prosecutor and the judge of the case have limited incentives and interests of their own in calling an ineffective defense attorney out. Thus, unless a different attorney is later brought into the case—something that does not happen in most pled cases—the actual impact of this requirement is also likely to be limited in avoiding the risk of wrongful convictions, unfair and unequal treatment, and not being able to advance other goals of the criminal process.

Something similar happens with demands that prosecutors do not overcharge, do not threaten the defendant with disproportionate punishment if they go to trial, and do not use pretrial detention as leverage to make a proposal that many criminal defendants—including innocent ones—would be unable to resist. These demands are important because they establish a set of professional

62 See, e.g., Duce (n 39); Feeley (n 33); McConville and Mirsky, Jury Trials and Plea Bargaining (2005: Hart Publishing).
expectations for the role of prosecutors. But they are unlikely per se to have substantial effect in practice if the defense attorney and the judge are working in coordination and cooperation with prosecutors as part of the same courtroom group.

My point is not that these types of requirements and expectations for plea bargaining and other trial-avoiding conviction mechanisms are not important. Rather, the point is that the potential of these requirements to advance the goals of the criminal process and respect criminal procedure principles is limited if we keep thinking that their enforcement will take place during the back-and-forth of criminal procedure litigation in individual cases, or by professional actors fulfilling their ethical and professional obligations just because their professional standards say so.

B. Criminal Procedure Codes and Regulations Should Assume That Trial-Avoiding Conviction Mechanisms Are the Rule, Not the Exception

In many jurisdictions, statistics indicate that most convictions are reached through trial-avoiding conviction mechanisms instead of through trial.\(^64\) But criminal procedure codes and regulations still tend to assume that adjudication through oral and public trial is the rule and that adjudication through trial-avoiding conviction mechanism is the exception. For instance, Latin American criminal procedure codes tend to regulate in their first few hundred articles the “regular” or “ordinary” criminal process that assumes an oral and public trial, and then spend only between one to a few articles to regulate the “procedimiento abreviado”—equivalent to plea bargaining in most Latin American jurisdictions—towards the end, among other “special proceedings.”\(^65\)

This traditional way of thinking that assumes that the trial is still the main adjudication mechanism presents at least two risks.

First, there is the risk that there are gaps in the regulation of plea bargaining because it is either an afterthought or policymakers assume that any gaps can be remedied by the defendant choosing to go to trial. For instance, the Supreme Court of the United States has conceived of the due process right to the disclosure of evidence from the prosecution to the defense as a trial right. Consequently, it has considered that the defendant does not have a right to access impeachment evidence before pleading guilty.\(^66\) This could make sense in a system in which trial is the default way of adjudication. But if it is not and fairness requires that the defense gets access to the elements of proof gathered by public authorities before the case gets adjudicated, the due process right to disclosure should be conceived of not as a trial, but as an adjudication right, and regulations should address how this right operates in the plea bargaining context. For the same reasons, indigent defendants should have a right to appointed counsel in trial-avoiding conviction mechanisms and should not be able to easily waive it.

\(^64\) Langer (2021) (n 1) and Langer (2023) (n 1).

\(^65\) See, e.g., Criminal Procedure Code of Argentina (Law 23.984) (regulating the “juicio abreviado” in one article out of 539 articles in the code); Criminal Procedure Code of Bolivia (regulating the “procedimiento abreviado” in two articles out of 442 articles in the code); National Criminal Procedure Code of Mexico (regulating “procedimiento abreviado” in eight out of 409 articles in the code).

The second risk of assuming that the trial is still the default adjudication mechanism is that policymakers may not realize that there are potential tradeoffs between the strengthening of the trial and the strengthening of plea bargaining adjudication proceedings. For instance, traditionally, civil law jurisdictions have included a written dossier that documents all procedural activity in a formal manner. Critics have pointed out that such a dossier weakens the trial as an adjudication mechanism since elements of proof gathered in a non-adversarial fashion in the pretrial phase influence and bias trial adjudicators before the defendant may exercise her/his/their right to confrontation, cross-examination, compulsory process, and to effective defense at trial. Consequently, several recent reforms in Latin America have eliminated the written dossier and deformedalized the pretrial phase to strengthen adjudication at the oral and public trial. However, adjudication under “procedimiento abreviado” is arguably more reliable in a system with a written dossier since this dossier may provide more reliable information than a deformedalized pretrial phase to prosecutors, judges, and the defense about how strong the case against the defendant is and which charges are warranted. In other words, the paradoxical effect of strengthening adjudication at trial through the elimination of the written dossier may have been the weakening of adjudication through “procedimiento abreviado” in various Latin American jurisdictions. My point here is not that the written dossier should be kept or should be eliminated. These types of decision are context specific and individual jurisdictions’ sovereign decisions. My point is rather that the drafters of criminal procedure codes and regulations should not assume that the trial is the regular way to adjudicate criminal cases, and plea bargaining or equivalent the exception. In many jurisdictions it is the other way around, and the regulation of adjudication should take this fact as a starting point to properly assess the advantages and disadvantages of various possible criminal procedure regulations.

C. Reframing the Prosecutor as Adjudicator of the Case

Traditional criminal procedure thought has assumed that the prosecutor is predominantly a party of the criminal process that is in a dispute with the defense in common law jurisdictions or predominantly an impartial magistrate that has the role of checking on the power of judges as adjudicators in civil law jurisdictions. But this chapter has argued that the spreading of plea bargaining and equivalent mechanisms has implied the adoption of an administrative model of criminal adjudication in which the prosecutor is the de facto adjudicator of the case.

Reframing the prosecutor this way has many important implications for the criminal process. For instance, if prosecutors are de facto adjudicators, they should strive to be impartial and evenhanded rather than partisan towards the case, against the adversarial ideal of the criminal process. Before adjudicating the case through a guilty plea, they should also be persuaded that the elements of proof that the police gathered are a reliable basis for a criminal conviction. Adjudicating prosecutors should also use a high standard of proof—as it is required in some Latin American

67 See, e.g., Summers (n 36).
69 Langer (n 10) (exploring these implications in the U.S. context).
jurisdictions\textsuperscript{70}—before making a charging decision and/or accepting a guilty plea that implies a conviction for a criminal defendant.

If prosecutors are de facto adjudicators of criminal cases, they may also have to publicly explain why they think that a criminal conviction is a better way to deal with a case than other alternatives such as dismissing or diverting the case and thus implementing the last resort principle. If prosecutors decide someone should be convicted, they may also have to publicly articulate why they think that the defendant is guilty and why the sentence requested is fair to the case. In addition, if the prosecutor is de facto adjudicator, before consenting to the application of the trial-avoiding conviction mechanism to her/his/their case, the defendant should have the right to access the elements of proof that the prosecutor has available so that the defendant may exercise her/his/their right to test and discuss them—i.e., her/his/their constitutional and human right to confrontation, to cross-examination, and to compulsory process. The defendant should also have a right to a hearing with the prosecutor to make representations to the prosecutor about the case.

Once again, my point here is not to suggest that jurisdictions should adopt any specific regulations since there are different ways to implement this idea. Rather, my point is that the fact that prosecutors and the police have become de facto adjudicators of many criminal cases should be explicitly or implicitly acknowledged and reflected in the regulation of criminal procedure and of these institutions and actors.

D. Skepticism Towards the Reliability and Fairness of the Defendant’s Consent

Traditional criminal procedure thought has assumed that voluntary guilty pleas and equivalent entered with an understanding of their consequences are a legitimate way to adjudicate criminal cases since innocent defendants will otherwise choose to go to trial. But for the reasons already discussed earlier in this chapter and in different chapters of this Handbook, the defendant’s consent to have her/his/their case adjudicated through a trial-avoiding conviction mechanism is often an unreliable mechanism for distinguishing between guilt and innocence, and to provide a fair disposition of criminal cases.\textsuperscript{71} Regulations and caselaw should thus require prosecutors, judges, and defense attorneys to be skeptical about the ability of the defendant’s consent to make adjudication through trial-avoiding conviction mechanisms reliable and fair.

This skepticism could have many implications in the regulation and use of these mechanisms. For instance, it may mean that the prosecutor, the judge, and even the defense attorney must have the duty to seriously corroborate the defendant’s guilt in ways independent of the defendant’s consent and admission of guilt. It also means that there must be some process owed to defendants besides asking them whether they consent and plead guilty or otherwise admit their guilt.

In some cases, such as those in which a defendant is released from pretrial detention if s/he pleads guilty or equivalent, regulations should acknowledge that the defendant’s consent and admission of guilt may not be at all reliable for the adjudication of the case through a trial-avoiding conviction mechanism. In these situations, prosecutors and judges should (be required to) consider

\textsuperscript{70} Langer and Sozzo (n 11) (describing these jurisdictions).

\textsuperscript{71} See, e.g., Helm & Growns (n 50).
whether the defendant may be released before s/he decides on whether to consent. And if the defendant is not released before making such a decision, the prosecutor and the judge should (be required to) have sufficient elements of proof that persuade them that the defendant is guilty of the crime charged and should also (be required to) give the defense an opportunity to argue the case.

Prosecutors and judges should (be required to) keep similar considerations and requirements in mind in the case of vulnerable defendants—such as young defendants and defendants with mental health issues—and in other cases where the alternatives presented to defendants created strong incentives to consent—such as cases in which there is a very substantial sentencing differential between the potential sentence after trial and the trial-avoiding conviction mechanism sentence.

But the risk of wrongful or unfair convictions due to the unreliability of the defendant’s consent exists in every criminal case.

E. Counterbalancing Plea Bargaining Incentives Systems

As already discussed, traditional criminal procedure assumes that the goals of the criminal process are advanced with the back-and-forth of litigation, while plea bargaining and similar mechanisms create incentives for prosecutors and defense attorneys to leave aside the ethos and practice of back-and-forth litigation and engage instead in a collaborative work with the court. These incentives may undermine the goals of the criminal process by encouraging prosecutors, defense attorneys, and judges to disregard their professional roles and responsibilities while adjudicating criminal cases. For instance, prosecutors have incentives to charge more than they should, defense attorneys to put their own personal or institutional interest ahead of the interest of the defendant, and judges not to truly check the legitimacy of adjudication through a trial-avoiding conviction mechanism. Penal policymakers should thus consider ways to counterbalance perverse incentives.

There are at least five sets of tools that can be used in this regard.

First, reducing the discretion of prosecutors, defense attorneys, and judges to prevent them from deviating from their professional roles and responsibilities. For instance, many jurisdictions establish a rule of mandatory prosecution—often combined with an opportunity principle—or establish a fixed discount for defendants that plead guilty or equivalent. These proposals have been made in the past to regulate plea bargaining. But my point is that a way to think about such regulations is that they are a way to counterbalance perverse plea bargaining’s incentives by reducing the prosecutor’s and judge’s discretion at charging or sentencing so that they cannot create a setting for defendants that would leave them without choice but to plead guilty.

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72 Berdejó (n 43).
73 See, e.g., Bachmaier (n 29) (referring to the principle of mandatory prosecution); Langer and Sozzo (n 11) (describing examples of fixed discounts in Latin America); Marsh (n 30) (on England and Wales), all in this Handbook.
Second, jurisdictions can create check lists of the duties that each of these actors have in plea proceedings that go beyond what the law specifies. This is not only a way to reduce discretion but to remind prosecutors, judges, and defense attorneys of their specific duties in plea proceedings, and to hold them accountable if they do not fulfill these duties.

For instance, beyond what it is established by the Criminal Integral Organic Code, the Constitutional Court of Ecuador has held that in abbreviated procedures the prosecutor: 1) before proposing the application of an abbreviated procedure must have sufficient elements of proof that if there were introduced at trial could result in a criminal conviction; 2) must be transparent with the defendant and/or the defense attorney about the information available in the dossier and ensure their access to it; 3) must abstain from putting direct or indirect pressure on the defendant to get her/his/their consent to the application of the abbreviated procedure to her/his/their case and about the content of the agreement; 4) must respect the points negotiated with the defense during the judicial control of the abbreviated procedure; and 5) must not use abbreviated procedures in cases in which there is a low likelihood that the case would be bound over to trial or end in a trial conviction.75

Judges, including appeal judges, 1) must exercise the judicial control of the abbreviated procedure requirements and of the defendant’s rights in an impartial, independent, diligent, and active fashion; 2) must focus in particular in examining whether the defendant’s consent was informed, free, and voluntary; 3) must listen directly from the defendant and must not limit judicial control to the formulation of leading questions; 4) must take all necessary measures to ensure that the defendant understands the nature and consequences of the abbreviated procedure in the concrete case; 5) must give enough time and means to defense attorneys to prepare their defense; 6) must assess whether the negotiation and agreement on the abbreviated procedure are based on elements of proof that tend to prove the defendant’s commission of the criminal offense; and 7) must ask the prosecutor and the defense attorney whether the requirements established in this decision by the Constitutional Court were fulfilled in the case.76

Public defenders and private defense attorneys 1) must keep an effective and transparent communication with their clients; 2) must abstain from undermining the will of the defendant in the abbreviated procedure; 3) must abstain from deceiving or putting pressure on the defendant to consent to the abbreviated procedure; 4) must explain in a clear and satisfactory way to the defendant the consequences of the abbreviated procedure and ensure that the defendant understands them; and 5) must assess the elements of proof in the dossier and, based on that information, advise the defendant about the advantages or disadvantages of the abbreviated procedure.77

In addition to these details, the Constitutional Court of Ecuador also ordered that the decision be broadly distributed among judges; that it be published for three months in institutional websites; that the decision be included in the capacitation programs of the judicial function school, the prosecutor school, and the defense school; that these schools get back to the Constitutional Court

75 Constitutional Court of Ecuador, Cases No. 189-19-JH and accumulated/21, December 8, 2021, para. 80.8.
76 Constitutional Court of Ecuador, Cases No. 189-19-JH and accumulated/21, December 8, 2021, para. 80.9.
77 Constitutional Court of Ecuador, Cases No. 189-19-JH and accumulated/21, December 8, 2021, para. 80.10.
with an education program and a schedule about how they were going to fulfill these duties; and that the judicial council distributed the decision by email.\footnote{Constitutional Court of Ecuador, Cases No. 189-19-JH and accumulated/21, December 8, 2021, para. 81.1. and 81.2. On guilty pleas and legal education more generally, see Vicky Kemp and Cerys Gibson, ‘Implications for Legal Education and Training in a Guilty Plea Environment’, in this Handbook.}

To a large extent, this list of professional duties overlaps with traditional criminal procedure requirements for guilty pleas and plea agreements whose limits I explain below. I am also not suggesting that these lists of duties for prosecutors, judges, and defense attorneys exhaust the duties they should have. But this decision of the Ecuadorian Constitutional Court is in a way innovative because it specifies the duties of professional actors in more detail than the Criminal Integral Organic Code, and because it established a plan for the diffusion and teaching of these specific duties. The Constitutional Court thus created a counterbalance to some of the perverse incentives that the abbreviate procedure creates for Ecuadorian professional actors.

Third, professional and institutional norms that advance the goals of the criminal process should be created, strengthened, and reinforced. For instance, Lorena Bachmaier argues in this volume that the norm that prosecutors are impartial officials is one of the reasons why trial-avoiding conviction mechanisms have not become coercive in Western Europe.\footnote{Bachmaier (n 29).} This is an example of how a professional norm may counterbalance the incentives that prosecutors may have to engage in coercive practices. And it goes beyond traditional criminal procedure thought because I am referring here to norms that are rooted, ingrained, and formally and informally enforced by concrete institutions, instead of simply being stated in criminal procedure codes or professional standards.

Also, once again, my point here is not that all jurisdictions should adopt any norms in particular since each sovereign jurisdiction should analyze the issue in its specific context. The point is that the creation, reinforcement, and strengthening of these types of norms is another way to enable that second-best adjudication through an administrative model may still sufficiently advance the goals of the criminal process and the penal system.

Fourth, jurisdictions could use material incentives to counterbalance perverse plea bargaining incentives to prosecutors, defense attorneys, and judges. For instance, they can hold them accountable through bar, administrative, or criminal proceedings if they seriously deviate from their duties and responsibility. Jurisdictions could also promote or give other benefits to prosecutors, defense attorneys, and judges that follow best practices in this regard. And they should not base their promotions on how many cases a given professional got adjudicated.

Finally, the institutions of the penal system can counteract the incentives that individual prosecutors, defense attorneys, and judges have in individual cases. For instance, a recent empirical study of Santiago, Chile reveals how the public defender office implemented a new institutional strategy to bring more minor offense cases to trial since witnesses often do not show up and the trial ends in an acquittal. This institutional policy has likely contributed to a substantial reduction
in the use of trial-avoiding conviction mechanisms and of convictions more generally in that jurisdiction.80

F. Systemic Due Process in Criminal Procedure

Historically, due process in criminal procedure has been thought of as minimum standards of justice that are due to each individual defendant that should be enforced through litigation in individual cases.81 This is still an important safeguard that should stay in place. But as we have discussed, when convictions are reached without trial with the defendant’s consent, litigation in individual cases is often an ineffective way to identify and address due process violations, and consent is a poor substitute for it. In addition, there may be due process violations that are not possible to even identify in individual cases because their detection requires looking at all cases or a set of cases within the system—e.g., whether a sentence is disproportionate or whether the law is applied equally across cases. Conceptualizing due process as not only an individual right that is exercised in individual criminal proceedings, but also as a systemic feature that the penal system as such must meet is another way to ensure that the use of trial-avoiding conviction mechanisms and other ways to dispose and adjudicate criminal cases advance the goals of the criminal process.82

Systemic due process presents two dimensions. First, as a feature of the penal system, it requires that the criminal process advances in the aggregate the goals of efficiently enforcing existing law, while minimizing the risk of wrongful convictions, treating people fairly and equally, using criminal punishment only as a last resort, not being corrupt, and being transparent and rendering accounts to society. No system of justice is perfect and all of them have a margin of error regarding each goal of the criminal process. (What is the tolerable margin of error is something that the relevant constituencies of the penal system must discuss and determine in individual jurisdictions.) However, the system as a whole must advance these goals in most cases.

Second, when the criminal process does not meet these goals, systemic due process requires not only providing a remedy to the individual cases in which errors or problems are identified, but also addressing the systemic causes of that error so that the criminal process as a whole manages to advance its goals in the future.

80 Javier Wilenmann and Juna Pablo Aristegui, ‘El delito de baja entidad y la estandarización de los acuerdos en el sistema penal chileno’ in Máximo Langer and Máximo Sozzo (n 46).
81 For a studied account explaining how a legal process may be judged to be good as a process, and the role of the judiciary in this regard, see Mike McConville and Luke Marsh, ‘Judicial Oversight in Criminal Justice and Procedural Legality’ (2021) 32(3) King’s Law Journal 345-380.
To address these two dimensions, systemic due process may require that penal systems adopt management techniques to assess whether proceedings and verdicts reached through trial-avoiding conviction mechanisms meet adjudication quality standards. This requires defining what is an error and how many errors are admissible, establishing systems of continuous evaluation—that may include statistical reporting systems with detailed and enough information and studies on specific issues—, having independent staff that generate these data and determine the causes of errors, and putting in place mechanisms that correct errors and the causes of errors once identified. Relatedly, given that verdicts that are the result of trial-avoiding conviction mechanisms are usually not appealed by the parties since they have reached an agreement, jurisdictions could have a system of random appeals, under which a set of the cases adjudicated is automatically reviewed by an appeal court or another body.

For instance, if prosecutors’ charging decisions are affected by implicit biases, the penal system should be able to identify such a problem and address it. If in the use of trial-avoiding conviction mechanisms a given system uses pretrial detention in situations in which it should not, thus creating inappropriate incentives for defendants to plead guilty, the system should have monitoring techniques in place to identify the problem and its causes, and to remedy it not only in past individual cases, but also for the future. Similarly, if in a given system judges set disproportionate punishments to defendants that choose to go to trial, systemic due process requires that the issue and its causes be identified and remedied.

Discussing specific management techniques and procedural regulations to identify errors and their causes and processes to remedy them is beyond the scope of this chapter. But various offices of the prosecution, public defender offices, criminal courts, and other governmental entities around the world have adopted this type of techniques, and units and processes to identify and remedy errors—e.g., conviction integrity units, monitoring charging decisions to check whether the principle of equal protection before the law is respected, etc. Individual jurisdictions should study these experiences, discuss them with their constituencies, and consider adopting techniques, units, and processes in a way that adjusts to their local realities. Adding a systemic due process lens in the penal system to the discussion of these experiences and this issue would be a way to signal that the adoption of these techniques, units, and processes is not just a choice but a requirement for penal systems that have administratized their criminal convictions and other adjudicative decisions.

V. Conclusion

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83 For similar points on the administrative side, see Mashaw, ‘Management Side of Due Process’ (n 82, 791 et seq.).
84 ibid, at 791 et seq. (discussing these issues in the context of administrative proceedings). On the need to improve data collection on plea bargaining more generally, see Johnson and Houlihan (n 14).
85 See, e.g., Berdejó (n 43).
86 See, e.g., William H. Simon, ‘The Organization of Prosecutorial Discretion’ in Langer and Sklansky (n 17); and Angela J. Davis, ‘Prosecutors, Democracy, and Race’ in Langer and Sklansky (n 17). For an insightful analysis of the adoption or non-adoption of these techniques and processes by criminal administrative agencies in the United States, see David Ames, Cassandra Handan-Nader, Daniel E. Ho & David Marcus, ‘Due Process and Mass Adjudication: Crisis and Reform’ (2020) 72 Stanford Law Review 1.
This chapter has argued that the spread of plea bargaining and other trial-avoiding adjudication mechanisms throughout the world has implied the spread of an administrative model of criminal adjudication. In these mechanisms, the prosecutor, the police, and other administrative agencies, often decide who gets convicted, for which offense, and even for which sentence, in proceedings that are not public and transparent and in which defendants may not exercise most of their criminal procedure rights, and in which the elements of proof are rarely tested.

This administrative model is second-best criminal adjudication. Most constitutions, human rights treaties, and other repositories of the ideals of criminal adjudication and the legal profession do not even mention these mechanisms and consider that oral and public trials where defendants may fully exercise their rights and in which evidence can be tested are still the best way to adjudicate criminal cases. This administrative model is also second-best criminal adjudication because except regarding the goal of efficiency, it is less equipped than oral and public trials to advance the criminal process goals of identifying the guilty while reducing the chances of wrongful conviction, treating defendants fairly and equally, using criminal law as a last resort, preventing corruption, and being transparent and rendering accounts to society. Given the real or perceived caseload pressures on many prosecutors around the world, there is also the risk that these mechanisms are used to provide standardized responses to uniformized criminal cases.

Despite their shortcomings, it is still possible that prosecutors deliver individualized justice and advance the criminal process goals by using these mechanisms. But advancing such goals requires acknowledging the limits of the assumptions of traditional criminal procedure thought. In the context of trial-avoiding adjudication mechanisms, there is often no back-and-forth litigation that can advance the goals of the criminal process, and the defendant’s consent is a poor substitute for such litigation. This chapter has thus proposed various ways to move beyond traditional criminal procedure thought in this context such as considering that trial-avoiding adjudication mechanisms are the rule not the exception when drafting criminal procedure codes and discussing individual doctrines and cases; reframing the prosecutor as an adjudicator of the criminal case; showing default skepticism towards the defendant’s consent’s as a means to produce reliable and fair plea outcomes; counterbalancing perverse incentives that accompany plea bargaining for the professional actors of the criminal process; and reconceptualizing due process in criminal procedure as not only an individual right, but a systemic requirement of the criminal process and the penal system.