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# *SYMPOSIUM*

## WONDERLAND SENTENCING: THERAPEUTIC PERSPECTIVES ON PRETRIAL PROVISIONAL SENTENCES

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*In* Alice's Adventures in Wonderland*, the Knave of Hearts is accused of stealing tarts. The Queen of Hearts insists that they should "[s]entence [the Knave] first" and hear the verdict afterwards. Alice derides "[t]he idea of having the sentence first" because, of course, nothing would be more absurd. In this Essay, I defend that absurd idea, at least provisionally.*

*While we certainly should not* punish *someone prior to conviction, we should carefully consider the benefits of "wonderland sentencing," in which those accused of crimes are given provisional sentences prior to the decision to proceed to trial. Doing so enables defendants to make better informed, fairer decisions about whether and under what circumstances to plead guilty. The proposal supports goals of therapeutic jurisprudence by (1) reducing prosecutorial leverage that many legal scholars consider both excessive and a cause of disproportional sentencing; (2) allowing defendants to be and feel heard by an impartial judge; and (3) providing defendants better information about their future sentencing liability, not only as it affects plea decisions, but also as it affects the very stressful period before their cases are resolved.*

*We give defendants very limited information prospectively about punishments for various crimes. Wonderland sentences would help correct our general failure to provide advance notice of the consequences of criminal conduct. While wonderland sentencing is just one of many therapeutic policy changes we could implement, given that approximately ninety-five percent of non-dismissed cases are resolved*

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*by plea bargains, wonderland sentencing has the potential to do a lot of good for a lot of people.*



## INTRODUCTION

In *Alice's Adventures in Wonderland*, the Knave of Hearts is accused of stealing tarts.[1] The Queen of Hearts insists that they should "[s]entence [the Knave] first" and hear the verdict afterwards.[2] Alice derides "[t]he idea of having the sentence first" in an exchange scholars frequently cite to illustrate an extraordinarily absurd attempt at justice.[3] In this Essay, I defend it (at least provisionally).

Of course, we shouldn't *punish* anyone prior to conviction.[4] But there is much to be said for what I call "wonderland sentencing," in which those accused of crimes are told, prior to deciding whether to plead guilty, what their sentence would likely be if convicted at trial. Doing so could enable defendants to make better informed, fairer, and more socially

[1] Lewis Carroll, Alice's Adventures in Wonderland 165–66 (London, MacMillan & Co. 1866).

[2] Id. at 187.

[3] Id.; see, e.g., Charles H. Gustafson, Judicial Review of Jeopardy Tax Collection: Sentence First, Verdict Afterwards, 26 Case W. Rsrv. L. Rev. 315, 315–16, 315 n.* (1976); Robert S. Pasley, Sentence First—Verdict Afterwards: Dishonorable Discharges Without Trial by Court-Martial?, 41 Corn. L.Q. 545, 545–47 (1956).

[4] But cf. Saul Smilansky, Determinism and Prepunishment: The Radical Nature of Compatibilism, 67 Analysis 347, 347–48 (2007) (arguing that the compatibilist view of free will held by many philosophers leads to the conclusion that we ought to pre-punish).

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advantageous decisions about whether and under what circumstances to plead guilty.

There are many possible variations on wonderland sentencing. My goal isn't to settle the details of one particular approach. Rather, I lay out the benefits of wonderland sentencing in general terms and then consider several ways to fill in the details, keeping in mind that any particular approach will have to coordinate with the varied sentencing laws in existing jurisdictions.

The impetus for wonderland sentencing comes from what is typically the most important decision defendants must make about their cases: whether to plead guilty in exchange for a lighter sentence. The decision can be extraordinarily difficult because defendants have limited relevant information. For example, they don't know exactly what evidence the prosecution would introduce or how convincing it would be to potential jurors. They also don't know how well their own witnesses would testify on their behalf.

Most importantly, however, even if defendants knew all the information that would be revealed at trial, they would still lack critical information about sentence severity. In many jurisdictions, judges have wide sentencing discretion, leaving defendants uncertain about how long their sentences are likely to be.[5] In others, there may be sentencing guidelines that limit judicial discretion.[6] But even in those jurisdictions, judges still have significant sentencing discretion and are often called upon to interpret sentencing guidelines or the application of maxima and minima in ways that are hard for defense counsel to predict.[7]

Even when extraordinarily harsh sentences are unlikely, they can still weigh on a defendant's decision-making.[8] For example, in 2024, Maine

[5] See, e.g., United States v. Jackson, 835 F.2d 1195, 1197 (7th Cir. 1987) (recognizing the broad sentencing discretion typically afforded to judges in non-guideline jurisdictions).

[6] See, e.g., 18 U.S.C. § 3553(b)(1) (advising federal courts to ordinarily impose a sentence within the guideline range); Minn. Sent'g Guidelines & Comment. § 1.A (Minn. Sent'g Guidelines Comm'n 2024).

[7] Cf. United States v. Booker, 543 U.S. 220, 245, 250–51 (2005) (holding the federal sentencing guidelines to be advisory and emphasizing the importance of judicial discretion).

[8] There is evidence in many domains, including mock criminal justice contexts, that vividly presented numbers can anchor people's estimates and preferences. See, e.g., Stephanie A. Cardenas, Charged Up and Anchored Down: A Test of Two Pathways to Judgmental and Decisional Anchoring Biases in Plea Negotiations, 29 Psych. Pub. Pol'y & L. 435, 435–36 (2023) (discussing how the willingness to plead guilty or recommend guilty pleas of mock defendants and defense attorneys can be anchored by harsh potential sentences); Roland Imhoff & Christoph Nickolaus, Combined Anchoring: Prosecution and Defense Claims as

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doctor Merideth Norris was found guilty of overprescribing painkillers.[9] She was convicted on fifteen counts of unlawfully distributing controlled substances and faced a maximum of twenty years' incarceration on each count.[10] Predictably, Dr. Norris was said to face up to three hundred years' incarceration.[11] When she was ultimately sentenced, however, she received no prison time.[12]

In reality, Dr. Norris was never going to spend three hundred years incarcerated, and almost certainly, her attorney gave her more realistic estimates. But defendants can be traumatized simply by hearing that they face such extreme sentences. Federal judges are required to notify defendants of the maximum sentence they face under the law, but not the sentence the judge expects to assign or the sentence she considers the highest she would be likely to assign if the case were to proceed to a verdict at trial.[13] Knowledge of theoretical sentencing maxima may be particularly influential and misleading when clients distrust their often court-appointed attorneys. Moreover, even with attorney estimates, defendants may face wide plausible sentencing ranges.

Prosecutors pressure defendants to plead guilty not only by threatening long sentences but also by making strategic use of uncertainty. Rational choice theory suggests that the uncertainty of sentences will drive risk-averse defendants to plead guilty to avoid trial. The more risk-averse the defendant, the more we expect risk to drive guilty pleas. Moreover, given that risk tolerance is associated with criminal and other antisocial behaviors,[14] greater uncertainty at sentencing is likely to put more

Sequential Anchors in the Courtroom, 26 Legal & Criminological Psych. 215, 215, 223–24 (2021) (finding that law student experimental subjects were anchored in their mock sentencing determinations by the recommendations of both the prosecution and the defense).

[9] Shawn P. Sullivan, Kennebunk Doctor Convicted on Multiple Counts of Illegally Distributing Opioids, Portsmouth Herald (June 24, 2024, at 11:23 ET), https://www.seacoastonline.com/story/news/local/york-star/2024/06/24/kennebunk-maine-doctor-merideth-norris-convicted-of-unlawfully-distributing-opioids/74191342007/ [https://perma.cc/K6LG-CPLC].

[10] Id.

[11] Id.

[12] Emily Allen, Kennebunk Doctor Will Not Serve Prison Time for Overprescribing Opioids, Portland Press Herald (May 16, 2025), https://www.pressherald.com/2025/05/15/kennebunkport-doctor-will-not-serve-jail-time-for-overprescribing-opioids [https://perma.cc/7G4M-4C9R].

[13] See Fed. R. Crim. P. 11(b)(1)(H).

[14] See Tim Friehe & Hannah Schildberg-Hörisch, Predicting Norm Enforcement: The Individual and Joint Predictive Power of Economic Preferences, Personality, and Self-Control, 45 Eur. J.L. & Econ. 127, 137–38 (2018); see also Thomas Epper et al., Preferences Predict Who Commits Crime Among Young Men, PNAS, Jan. 31, 2022, at 1, 5 (finding a statistically

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pressure on prosocial defendants to plead guilty than antisocial defendants—precisely the opposite of the direction we seek. Since prosocial defendants are less likely to be guilty than antisocial defendants as a general rule, uncertainty at sentencing has the perverse effect of pushing innocent defendants to plead guilty with greater force than it pushes guilty defendants to do the same.[15] Wonderland sentencing provides a way to make sentences fairer and reduce erroneous convictions by allowing defendants to make less risky, better informed decisions about whether to plead guilty.

Imagine if we lived in a world of wonderland sentencing, where defendants made plea bargaining decisions with relatively accurate potential sentence information. In such a world, I suspect, a proposal to *eliminate* wonderland sentencing and hide such information from defendants would strike us as about as absurd as the Queen of Hearts's proposal. And unlike some prior proposals to give judges a larger role in plea processes,[16] wonderland sentencing is unlikely to offend rules against judicial participation in plea bargaining. In fact, there may be no legal impediments to the implementation of wonderland sentencing; judges could start the process today, and it probably already occurs from time to time.

In Part I, I discuss in more detail how wonderland sentencing could work. In Part II, I analyze wonderland sentencing from traditional retributivist and consequentialist perspectives. I also discuss how those perspectives could be modified to address what I call "therapeutic retributivism" and "therapeutic consequentialism." I conclude that while it is too soon to decide that wonderland sentencing will necessarily improve the criminal legal system, we have more than enough reason to pilot studies to gather more information.

## I. APPROACHES TO WONDERLAND SENTENCING

Approximately ninety-five percent of criminal cases in the United States that aren't dismissed are resolved not by trial but by plea

significant positive correlation between risk tolerance and criminality for property crimes, though not for violent, drug, or sexual crimes).

[15] See Robert E. Scott & William J. Stuntz, Plea Bargaining as Contract, 101 Yale L.J. 1909, 1948–49 (1992).

[16] See, e.g., Daniel S. McConkie, Judges as Framers of Plea Bargaining, 26 Stan. L. & Pol'y Rev. 61, 65 (2015).

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bargains.[17] Our heavy reliance on plea bargaining gives tremendous power to prosecutors.[18] In 1978, John Langbein compared plea bargaining to torture. According to Langbein,

> In twentieth-century America we have duplicated the central experience of medieval European criminal procedure . . . . We coerce the accused against whom we find probable cause to confess his guilt. To be sure, our means are much politer; we use no rack, no thumbscrew, no Spanish boot to mash his legs. But like the Europeans of distant centuries who did employ those machines, we make it terribly costly for an accused to claim his right to the constitutional safeguard of trial.[19]

While judges are supposed to limit the pressure prosecutors apply, they have limited tools and incentives to do so. They are especially limited when defendants plead guilty.[20] In the federal system, for example, judges are supposed to make sure pleas are knowing, voluntary, and intelligent, and inform defendants about some of their basic rights, including the right to proceed to a jury trial.[21] Judges do not have to accept a guilty plea,[22] but in practice, they almost always do.[23]

In a world with wonderland sentencing, defendants would receive information about their sentences prior to making a final decision about how to plead. Depending on the particular form of wonderland sentencing, defendants could be told a likely sentence or a likely range of sentences they would face upon conviction. Or, they could be told, in a firm or tentative manner, what a judge thinks is the maximum punishment she would realistically assign. These caps or estimates could include assumptions, for example, that there are no big surprises that emerge before or during trial.

Under current sentencing policies, prosecutors have tremendous leverage to influence sentencing: if a defendant faces a two-year prison

[17] Lindsey Devers, Bureau of Just. Assistance, U.S. Dep't of Just., Plea and Charge Bargaining: Research Summary 1 (2011), https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/pleabargainingresearchsummary.pdf [https://perma.cc/SLM4-KBMA].

[18] See McConkie, supra note 16, at 78–79.

[19] John H. Langbein, Torture and Plea Bargaining, 46 U. Chi. L. Rev. 3, 12 (1978).

[20] See McConkie, supra note 16, at 79.

[21] See Fed. R. Crim. P. 11(b)(1)–(2).

[22] Santobello v. New York, 404 U.S. 257, 262 (1971) ("There is, of course, no absolute right to have a guilty plea accepted. A court may reject a plea in exercise of sound judicial discretion." (citations omitted)).

[23] See Dylan R. McDonough, In the Shadow of the Bench: Judicial Discretion to Reject Plea Agreements, 57 Colum. J.L. & Soc. Probs. 633, 678 (2024).

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sentence after trial, the option to plead down to a day in prison applies a lot of pressure to plead guilty. Reasonable defendants, including innocent ones, might well feel compelled to accept such a deal. The option to plead guilty can be so much safer than going to trial.

Wonderland sentencing, by contrast, reduces prosecutorial leverage by reducing the risk associated with sentencing and the likelihood that such risk will lead to erroneous convictions. Suppose a defendant who goes to trial faces a fifty-percent chance of a not-guilty verdict and a fifty-percent chance of a ten-year sentence. If the defendant is very risk averse (either individually or as advised by counsel and family), then he will accept certain plea deals even if they are substantially longer than the expected value of five years' incarceration.[24] By contrast, a risk-loving defendant would be unwilling to accept some plea deals even if they are lower than his probabilistic expectation of five years' incarceration.

This result is bad because, on average, more risk-averse defendants are less likely to have committed crimes than risk-loving defendants.[25] Risky sentencing is bad because, as a general matter, it applies more pressure on not-guilty defendants to plead than on guilty defendants.[26] This is the exact opposite of what we want. We want those who are not guilty to be more likely to press for trial so that we may examine additional evidence that makes their lack of guilt all the more clear.

### *A. What Information Would Be Available to Wonderland Sentencers?*

How do we give wonderland sentencers enough information to make meaningful assessments before trial? We can't sentence the Knave of Hearts until we know precisely what he did. One solution is to give wonderland sentencers charging documents that describe the crimes the

[24] I make some simplifying assumptions here, including, for example, that the defendant (like most defendants) is not paying for his own defense. See Caroline Wolf Harlow, Bureau of Just. Stat., U.S. Dep't of Just., NCJ 179023, Defense Counsel in Criminal Cases 1 (2000), https://bjs.ojp.gov/content/pub/pdf/dccc.pdf [https://perma.cc/P6QP-TPZC].

[25] See supra note 14 and accompanying text.

[26] See Scott & Stuntz, supra note 15, at 1948–49. But cf. Oren Gazal-Ayal & Avishalom Tor, The Innocence Effect, 62 Duke L.J. 339, 390 (2012) ("[The] near-universal scholarly belief that plea bargaining routinely generates false guilty pleas is overstated, though not wholly erroneous. Innocents are less likely to plead guilty than shadow-of-trial models assume, even in the face of attractive plea offers, except possibly when they believe that conviction is extremely likely, when they are facing the death penalty, or when they had falsely confessed during the investigation.").

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defendant is accused of committing. According to the Federal Rules of Criminal Procedure,

> The indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged and must be signed by an attorney for the government. . . . A count may allege that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. For each count, the indictment or information must give the official or customary citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated.[27]

Were we to provide wonderland sentencers with only criminal charging information, wonderland sentencing would be quite difficult. Knowing that an offender was charged with aggravated assault, for example, might only reveal limited detail about the amount of harm the defendant actually caused or risked causing and his precise culpability for doing so.

We could give defendants the *option* of providing additional evidence, perhaps restricted to certain types or quantities of evidence. By making it an option, defendants would not be required to offer any information and thereby reveal defense strategies or infringe their rights against self-incrimination. But should a defendant choose to exercise this option, the wonderland sentencer could afford the government the option to provide its own suitably restricted evidence as well.

Presumably, wonderland sentencers would at least provide a provisional maximum for each charge a defendant faces, meaning the highest sentence at or below the legal maximum that the judge would realistically impose. That information alone would dramatically reduce sentencing uncertainty. Ideally, defendants would also have a good sense of their total punishment liability at trial. For example, they could be told how various charges are likely to interact with each other given that some charges could be dropped before trial or fail to be proved at trial. They could also be told whether sentences for different crimes would run concurrently or consecutively.

In many cases, few crimes are alleged, and wonderland sentencing would be quite manageable. Sentencers could plausibly provide a maximum or estimated overall sentence under a few hypothetical scenarios. In some cases, though, there may be too many alleged crimes

[27] Fed. R. Crim. P. 7(c)(1).

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to work through all possible variations. In such cases, the wonderland sentencer could speak in broad terms, provide estimates under a couple of likely scenarios, or even just provide a wonderland sentence on the assumption that all alleged crimes are proven.

Still further questions would arise: How do we handle defendants who might cooperate with the government as to certain charges? What role, if any, should victims have at wonderland sentencing? What should wonderland sentencers assume about whether defendants convicted at trial will subsequently express remorse?

Difficult as they are, we can surely resolve many questions that would arise. For example, our current practices dramatically restrict the sentencing information available to jurors.[28] Were we to remain consistent with current practices, there is a risk that jurors would learn about a wonderland sentence and that it would color their views about the merits of a case. To address the problem, we could require wonderland sentences to remain confidential until a defendant either pleads guilty or receives a verdict at trial. Doing so would reduce the likelihood that potential jurors would be exposed to judicial reactions to cases before the jury process is completed. The main point is that we should not let the challenges of perfection prevent us from increasing the amount of information we give to defendants.

### *B. When Would Wonderland Sentencing Occur and Would It Be Mandatory?*

Wonderland sentencing could occur any time after a defendant is officially charged with a crime, provided there is an indictment or other documentation that allows a wonderland sentencer to make an informed decision.

While wonderland sentencing could be forced upon every defendant or every defendant who commits a crime serious enough to warrant detailed attention to sentence length, it probably makes more sense to make participation optional. That way, wonderland sentencing is unlikely to harm defendants. By giving them the option to participate, we can generally presume that defendants and their lawyers will only opt for wonderland sentencing when they expect it to yield a more favorable outcome relative to traditional approaches. Once we have substantial data

[28] See Daniel Epps & William Ortman, The Informed Jury, 75 Vand. L. Rev. 823, 830–32 (2022).

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about how wonderland sentencing works in real contexts, we could reevaluate whether it ought to remain optional.

### *C. Who Would Issue a Wonderland Sentence?*

Given that prosecutors are often incentivized to seek more serious sentences,[29] a wonderland sentencer should be someone other than a prosecutor. That still leaves many options. One natural solution is to have judges set wonderland sentences. The role of sentencing is traditionally understood as a judicial role,[30] and we often turn to judges when seeking independent and impartial decision-making (even if our hopes are sometimes dashed). As a starting point, the sentencer could be the judge who presides in a particular case or is expected to eventually preside. This is the most efficient approach. The judge would need to be familiar with the case, and that familiarity could be deepened during wonderland sentencing. (This is also the easiest approach to implement since, as I argue in the following Section, judges in most jurisdictions can begin issuing wonderland sentences today.) While judges face substantial pressure to move through their caseloads quickly, if they maintain the objectivity that is supposed to characterize judicial decision-making, they will face less pressure to settle cases than prosecutors do.

We could also mitigate the effect of judicial pressure to resolve dockets quickly by picking independent wonderland sentencers who will play no further role in the cases they examine. These independent sentencers wouldn't be as strongly incentivized to push plea deals. They could be specially trained in wonderland sentencing or could simply be judges *other than* the judge who would ordinarily preside in the case at issue. Use of dedicated wonderland sentencers would also fight the possible perception a defendant might have that *the judge in his case* has already determined his guilt by issuing a wonderland sentence prior to trial, and it would reduce the risk that a judge's ultimate sentence would be inappropriately anchored by the judge's early impressions of a case.[31]

Independent wonderland sentencers would offer a further advantage: when a judge issues a sentence after conviction, it is very hard to

[29] See, e.g., Rachel E. Barkow, Administering Crime, 52 UCLA L. Rev. 715, 728 (2005) ("Prosecutors have an incentive to lobby for harsher sentences because longer sentences make it easier for them to obtain convictions through plea bargaining.").

[30] See Epps & Ortman, supra note 28, at 830.

[31] See supra note 8.

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successfully appeal it.[32] Wonderland sentencing presents an opportunity to reduce this arbitrariness by allowing at least two people to weigh in on each sentence. The wonderland sentencer might set a maximum sentence that the final sentencing judge ultimately accepts or further reduces. Defendants would be subject to less risk than usual because a judge with severe punitive inclinations may be capped by a punishment level set by a wonderland sentencer. Alternatively, an extremely punitive wonderland sentencer's influence could be muted by a less extreme judge who imposes the final sentence.

Having an independent wonderland sentencer would also allow a defendant's full criminal history to be considered at the wonderland stage without biasing final sentencing decisions. Judges sometimes gain familiarity with a defendant's criminal history prior to trial, perhaps to rule on evidentiary questions related to prior bad conduct.[33] But even in such cases, judges' exposure to defendants' criminal history may be limited or incomplete. To the extent judicial decision-making at trial may be subtly or not-so-subtly influenced by knowledge of criminal history, we might prefer a system where wonderland sentencers have full information about a defendant's criminal history while trial judges are given more limited information as needed. By separating wonderland sentencing and final sentencing, we wouldn't disturb our current practices in terms of the knowledge judges have about defendants' criminal history during trial.

### *D. Has Wonderland Sentencing Been Considered Before?*

Several scholars have advocated approaches to plea bargaining with greater judicial involvement or oversight than we have now.[34] Notably for

[32] Cf. United States v. Jackson, 835 F.2d 1195, 1197 (7th Cir. 1987) (stating in a presentencing guidelines federal case that "[t]he selection of a sentence within the statutory range is essentially free of appellate review").

[33] See, e.g., Fed. R. Evid. 609(a)(1)(B) (governing the admissibility of evidence of a criminal conviction that is introduced to impeach a testifying criminal defendant's character for truthfulness and calling for the judge to weigh the conviction's "probative value" and "prejudicial effect").

[34] See, e.g., Colin Miller, Anchors Away: Why the Anchoring Effect Suggests that Judges Should Be Able to Participate in Plea Discussions, 54 B.C. L. Rev. 1667, 1670–71 (2013); cf. Russell D. Covey, Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings, 82 Tul. L. Rev. 1237, 1273–75 (2008) (advocating for the implementation of plea-based ceiling systems, in which judges enforce caps on possible trial sentences that are calculated based on the prosecution's plea offer).

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our purposes, Daniel McConkie has recommended allowing defendants to request pre-plea, public hearings run by judges.[35] Writing principally about federal sentencing, he has recommended that judges be given pre-plea sentence reports that discuss a defendant's criminal history and other pertinent sentencing factors.[36] During these hearings, after arguments from both sides, a judge would provide information about a defendant's likely sentences *both* if a guilty plea were made pre-trial and if instead the jury convicted at trial.[37] So McConkie envisions a system that includes wonderland sentencing as part of a broad package of greater judicial involvement.

It is helpful, however, to conceptually separate wonderland sentencing from grander initiatives. In the federal system and under similar statutes in many states, a rule of criminal procedure prohibits judges from "participat[ing]" in plea bargaining.[38] The rule addresses concerns "that defendants might feel coerced by the judge into pleading guilty and that plea bargaining judges might not be able to objectively assess the voluntariness of the guilty pleas."[39] As to federal sentencing, courts have interpreted the prohibition on judicial participation in plea bargaining

[35] See McConkie, supra note 16, at 64–65. McConkie focused on federal sentencing, though given the federal sentencing guidelines, it is likely that federal sentencing is somewhat less in need of sentencing clarity than jurisdictions without guidelines.

[36] Id. at 64–65, 71.

[37] Id. at 65.

[38] Fed. R. Crim. P. 11(c)(1); see, e.g., Colo. Rev. Stat. § 16-7-302(1) (2025) ("The trial judge shall not participate in plea discussions."); Wash. Rev. Code § 9.94A.421 (2024) ("The court shall not participate in any [plea] discussions under this section."). Some states, however, allow judicial participation in plea bargaining, including Florida and Connecticut. See Fla. R. Crim. P. 3.171(d); State v. Revelo, 775 A.2d 260, 268 (Conn. 2001); Miller, supra note 34, at 1692 ("After hearing the defense and prosecution, the judge [in Florida] reveals how he or she would dispose the case in an expected post-plea sentence. Specifically, the recommendation usually takes the form of a sentence range, a cap, or a fixed sentence. As a general rule, Florida judges do not give information about the post-trial sentence possibilities, as defendant[s] may perceive these statements as coercing them into waiving their right to a trial." (footnotes omitted)). According to Miller, Connecticut judges participating in plea discussions sometimes do give estimated posttrial sentences—*a real-world instance of wonderland sentencing*—with final sentencing done by a judge who is not bound by the wonderland estimate. See id. at 1692–93, 1693 n.177.

[39] McConkie, supra note 16, at 72.

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quite strictly,[40] and the rules as they currently stand plausibly prohibit McConkie's proposal.[41]

When a judge merely provides a wonderland sentence, however, we needn't view it as participation in the plea-bargaining process. Judges can and should provide early sentencing information for a variety of reasons unrelated to the bargaining aspects of pleas. Importantly, doing so would provide defendants with a more realistic understanding of the process they will undergo if they exercise their right to a trial. For example, defendants might want a better understanding of their sentencing liability when deciding whether to hire private counsel or change current counsel. They might make different decisions about child custody or other family matters depending on their potential criminal liability. And better knowledge of future sentencing liability may simply calm their most extreme punishment fears (or awaken them to a level of seriousness they otherwise failed to appreciate).

We give people very limited information prospectively about punishments for various crimes. Though we purport to require fair notice in the criminal legal system, generally speaking, a person contemplating a particular crime cannot realistically appraise the punishment for committing it, at least without considerable legal training or advice. Wonderland sentences are a partial corrective to our failure to give genuine notice of sentencing consequences in general.

To be sure, wonderland sentences would in fact influence plea bargaining, but influence and interference are not the same. Legislatures do not interfere with plea bargaining by setting statutory minima and maxima or making other changes to sentencing that will inevitably influence actual plea bargains. It is simply part of the legislature's role to make such determinations, much as it is the role of judges to engage in posttrial sentencing. Wonderland sentencing just shares information earlier in the process that shouldn't be kept secret anyhow. Given that wonderland sentencing doesn't really involve judicial meddling with plea bargaining, judges are likely free to engage in the practice already. Thus,

[40] See, e.g., United States v. Baker, 489 F.3d 366, 370–71 (D.C. Cir. 2007) (indicating that the permissible judicial role in the plea bargaining process is limited to accepting or rejecting plea agreements); United States v. Ebel, 299 F.3d 187, 191 (3d Cir. 2002) (explaining that Rule 11 "completely remov[es] the judge from plea negotiations").

[41] McConkie recommends amending the Federal Rules of Criminal Procedure to permit his proposal but thinks that there are good legal arguments for deeming his proposal permissible even under the Rules as they stand. See McConkie, supra note 16, at 85–86.

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an advantage of wonderland sentencing is that it is more likely to be permissible than programs that involve broader judicial participation in plea bargaining.

Of course, McConkie may be right that we ought to have more judicial involvement in plea bargaining in general, but his proposal would also require considerably more judicial time and resources than wonderland sentencing. As Judge Jed Rakoff describes the matter,

> In the state courts of the United States, the average time for a guilty-plea allocution is 13 minutes. Of those 13 minutes, at least five, or more commonly 10, are spent advising the defendant of the rights he's giving up, like his right to a jury trial and his right to confront the witnesses against him and so forth—rights that are in the Constitution. And after the judge has elicited that, yes, he's willing to waive all those rights, the judge then has a few minutes, at best, to probe as to why he's pleading guilty.[42]

With about ninety-five percent of non-dismissed criminal cases resolved by guilty plea, most of which are resolved quickly, any proposal for greater judicial involvement in cases will be expensive. With limited prospects for increasing current investment in criminal adjudication resources, wonderland sentencing has the advantage of being relatively inexpensive, at least compared to proposals that would substantially increase judicial involvement in plea bargaining or even eliminate plea bargaining entirely. With wonderland sentencing, judges can give their impressions of a case based on an indictment, subject to change based on new information that arises at trial. The investment of resources would be far less than what McConkie envisions, giving wonderland sentencing better chances of being adopted.

## II. THEORETICAL PERSPECTIVES ON WONDERLAND SENTENCING

So far, I have provisionally endorsed wonderland sentencing and described some plausible approaches. My endorsement is provisional, in part because there is much that we don't know about how wonderland sentencing would actually impact the criminal legal system. In a world

[42] Jack Newsham, Judge Jed Rakoff Says the US Justice System Is 'Broken.' He Explains Why the Innocent Plead Guilty, While the Guilty Go Free., Bus. Insider (June 5, 2021, at 08:51 ET), https://www.businessinsider.com/interview-jed-rakoff-guilty-innocent-corporate-accountability-judicial-reform-2021-6.

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with wonderland sentencing, prosecutors, defense attorneys, and judges would likely adapt to the new approach in unpredictable ways. For example, since prosecutors know they will have less leverage after wonderland sentencing, they may exercise even greater leverage beforehand by increasing the number or severity of charges they bring. While reputational and judicial forces constrain this leverage to some extent, it's hard to predict the effects of wonderland sentencing when multiple parties act strategically in a dynamic environment.

In addition to the empirical and predictive questions raised by wonderland sentencing, we also need to make value choices about its likely pros and cons. To do so, we turn to some traditional and not-so-traditional theories of criminal justice that help us understand when the legal system is functioning as it ought to.

### *A. Retributivist Perspectives*

Punishment is often understood in a retributive fashion.[43] While there are many different kinds of retributivists, they typically believe that punishment is justified when and only when offenders deserve it.[44] Punishment should be imposed, on their view, in an amount proportional to the seriousness of an offender's crime.[45] At a minimum, proportionality is thought to serve as a limit on retributivist punishment because almost all retributivists endorse a firm prohibition on purposely or knowingly punishing in excess of what is proportional.[46]

Here's how I expect most retributivist legal scholars to view wonderland sentencing: We have way too much incarceration right now, in part because prosecutors have so much leverage over defendants.[47] Prosecutors can easily induce defendants to plead guilty, even when pleas

[43] See Victor Tadros, The Ends of Harm: The Moral Foundations of Criminal Law 42 (2011) (describing retributivism as the "dominant view" of punishment theorists); Vincent Geeraets, The Enduring Pertinence of the Basic Principle of Retribution, 34 Ratio Juris 293, 296 (2021) ("Looking at present debates suggests that retributivism is probably now more popular than any other philosophical theory [of punishment].").

[44] See Alec Walen, Retributive Justice, Stan. Encyclopedia Phil. (July 31, 2020), https://plato.stanford.edu/archives/win2023/entries/justice-retributive/ [https://perma.cc/AQB9-9AHX].

[45] Id.

[46] Id. There are many variations, however, on how retributivism is defined.

[47] The view that we currently have too much incarceration doesn't follow from retributivism itself; it is a sociological claim about actual legal scholars. Cf. Eric Martínez & Kevin Tobia, What Do Law Professors Believe About Law and the Legal Academy?, 112 Geo. L.J. 111, 157–59 (2023) (finding that over ninety-five percent of legal scholars surveyed would like to reform carceral practices and a substantial group would abolish incarceration entirely).

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involve substantial sentences. Wonderland sentencing is likely to reduce incarceration of the innocent by making it easier for them to pursue more detailed factfinding at trial and to reduce sentences overall by limiting prosecutorial power. It should thereby bring the criminal legal system one step closer to a just system of proportional punishment.

### *B. Therapeutic Retributivism*

"Therapeutic jurisprudence" is an interdisciplinary field of legal scholarship addressing issues of criminal law, mental health law, constitutional law, and more.[48] It doesn't fit neatly into a traditional category of punishment theory. Sometimes, it is defined as a *descriptive* theory that examines "the extent to which substantive rules, legal procedures, and the roles of lawyers and judges produce therapeutic or antitherapeutic consequences."[49] Sometimes, its *normative* goals are more explicit.[50]

I focus on versions that make normative claims about how the law should be. Can we marry principles of normative therapeutic jurisprudence with retributivism? At first glance, at least, it is a marriage one might expect to zoom toward divorce. After all, retributivism seems to be about deliberately causing suffering while therapeutic jurisprudence seems to be about healing suffering and increasing well-being.

To analyze wonderland sentencing under therapeutic retributivism, we can distinguish two conceptions of "therapeutic." One concerns what is psychologically therapeutic.[51] On this view, something is therapeutic

[48] See David C. Yamada, Therapeutic Jurisprudence: Foundations, Expansion, and Assessment, 75 U. Mia. L. Rev. 660, 663, 682 (2021) (providing a recent overview of the field); Hadar Dancig-Rosenberg & Tali Gal, Restorative Criminal Justice, 34 Cardozo L. Rev. 2313, 2336, 2342 (2013) (connecting therapeutic and restorative justice).

[49] David B. Wexler & Bruce J. Winick, Therapeutic Jurisprudence as a New Approach to Mental Health Law Policy Analysis and Research, 45 U. Mia. L. Rev. 979, 981 (1991).

[50] For example, Bruce Winick stated that therapeutic jurisprudence is "particularly useful for law reform," noting that it is "normative in orientation." Bruce J. Winick, The Jurisprudence of Therapeutic Jurisprudence, 3 Psych. Pub. Pol'y & L. 184, 185, 188 n.17 (1997). Therapeutic jurisprudence has also been criticized for not paying enough attention to theory. Nigel Stobbs, Therapeutic Jurisprudence as Theoretical and Applied Research, *in* The Methodology and Practice of Therapeutic Jurisprudence 29, 30–31 (Nigel Stobbs, Lorana Bartels & Michel Vols eds., 2019) ("[T]here has been a dearth of scholarship on [therapeutic jurisprudence] *as a theory*, which is perhaps understandable, given that those who apply [it] are overwhelmingly interested in changing how things work *in practice*.").

[51] Cf. David B. Wexler, Two Decades of Therapeutic Jurisprudence, 24 Touro L. Rev. 17, 20 (2008) (referencing therapeutic jurisprudence's focus on "psychological well-being").

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when it takes a person from a state of ill physical or mental health and either eases or eliminates the negative condition. This description presents the challenge of identifying particular negative physical and mental conditions from which to measure what is therapeutic, perhaps by reference to definitions of ill health from the medical community.

A "therapeutic retributivism" that blends a psychological notion of therapy with retributivism might hold that, so long as punishments like incarceration are not disproportional, the therapeutic effects punishments generate can be valuable. Such effects might include beneficial psychological processes of guilt and repentance to the extent that they are, in fact, psychologically therapeutic. Less controversially, this view of therapy could find value in the vocational counseling and psychological, psychiatric, and substance abuse treatments that are sometimes available in carceral (or other punitive) environments. Forms of therapeutic retributivism based on psychological accounts of therapy can endorse wonderland sentencing to the extent retributivism can obtain therapeutic goals while remaining consistent with requirements of proportionality. Some may find it perplexing, however, to advocate the intentional infliction of suffering on offenders while simultaneously seeking their psychological improvement.

An alternative notion of therapy concerns what is philosophically or spiritually therapeutic. On this view, something can be therapeutic for one's soul, or even the universe, and not just one's mind or body. Many punishment scholars use these and related concepts to understand the nature of the criminal legal system. For example, according to Antony Duff, punishment should be a communicative enterprise where "censure is expressed by the formal convictions that follow on proof of guilt at a criminal trial."[52] Duff writes,

> A criminal trial is . . . a communicative enterprise in which a citizen is called to answer a charge of wrongdoing and to take part in the process by which that charge is tested. If he is convicted, his conviction communicates to him (and to others) the censure that he has been proved to deserve for his crime. He is expected (but not compelled) to understand and accept the censure as justified: to understand and accept that he committed a wrong for which the community now properly

[52] R.A. Duff, Punishment, Communication, and Community 29 (2001); cf. Sandra G. Mayson, The Concept of Criminal Law, 14 Crim. L. & Phil. 447, 449 (2020) (supporting the Duffian approach).

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> censures him. . . . [The law aims to persuade people] to accept not just that certain kinds of conduct are 'prohibited' by the law but that and why such conduct is wrong.[53]

Unlike those who focus on therapy as a psychological construct, Duff aims for therapeutic outcomes in a more philosophical sense: "The moral possibility of trials and punishments does not, of course, depend upon their actual success in bringing wrongdoers to engage in the communicative enterprise, or to answer for, to repent, or to make amends for their crimes: we must address the wrongdoer as someone who *could* respond appropriately . . . ."[54] While Duff likely values psychological forms of therapy as well, his theory is geared toward communication, repentance, and reintegration in ways that seem to principally concern philosophical rather than psychological processes.

As with forms of therapeutic retributivism based on psychological accounts of therapy, nonpsychological versions can also value wonderland sentencing to the extent that it promotes, in particular, nonpsychological therapy. Such "philosophical therapy" might arise from states of guilt, repentance, and reintegration that are more appropriate in quantity than they are under current sentencing regimes. If current regimes are too punitive, wonderland sentencing could hold the promise of states of guilt, repentance, and reintegration that are more appropriate to actual circumstances. While this more philosophical version of therapeutic retributivism may also be viewed as perplexing to the extent that it intentionally inflicts psychological suffering to achieve therapeutic goals, the therapeutic goals—being nonpsychological—do not conflict as directly as we might think in the case of psychological therapeutic retributivism.

While therapeutic retributivists endorsing either notion of therapy can endorse wonderland sentencing, it is worth drawing the distinction between psychological and nonpsychological forms because they can lead to dramatically different consequences in some cases. For example, consider a person who experiences tremendous psychological pain from being falsely accused and convicted of a crime. If this person falsely comes to believe that he committed the crime of which he is accused, it

[53] Duff, supra note 52, at 80–81 (citations omitted).

[54] Antony Duff, Can We Punish the Perpetrators of Atrocities?, *in* The Religious in Responses to Mass Atrocity: Interdisciplinary Perspectives 79, 91 (Thomas Brudholm & Thomas Cushman eds., 2009).

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might be psychologically therapeutic, at least according to traditional indicia of stress, depression, and anxiety, if he no longer suffers the pain of feeling unjustly convicted. By contrast, I expect those endorsing more philosophical conceptions of therapy, such as Antony Duff, would be deeply troubled by a case in which psychological improvement was founded on false beliefs.

So I have suggested we can blend therapeutic jurisprudence with retributive approaches to punishment, and perhaps it counts in favor of wonderland sentencing that many traditional retributivist and therapeutic retributivist legal scholars could support it as an effort to promote (what they take to be) proportionality in sentencing.

I have recently written a book, however, in which I claim that retributivism is woefully incomplete.[55] Among other reasons, retributivists have never provided a good account of what makes a punishment proportional.[56] We cannot say that sentences will become more proportional under wonderland sentencing without a description of what makes a sentence proportional. Absent such an account, complaints about proportionality simply reflect gut intuitions with little to ground them.

As described in the 1883 U.S. Supreme Court case *Ex parte Crow Dog*, Crow Dog was a Native American man convicted of murdering a Lakota leader.[57] Through a tribal legal process, he was sentenced to make restitution in the form of "$600, 8 horses, and one blanket[,] which was a significant payment in those days."[58] The tribe's solution involved neither capital punishment nor confinement, meaning that there is no unassailable intuition that some incarceration is always proportionally imposed on serious crimes. *Crow Dog* shows us that a real-world tribal legal system did not require incarceration (or any other severe punishment) for murder, perhaps the most odious crime of all.

Similarly, retributivists have no good answer to those who seek longer prison sentences than we have now. For example, Elon Musk recently tweeted to his millions of followers that "[a] second conviction for

[55] See, e.g., Adam J. Kolber, Punishment for the Greater Good 50–60 (2024).

[56] See, e.g., id. at 60–68.

[57] 109 U.S. 556, 557 (1883).

[58] Tribal Governance: Crow Dog Case (1883), Univ. of Alaska Fairbanks, https://www.uaf.edu/tribal/academics/112/unit-1/crowdogcase.php [https://perma.cc/AVK9-7Q7M] (last visited Jan. 10, 2026).

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aggravated violent crime should get life imprisonment."[59] Since retributivists have no theory that goes beyond gut intuition to tell us how long sentences should be, they can't be confident that Musk's proposal would necessarily be disproportional. If all that traditional and therapeutic retributivists have to ground their claims in are gut intuitions, then their arguments are on very shaky ground when applied in real-world contexts.

### *C. Consequentialist Perspectives*

According to consequentialists, we ought to act so as to achieve the best consequences. After settling on the value of various possible consequences, most consequentialists say our acts should maximize the value of good consequences relative to bad ones.[60] In the punishment context, consequentialists could say that acts of punishment, such as incarceration, are justified when the expected harms of punishment (stress, anxiety, separation from friends and family, the costs of maintaining prisons, and so on) are less than the expected benefits (including crime deterrence, incapacitation of dangerous people, and, hopefully, offender rehabilitation).

To evaluate wonderland sentencing, consequentialists would assess the expected costs and benefits. On the benefits side, if sentences are currently too long from a consequentialist perspective,[61] they can expect wonderland sentencing to reduce total incarceration and thereby save a lot of money for the state and spare inmates and their families unnecessary suffering. They should also recognize the concerns I raised about the comparatively higher pressure that sentencing uncertainty puts on risk-averse defendants relative to more risk-neutral or risk-loving defendants and the corresponding risk that we are not efficiently using criminal justice resources when we punish the innocent or over-punish the guilty. Consequentialists should also recognize as a benefit that wonderland sentencing is generally likely to reduce the stress and strain innocent defendants experience when erroneously accused of a crime.[62]

[59] Elon Musk (@elonmusk), X (Sep. 10, 2025, at 03:48 ET), https://x.com/elonmusk/status/1965683791529410833 [https://perma.cc/Y843-Q8WB].

[60] See Julia Driver, Consequentialism 1–2 (2012).

[61] I believe many consequentialist legal scholars would endorse this view, again, as a sociological matter rather than anything that follows directly from consequentialism.

[62] These stresses and strains are harder to categorize, however, when imposed on guilty defendants. The experiences are bad in and of themselves, but they may positively contribute to the criminal legal system's deterrence goals.

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The critical issue for many consequentialists, I suspect, concerns the comparison of the benefits of wonderland sentencing to the substantial costs it would create in terms of judicial administration. On this score, it's hard to predict the net costs and benefits without much more detailed plans for wonderland sentencing, along with estimates of its financial costs. These costs will have to be weighed against the even harder-to-measure benefits consequentialists hope to obtain from wonderland sentencing, including improved carceral efficiency and reduced overall need for incarceration.

What we can say confidently is that consequentialists should support pilot studies of wonderland sentencing. During these studies, we would gain better information about the costs of wonderland sentencing and how it affects sentence length. It would, of course, be difficult to assess changes in deterrence and other effects associated with wonderland sentencing, but depending on the size and duration of the experiment, we might gather some suggestive information. Right now, courts in the United States almost always rely on traditional sentencing.[63] A pilot study using wonderland sentencing would be a small price to pay for a program with potentially substantial benefits.

### *D. Therapeutic Consequentialism*

The marriage of consequentialism and therapeutic jurisprudence may have a more natural fit. Consequentialism has its roots in Benthamite utilitarianism, which quite explicitly sought to improve well-being.[64] When consequentialism is put into action, it requires a valuation of various possible consequences. One thing we can confidently say about therapeutic consequentialism is that it would treat therapy or therapeutic states of the world as valuable—perhaps even intrinsically valuable. And just as therapeutic jurisprudence scholars recognize that there can be trade-offs between therapeutic goals and other goals,[65] so too would therapeutic consequentialists. Therapeutic consequentialism, so far, fits in well as a kind of consequentialism.

[63] See supra note 38 and accompanying text.

[64] See Walter Sinnott-Armstrong, Consequentialism, Stan. Encyclopedia Phil. (Oct. 4, 2023), https://plato.stanford.edu/entries/consequentialism [https://perma.cc/Z282-6D8H].

[65] Therapeutic jurisprudence seeks to "ascertain whether the law's antitherapeutic effects can be reduced, and its therapeutic effects enhanced, without subordinating due process and other justice values." Winick, supra note 50, at 185.

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A second feature of therapeutic consequentialism is that it would emphasize that therapy is important not just for assessing amounts of punishment but also as a tool to use throughout all law enforcement, adjudication, and punishment processes. Therapeutic consequentialism reminds us that there are many opportunities to make the criminal legal system less painful and more therapeutic. It fights our natural tendency to hold retributive sentiments toward those who break societal norms[66]—sentiments that sometimes serve society poorly. Once again, therapeutic consequentialism meshes well with other forms of consequentialism because, in this capacity, therapeutic consequentialism isn't dictating results and can't conflict with other forms of consequentialism. Rather, it's serving as a debiasing agent to fight our natural instincts to seek retribution or even revenge.

Nevertheless, we ought not identify all therapeutic jurisprudence with therapeutic consequentialism. The biggest sticking point is that consequentialists traditionally promote the best expected consequences without reference to deontological constraints. Such constraints limit the good consequences we are allowed to seek.[67] For example, if you believe that it is never morally appropriate to kill even when doing so will prevent five other people from being killed, then you may take killing to be a firm deontological constraint on our actions. The constraint prohibits killing even when an instance of killing would reduce the total number of killings.

As traditionally described, therapeutic jurisprudence may be viewed as taking no explicit position on deontological constraints. On the other hand, some writing in the tradition seems to endorse certain rights that trump therapeutic values.[68] Such writers may be, at least implicitly, endorsing deontological constraints. These therapeutic jurisprudence

[66] For some evidence of our retributivist inclinations, see Kevin M. Carlsmith, John M. Darley & Paul H. Robinson, Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment, 83 J. Personality & Soc. Psych. 284, 296–97 (2002); Kevin M. Carlsmith, On Justifying Punishment: The Discrepancy Between Words and Actions, 21 Soc. Just. Rsch. 119, 127 (2008).

[67] See Michael S. Moore, The Rationality of Threshold Deontology, *in* Moral Puzzles and Legal Perplexities: Essays on the Influence of Larry Alexander 371, 374–75 (Heidi M. Hurd ed., 2019) (endorsing deontological constraints).

[68] For example, Michael Perlin writes that "*dignity* is the core of the entire therapeutic jurisprudence enterprise." Michael L. Perlin, "Have You Seen Dignity?": The Story of the Development of Therapeutic Jurisprudence, 27 N.Z. Us. L. Rev. 1135, 1137 (2017) (N.Z.). Scholars focused on dignity usually think it trumps the goal of maximizing good consequences.

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scholars may hew more closely to the therapeutic retributivist line (which usually endorses constraints) than the therapeutic consequentialist one (which usually does not).

## CONCLUSION

Wonderland sentencing can increase sentencing fairness by reducing the uncertainty that surrounds criminal adjudication. Perhaps in an ideal world, people would know the precise sentences associated with potential crimes they might commit. In reality, they generally don't and have no practical way of gaining such knowledge in the vast majority of cases. Perhaps more startling, even when a person has been charged with a particular crime, the person's lawyer may still have limited information to enable the posttrial sentencing range to be accurately estimated prior to decisions to plead.

Wonderland sentencing, in its many variations, can offer caps or other estimates that help defendants decide whether to accept a plea deal. Reducing sentencing uncertainty also enables defendants to better plan their lives and reduces the ability of prosecutors to coerce guilty pleas from innocent defendants. Guilty pleas serve a signaling function by encouraging innocent defendants to go to trial. Too much prosecutorial leverage interferes with that signal.

Many retributivists are likely to support wonderland sentencing for its ability to promote proportionality. I keep my support provisional because I think we need more data to deem it consequentially beneficial. But there is good reason to think that a pilot program would be a worthy investment. While wonderland sentencing is just one of many therapeutic policy changes we could implement, given that approximately ninety-five percent of cases are resolved by plea bargain, it has the potential to do a lot of good in a lot of cases.