issue would tend to increase the expected value of the plaintiff's claim, and this might (though it need not) lead him to spend more money on his case rather than less; the defendant, however, might spend less.[1] Even if the cost of trial were lower under strict liability, the effect would be, by narrowing the gap between the costs of litigation and those of settlement, to make litigation relatively more attractive than under the negligence standard, resulting in a larger fraction of claims tried.[2]

Thus far, the number of accidents has been assumed unchanged by a substitution of strict liability for negligence. The assumption may be unwarranted. A rule of strict liability is more definite than one of negligence and hence is likely to be administered with fewer errors. Legal error both reduces the efficiency of the liability system directly and, by increasing the number of accidents, increases the number of claims and hence the administrative expense of a liability system.

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§21.7 Plea Bargaining, the Reform of Criminal Procedure, and the Futility Thesis

The counterpart in criminal procedure to settlement negotiations in civil procedure, plea bargaining is criticized both as denying the defendant's right to the procedural safeguards of a trial and as leading to reduced sentences. Neither criticism is persuasive to an economist. If a settlement did not make both parties to a criminal case better off than if they went to trial, one or the other would invoke his right to a trial; hence the criminal defendant is compensated for giving up the procedural safeguards to which he would be entitled in a trial. Given a fixed prosecutorial budget, average sentences will probably be heavier rather than lighter if plea bargaining is allowed, because the prosecutor can use the money saved in plea bargains (since as with civil settlements a plea-bargained disposition is cheaper than a trial) to build a stronger case when bargaining fails—and knowing this defendants will give better terms in bargaining. Well, but doesn't this imply that plea bargaining is worse for criminal defendants as a whole? And if so can the practice really be thought Pareto superior to forbidding it? What if the assumption that the prosecutor's budget is fixed is relaxed? Finally, what assumption is being made about the litigation resources available to criminal defendants?

§21.6 1. The determinants of litigation expenditures are complex. See §21.8 *infra*.

2. Although settlement costs may also be lower if prediction of the outcome of litigation is easier (why?), a proportionately equal reduction in both litigation and settlement costs would result in a reduction in the absolute difference between them.

means, in part at least, by their paying clients) rather than by the accused criminals themselves. Although the average sentence should not be affected by whether it is negotiated or imposed after trial, the variance in sentencing would increase since a trial is likely to result either in acquittal or in a stiffer sentence than a bargained sentence (why?). This would inject additional risk into the expected cost of punishment.

The length of time it takes to bring federal criminal defendants to trial has been shortened by the Speedy Trial Act, although with great disruption of the civil trial calendars of federal judges. Is the disruption worthwhile? The standard "line" on speedy trial is that delay in bringing a criminal defendant to trial is hard on the defendant by subjecting him to protracted uncertainty about his fate, and hard on society by reducing the expected cost of punishment for anyone with a positive discount rate. But both of these assertions can't be true for the same defendant; delay will make things either worse or better for him. Each assertion may be true, however, of a different group of defendants—those who are let out on bail and those forced to stay in jail awaiting trial, respectively. Speedier trials increase the punishment costs of the first group and reduce those of the second. And for those defendants in the latter group (i.e., denied bail) who are guilty in fact but are either acquitted or receive a sentence shorter than the period of their pretrial imprisonment, that imprisonment *is* their punishment, and any measure that reduces its length reduces the effective punishment cost—and speedy trial does that.

Since the Bail Reform Act of 1984, pretrial detention, that is, refusal to admit a defendant to bail pending trial, has become routine in federal criminal prosecutions. The effect of this controversial practice, noxious to civil libertarians, is to increase the expected punishment cost of innocent as well as of guilty defendants, but the first, the undesired effect, is mitigated (1) by the Speedy Trial Act, which minimizes the period of pretrial detention, and (2) by the fact that, in an era of high crime rates, few acquitted defendants are in fact innocent. To anticipate the next chapter, a prosecutor on a fixed budget will screen potential cases for those that can be won at least cost; these will be cases where the defendants are guilty; but because of the heavy burden of proof on the prosecutor, some fraction of the guilty defendants whom he prosecutes will be acquitted. That they will have sustained some punishment by virtue of pretrial detention is a good thing from the standpoint of deterring crime.

It might seem that to assume that most acquitted defendants are guilty is to justify not only pretrial detention, but also the jettisoning of all the traditional procedural safeguards of criminal defendants. Not so. What makes the prosecutor screen his cases for defendants who are guilty in fact is the difficulty, given those safeguards, of convicting an innocent person. The safeguards are essential to assure the careful screening that in turn—given high crime rates relative to prosecutorial resources—minimizes the number of innocent people subjected to pretrial detention. It is

We just saw that criminal defendants might be better off if plea bargaining were forbidden. Here is an argument that *prosecutors* might be better off. Suppose plea bargaining were forbidden but a defendant could choose to plead guilty rather than go to trial, and if he did plead guilty, he would receive a lighter sentence. Then most guilty defendants would plead guilty, and prosecutors would be saving not only trial costs but also bargaining costs. If most defendants are in fact guilty, the resulting savings could dominate the added costs of trial in those cases that would have been plea bargained in a system that permitted plea bargaining.[1]

Suppose plea bargaining is, for whatever reason, deemed undesirable. What should be done about it? Should the number of judges be increased so that more cases could be tried? Increasing the number of judges might not affect the amount of plea bargaining. Plea bargaining takes place because negotiation is a cheaper way of resolving controversies than litigation. Its incidence is therefore determined by the relative costs of negotiation and of litigation and by the amount of uncertainty over the outcome of litigation—factors not greatly affected by the number of judges (uncertainty might actually be greater with more judges). Although more judges might enable speedier trials (but see §21.10 *infra*), and speedier trials might affect the stakes to the defendant (and prosecutor?[2]) and thereby the terms of the bargain, this should not affect the *amount* of bargaining.

Intuitively it might seem that the provision of counsel to indigent defendants would reduce the proportion of bargained pleas, but the intuition is contrary to economic theory. Although the defendant who has no lawyer will have very poor prospects if he elects to go to trial, this just means he will accept a longer bargained sentence than if he has the assistance of counsel. If anything, providing counsel for the indigent should facilitate plea bargaining, since a defense lawyer is more likely than an uncounseled defendant to make an accurate estimate of the probable outcome of a trial.

If plea bargaining were forbidden and there were no increase in the number of judges—if, in other words, the demand for criminal trials increased several-fold with no increase in the supply (unless judges stopped trying civil cases)—the result would be an enormous increase in the waiting period for criminal trials. The expected punishment cost of people free on bail would fall precipitously and that of people imprisoned until trial would increase (unless they could successfully argue that their constitutional right to a speedy trial had been infringed by the delay). Since litigation is more costly than plea bargaining, there would be some increase in the legal expenses of criminal activity, but most of these expenses are now borne by the government and by pro bono private lawyers (which

§21.7 1. See Jennifer F. Reinganum, Plea Bargaining and Prosecutorial Discretion, 78 Am. Econ. Rev. 713 (1988). Is this really *prohibiting* plea bargaining?

2. What assumptions are being made about the prosecutor's incentives? See §22.3 *infra*.

means, in part at least, by their paying clients) rather than by the accused criminals themselves. Although the average sentence should not be affected by whether it is negotiated or imposed after trial, the variance in sentencing would increase since a trial is likely to result either in acquittal or in a stiffer sentence than a bargained sentence (why?). This would inject additional risk into the expected cost of punishment.

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in societies that lack our elaborate procedural safeguards in criminal trials, or that spend heavily on prosecutors relative to the amount of crime, or that do both, in which pretrial detention is an ominous practice.

The federal sentencing guidelines greatly curtail the sentencing discretion of federal judges. This may actually reduce the deterrent and preventive effects of criminal punishment. Broad sentencing discretion enables the judge to practice a form of price discrimination that consists of deciding what penalty is optimal given the particular characteristics of the defendant. If the defendant seems to belong to a class of people who are easily deterrable, a light sentence may suffice to deter him, and those like him, in the future; if he is a hardened and inveterate criminal, a heavy sentence may be necessary for this purpose. If these sentences are averaged together and the same sentence given to each defendant, there will be less deterrence; the heavier sentence will be wasted on the easily deterrable, and the lighter sentence will underdeter the hardened criminals. Of course this problem can be remedied by "averaging up"; but the extra costs of lengthy imprisonment of the easily deterrable are wasted from a social standpoint. Perhaps recognizing that sentencing uniformity could actually reduce deterrence, Congress coupled the creation of the Sentencing Commission (the body that promulgates the actual guidelines) with the abolition of parole, a move that significantly increased the average length of imprisonment of criminal defendants.

The fact that, especially with the promulgation of guidelines that curtail judicial sentencing discretion, severity of punishment is taken largely out of the judges' hands (more broadly, judges control only part of the criminal justice system, the part governed by constitutional norms) raises the question whether the creation of elaborate procedural safeguards for criminal defendants can do much to protect the innocent, and specifically whether the creation of new procedural rights for criminal defendants by the "Warren Court" in the 1960s did much. Although the causality is deeply uncertain, there is a bit of evidence that the Court's rulings contributed to the upsurge in crime in the 1960s and 1970s.[3] Federal and state legislators responded to the increase in crime. They expanded pretrial detention, authorized greater use of wiretapping and other electronic surveillance, prescribed harsher sentences, increased the scope of pretrial detention (that is, reduced the right to release upon the posting of a bond), and appropriated more money for prisons, police, and prosecutors. The legislative response suggests that there is a tug of war — a game, in game-theoretic terms — between courts, which are primarily responsible for the creation, through constitutional interpretation, of new rights for criminal defendants, and legislatures (compare §19.7 *supra*). Apart from reducing

3. See Isaac Ehrlich and George D. Brower, On the Issue of Causality in the Economic Model of Crime and Law Enforcement: Some Theoretical Considerations and Experimental Evidence, 77 Am. Econ. Rev. Papers & Proceedings 99 (May 1987).

the nonconstitutional rights of defendants, legislatures can neutralize the effect of a new court-created right either by reducing the funding for the defense of indigent criminal defendants, thus making it easier to convict them, or by increasing the severity of punishments, with the consequence that even if fewer innocent people are convicted, those that are will serve longer sentences. The total suffering of the innocent will not be reduced, unless the courts invalidate statutes that impose severe punishments, or require generous compensation of lawyers for indigent criminal defendants. United States courts have been unwilling to do either.

Let the expected cost of punishment, a measure of deterrence, be denoted by $EC = pS$, with p the probability of apprehension and conviction and S the sentence. If a court-created right leads to a reduction in p for both innocent and guilty defendants (and that is the likeliest consequence, since a right that makes it more difficult to convict an innocent person will also make it more difficult to convict a guilty one), and the legislature wishes to maintain EC at its previous level, it can do so either by raising S through a law increasing the penalties for crime or by raising p through a reduction in funding for the defense of indigent defendants. Both have in fact been legislative responses in the United States to perceived judicial excesses in the protection of the rights of criminal defendants.

§21.8 Expenditures on Litigation and the Quest for Efficient Procedure

A party optimizes his litigation expenditures by spending up to the point where a dollar spent increases the expected value of the litigation to him (by increasing his chances of winning) by just a dollar. But every expenditure decision by one party affects the expenditure decision of the other, by altering the probability and hence expected value of an outcome favorable to the other, much as every price or output change by an oligopolist alters his rivals' optimum price and output (see §10.4 *supra*). If each party, in deciding how much to spend on the lawsuit, therefore takes account of the effect of his expenditures on the other party's, then, as in the oligopoly case, there will be no determinate level at which the analyst could say that neither party (if rational) would have an incentive to make any further change in his expenditures.

Since, however, these expenditures are largely offsetting, parties to litigation often find it mutually advantageous to agree not to incur a particular litigation expense (for example, by stipulating to a fact so that it doesn't have to be established by testimony). This may seem a good thing. Yet offsetting expenditures on litigation are not necessarily wasteful from a

social as distinct from a private standpoint, since they increase the probability of a correct decision by giving the tribunal more information.

Even without being able to model precisely the reaction functions of each party to the expenditure decisions of the other, we may have reasonable grounds for believing (in accordance with §21.5 *supra*) that parties probably spend more on litigation the greater the stakes. Hence we would expect bigger cases to be decided correctly a higher proportion of the time than smaller ones.

Many procedural rules can be viewed as being designed to increase the productivity of the parties' litigation expenditures. An example is the rule that permits the judge to take judicial notice of obviously true facts so that the party having the burden of proof need not establish the fact by evidence. The effect of this rule on the party's litigation expenditures is shown in Figure 21.2. D is the average value to the party of various quantities of evidence and S the average (equal to marginal) cost of that evidence. A rule of procedure (such as judicial notice) that reduces the cost of evidence without reducing its value shifts S downward, to S', leading the litigant to expand his purchase of evidence from q to q'. Whether his total expenditure (price times quantity) will increase depends, however, on the price elasticity of demand in the region of the demand curve between q and q'. If the elasticity is less than one, total expenditures will increase; if it is equal to one, they will be the same; and if it is greater than one, they will decrease. In which case will efficiency be greatest?

Another important set of economizing procedural rules concerns joinder of claims and of parties (plaintiffs or defendants, or both) through such devices as class actions (discussed in the next section), permissive and compulsory joinder, and permissive and compulsory counterclaims. Con-

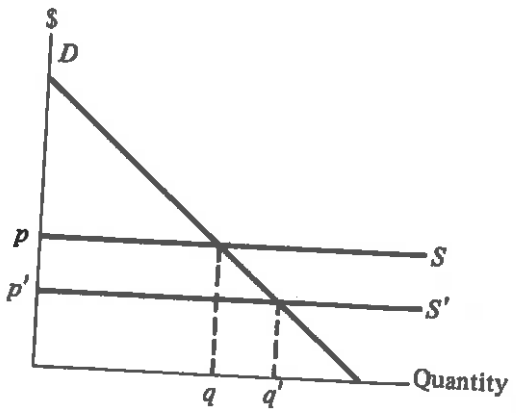

Figure 21.2