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OVERCRIMINALIZATION 2.0: THE SYMBIOTIC RELATIONSHIP BETWEEN PLEA BARGAINING AND OVERCRIMINALIZATION

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In discussing imperfections in the adversarial system, Professor Ribstein notes in his article entitled *Agents Prosecuting Agents*, that "prosecutors can avoid the need to test their theories at trial by using significant leverage to virtually force even innocent, or at least questionably guilty, defendants to plead guilty."[1] If this is true, then there is an enormous problem with plea bargaining, particularly given that over 95% of defendants in the federal criminal justice system succumb to the power of bargained justice.[2] As such, while Professor Ribstein pays tribute to plea bargaining, this piece provides a more detailed analysis of modern-day plea bargaining and its role in spurring the rise of overcriminalization. In fact, this article argues that a symbiotic relationship exists between plea bargaining and overcriminalization because these legal phenomena do not merely occupy the same space in our justice system, but also rely on each other for their very existence.

To illustrate the co-dependent nature of plea bargaining and overcriminalization, consider what it would mean if there were no plea bargaining. Novel legal theories and overly-broad statutes would no longer be tools merely for posturing during charge and sentence bargaining, but would have to be defended and affirmed both morally and legally at trial. Further, the significant costs of prosecuting individuals with creative, tenuous, and technical charges would not be an abstract possibility used in determining how great of an incentive to offer a defendant in return for pleading guilty. Instead, these costs would be a real consideration in determining whether justice is being served by bringing a prosecution at all.

Similarly, consider the significant ramifications that would follow should there no longer be overcriminalization. The law would be refined and clear regarding conduct for which criminal liability may attach. Individual benefits, political pressure, and notoriety would not incentivize the

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1 *See* Larry E. Ribstein, *Agents Prosecuting Agents*, 7 J.L. ECON. & POL'Y 617 (2011).

2 U.S. SENTENCING COMM'N, 2009 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2010), *available at* http://ftp.ussc.gov/ANNRPT/2009/FigC.pdf.

invention of novel legal theories upon which to base liability where none otherwise exists, despite the already expansive size of the United States criminal code. Further, novel legal theories and overly-broad statutes would not be used to create staggering sentencing differentials that coerce defendants, even innocent ones, to falsely confess in return for leniency.

As these hypothetical considerations demonstrate, plea bargaining and overcriminalization perpetuate each other, as plea bargaining shields overcriminalization from scrutiny and overcriminalization creates the incentives that make plea bargaining so pervasive. For example, take the novel trend toward deputizing corporate America as agents of the government, as illustrated in the case of Computer Associates.[3]

In 2002, the Department of Justice and the Securities and Exchange Commission began a joint investigation regarding the accounting practices of Computer Associates, an Islandia, New York-based manufacturer of computer software.[4] Almost immediately, the government requested that Computer Associates perform an internal investigation.[5] As has been noted by numerous commentators, such internal investigations provide invaluable assistance to the government, in part because corporate counsel can more easily acquire confidential materials and gain unfettered access to employees.[6] Complying with the government's request, Computer Associates hired an outside law firm.[7] What happened next was both typical and atypical:

> Shortly after being retained in February 2002, the Company's Law Firm met with the defendant Sanjay Kumar [former CEO and chairman of the board] and other Computer Associates executives [including Stephen Richards, former head of sales,] in order to inquire into their knowledge of the practices that were the subject of the government investigations. During these meetings, Kumar and others did not disclose, falsely denied and otherwise concealed the existence of the 35-day month [accounting] practice. Moreover, Kumar and others concocted and presented to the company's law firm an assortment of false justifications, the pur-

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[3] *See* United States v. Kumar, 617 F.3d 612, 616-19 (2d Cir. 2010); *see also* United States v. Kumar, 2006 WL 6589865 (E.D.N.Y. Feb. 21, 2006); Indictment, United States v. Kumar 30-32 (E.D.N.Y. Sept. 22, 2004), *available at* http://www.justice.gov/archive/dag/cftf/chargingdocs/compassocs.pdf.

[4] *Kumar*, 617 F.3d at 617; *see also* Robert G. Morvillo & Robert J. Anello, *Beyond 'Upjohn': Necessary Warnings in Internal Investigations*, 224 N.Y.L.J. 3 (Oct. 4, 2005).

[5] *Kumar*, 617 F.3d at 617.

[6] *See, e.g.*, Morvillo & Anello, *supra* note 4 ("Corporate internal investigations have become a potent tool for prosecutors in gathering evidence against corporate employees suspected of wrongdoing."). Though outside the scope of this article, another phenomenon leading to the growth of overcriminalization in white collar criminal cases is the lack of aggressive defense strategies. Where the government can secure convictions and concessions with mere threats, they have the ability to launch more investigations with wider reaches using the same resources. *See, e.g.*, Alex Berenson, *Case Expands Type of Lies Prosecutors Will Pursue*, N.Y. TIMES, May 17, 2004, at C1 (quoting a Washington, D.C.-based defense attorney as saying, "An internal investigation has to be an absolute search for the truth and an absolute capitulation to the government.").

[7] Morvillo & Anello, *supra* note 4.

> pose of which was to support their false denials of the 35-day month practice. Kumar and others knew, and in fact intended, that the company's law firm would present these false justifications to the United States Attorney's Office, the SEC and the FBI so as to obstruct and impeded (sic) the government investigations.
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> For example, during a meeting with attorneys from the company's law firm, the defendant Sanjay Kumar and Ira Zar discussed the fact that former Computer Associates salespeople had accused Computer Associates of engaging in the 35-day month practice. Kumar falsely denied that Computer Associates had engaged in such a practice and suggested to the attorneys from the company's law firm that because quarterly commissions paid to Computer Associates salespeople regularly included commissions on license agreements not finalized until after end of quarter, the salespeople might assume, incorrectly, that revenue associated with those agreements was recognized by Computer Associates within the quarter. Kumar knew that this explanation was false and intended that the company's law firm would present this false explanation to the United States Attorney's Office, the SEC and the FBI as part of an effort to persuade those entities that the accusations of the former salespeople were unfounded and that the 35-day month practice never existed.[8]

The interviewing of employees by private counsel as part of an internal investigation is common practice and few would be surprised to learn that employees occasionally lie during these meetings. Further, information gathered during internal investigations is often passed along to the government in an effort to cooperate.[9] What was uncommon in the Computer Associates situation, however, was the government's response to the employees' actions. Along with the traditional host of criminal charges related to the accounting practices under investigation, the government indicted Kumar and others with obstruction of justice for lying to Computer Associates' private outside counsel.[10] According to the government, the defendants "did knowingly, intentionally and corruptly obstruct, influence and impede official proceedings, to wit: the Government Investigations," in violation of 18 U.S.C. § 1512(c)(2).[11]

This novel and creative use of the obstruction of justice laws, which had recently been amended after the collapse of Enron and the passage of Sarbanes–Oxley, was ill-received by many members of the legal establishment.[12] Echoing the unease expressed by the bar, Kumar and his codefen-

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8 Indictment, *supra* note 3.

9 Timothy P. Harkness & Darren LaVerne, *Private Lies May Lead to Prosecution: DOJ Views False Statements to Private Attorney Investigators as a Form of Obstruction of Justice*, 28 NAT'L L.J. S1 (July 24, 2006) ("[I]nternal investigations—and the practice of sharing information gathered during those investigations with federal regulators and prosecutors—have become standard practice . . . .").

10 Indictment, *supra* note 3.

11 *Id.* at 38.

12 As examples, consider the following excerpts from news articles regarding the case:

> Defense lawyers and civil libertarians are expressing alarm at the government's aggressive use of obstruction of justice laws in its investigation of accounting improprieties at Computer Associates . . . .
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> . . . .
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> . . . The Computer Associate executives were never accused of lying directly to federal investigators or a grand jury. Their guilty pleas were based on the theory that in lying to Wachtell

dants challenged the validity of the government's creative charging decision and filed a motion to dismiss.[13] The district court responded by denying the defendants' motion without specifically addressing their concerns about the government's interference with the attorney–client privilege.[14] The stage was thus set for this important issue to make its way to the U.S. Court of Appeals for the Second Circuit (and, perhaps, eventually the U.S. Supreme Court) for guidance on the limits of prosecutorial power to manipulate the relationships among a corporation, its employees, and its private counsel.

Unfortunately, despite the grave concerns expressed from various corners of the legal establishment about the obstruction of justice charges in the Computer Associates case, the appellate courts never had the opportunity to scrutinize the validity of this novel and heavily criticized expansion of criminal law. The government's new legal theory went untested in the Computer Associates case due to the symbiotic relationship between plea bargaining and overcriminalization. Three of the five defendants in the Computer Associates case pleaded guilty immediately, while Kumar and Stephens gave in to the pressures of plea bargaining two months after filing their unsuccessful motion to dismiss before the district court.[15] As might be expected in today's enforcement environment, not even the corporation challenged the government in the matter. Computer Associates entered into a deferred prosecution agreement that brought the government's investigation to an end.[16] Once again, overcriminalization created a situation where the defendants could be charged with obstruction of justice and presented

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> [the law firm representing Computer Associates] they had misled federal officials, because Wachtell passed their lies to the government.

Berenson, *supra* note 6.

> While the legal theory of obstruction in these cases may be unremarkable, the government's decision to found these obstruction charges on statements to lawyers is notable as a further example of government actions that are changing the role of counsel for the corporation.

Audrey Strauss, *Company Counsel as Agents of Obstruction*, CORP. COUNS. (July 1, 2004).

> The possibility that lying to an attorney, hired by a defendant's employer and acting in a purely private capacity, could lead to criminal charges contributed to growing concern within the criminal defense bar that the government was effectively transforming company lawyers into an arm of the state.

Harkness & LaVerne, *supra* note 9.

13 *See* United States v. Kumar, 2006 WL 6589865, at *1 (E.D.N.Y. Feb. 21, 2006).

14 *See id.* at *5. The court noted, "An objective reading of the remarks of the Senators and Representatives compels the conclusion that what they plainly sought to eliminate was corporate criminality in all of its guises which, in the final analysis, had the effect of obstructing, influencing or, impeding justice being pursued in an 'official proceeding' . . . ." *Id.* at *4.

15 United States v. Kumar, 617 F.3d 612, 618 (2d Cir. 2010).

16 *Kumar*, 617 F.3d at 617.

with significant incentives to plead guilty, while plea bargaining ensured these novel legal theories would go untested.

Given the symbiotic existence of plea bargaining and overcriminalization, perhaps the answer to overcriminalization does not lie solely in changing imperfect prosecutorial incentives or changing the nature of corporate liability—it may also lie in changing the game itself.[17] Perhaps the time has come to reexamine the role of plea bargaining in our criminal justice system.

While the right to plead guilty dates back to English common law, the evolution of plea bargaining into a force that consumes over 95% of defendants in the American criminal justice system mainly took place in the nineteenth and twentieth centuries.[18] In particular, appellate courts after the Civil War witnessed an influx of appeals involving "bargains" between defendants and prosecutors.[19] While courts uniformly rejected these early attempts at bargained justice, deals escaping judicial review continued to be struck by defendants and prosecutors.[20]

By the turn of the twentieth century, plea bargaining was on the rise as overcriminalization flourished and courts became weighed down with ever-growing dockets.[21] According to one observer, over half of the defendants in at least one major urban criminal justice system in 1912 were charged with crimes that had not existed a quarter century before.[22] The challenges presented by the growing number of prosecutions in the early twentieth

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17 *See* Larry E. Ribstein, *Agents Prosecuting Agents*, 7 J.L. ECON. & POL'Y 617 (2011) (proposing to address overcriminalization in the context of corporate liability by changing imperfect incentives and the nature of corporate liability itself).

18 *See* Lucian E. Dervan, *Plea Bargaining's Survival: Financial Crimes Plea Bargaining, A Continued Triumph in a Post-Enron World*, 60 OKLA. L. REV. 451, 478 (2007) (discussing the rise of plea bargaining in the nineteenth and twentieth centuries); Mark H. Haller, *Plea Bargaining: The Nineteenth Century Context*, 13 LAW & SOC'Y REV. 273, 273 (1978) ("[Alschuler and Friedman] agree that plea bargaining was probably nonexistent before 1800, began to appear during the early or mid-nineteenth century, and became institutionalized as a standard feature of American urban criminal courts in the last third of the nineteenth century."); *see also* John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 LAW & SOC'Y REV. 261 (1978); Lynn M. Mather, *Comments on the History of Plea Bargaining*, 13 LAW & SOC'Y REV. 281 (1978); John Baldwin & Michael McConville, *Plea Bargaining and Plea Negotiation in England*, 13 LAW & SOC'Y REV. 287 (1978).

19 *See* Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 19 (1979) ("It was only after the Civil War that cases of plea bargaining began to appear in American appellate court reports.").

20 *See id.* at 19-22. In particular, plea bargaining appears to have grown in prominence because judges and prosecutors began accepting bribes from defendants in return for "plea agreements" that guaranteed reduced sentences. According to Professor Albert Alschuler, "The gap between these judicial denunciations of plea bargaining [in the late nineteenth century] and the practice of many urban courts at the turn of the century and thereafter was apparently extreme. In these courts, striking political corruption apparently contributed to a flourishing practice of plea bargaining." *Id.* at 24.

21 *Id.* at 5, 19, 27.

22 *Id.* at 32.

century accelerated with the passage of the Eighteenth Amendment and the beginning of the Prohibition Era.[23] To cope with the strain on the courts, the symbiotic relationship between overcriminalization and plea bargaining was born:

> [F]ederal prosecutions under the Prohibition Act terminated in 1930 had become nearly eight times as many as the total of all pending federal prosecutions in 1914. In a number of urban districts the enforcement agencies maintain that the only practicable way of meeting this situation with the existing machinery of federal courts . . . is for the United States Attorneys to make bargains with defendants or their counsel whereby defendants plead guilty to minor offenses and escape with light penalties.[24]

In return for agreeing not to challenge the government's legal assertions and for assisting in lessening the strain created by overcriminalization, defendants were permitted to plead guilty to reduced charges and in return for lighter sentences.[25] The strategy of using plea bargaining to move cases through the system was effective, as the number of defendants relieving the government of its burden at trial swelled. Between the early 1900s and 1916, the number of federal cases concluding with a guilty plea rose sharply from 50% to 72%.[26] By 1925, the number had reached 90%.[27]

By 1967, the relationship between plea bargaining and overcriminalization had so solidified that even the American Bar Association (ABA) proclaimed the benefits of bargained justice for a system that remained unable to grapple with the continued growth of dockets and the criminal code.[28] The ABA stated:

> [A] high proportion of pleas of guilty and *nolo contendere* does benefit the system. Such pleas tend to limit the trial process to deciding real disputes and, consequently, to reduce the need for funds and personnel. If the number of judges, courtrooms, court personnel and counsel for prosecution and defense were to be increased substantially, the funds necessary for such increases might be diverted from elsewhere in the criminal justice process. Moreo-

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23 Alschuler, *supra* note 19, at 5, 27; *see also* GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 8 (2003).

24 Alschuler, *supra* note 19, at 27 (citing Nat'l Comm'n On Law Observance & Enforcement, Report On The Enforcement Of The Prohibition Laws Of The United States 56 (1931)).

25 *Id.* at 29; *see also* Donald A. Dripps, *Overcriminalization, Discretion, Waiver: A Survey of Possible Exit Strategies*, 109 PENN ST. L. REV. 1155, 1156-61 (2005) (discussing the relationship between broadening legal rules and plea bargaining); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 519-20 (2001) (discussing the influence of broader laws on the rate of plea bargaining); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 129 (2005) ("Changes in federal sentencing practices during the 1980s and 1990s increased the certainty and size of the penalty for going to trial, and mightily influenced the guilty plea and acquittal rates during those times.").

26 Alschuler, *supra* note 19, at 27.

27 *Id.*

28 AM. BAR ASS'N PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY 2 (Approved Draft, 1968).

> ver, the limited use of the trial process for those cases in which the defendant has grounds for contesting the matter of guilt aids in preserving the meaningfulness of the presumption of innocence.[29]

Interestingly, although plea bargaining had gained widespread approval by the 1960s, the U.S. Supreme Court had yet to rule on the constitutionality of bargained justice. Finally, in 1970, the Court took up *Brady v. United States*,[30] a case decided in the shadows of a criminal justice system that had grown reliant on a force that led 90% of defendants to waive their right to trial and confess their guilt in court.[31]

In *Brady*, the defendant was charged under a federal kidnapping statute that allowed for the death penalty if a defendant was convicted by a jury.[32] This meant that defendants who pleaded guilty could avoid the capital sanction by avoiding a jury verdict altogether.[33] According to Brady, this statutory incentive led him to plead guilty involuntarily for fear that he might otherwise be put to death.[34] The *Brady* Court, however, concluded that it is permissible for a criminal defendant to plead guilty in exchange for the probability of a lesser punishment,[35] a ruling likely necessitated by the reality that the criminal justice system would collapse if plea bargaining was invalidated.

While the *Brady* decision signaled the Court's acceptance of plea bargaining, it contained an important caveat regarding how far the Court would permit prosecutors to venture in attempting to induce guilty pleas. In *Brady*'s concluding paragraphs, the Court stated that plea bargaining was a tool for use only in cases where the evidence was overwhelming and the defendant, unlikely to succeed at trial, might benefit from the opportunity to bargain for a reduced sentence,[36] a stance strikingly similar to the ABA's at the time.[37] According to the Court, plea bargaining was not to be used to overwhelm defendants and force them to plead guilty where guilt was uncertain:

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29 *Id.*

30 *See* Brady v. United States, 397 U.S. 742 (1970).

31 Diana Borteck, *Pleas for DNA Testing: Why Lawmakers Should Amend State Post-Conviction DNA Testing Statutes to Apply to Prisoners Who Pled Guilty*, 25 CARDOZO L. REV. 1429, 1439 n.43 (2004) (citing Corinna Barrett Lain, *Accuracy Where It Matters: Brady v. Maryland in the Plea Bargaining Context*, 80 WASH. U.L. Q. 1, 1 (2002)) (noting that since the 1960s the plea bargaining rate has been around ninety percent); *see also* AM. BAR ASS'N, *supra* note 28, at 1-2 ("The plea of guilty is probably the most frequent method of conviction in all jurisdictions; in some localities as many as 95 per cent of the criminal cases are disposed of this way."). Today, pleas of guilty account for over 95% of all federal cases. *See* U.S. SENTENCING COMM'N, *supra* note 2.

32 *Brady*, 397 U.S. at 743.

33 *See id.*

34 *Id.* at 743-44.

35 *Id.* at 747, 751.

36 *Id.* at 752.

37 AM. BAR ASS'N, *supra* note 28, at 2.

> For a Defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious – his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated. For the State there are also advantages – the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are *conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof.*[38]

According to the Court, if judges, prosecutors, and defense counsel failed to observe these constitutional limitations, the Court would be forced to reconsider its approval of the plea bargaining system altogether:[39]

> This is not to say that guilty plea convictions hold no hazard for the innocent or that the methods of taking guilty pleas presently employed in this country are necessarily valid in all respects. This mode of conviction is no more foolproof than full trials to the court or to the jury. Accordingly, we take great precautions against unsound results, and we should continue to do so, whether conviction is by plea or by trial. We would have serious doubts about this case if the encouragement increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves.[40]

Unfortunately, evidence from the last forty years shows that *Brady's* attempt to limit plea bargaining has not been successful. For example, as Professor Ribstein noted, today even innocent defendants can be persuaded by the staggering incentives to confess one's guilt in return for a bargain.[41]

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[38] *Brady*, 397 U.S. at 752 (emphasis added).

[39] *Id*. at 758.

[40] *Id*. at 757-58. The sentiment that innocent defendants should not be encouraged to plead guilty has been echoed by academics. *See* Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1382 (2003) ("Even if innocent defendants want to plead guilty, the law should not go out of its way to promote these unjust results."); Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1158 (2005) (supporting Bibas' statements regarding innocent defendants and plea bargaining).

[41] *See* Michael O. Finkelstein, *A Statistical Analysis of Guilty Plea Practices in the Federal Courts*, 89 HARV. L. REV. 293, 295 (1975) ("On the basis of the analysis that follows, I conclude that the pressure on defendants to plead guilty in the federal courts has induced a high rate of conviction by 'consent' in cases in which no conviction would have been obtained if there had been a contest."); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1949-51 (1992) (discussing plea bargaining's innocence problem); David L Shapiro, *Should a Guilty Plea Have Preclusive Effect?*, 70 IOWA L. REV. 27, 39-46 (1984) (discussing innocent defendants and plea bargaining); Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Really Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1343-44 (1997) ("[T]he results of our research suggest that some defendants who perhaps were innocent, and a larger group who probably would have been acquitted had the case gone to trial, were nonetheless induced to plead guilty."); *see also* Russell D. Covey, *Signaling and Plea Bargaining's Innocence Problem*, 66 WASH. & LEE L. REV. 73, 74 (2009) ("Plea bargaining has an innocence problem."); Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 CARDOZO L. REV. 2295, 2295-96 (2006) (arguing a partial ban on plea bargaining would assist in preventing innocent defendants

Importantly, this failure of the *Brady* limitation is due in part to the fact that overcriminalization, the phenomenon that initially created swelling dockets and the need for plea bargaining, makes creating the incentives to plead guilty easy by propagating a myriad of broad statutes from which staggering sentencing differentials can be created. All the while, plea bargains prevent these incentives, sentencing differentials, and, in fact, overcriminalization itself, from being reviewed.[42]

Plea bargaining's drift into constitutionally impermissible territory under *Brady*'s express language indicates the existence of both a problem and an opportunity. The problem is that the utilization of large sentencing differentials based, at least in part, on novel legal theories and overly-broad statutes, results in increasingly more defendants pleading guilty. Despite the ever-growing number of Americans captured by the criminal justice system through an increasingly wide application of novel legal theories and overly-broad statutes, these theories and statutes are seldom tested. No one is left to challenge their application—everyone has pleaded guilty instead.

The opportunity is to challenge plea bargaining and reject arguments in favor of limitless incentives that may be offered in exchange for pleading guilty. This endeavor is not without support; *Brady* itself is the guide. By focusing on changing the entire game, it may be possible to restore justice to a system mired in posturing and negotiation about charges and assertions that will never be challenged in court. Such a challenge may also slow or even reverse the subjugation of Americans to the costs, both social and moral, of overcriminalization—plea bargaining's unfortunate mutualistic symbiont.

The great difficulty lies in bringing the problem to the forefront so that it can be examined anew. Who among those offered the types of sentencing differentials created through the use of novel legal theories and overly broad statutes will reject the incentives and challenge the system as a whole? Will it be someone like Lea Fastow?

From 1991 to 1997, Lea Fastow, the wife of Enron Chief Financial Officer Andrew Fastow, served as a Director of Enron and its Assistant Treasurer of Corporate Finance.[43] Although Ms. Fastow was a stay-at-home mother raising two small children in 2001, federal investigators determined that she had known of her husband's fraudulent financial dealings and had

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from being forced to plead guilty by forcing asset allocation by prosecutors towards only strong cases); Leipold, *supra* note 40, at 1154 ("Yet we know that sometimes innocent people plead guilty . . . .").

[42] *See* Ellen S. Podgor, *White Collar Innocence: Irrelevant in the High Stakes Risk Game*, 85 CHI.-KENT L. REV. 77, 78 (2010) ("The pronounced gap between those risking trial and those securing pleas is what raises concerns here. Some refer to this as a 'trial penalty' while others value the cooperation and support the vastly reduced sentences.").

[43] Michelle S. Jacobs, *Loyalty's Reward–A Felony Conviction: Recent Prosecutions of High-Status Female Offenders*, 33 FORDHAM URB. L.J. 843, 856 (2006).

even assisted him in perpetrating the frauds.[44] In response, the government, which had already indicted her husband, indicted her under a six-count indictment that included charges of conspiracy to commit wire fraud, conspiracy to defraud the United States, money laundering conspiracy, aiding and abetting, and filing a false tax return.[45]

Based on the indictment's allegations, Ms. Fastow faced a possible ten-year prison sentence, but the government was more interested in persuading her to cooperate.[46] As a result, the government offered her a deal.[47] In return for pleading guilty, the government would charge her with a single count of filing a false tax return, which carried a recommended sentence of five months in prison.[48] The deal also included an agreement that Ms. Fastow and her husband, who also intended to plead guilty in return for leniency, would not have to serve their prison sentences simultaneously, thus ensuring their children would always have one parent at home.[49] As the lead prosecutor in the case stated, "The Fastows' children can be taken into account in deciding when Andrew Fastow will begin serving his sentence.

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[44] *Id.* at 856-57.

> During the time in question, Andrew Fastow and Michael Kopper created several Special Purpose Entities (SPEs) to hold off-balance sheet treatment of assets held by Enron. . . . Ms. Fastow assisted with concealing the fraudulent nature of two of the SPEs. In both cases, Ms. Fastow accepted "gifts" in her name and in the names of her children, knowing that the gifts were kickbacks. In another instance, the Fastows were attempting to hide the fact that Ms. Fastow's father was used as an "independent" third party of RADR [one of the two SPEs]. When the Fastows realized that the father's ownership would trigger a reporting requirement, they had him pull out of the deal. Ms. Fastow convinced her father to file a false tax return in an effort to continue hiding their involvement in the SPE.

Id.; *see also* Mary Flood, *Lea Fastow in Plea-Bargain Talks; Former Enron CFO's Wife Could Get 5-month Term but Deal Faces Hurdles*, HOUS. CHRON., Nov. 7, 2003, at A1.

[45] Indictment, United States v. Fastow (S.D.T.X. 2003), *available at* http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/enron/usleafstw43003ind.pdf.

[46] The ten year sentence is calculated using the 2002 Sentencing Guidelines for fraud. Beginning with a base offense level of six points, Fastow would have received twenty points for a $17 million loss, and four points for an offense involving more than fifty people. A defendant with no previous criminal history and thirty points has a sentencing range between 97 to 121 months. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (2002).

[47] Flood, *supra* note 44, at A1.

[48] *See* Bruce Zucker, *Settling Federal Criminal Cases in the Post-Enron Era: The Role of the Court and Probation Office in Plea Bargaining Federal White Collar Cases*, 6 FL. COASTAL L. REV. 1, 3-4 (2004).

[49] *See* Jacobs, *supra* note 43, at 859.

> During the renegotiation of the second plea, it was widely reported that Ms. Fastow was interested in a plea that would allow her children to stay at home with one parent while the other was incarcerated, rather than running the risk that both parents would be incarcerated at the same time. The government apparently acquiesced to this request.

Id.

There is no reason for the government, when it can, to have a husband and wife serve their sentences at the same time."[50]

For Lea Fastow, the reality of her situation removed any free will she might have had to weigh her options.[51] With two small children at home and the prospect of simultaneous prison sentences for her and her husband, the decision to accept the offer was made for her.[52] As one family friend stated, "It's a matter of willing to risk less when it's for her children than she would risk if it were just for herself."[53] As such, she succumbed to the pressure to confess her guilt and accepted the deal.[54]

Though the judge in the case would force the government to revise its offer because he believed five months was too lenient, Lea Fastow would eventually plead guilty to a misdemeanor tax charge and serve one year in prison.[55] The agreement to confess her guilt in return for a promise of leniency lessened her sentence by nine years and ensured that her children would not be without a parent.[56] As promised, Andrew Fastow was not required to report to prison for his offenses until after his wife was released.[57] As has become all too familiar today, Lea Fastow did not challenge the use of sentencing differentials and bargaining incentives. She did not ask the Supreme Court to examine modern-day plea bargaining against the standards established in *Brady* forty years ago. Just as is true of so many other defendants, she pleaded guilty instead.

And so we wait.

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[50] Mary Flood & Clifford Pugh, *Lea Fastow Expresses "Regret" at Sentencing; Wife of ex-Enron CFO Faces Year in Prison*, HOUS. CHRON., May 7, 2004, at A19.

[51] *See* Lynumn v. Illinois, 372 U.S. 528, 534 (1963) ("[T]he question in each case is whether the defendant's will was overborne at the time he confessed. If so, the confession cannot be deemed 'the product of a rational intellect and a free will.'") (internal citations removed).

[52] *See* Greg Farrell & Jayne O'Donnell, *Plea Deals Appear Close for Fastows*, USA TODAY, Jan. 8, 2004, at 1B ("One of the reasons that Lea Fastow wants to limit her jail time to five months is that she and her husband have two young children, and they're trying to structure their pleas so they're not both in jail at the same time.").

[53] Flood, *supra* note 44, at A1 ("A family friend said Lea Fastow is willing to consider pleading guilty and forgoing a chance to tell her side to a jury because it would be better for her two small children and could ensure they would not be without a parent at home.").

[54] *See* Mary Flood, *Fastows to Plead Guilty Today; Feds Now Focus on Skilling, Lay*, HOUS. CHRON., Jan. 14, 2004, at A1 ("The plea bargains for the Fastows, who said they wanted to be sure their two children are not left parentless, have been in limbo for more than a week.").

[55] Flood & Pugh, *supra* note 50.

[56] *See* Mary Flood, *Lea Fastow Begins Prison Sentence; Ex-Enron CFO's Wife Arrives Early to Start 1-year Term*, HOUS. CHRON., July 13, 2004, at A1; Farrell & O'Donnell, *supra* note 52, at 1B ("U.S. District Judge David Hittner told Lea Fastow Wednesday that he refused to be locked in to the five-month prison sentence that her lawyers had negotiated with prosecutors.").

[57] *See* Flood, *Lea Fastow Begins Prison Sentence*, *supra* note 56.

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CRIMINAL LAW

THE INNOCENT DEFENDANT'S DILEMMA: AN INNOVATIVE EMPIRICAL STUDY OF PLEA BARGAINING'S INNOCENCE PROBLEM

LUCIAN E. DERVAN*

AND

VANESSA A. EDKINS, Ph.D.**

In this Article, Professors Dervan and Edkins discuss a recent psychological study they completed regarding plea bargaining and innocence. The study, involving dozens of college students and taking place over several months, revealed that more than half of the innocent participants were willing to falsely admit guilt in return for a benefit. These research findings bring significant new insights to the long-standing

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debate regarding the extent of plea bargaining's innocence problem. The Article also discusses the history of bargained justice and examines the constitutional implications of the study's results on plea bargaining, an institution the Supreme Court reluctantly approved of in 1970 in return for an assurance that it would not be used to induce innocent defendants to falsely admit guilt.

TABLE OF CONTENTS

I. INTRODUCTION 2
II. THE HISTORICAL RISE OF PLEA BARGAINING AND ITS INNOCENCE PROBLEM 5
A. The Rise of Plea Bargaining 7
B. Plea Bargaining's Innocence Debate 15
III. LABORATORY EVIDENCE OF PLEA BARGAINING'S INNOCENCE PROBLEM 24
A. Study Methodology—Confronting a Devil's Bargain 28
B. Study Results—The Innocent Defendant's Dilemma Exposed 33
1. Pleading Rates for Guilty and Innocent Students 34
2. The Impact of Sentencing Differentials 38
IV. THE CONSTITUTIONALITY OF THE INNOCENT DEFENDANT'S DILEMMA 43

I. INTRODUCTION

In 1989, Ada JoAnn Taylor sat quietly in a nondescript chair contemplating her choices.[1] On a cold February evening four years earlier, a sixty-eight-year-old woman was brutally victimized in Beatrice, Nebraska.[2] Police were now convinced that Taylor and five others were responsible for the woman's death.[3] The options for Taylor were stark.[4] If she pleaded guilty and cooperated with prosecutors, she would be rewarded

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[1] *See Know the Cases: Ada JoAnn Taylor*, THE INNOCENCE PROJECT, www.innocenceproject.org/Content/Ada_JoAnn_Taylor.php (last visited Oct. 26, 2012) [hereinafter *Taylor*, THE INNOCENCE PROJECT].

[2] *See id.* ("Sometime during the night of February 5, 1985, 68-year-old Helen Wilson was sexually assaulted and killed in the Beatrice, Nebraska, apartment where she lived alone.").

[3] *But see id.* ("An FBI analysis of the Wilson murder and the three other [related] crimes concluded that 'we can say with almost total certainty that this crime was committed by one individual acting alone.'").

[4] *See id.*

with a sentence of ten to forty years in prison.[5] If, however, she proceeded to trial and was convicted, she would likely spend the rest of her life behind bars.[6]

Over a thousand miles away in Florida, and more than twenty years later, a college student sat nervously in a classroom chair contemplating her options.[7] Just moments before, a graduate student had accused her of cheating on a logic test being administered as part of a psychological study. The young student was offered two choices. If she admitted her offense and saved the university the time and expense of proceeding with a trial before the Academic Review Board, she would simply lose her right to compensation for participating in the study. If, however, she proceeded to the review board and lost, she would lose her compensation, her faculty advisor would be informed, and she would be forced to enroll in an ethics course.

In Beatrice, Nebraska, the choice for Taylor was difficult, but the incentives to admit guilt were enticing.[8] A sentence of ten to forty years in prison meant she would return home one day and salvage at least a portion of her life.[9] The alternative, a lifetime behind bars, was grim by comparison.[10] After contemplating the options, Taylor pleaded guilty to aiding and abetting second-degree murder.[11] Twenty years later, the college student made a similar calculation.[12] While the loss of compensation for

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[5] *See id.* ("Ada JoAnn Taylor agreed with prosecutors to plead guilty and testify at the trial of co-defendant Joseph White regarding her alleged role in the murder. In exchange for her testimony, she was sentenced to 10 to 40 years in prison.").

[6] *See id.*

[7] *See infra* Part III (discussing the plea-bargaining study).

[8] *See Taylor*, THE INNOCENCE PROJECT, *supra* note 1.

[9] *See id.*

[10] *See id.*; *see also* Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 WAKE FOREST L. REV. 681, 712 (1998) (discussing the severity of life in prison and noting that some death row inmates "waive their appeals out of fear that they will perhaps succeed and be faced with a mandatory LWOP sentence"). As noted by one philosopher:

> What comparison can there really be, in point of severity between consigning a man to the short pang of a rapid death, and immuring him in a living tomb, there to linger out what may be a long life in the hardest and most monotonous toil, without any of its alleviation or rewards—debarred from all pleasant sights and sounds, and cut off from all earthly hope, except a slight mitigation of bodily restraint, or a small improvement of diet?

Id. (quoting LEON SHASKOLSKY SHELEFF, ULTIMATE PENALTIES: CAPITAL PUNISHMENT, LIFE IMPRISONMENT, PHYSICAL TORTURE 60 (1987) (quoting John Stuart Mill, Parliamentary Debate on Capital Punishment Within Prisons Bill (Apr. 21, 1868))).

[11] *Taylor*, THE INNOCENCE PROJECT, *supra* note 1.

[12] *See infra* Part III (discussing the plea-bargaining study).

participating in the study was a significant punishment, it was certainly better than being forced to enroll in a time-consuming ethics course.[13] Just as Taylor had decided to control her destiny and accept the certainty of the lighter alternative, the college student admitted that she had knowingly cheated on the test.[14]

That Taylor and the college student both pleaded guilty is not the only similarity between the cases. Both were also innocent of the offenses of which they had been accused.[15] After serving nineteen years in prison, Taylor was exonerated after DNA testing proved that neither she nor any of the other five defendants in her case were involved in the murder.[16] As for the college student, her innocence is assured by the fact that, unbeknownst to her, she was actually part of an innovative new study into plea bargaining and innocence.[17] The study, conducted by the authors, involving dozens of college students and taking place over several months, not only recreated the innocent defendant's dilemma experienced by Taylor, but also revealed that plea bargaining's innocence problem is not isolated to an obscure and rare set of cases.[18] Strikingly, the study demonstrated that more than half of the innocent participants were willing to falsely admit guilt in return for a perceived benefit.[19] This finding brings new insights to the long-standing debate regarding the possible extent of plea bargaining's innocence problem and ignites a fundamental constitutional question regarding an institution the Supreme Court reluctantly approved of in 1970 in return for an assurance that it would not be used to induce innocent defendants to falsely admit guilt.[20]

This Article begins in Part II by examining the history of plea

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[13] *See infra* Part III.

[14] *See infra* Part III.

[15] *See Taylor*, THE INNOCENCE PROJECT, *supra* note 1.

[16] *See id.* It should also be noted that five of the six defendants in the Wilson murder case pleaded guilty. As described above, DNA evidence showed that all six defendants were innocent and played no role in the sexual assault or murder of Wilson. *See id.*; *see also Know the Cases: Debra Shelden*, THE INNOCENCE PROJECT, www.innocenceproject.org/Content/Debra_Shelden.php (last visited Jan. 1, 2012) ("Debra Shelden agreed with prosecutors to plead guilty and testify falsely to her alleged role in the crime at the trial of co-defendant Joseph White in exchange for a lighter sentence."); *Know the Cases: James Dean*, THE INNOCENCE PROJECT, www.innocenceproject.org/Content/James_Dean.php (last visited Jan. 1, 2012) ("Joseph White was the only defendant in this case to go to trial, and three of his five co-defendants testified against him in exchange for shorter sentences than those they may have received had their own cases gone to trial.").

[17] *See infra* Part III (discussing the plea-bargaining study).

[18] *See infra* Part III.

[19] *See infra* Part III.

[20] *See infra* Part III.

bargaining in the United States, including an examination of the current debate regarding the prevalence of plea bargaining's innocence problem.[21] In Part III, this Article discusses the psychological study of plea bargaining conducted by the authors.[22] This Part reviews the methodology and results of the study.[23] Finally, Part III analyzes the constitutional limits placed on plea bargaining by the Supreme Court in its landmark 1970 decision, *Brady v. United States*.[24] In this decision, the Supreme Court stated that plea bargaining was a tool for use only when the evidence of guilt was overwhelming and the defendant might benefit from the opportunity to bargain.[25] According to the Court, if it became evident that plea bargaining was being used more broadly to create incentives for questionably guilty defendants to "falsely condemn themselves," the entire institution of plea bargaining and its constitutionality would require reexamination.[26] Perhaps, as a result of this new study, a time for such reevaluation has arrived.

II. THE HISTORICAL RISE OF PLEA BARGAINING AND ITS INNOCENCE PROBLEM

On December 23, 1990, a twenty-one-year-old woman was robbed and sexually assaulted by an unknown assailant in New Jersey.[27] Three days after the attack, and again a month later, the victim identified John Dixon as the perpetrator from a photo array.[28] Dixon was arrested on January 18, 1991, and ventured down a road familiar to criminal defendants in the United States.[29] Threatened by prosecutors with a higher prison sentence if he failed to cooperate and confess to his alleged crimes, Dixon pleaded guilty to sexual assault, kidnapping, robbery, and unlawful possession of a weapon.[30] He received a sentence of forty-five years in prison.[31] Ten years

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[21] *See infra* Part II (discussing the historical rise of plea bargaining and its innocence problem).

[22] *See infra* Part III (discussing the plea-bargaining study).

[23] *See infra* Part III.

[24] *See* Brady v. United States, 397 U.S. 742 (1970).

[25] *Id.* at 752.

[26] *Id.* at 757–58; *see also* Lucian E. Dervan, *Bargained Justice: Plea-Bargaining's Innocence Problem and the* Brady *Safety-Valve*, 2012 UTAH L. REV. 51.

[27] *Know the Cases: John Dixon*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/Content/John_Dixon.php (last visited Jan. 23, 2012) [hereinafter *Dixon*, THE INNOCENCE PROJECT] (describing the story of John Dixon, who pleaded guilty to rape charges for fear that he would receive a harsher sentence if he proceeded to trial but who was later exonerated by DNA evidence).

[28] *See id.*

[29] *See id.*

[30] *See id.*; *see also* Richard Klein, *Due Process Denied: Judicial Coercion in the Plea*

later, however, Dixon was released from prison after DNA evidence established that he could not have been the perpetrator of the crime.[32] While the story of an innocent man pleading guilty and serving a decade in prison before exoneration is a tragedy, perhaps it should not be surprising given the prominence and power of plea bargaining in today's criminal justice system.[33]

Plea bargaining, however, was not always such a dominant force in the United States.[34] In fact, when appellate courts first began to see an influx of such bargains around the time of the American Civil War, most struck down the deals as unconstitutional.[35] Despite these early judicial rebukes, plea bargaining continued to linger in the shadows as a tool of corruption.[36]

Bargaining Process, 32 HOFSTRA L. REV. 1349, 1398 (2004).

> By the time of the plea allocution it is clear that the defendant has decided to take the plea bargain and knows or has been instructed by counsel to tell the court that he did indeed do the crime. Predictably, the National Institute of Justice survey found that judges rejected guilty pleas in only two percent of cases. Since efficiency and speed is the name of the game, it is not unexpected that meaningful questioning of the defendant does not occur and it is not surprising that the Institute concluded that the plea allocution procedure is "close to being a new kind of 'pious fraud.'"

Id. (citations omitted); *see also* Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 93 (2005) ("But when it comes to the defendant's 'voluntariness'—the second half of the formula—courts have walked away. The proper knowledge, together with a pro forma statement from the defendant that her guilty plea was not coerced, normally suffices.").

[31] *See Dixon*, THE INNOCENCE PROJECT, *supra* note 27.

[32] *See id.*

[33] *See* U.S. SENTENCING COMM'N, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, fig.C [hereinafter 2010 SOURCEBOOK, fig.C], *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/FigureC.pdf (documenting that almost 97% of convicted defendants in the federal criminal justice system plead guilty).

[34] *See* Dervan, *supra* note 26, at 58; Lucian E. Dervan, *Plea Bargaining's Survival: Financial Crimes Plea Bargaining, A Continued Triumph in a Post-Enron World*, 60 OKLA. L. REV. 451, 478 (2007); Mark H. Haller, *Plea Bargaining: The Nineteenth Century Context*, 13 LAW & SOC'Y REV. 273, 273 (1979) ("[Alschuler and Friedman] agree that plea bargaining was probably nonexistent before 1800, began to appear during the early or mid-nineteenth century, and became institutionalized as a standard feature of American urban criminal courts in the last third of the nineteenth century."). For further discussion regarding the early history of plea bargaining, see John Baldwin & Michael McConville, *Plea Bargaining and Plea Negotiation in England*, 13 LAW & SOC'Y REV. 287 (1979); John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 LAW & SOC'Y REV. 261 (1979); Lynn M. Mather, *Comments on the History of Plea Bargaining*, 13 LAW & SOC'Y REV. 281 (1979).

[35] *See* Dervan, *supra* note 26, at 58–59.

[36] *See* Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 19–24 (1979).

Then, in response to growing pressures on American courts due to overcriminalization in the early twentieth century, plea bargaining began a spectacular rise to power.[37] That today almost 97% of convictions in the federal system result from pleas of guilt, such as John Dixon's in New Jersey in 1991, is both a testament to the institution's resilience and a caveat about its power of persuasion.[38]

A. THE RISE OF PLEA BARGAINING

While most discussions regarding the rise of plea bargaining begin in the late nineteenth century, the full history of plea bargaining dates back hundreds of years to the advent of confession law.[39] As Professor Albert Alschuler noted, "[T]he legal phenomenon that we call a guilty plea has existed for more than eight centuries . . . [as] a 'confession.'"[40] Interestingly, early legal precedent regarding confessions prohibited the offering of any inducement to prompt the admission.[41] As an example, in the 1783 case of *Rex v. Warickshall*, an English court stated, "[A] confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape . . . that no credit ought to be given to it."[42] While plea bargaining as it exists today relies upon the use of incentives, common law prohibitions on such inducements persisted until well into the twentieth century.[43]

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[37] George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 859 (2000) [hereinafter Fisher, *Plea Bargaining's Triumph (Yale)*] ("There is no glory in plea bargaining. In place of a noble clash for truth, plea bargaining gives us a skulking truce . . . . But though its victory merits no fanfare, plea bargaining has triumphed . . . . The battle has been lost for some time."); *see also* GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA (2003) [hereinafter FISHER, PLEA BARGAINING'S TRIUMPH].

[38] *See* 2010 SOURCEBOOK, fig.C, *supra* note 33.

[39] *See* Alschuler, *supra* note 36, at 12.

[40] *See id.* at 13.

[41] *See id.* at 12.

[42] *See id.* ("It soon became clear that any confession 'obtained by [a] direct or implied promise[], however slight' could not be received in evidence. Even the offer of a glass of gin was a 'promise of leniency' capable of coercing a confession." (footnotes omitted)).

[43] *See* Dervan, *supra* note 26, at 65–66 (discussing the evolution of the doctrine that guilty pleas must be voluntary); *see also* Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652, 657 (1981) ("Plea negotiation works . . . only because defendants have been led to believe that their bargains are in fact bargains. If this belief is erroneous, it seems likely that the defendants have been deluded into sacrificing their constitutional rights for nothing."); Russell D. Covey, *Signaling and Plea Bargaining's Innocence Problem*, 66 WASH. & LEE L. REV. 73, 77–78 (2009) ("Assuming that prosecutors seek to maximize and defendants seek to minimize sentences, the price of any plea should be the product of the anticipated trial sentence and the likelihood of conviction, discounted by

The first influx of plea-bargaining cases at the appellate level in the United States occurred shortly after the Civil War.[44] Relying on past confession precedent prohibiting the offering of incentives in return for admissions of guilt, various courts summarily rejected these bargains and permitted the defendants to withdraw their statements.[45] These early American appellate decisions, however, did not prevent plea bargaining from continuing to operate in the shadows.[46] Plea bargains continued to be used during this period, despite strong precedential condemnation, at least in part as a tool of corruption.[47] As an example, and as Professor Alschuler has previously noted, there are documented accounts that by 1914 a defense attorney in New York would "stand out on the street in front of the Night Court and dicker away sentences in this form: $300 for ten days, $200 for twenty days, $150 for thirty days."[48] Such bargains were not limited to New York.[49] One commentator in 1928 discussed the use of "fixers," who negotiated bargains between the government and the defense in Chicago, Illinois:

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some factor to reflect the resources saved by not having to try the case.").

[44] *See* Alschuler, *supra* note 36, at 19–21.

[45] *See id.* Alschuler provides several examples of statements made by the appellate courts examining plea bargains in the late nineteenth century.

> The least surprise or influence causing [the defendant] to plead guilty when he had any defense at all should be sufficient cause to permit a change of the plea from guilty to not guilty.
>
> . . .
>
> No sort of pressure can be permitted to bring the party to forego any right or advantage however slight. The law will not suffer the least weight to be put in the scale against him.
>
> [W]hen there is reason to believe that the plea has been entered through inadvertence . . . and mainly from the hope that the punishment to which the accused would otherwise be exposed may thereby be mitigated, the Court should be indulgent in permitting the plea to be withdrawn.

Id. at 20 (citations omitted). A legal annotation from the period stated:

> We would conclude, from an examination of all the cases upon the subject, that where there is an inducement of any kind held out to the prisoner, by reason of which he enters the plea of guilty, it will . . . better comport with a sound judicial discretion to allow the plea to be withdrawn . . ., and especially so when counsel and friends represent to the accused that it has been the custom and common practice of the court to assess a punishment less than the maximum upon such a plea . . . .

Id. at 24 (quoting M.W. Hopkins, *Withdrawal of Plea of Guilty*, 11 CRIM. L. MAG. 479, 484 (1889)).

[46] *See* Alschuler, *supra* note 36, at 22.

[47] *See id.* at 24 ("The gap between these judicial denunciations of plea bargaining [in the late nineteenth century] and the practices of many urban courts at the turn of the century and thereafter was apparently extreme. In these courts, striking political corruption apparently contributed to a flourishing practice of plea bargaining.").

[48] *Id.* (citations omitted).

[49] *See id.* at 24–25.

> This sort of person is an abomination and it is a serious indictment against our system of criminal administration that such a leech not only can exist but thrive. The "fixer" is just what the word indicates. As to qualifications, he has none, except that he may be a person of some small political influence.[50]

The use of plea bargaining by such "fixers" ensured that the practice would survive despite judicial repudiation, though a later phenomenon ultimately brought it out of the shadows.[51]

While corruption kept plea bargaining alive during the late nineteenth and early twentieth centuries, overcriminalization necessitated plea bargaining's emergence into mainstream criminal procedure and its rise to dominance.[52] According to one analysis of individuals arrested in Chicago in 1912, "more than one half were held for violation of legal precepts which did not exist twenty-five years before."[53] As the number of criminal statutes—and, as a result, criminal defendants—swelled, court systems became overwhelmed.[54] In searching for a solution, prosecutors turned to bargained justice, the previous bastion of corruption, as a mechanism by which official and "legitimate" offers of leniency might ensure defendants waived their rights to trial and cleared cases from the dockets.[55] The

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[50] *Id.* This quotation is attributed to Albert J. Harno, Dean, University of Illinois Law School. *See id.*

[51] *See* Dervan, *supra* note 26, at 59 ("While corruption introduced plea bargaining to the broader legal community, it was the rise in criminal cases before and during Prohibition that spurred its growth and made it a legal necessity.").

[52] *See id.*; *see also* Donald A. Dripps, *Overcriminalization, Discretion, Waiver: A Survey of Possible Exit Strategies*, 109 PENN. ST. L. REV. 1155, 1156–61 (2005) (discussing the relationship between broadening legal rules and plea bargaining); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 519–20 (2001) (discussing the influence of broader laws on the rate of plea bargaining). For a definition of "overcriminalization," see Lucian E. Dervan, *Overcriminalization 2.0: The Symbiotic Relationship Between Plea Bargaining and Overcriminalization*, 7 J.L. ECON. & POL'Y 645, 645–46 (2011). Similarly, consider the significant ramifications that would follow should there no longer be overcriminalization:

> The law would be refined and clear regarding conduct for which criminal liability may attach. Individual benefits, political pressure, and notoriety would not incentivize the invention of novel legal theories upon which to base liability where none otherwise exists, despite the already expansive size of the United States criminal code. Further, novel legal theories and overly-broad statutes would not be used to create staggering sentencing differentials that coerce defendants, even innocent ones, to falsely confess in return for leniency.

Id. at 645–46.

[53] *See* Alschuler, *supra* note 36, at 32.

[54] *See* Dervan, *supra* note 52, at 650 ("In return for agreeing not to challenge the government's legal assertions and for assisting in lessening the strain created by overcriminalization, defendants were permitted to plead guilty to reduced charges and in return for lighter sentences.").

[55] *See id.*

reliance on bargains during this period is evidenced by the observed rise in guilty plea rates.[56] Between 1908 and 1916, the number of federal convictions resulting from pleas of guilty rose from 50% to 72%.[57]

The passage of the Eighteenth Amendment and advent of the Prohibition era in 1919 only exacerbated the overcriminalization problem and required further reliance on plea bargaining to ensure the continued functionality of the justice system.[58] As George Fisher noted in his seminal work on plea bargaining, prosecutors had little option other than to continue attempting to create incentives for defendants to avoid trial.[59] By 1925, almost 90% of criminal convictions were the result of guilty pleas.[60] By the end of the Prohibition era, plea bargaining had successfully emerged from the shadows of the American criminal justice system to take its current place as an indispensable solution for an overwhelmed structure.[61]

Though plea-bargaining rates rose significantly in the early twentieth century, appellate courts were still reluctant to approve such deals when appealed.[62] For example, in 1936, Jack Walker was charged with armed robbery.[63] In a scene common in today's criminal justice system, prosecutors threatened to seek a harsh sentence if Walker failed to cooperate, but offered a lenient alternative in return for a guilty plea.[64] Facing a sentence twice as long if he lost at trial, Walker pleaded guilty.[65] The United States Supreme Court found the bargain constitutionally impermissible, noting that the threats and inducements had made Walker's plea involuntary.[66]

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[56] *See* Alschuler, *supra* note 36, at 33.

[57] *See id.* at 27.

[58] *See* Scott Schaeffer, *The Legislative Rise and Populist Fall of the Eighteenth Amendment: Chicago and the Failure of Prohibition*, 26 J.L. & POL. 385, 391–98 (2011) (discussing the history of the passage of the Eighteenth Amendment).

[59] *See* FISHER, PLEA BARGAINING'S TRIUMPH, *supra* note 37, at 210; *see also* Alschuler, *supra* note 36, at 28 ("The rewards associated with pleas of guilty were manifested not only in the lesser offenses of which guilty-plea defendants were convicted but also in the lighter sentences that they received.").

[60] Alschuler, *supra* note 36, at 27.

[61] *See* Dervan, *supra* note 26, at 60 ("As Prohibition was extinguished, the United States continued its drive to create new criminal laws, a phenomenon that only added to the courts' growing case loads and the pressure to continue to use bargaining to move cases through the system.").

[62] *See, e.g.*, Walker v. Johnston, 312 U.S. 275, 279–80 (1941).

[63] *See id.*

[64] *See id.* at 280.

[65] *Id.* at 281.

[66] *See id.* at 279–86; *see also* Hallinger v. Davis, 146 U.S. 314, 324 (1892) (requiring that defendant voluntarily avail himself of the option to plead guilty).

> [Walker] was deceived and coerced into pleading guilty when his real desire was to plead not guilty or at least to be advised by counsel as to his course. If he did not voluntarily waive his right to counsel, or if he was deceived or coerced by the prosecutor into entering a guilty plea, he was deprived of a constitutional right.[67]

Once again, despite plea bargaining's continued presence in the court system, the Supreme Court was reluctant to embrace the notion of bargained justice and coerced confessions.[68]

By 1967, despite a continued rejection of plea bargaining by appellate courts, even the American Bar Association (ABA) was beginning to see the benefits of the practice.[69] In a report regarding the criminal justice system, the ABA noted that the use of plea bargaining allowed for the resolution of many cases without a trial, which was necessary given the system's lack of resources.[70] In particular, the report noted that "the limited use of the trial process for those cases in which the defendant has grounds for contesting the matter of guilt aids in preserving the meaningfulness of the presumption of innocence."[71]

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[67] *Walker*, 312 U.S. at 286; *see also* ALISA SMITH & SEAN MADDAN, NAT'L ASS'N OF CRIM. DEF. LAWYERS, THREE-MINUTE JUSTICE: HASTE AND WASTE IN FLORIDA'S MISDEMEANOR COURTS 15 (2011) (noting that a study of misdemeanor cases in Florida courts found that 66% of defendants appeared at arraignment without counsel and almost 70% of defendants pleaded guilty or no contest at arraignment). According to the NACDL report, "[t]rial judges failed to advise the unrepresented defendants of their right to counsel in open court . . . only 27% of the time." *Id.* In less than 50% of the cases, the judges asked the defendants if they wanted an attorney. *See id.* Finally, the report stated, "only about one-third of the time did the trial judge discuss the importance and benefits of counsel or disadvantages of proceeding without counsel." *Id.*

[68] During the period between 1941 and 1970, several additional appellate cases challenged the constitutionality of plea bargaining. *See, e.g.*, United States v. Jackson, 390 U.S. 570, 571–72 (1968) (striking down a statute that allowed for the death penalty only when a defendant failed to plead guilty and moved forward with a jury trial as an "impermissible burden upon the exercise of a constitutional right"); Machibroda v. United States, 368 U.S. 487, 491–93 (1962) (finding a prosecutor's offer of leniency and threats of additional charges an improper inducement that stripped the voluntariness of defendant's guilty plea); Shelton v. United States, 242 F.2d 101, 113 (5th Cir. 1957), *judgment set aside*, 246 F.2d 571 (5th Cir. 1957) (en banc), *rev'd per curiam*, 356 U.S. 26 (1958) (involving a defendant the court determined was induced to plead guilty by the promise of a light sentence and the dismissal of other pending charges). In *Shelton*, the court stated, "[j]ustice and liberty are not the subjects of bargaining and barter." 242 F.2d at 113.

[69] *See* AM. BAR ASS'N, PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY 2 (Tentative Draft 1967) [hereinafter ABA PROJECT].

[70] *See id.*

[71] *Id.*

> [A] high proportion of pleas of guilty and *nolo contendere* does benefit the system. Such pleas tend to limit the trial process to deciding real disputes and, consequently, to reduce the need for funds and personnel. If the number of judges, courtrooms, court personnel and counsel for

Three years after the ABA embraced plea bargaining as a necessary tool in an overburdened system, the United States Supreme Court finally directly addressed the constitutionality of modern plea bargaining in the case of *Brady v. United States*.[72] The case involved a defendant charged with kidnapping in violation of federal law.[73] The charged statute permitted the death penalty, but only where recommended by a jury.[74] This meant that a defendant could avoid capital punishment by pleading guilty.[75] Realizing his chances of success at trial were minimal given that his codefendant had agreed to testify against him, Brady pleaded guilty and was sentenced to fifty years in prison.[76] He later changed his mind, however, and sought to have his plea withdrawn, arguing that his act was induced by his fear of the death penalty.[77]

Prior precedent regarding plea bargaining suggested that the Supreme Court would look with disfavor upon the defendant's decision to plead guilty in return for the more lenient sentence, but plea bargaining's rise during the previous century and its unique role by 1970 protected the practice from absolute condemnation.[78] Instead of finding plea bargaining unconstitutional, the Court acknowledged the necessity of the institution to protect crowded court systems from collapse.[79] The Court then went on to

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> prosecution and defense were to be increased substantially, the funds necessary for such increases might be diverted from elsewhere in the criminal justice process. Moreover, the limited use of the trial process for those cases in which the defendant has grounds for contesting the matter of guilt aids in preserving the meaningfulness of the presumption of innocence.

Id.

[72] *See* Brady v. United States, 397 U.S. 742, 743 (1970).

[73] *See id.* Interestingly, the defendant in *Brady* was charged under the same federal statute at issue in the 1968 case of *United States v. Jackson*. *See Jackson*, 390 U.S. at 583; *see also* Dervan, *supra* note 26, at 75–76 ("With regard to the federal kidnapping statute, [the *Jackson* court stated that] the threat of death only for those who refuse to confess their guilt is an example of a coercive incentive that makes any resulting guilty plea invalid.").

[74] The law, 18 U.S.C. § 1201(a), read as follows:

> Whoever knowingly transports in interstate . . . commerce, any person who has been unlawfully . . . kidnap[p]ed . . . and held for ransom . . . or otherwise . . . shall be punished (1) by death if the kidnap[p]ed person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.

Jackson, 390 U.S. at 570–71.

[75] *See Brady*, 397 U.S. at 743.

[76] *See id.* at 743–44.

[77] *See id.* at 744.

[78] *See supra* notes 44–68 and accompanying text.

[79] *See Brady*, 397 U.S. at 752–58; *see also* Miranda v. Arizona, 384 U.S. 436 (1966) (describing the protection against self-incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (describing the right to counsel); Mapp v. Ohio, 367 U.S. 643 (1961) (describing the

describe the type of bargains that would be acceptable[80]:

> Of course, the agents of the State may not produce a plea by actual or threatened physical harm or by mental coercion overbearing the will of the defendant. But nothing of the sort is claimed in this case; nor is there evidence that Brady was so gripped by fear of the death penalty or hope of leniency that he did not or could not, with the help of counsel, rationally weigh the advantages of going to trial against the advantages of pleading guilty.[81]

The Court continued:

> [A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes).[82]

After *Brady*, plea bargaining was permitted and could fully emerge into the mainstream of the American criminal justice system.[83] As long as the plea was "voluntary," which meant that it was not induced "by actual or threatened physical harm or by mental coercion overbearing the will of the defendant," the bargain would be permitted.[84]

Plea bargaining continued its rise over the next four decades and, today, over 96% of convictions in the federal system result from pleas of guilt rather than decisions by juries.[85] While plea bargaining was a

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exclusionary rule); Dervan, *supra* note 26, at 81 ("[T]he Supreme Court imposed the 'exclusionary rule' for violations of the Fourth Amendment, granted the right to counsel, and imposed the obligation that suspects be informed of their rights prior to being interrogated.").

[80] *See Brady*, 397 U.S. at 750–51.

[81] *Id.*

[82] *Id.* at 755 (quoting Shelton v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc), *rev'd per curiam*, 356 U.S. 26 (1958)). Interestingly, the language used by the Supreme Court in *Brady* is the same as language proposed by the United States Court of Appeals for the Fifth Circuit several years earlier to address "voluntariness." *See* Shelton v. United States, 242 F.2d 101, 115, *judgment set aside*, 246 F.2d 571 (5th Cir. 1957) (en banc), *rev'd per curiam*, 356 U.S. 26 (1958). The *Shelton* case almost rose to the United States Supreme Court for review of the constitutionality of plea bargaining in 1958, but was surreptitiously withdrawn prior to argument after the government admitted that the guilty plea may have been improperly obtained. *See* Dervan, *supra* note 26, at 73 ("According to Professor Albert Alschuler, evidence indicates that the government likely confessed its error for fear that the Supreme Court would finally make a direct ruling that all manner of plea bargaining was wholly unconstitutional.").

[83] *See Brady*, 397 U.S. at 750–55.

[84] *Id.* at 750.

[85] *See* U.S. SENTENCING COMM'N, 2011 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, fig.C, *available at* http://www.ussc.gov/Data_and_Statistics/Annual_

powerful force in 1970, the ability of prosecutors to create significant incentives for defendants to accept plea offers grew exponentially after *Brady* with the implementation of sentencing guidelines throughout much of the country.[86] As one commentator explained, "By assigning a fixed and narrow penalty range to almost every definable offense, sentencing guidelines often empower prosecutors to dictate a defendant's sentence by manipulating the charges."[87] Through charge selection and influence over sentencing ranges, prosecutors today possess striking powers to create significant sentencing differentials, a term used to describe the difference between the sentence a defendant faces if he or she pleads guilty versus the sentence risked if he or she proceeds to trial and is convicted.[88] Many have

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Reports_and_Sourcebooks/2011/FigureC.pdf.

[86] *See* FISHER, PLEA BARGAINING'S TRIUMPH, *supra* note 37, at 210 ("[Sentencing Guidelines] invest prosecutors with the power, moderated only by the risk of loss at trial, to dictate many sentences simply by choosing one set of charges over another."); *see also* Mary Patrice Brown & Stevan E. Bunnell, *Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia*, 43 AM. CRIM. L. REV. 1063, 1066–67 (2006) ("Like most plea agreements in federal or state courts, the standard D.C. federal plea agreement starts by identifying the charges to which the defendant will plead guilty and the charges or potential charges that the government in exchange agrees not to prosecute."); Geraldine Szott Moohr, *Prosecutorial Power in an Adversarial System: Lessons from Current White Collar Cases and the Inquisitorial Model*, 8 BUFF. CRIM. L. REV. 165, 177 (2004) ("The power of the prosecutor to charge is two-fold; the power to indict or not . . . and the power to decide what offenses to charge."); Joy A. Boyd, Comment, *Power, Policy, and Practice: The Department of Justice's Plea Bargaining Policy as Applied to the Federal Prosecutor's Power Under the United States Sentencing Guidelines*, 56 ALA. L. REV. 591, 592 (2004) ("Not only may a prosecutor choose whether to pursue any given case, but she also decides which charges to file."); Jon J. Lambiras, Comment, *White-Collar Crime: Why the Sentencing Disparity Despite Uniform Guidelines?*, 30 PEPP. L. REV. 459, 512 (2003) ("Charging decisions are a critical sentencing matter and are left solely to the discretion of the prosecutor. When determining which charges to bring, prosecutors may often choose from more than one statutory offense.").

[87] FISHER, PLEA BARGAINING'S TRIUMPH, *supra* note 37, at 17; *see also* Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1252 (2004) ("The overwhelming and dominant fact of the federal sentencing system, beyond the Commission and the guidelines and mandatory penalties, is the virtually absolute power the system has given prosecutors over federal prosecution and sentencing."); Boyd, *supra* note 86, at 591–92 ("While the main focus of the Sentencing Guidelines appeared to be narrowing judicial discretion in sentencing, some critics argued that the Sentencing Guidelines merely shifted the federal judges' discretionary power to federal prosecutors.").

[88] *See* Alschuler, *supra* note 43, at 652–53. Professor Alschuler stated, "Criminal defendants today plead guilty in overwhelming numbers primarily because they perceive that this action is likely to lead to more lenient treatment than would follow conviction at trial. A number of studies suggest that this perception is justified." *Id.* at 652–53. Among the studies cited by Professor Alschuler in support of his statement are the following: MARVIN ZALMAN ET AL., SENTENCING IN MICHIGAN: REPORT OF THE MICHIGAN FELONY SENTENCING PROJECT 268 (1979) (noting that proceeding to trial tended to increase the probability of serving prison time); H. Joo Shin, *Do Lesser Pleas Pay?: Accommodations in the Sentencing*

surmised that the larger the sentencing differential, the greater the likelihood a defendant will forego his or her right to trial and accept the deal.[89]

B. PLEA BARGAINING'S INNOCENCE DEBATE

In 2004, Lea Fastow, wife of former Enron Chief Financial Officer

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and Parole Processes, 1 J. CRIM. JUST. 27, 31 (1973) (noting that defendants charged with robbery and felonious assault who proceeded to trial received sentences almost twice as long as those who pleaded guilty); Franklin E. Zimring et al., *Punishing Homicide in Philadelphia: Perspectives on the Death Penalty*, 43 U. CHI. L. REV. 227, 236 (1976) (noting that no homicide defendants who pleaded guilty received a sentence of life or death, as compared to 29% of those convicted at trial); Patrick R. Oster & Roger Simon, *Jury Trial a Sure Way to Increase the Rap*, CHI. SUN TIMES, Sept. 17, 1973, at 4 (noting a disparity between sentences of murder defendants who pleaded guilty and those who proceeded to trial); *see also* Alschuler, *supra* note 43, at 653 n.2; Stephanos Bibas, *Bringing Moral Values into a Flawed Plea-Bargaining System*, 88 CORNELL L. REV. 1425, 1425 (2003) ("The criminal justice system uses large sentence discounts to induce guilty pleas. Of course these discounts exert pressure on defendants to plead guilty."); Dervan, *supra* note 26, at 64 ("[P]lea bargaining's rise to dominance during the nineteenth and twentieth centuries resulted from prosecutors gaining increased power over the criminal justice system and, through such power, the ability to offer increasingly significant incentives to those willing to confess their guilt in court."); Lucian E. Dervan, *The Surprising Lessons from Plea Bargaining in the Shadow of Terror*, 27 GA. ST. U. L. REV. 239, 245 (2011) ("Key to the success of prosecutors' use of increasing powers to create incentives that attracted defendants was their ability to structure plea agreements that included significant differences between the sentence one received in return for pleading guilty and the sentence one risked if he or she lost at trial.").

[89] One study analyzed robbery and burglary defendants in three California jurisdictions and found that defendants who went to trial received significantly higher sentences. *See* David Brereton & Jonathan D. Casper, *Does It Pay to Plead Guilty? Differential Sentencing and the Functioning of Criminal Courts*, 16 LAW & SOC'Y REV. 45, 55–59 (1981–1982); Daniel Givelber, *Punishing Protestations of Innocence: Denying Responsibility and Its Consequences*, 37 AM. CRIM. L. REV. 1363, 1382 (2000) ("The differential in sentencing between those who plead and those convicted after trial reflects the judgment that defendants who insist upon a trial are doing something blameworthy."); Shin, *supra* note 88, at 27 (finding that charge reduction directly results in reduction of the maximum sentence available and indirectly results in lesser actual time served); Tung Yin, Comment, *Not a Rotten Carrot: Using Charges Dismissed Pursuant to a Plea Agreement in Sentencing Under the Federal Guidelines*, 83 CALIF. L. REV. 419, 443 (1995) ("Curiously, the arena of plea bargaining pits the concepts of duress and consideration against each other: a large sentencing differential makes it more likely that a defendant is coerced into pleading guilty, and yet it also increases the benefit offered in exchange for the guilty plea."). The Brereton and Casper study stated:

> The point of the preceding discussion is simple enough: when guilty plea rates are high, expect to find differential sentencing. We believe that recent arguments to the effect that differentials are largely illusory do not withstand serious scrutiny, even though this revisionist challenge has been valuable in forcing us to examine more closely what is too often taken to be self-evidently true.

Brereton & Casper, *supra*, at 89.

Andrew Fastow, was accused of engaging in six counts of criminal conduct related to the collapse of the Texas energy giant.[90] Though conviction at trial under the original indictment carried a prison sentence of ten years under the Federal Sentencing Guidelines, the government offered Fastow a plea bargain.[91] In return for assisting in their prosecution, she would be eligible for a mere five months in prison.[92] With small children to consider and a husband who would certainly receive a lengthy prison sentence, Fastow accepted the offer.[93] The question that remained, however, was whether Fastow had pleaded guilty because she had committed the alleged offenses, or whether the plea bargaining machine had become so powerful that even innocent or questionably guilty defendants were now becoming mired in its powerful grips.[94]

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[90] *See* Indictment, United States v. Fastow, Cr.No. H-03- (S.D. Tex. Apr. 30, 2003), *available at* http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/enron/usleafstw43003ind.pdf; *see also* Michelle S. Jacobs, *Loyalty's Reward—A Felony Conviction: Recent Prosecutions of High-Status Female Offenders*, 33 FORDHAM URB. L.J. 843 (2006); Mary Flood, *Lea Fastow in Plea-Bargain Talks*, HOUS. CHRON., Nov. 7, 2003, at 1A.

[91] *See* Bruce Zucker, *Settling Federal Criminal Cases in the Post-Enron Era: The Role of the Court and Probation Office in Plea Bargaining Federal White Collar Cases*, 6 FLA. COASTAL L. REV. 1, 3–5 (2004). The ten-year sentence is calculated using the 2002 sentencing guidelines for fraud and the allegations contained in Fastow's indictment. Given an alleged loss amount of $17 million and more than fifty victims, Fastow, who had no prior criminal record, faced a sentencing range of 97–121 months. *See* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 & ch. 5, pt. A (2002).

[92] *See* Zucker, *supra* note 91, at 3. In Fastow's eventual plea agreement, the prosecutors used a federal misdemeanor charge as a mechanism by which to ensure the judge could not sentence Fastow beyond the terms of the arrangement. *See* Mary Flood, *Fastows to Plead Guilty Today*, HOUS. CHRON., Jan. 14, 2004, at 1A.

[93] *See* Greg Farrell & Jayne O'Donnell, *Plea Deals Appear Close for Fastows*, USA TODAY, Jan. 8, 2004, § B, at 1 ("One of the reasons that Lea Fastow wants to limit her jail time to five months is that she and her husband have two young children, and they're trying to structure their pleas so they're not both in jail at the same time."); *see also* Flood, *supra* note 92, at A1 ("The plea bargains for the Fastows, who said they wanted to be sure their two children are not left parentless, have been in limbo for more than a week."). Interestingly, the judge in the case later rejected the government's attempts to utilize a binding plea agreement containing the five-month offer. *See* Farrell & O'Donnell, *supra*, § B, at 1 ("U.S. District Judge David Hittner told Lea Fastow Wednesday that he refused to be locked in to the five-month prison sentence that her lawyers had negotiated with prosecutors."). In response, the government withdrew the original charges and allowed Lea Fastow to plead guilty to a single misdemeanor tax charge. *See New Plea Bargain for Lea Fastow in Enron Case*, N.Y. TIMES, Apr. 30, 2004, at C13. The judge then sentenced her to one year in prison. *See Lea Fastow Enters Prison*, CNNMONEY (July 12, 2004, 12:52 PM), http://money.cnn.com/2004/07/12/news/newsmakers/lea_fastow/index.htm.

[94] *See* Dervan, *supra* note 26, at 56 ("Today, the incentives to bargain are powerful enough to force even an innocent defendant to falsely confess guilt in hopes of leniency and in fear of reprisal."); *see also* Larry E. Ribstein, *Agents Prosecuting Agents*, 7 J.L. ECON. & POL'Y 617, 628 (2011) ("[P]rosecutors can avoid having to test their theories at trial by using

It is unclear how many of the more than 96% of defendants who are convicted through pleas of guilt each year are actually innocent of the charged offenses, but it is clear that plea bargaining has an innocence problem.[95] As Professor Russell D. Covey has stated, "When the deal is good enough, it is rational to refuse to roll the dice, regardless of whether one believes the evidence establishes guilt beyond a reasonable doubt, and regardless of whether one is factually innocent."[96] While almost all commentators agree with Covey's statement that some innocent defendants will be induced to plead guilty, much debate exists regarding the extent of this phenomenon.[97]

Some argue that plea bargaining's innocence problem is significant

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significant leverage to virtually force even innocent, or at least questionably guilty, defendants to plead guilty.").

[95] *See* Michael O. Finkelstein, *A Statistical Analysis of Guilty Plea Practices in the Federal Courts*, 89 HARV. L. REV. 293, 295 (1975) ("[T]he pressure on defendants to plead guilty in the federal courts has induced a high rate of conviction by 'consent' in cases in which no conviction would have been obtained if there had been a contest."); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1950–51 (1992) (discussing plea bargaining's innocence problem); David L. Shapiro, *Should a Guilty Plea Have Preclusive Effect?*, 70 IOWA L. REV. 27, 27 (1984); *see also* Covey, *supra* note 43, at 74 ("Plea bargaining has an innocence problem."); Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 CARDOZO L. REV. 2295, 2295–96 (2006) (arguing for a partial ban on plea bargaining to reduce the likelihood innocent defendants will plead guilty); Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1154 (2005).

[96] Russell D. Covey, *Longitudinal Guilt: Repeat Offenders, Plea Bargaining, and the Variable Standard of Proof*, 63 FLA. L. REV. 431, 450 (2011) ("The risk of inaccurate results in the plea bargaining system thus seems substantial."); *see also* Gregory M. Gilchrist, *Plea Bargains, Convictions and Legitimacy*, 48 AM. CRIM. L. REV. 143, 148 (2011).

> That plea bargaining represents something of an affront to the rule against coerced confessions has been oft-noted and more often ignored. The objections that have been leveled against plea bargaining are numerous and diverse, but most stem from a common problem: plea bargaining reduces the ability of the criminal justice system to avoid convicting the innocent.

Gilchrist, *supra*, at 148; *see also* Gazal-Ayal, *supra* note 95, at 2306 ("In all these cases, an innocent defendant might accept the offer in order to avoid the risk of a much harsher result if he is convicted at trial, and thereby plea bargaining could very well lead to the conviction of factually innocent defendants."); Leipold, *supra* note 95, at 1154 ("Yet we know that sometimes innocent people plead guilty, and we know some of the reasons why . . . [S]ometimes the prosecutor offers such a generous discount for admitting guilt that the defendant feels he simply can't take the chance of going to trial.").

[97] It is worth mentioning that even Joan of Arc and Galileo Galilei fell victim to the persuasions of plea bargaining. *See* Alschuler, *supra* note 36, at 41 ("[Joan of Arc] demonstrated that even saints are sometimes unable to resist the pressures of plea negotiation."); Kathy Swedlow, *Pleading Guilty v. Being Guilty: A Case for Broader Access to Post-Conviction DNA Testing*, 41 CRIM. L. BULL. 575, 575 (2005) (describing Galileo's decision to admit his belief in the theory that the earth was the center of the universe in return for a lighter sentence).

and brings into question the legitimacy of the entire criminal justice system.[98] Professor Ellen S. Podgor wrote recently of plea bargaining, "[O]ur existing legal system places the risk of going to trial, and in some cases even being charged with a crime, so high, that innocence and guilt no longer become the real considerations."[99] But even for those who believe that plea bargaining leads to large numbers of innocent defendants pleading guilty, an uncertainty persists regarding exactly how susceptible innocent defendants are to bargained justice.[100] This is troubling because it prevents an accurate assessment of what must be done in response to this potential injustice.[101]

Others argue, however, that plea bargaining's innocence problem is "exaggerated" and the likelihood of persuading an innocent defendant to falsely confess is minimal.[102] This argument rests, in part, on a perception

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[98] *See* Dervan, *supra* note 26, at 97 ("That plea-bargaining today has a significant innocence problem indicates that the *Brady* safety-valve has failed and, as a result, the constitutionality of modern day plea bargaining is in great doubt."); Gilchrist, *supra* note 96, at 147 ("By failing to generate results correlated with the likely outcome at trial, plea bargaining undermines the legitimacy of the criminal justice system."); F. Andrew Hessick III & Reshma M. Saujani, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. PUB. L. 189, 197 (2002) ("While the concept of convicting an innocent person is a terrible imperfection of our justice system, an innocent person pleading guilty is inexcusable.").

[99] Ellen S. Podgor, *White Collar Innocence: Irrelevant in the High Stakes Risk Game*, 85 CHI.-KENT L. REV. 77, 77–78 (2010); *see also* Covey, *supra* note 43, at 80 ("[A]s long as the prosecutor is willing and able to discount plea prices to reflect resource savings, regardless of guilt or innocence, pleading guilty is the defendant's dominant strategy. As a result, non-frivolous accusation—not proof beyond a reasonable doubt—is all that is necessary to establish legal guilt.").

[100] *See* Dervan, *supra* note 26, at 96–97 (discussing plea bargaining's innocence problem, but acknowledging that the exact impact of bargained justice on innocent defendants is, as of yet, unknown); *see also* Scott W. Howe, *The Value of Plea Bargaining*, 58 OKLA. L. REV. 599, 631 (2005) ("The number of innocent defendants who accept bargained guilty pleas is uncertain.").

[101] *See* Ric Simmons, *Private Plea Bargains*, 89 N.C. L. REV. 1125, 1173 (2011) ("If the plea bargaining process is indeed a reasonable replacement for a trial, then plea bargaining should be encouraged . . . On the other hand, if the results are dependent on factors unrelated to what would occur at trial, then society should work to reform, limit, or abolish the practice.").

[102] *See* Shapiro, *supra* note 95, at 40 ("[Plea bargaining's] defenders deny that the chances of convicting the innocent are substantial . . . ."); Avishalom Tor et al., *Fairness and the Willingness to Accept Plea Bargain Offers*, 7 J. EMPIRICAL LEGAL STUD. 97, 114 (2010) ("[I]f innocents tend to reject offers that guilty defendants accept, the concern over the innocence problem may be exaggerated."); Oren Gazal-Ayal & Limor Riza, *Plea-Bargaining and Prosecution* 13 (European Ass'n of Law & Econ., Working Paper No. 013-2009, 2009) ("Since trials are designed to reveal the truth, an innocent defendant would correctly estimate that his chances at trial are better than the prosecutor's offer suggests. As a result, innocent defendants tend to reject offers while guilty defendants tend to accept

that innocent defendants will reject prosecutors' plea offers and instead will proceed to trial backed by the belief that their factual innocence will protect them from conviction.[103] One commentator noted that supporters of the plea-bargaining system believe "[p]lea agreements are not forced on defendants . . . they are only an option. Innocent defendants are likely to reject this option because they expect an acquittal at trial."[104]

Such skeptics are in good company. Even the Supreme Court in its landmark *Brady* decision permitting bargained justice rejected concerns that innocent defendants would falsely confess to crimes they did not commit.[105] The Court stated:

> We would have serious doubts about this case if the encouragement of guilty pleas by offers of leniency substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves. But our view is to the contrary and is based on our expectations that courts will satisfy themselves that pleas of guilty are voluntarily and intelligently made by competent defendants with adequate advice of counsel and that there is nothing to question the accuracy and reliability of the defendants' admissions that they committed the crimes with which they are charged.[106]

This sentiment was expressed by the Court again eight years later in *Bordenkircher v. Hayes*.[107] In *Bordenkircher*, the Court stated that as long as the defendant is free to accept or reject a plea bargain, it is unlikely an innocent defendant will be "driven to false self-condemnation."[108] Even those who argue that plea bargaining's innocence problem is exaggerated, however, rely mainly on speculation regarding how innocent defendants will respond in such situations.[109]

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them."); *see also* Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1165 (2008).

> When an innocent defendant rationally chooses to plead guilty, the system should want to protect access. It should recognize that at least for the innocent defendant it is not bad that some deals are more than just sensible—they would be improvident to reject. Particularly where process costs are high and the consequences of conviction low, a bargained-for conviction of an innocent accused is no evil; it is the constructive minimization thereof—an unpleasant medicine softening the symptoms of separate affliction.

Bowers, *supra*, at 1165.

[103] *See* Gazal-Ayal, *supra* note 95, at 2298.

[104] *See id.*

[105] *See* Brady v. United States, 397 U.S. 742, 757–58 (1970).

[106] *Id.* at 758.

[107] Bordenkircher v. Hayes, 434 U.S. 357 (1978).

[108] *Id.* at 363 ("Indeed, acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process.").

[109] *See supra* notes 102–104 and *infra* notes 111–123 and accompanying text.

The need by both sides of the innocence debate to gather more data regarding the extent to which innocent defendants might be vulnerable to the persuasive power of plea bargaining has led to numerous studies.[110] Several legal scholars have conducted examinations of exoneration statistics in an effort to identify examples where innocent defendants were convicted by guilty pleas.[111] Professor Samuel Gross conducted one of the most comprehensive studies in 2005.[112] While Professor Gross's research explored exonerations in the United States broadly, he also specifically discussed plea bargaining's innocence problem.[113] His study stated that twenty of 340 exonerees had pleaded guilty.[114] Although Professor Gross found a relatively low number among those exonerated who falsely pleaded guilty, there are significant limitations to using this study to disprove the innocence problem surrounding guilty pleas.[115] Upon closer examination of this and other exoneration studies, one realizes that while exoneration data is vital to our understanding of wrongful convictions generally, it cannot accurately or definitively explain how likely innocent defendants are to

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[110] *See infra* note 111.

[111] *See* Baldwin & McConville, *supra* note 34, at 296–98 (discussing plea bargaining's innocence problem in England); Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 74 (2008) (noting that nine of the first two hundred individuals exonerated by the Innocence Project had pleaded guilty); Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 524, 536 (2005) (examining the number of persons exonerated who pleaded guilty); D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 778–79 (2007) (examining DNA exonerations for capital rape–murder convictions); George C. Thomas III, *Two Windows into Innocence*, 7 OHIO ST. J. CRIM. L. 575, 577–78 (2010) ("McConville and Baldwin concluded that two percent of the guilty pleas were of doubtful validity. As there were roughly two million felony cases filed in 2006, if two percent result in conviction of an innocent defendant, 40,000 wrongful felony convictions occur per year.").

[112] *See* Gross et al., *supra* note 111, at 523.

[113] *See id.* at 524, 536.

[114] *Id.* (observing that of this number, fifteen were murder defendants, four were rape defendants, and one was a gun-possession defendant facing life in prison as a habitual offender). Professor Gross goes on to note that in two cases of mass exoneration involving police misconduct, a subset of cases not included in his study, a significant number of the defendants pleaded guilty. *See id.* ("By contrast, thirty-one of the thirty-nine Tulia defendants pled guilty to drug offenses they did not commit, as did the majority of the 100 or more exonerated defendants in the Rampart scandal in Los Angeles.").

[115] *See* Howe, *supra* note 100, at 631 ("Particularly if many innocent defendants who go to trial are acquitted, [Professor Gross's] figure does not support claims that innocent defendants are generally more risk averse regarding trials than factually guilty defendants or that prosecutors frequently persuade innocent defendants with irresistibly low plea offers."). Howe goes on, however, to caution those who might rely on this study in such a manner because of the difficulty in gaining an exoneration following a guilty plea as opposed to following a conviction by trial. *See id.*

plead guilty.[116]

As noted by other scholars in the field, three problems exist with exoneration data when applied to plea-bargaining research.[117] First, exoneration data predominantly focuses on serious felony cases such as murder or rape where there is available DNA evidence and where the defendants' sentences are lengthy enough for the exoneration process to work its way through the system.[118] This means that exoneration data does not examine the role of innocence and plea bargaining in the vast majority of criminal cases, those not involving murder or rape, including misdemeanor cases.[119] Second, because many individuals who plead guilty do so in return for a reduced sentence, it is highly likely that innocent defendants who plead guilty have little incentive or insufficient time to pursue exoneration.[120] Finally, even if some innocent defendants who pleaded guilty had the desire and time to move for exoneration, many would be prohibited from challenging their convictions by the mere fact that they had pleaded guilty.[121] As such, innocent defendants who plead guilty are not accurately captured by the exoneration data sets and,

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[116] *See* Howe, *supra* note 100, at 631; Russell Covey, Mass Exoneration Data and the Causes of Wrongful Convictions 1 (Aug. 22, 2011) (unpublished manuscript), *available at* ssrn.com/abstract=1881767.

[117] *See* Howe, *supra* note 100, at 631; Covey, *supra* note 116, at 1.

[118] *See* Covey, *supra* note 116, at 1 ("[The post-conviction testing of DNA] dataset has significant limitations, chief of which is that it is largely limited to the kinds of cases in which DNA evidence is available for post-conviction testing.").

[119] The Federal Bureau of Investigation crime statistics indicate that in 2010 there were 1,246,248 violent crimes and 9,082,887 property crimes in the United States. *See* U.S. DEP'T OF JUSTICE, F.B.I., CRIME IN THE UNITED STATES, at tbl.1 (2010), *available at* http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.2010/tables/10tbl01.xls. Of this number, murder accounted for 1.2% and forcible rape accounted for 6.8% of the violent crimes. *See id.* Further, in 2011, the National Association of Criminal Defense Attorneys released a report regarding misdemeanor cases in Florida. *See* SMITH & MADDAN, *supra* note 67. The report noted that nearly a half-million misdemeanor cases are filed in Florida each year, and over 70% of those cases are resolved with a guilty plea at arraignment. *See id.* at 10.

[120] *See* Jon B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Convictions After a Century of Research*, 100 J. CRIM. L. & CRIMINOLOGY 825, 834–35 (2010).

[121] *See* JH Dingfelder Stone, *Facing the Uncomfortable Truth: The Illogic of Post-Conviction DNA Testing for Individuals Who Pleaded Guilty*, 45 U.S.F. L. REV. 47, 50–52 (2010) (discussing restrictions on the ability of defendants who pleaded guilty to utilize postconviction DNA testing); *see also* Howe, *supra* note 100, at 631 ("Those relying on [Professor Gross's] study, however, should do so cautiously. The proportion of false convictions due to guilty pleas probably exceeds the exoneration figure from the study, because pleading guilty, as opposed to being convicted after trial, likely makes subsequent exoneration more difficult.").

therefore, it is highly likely that the true extent of plea bargaining's innocence problem is significantly underestimated by these studies.[122] Consequently, one must look elsewhere to determine the true likelihood that an innocent defendant might falsely condemn himself in return for an offer of leniency in the form of a plea bargain.[123]

One such source of information are psychological studies regarding plea bargaining and the decisionmaking processes of defendants in the criminal justice system.[124] Unfortunately, these studies are also problematic and fail to resolve definitively plea bargaining's innocence debate because the majority merely employ vignettes in which participants are asked to imagine themselves as guilty or innocent and faced with a hypothetical decision regarding whether to accept or reject a plea offer.[125] As a result of the utilization of such imaginary and hypothetical scenarios, these studies are unable to capture either the full impact of a defendant's knowledge that she is factually innocent or the true gravity of the choices she must make when standing before the criminal justice system accused of a crime she did

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[122] Even Professor Gross acknowledges that his study fails to capture many innocent defendants who plead guilty. In concluding his discussion regarding the Tulia and Rampart mass exoneration cases, he notes that these cases received attention because they involved large-scale police corruption. He goes on to state, "If these same defendants had been falsely convicted of the same crimes by mistake—or even because of unsystematic acts of deliberate dishonesty—we would never have known." Gross et al., *supra* note 111, at 537; *see also* Allison D. Redlich & Asil Ali Özdoğru, *Alford Pleas in the Age of Innocence*, 27 BEHAV. SCI. & L. 467, 468 (2009) ("Determining the prevalence of innocents is methodologically challenging, if not impossible. There is no litmus test to definitively determine who is innocent and who is guilty. Exonerations are long, costly, and arduous processes; efforts towards them are often unsuccessful for reasons having little to do with guilt or innocence.").

[123] *See infra* notes 124–140 (discussing psychological studies of plea bargaining).

[124] The majority of psychological studies to date have only looked at the phenomenon from the perspective of the attorney and his or her decisionmaking process. *See* Vanessa A. Edkins, *Defense Attorney Plea Recommendations and Client Race: Does Zealous Representation Apply Equally to All?*, 35 LAW & HUM. BEHAV. 413, 413 (2011); *see also* Greg M. Kramer et al., *Plea Bargaining Recommendations by Criminal Defense Attorneys: Evidence Strength, Potential Sentence, and Defendant Preference*, 25 BEHAV. SCI. & L. 573, 573 (2007); Hunter A. McAllister & Norman J. Bregman, *Plea Bargaining by Prosecutors and Defense Attorneys: A Decision Theory Approach*, 71 J. APPLIED PSYCHOL. 686, 686 (1986).

[125] *See* Kenneth S. Bordens, *The Effects of Likelihood of Conviction, Threatened Punishment, and Assumed Role on Mock Plea Bargaining Decisions*, 5 BASIC & APPLIED SOC. PSYCHOL. 59, 63–65 (1984) (discussing the methodology of the study); W. Larry Gregory et al., *Social Psychology and Plea Bargaining: Applications, Methodology, and Theory*, 36 J. PERSONALITY & SOC. PSYCHOL. 1521, 1522–28 (1978) (discussing the methodology of the study); Tor et al., *supra* note 102, at 103–09 (discussing the methodology of the study).

not commit.[126] Nevertheless, these studies do offer some preliminary insights into the world of the innocent defendant's dilemma.

One of the first psychological studies attempting to understand a defendant's plea-bargaining decisionmaking process through the use of vignettes was conducted by Professors Larry Gregory, John Mowen, and Darwyn Linder in 1984 (Gregory study).[127] In the Gregory study, students were asked to "imagine that they were innocent or guilty of having committed an armed robbery."[128] The students were then presented with the evidence against them and asked to make a decision regarding whether they would plead guilty or proceed to trial.[129] As might be expected, the study revealed that students imagining themselves to be guilty were significantly more likely to plead guilty than those who were imagining themselves to be innocent.[130] In the experiment, 18% of the "innocent" students and 83% of the "guilty" students pleaded guilty.[131] While these results might lend support to the argument that few innocent defendants in the criminal justice system falsely condemn themselves—if you can consider 18% to be an insignificant number—the study suffered from its utilization of hypotheticals.[132] As has been shown in social psychological studies for decades, what people say they will do in a hypothetical situation

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[126] *See supra* note 125.

[127] *See* Gregory et al., *supra* note 125.

[128] *Id.* at 1522. The Gregory study involved 143 students. Interestingly, the study only utilized male participants. The study stated, "Since most armed robberies are committed by men, only male students were used." *Id.* The methodological explanation went on to describe the particulars of the study:

> After listening to a tape recording of their defense attorney's summary of the evidence that would be presented for and against them at their trial, students opened an experimental booklet that contained information about the charges against them (four versus one), the punishment they would face if convicted (ten to fifteen years in prison versus one to two years in prison), and the details of the plea bargain that was offered them. Students then indicated whether they accepted or rejected the plea bargain, responded to manipulation checks, indicated their perceived probability of conviction, and indicated how sure their defense attorney and the judge were of their innocence or guilt.

Id.

[129] *Id.* The study also discussed the results of different students facing differing punishments and numbers of charges. The study found that the severity of punishment and the number of charges only affected the guilty condition, not the innocent condition. Those in the guilty condition behaved as would be expected: most likely to accept a plea with a large number of charges and a severe penalty attached (100%), and least likely with a few number of charges and a low penalty attached (63%). The innocent defendants had a low rate of plea bargaining regardless of condition (11%–33%). *Id.* at 1524, tbl.1.

[130] *See id.* at 1524–26.

[131] *See id.*

[132] *See supra* notes 125–126 and accompanying text.

and what they would do in reality are two very different things.[133]

Perhaps acknowledging the unreliable nature of a study relying merely on vignettes to explore such an important issue, Gregory attempted to create a more realistic innocent defendant's dilemma in a subsequent experiment.[134] In the study, students were administered a "difficult exam after being given prior information by a confederate that most of the answers were 'B' (guilty condition) or after being given no information (innocent condition)."[135] After the test, the students were accused of the "crime" of having prior knowledge of the answers and told they would have to appear before an ethics committee.[136] The participants were then offered a plea bargain that required their immediate admission of guilt in return for a less severe punishment.[137] Unfortunately, the second study was only successfully administered to sixteen students, too few to draw any significant conclusions.[138] Nevertheless, Gregory was finally on the right path to answering the lingering question pervading plea bargaining's innocence debate. How likely is it that an innocent defendant might falsely plead guilty to a crime he or she did not commit?[139]

III. LABORATORY EVIDENCE OF PLEA BARGAINING'S INNOCENCE PROBLEM

In 2006, a wave of new accounting scandals pervaded the American corporate landscape.[140] According to federal prosecutors, numerous companies were backdating stock options for senior executives to increase compensation without disclosing such expenses to the public as required by

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[133] *See* Richard E. Nisbett & Timothy D. Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 PSYCHOL. REV. 231, 246 (1977).

[134] *See* Gregory et al., *supra* note 125, at 1526–27.

[135] *Id.* at 1526.

[136] *See id.*

[137] *See id.*

[138] *See id.* at 1528. The results of the second study by Gregory and colleagues were that six of eight guilty students accepted the deal and zero of eight innocent students accepted the deal. *See id.* These findings led to further research regarding the effect of an innocent defendant's belief that he or she would succeed at trial. In their work regarding fairness and plea negotiations, Tor, Gazal-Ayal, and Garcia showed that "guilty" participants were more likely to accept a plea than the "innocent" participants. *See* Tor et al., *supra* note 102, at 113–14.

[139] *See infra* Part IV (discussing the results of the authors' plea-bargaining study).

[140] Companies including Broadcom, Brocade Communications, McAfee, and Comverse Technologies were targeted by the government during the stock options backdating investigations. *See* Peter J. Henning, *How the Broadcom Backdating Case Went Awry*, N.Y. TIMES DEALBOOK (Dec. 15, 2009, 1:37 PM), http://dealbook.nytimes.com/2009/12/14/how-the-broadcom-backdating-case-has-gone-awry/.

Securities and Exchange Commission regulations.[141] Prosecutors alleged that one such company was Broadcom, a large semiconductor manufacturer in California.[142] After Broadcom restated $2.2 billion in charges because of backdating in January 2007, the government indicted Dr. Henry Samueli, cofounder and former Chief Technical Officer of the company.[143] Dr. Samueli pleaded guilty and, as part of his deal, agreed to testify for the prosecution against Henry T. Nicholas III, Broadcom's other cofounder, and William J. Ruehle, the company's Chief Financial Officer.[144] After Dr. Samueli offered his testimony at trial, however, U.S. District Judge Cormac J. Carney voided Dr. Samueli's guilty plea, dismissed the charges against all the defendants, and called the prosecutors' actions a "shameful" campaign of intimidation.[145] The judge stated in open court that "there was no evidence at trial to suggest that Dr. Samueli did anything wrong, let alone criminal. Yet, the government embarked on a campaign of intimidation and other misconduct to embarrass him and bring him down." The judge went on to state, "One must conclude that the government engaged in this misconduct to pressure Dr. Samueli to falsely admit guilt and incriminate [the other defendants] or, if he was unwilling to make such a false admission and incrimination, to destroy Dr. Samueli's credibility as a witness for [the other defendants]."[146] With this unusual public rebuke of

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[141] *See Events in the Broadcom Backdating Case*, L.A. TIMES (Dec. 16, 2009), http://articles.latimes.com/2009/dec/16/business/la-fi-broadcom-timeline16-2009dec16 ("Stock options, typically used as incentive pay, allow employees to buy stock in the future at current prices. Broadcom Corp. and other companies also backdated the options to a previously lower price to give employees a little extra when they cashed in the options.").

[142] *See* Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 940–41 (2010) (discussing the Broadcom case); Ribstein, *supra* note 94, at 630 (discussing the Broadcom case).

[143] *See* Press Release, Dep't of Justice, Broadcom Co-Founder Pleads Guilty to Making False Statement to the SEC in Backdating Investigation (June 23, 2008), *available at* http://www.justice.gov/usao/cac/Pressroom/pr2008/086.html.

[144] *See* Stuart Pfeifer & E. Scott Reckard, *Judge Throws Out Stock Fraud Charges Against Broadcom Co-Founder, Ex-CFO*, L.A. TIMES, Dec. 16, 2009, at A16; *see also* Indictment, United States v. Nicholas, SA CR 08-00139 (C.D. Cal. June 4, 2008), *available at* http://lawprofessors.typepad.com/whitecollarcrime_blog/files/broadcom_nicholasruehleindictment.pdf.

[145] *See* Reporter's Transcript of Proceedings at 5195, United States v. Ruehle, No. SACR 08-00139-CJC (C.D. Cal. Dec. 15, 2009) [hereinafter Transcript of Proceedings, Ruehle] ("Based on the complete record now before me, I find that the Government has intimidated and improperly influenced the three witnesses critical to Mr. Ruehle's defense. The cumulative effect of that misconduct has distorted the truth-finding process and compromised the integrity of the trial.").

[146] *Id.* at 5197–99 ("Needless to say, the government's treatment of Dr. Samueli was shameful and contrary to American values of decency and justice."); *see also* Michael Hilzik, *Judicial System Takes a Hit in Broadcom Case*, L.A. TIMES, July 18, 2010, at B3

the prosecutorial tactics that forced an innocent defendant into a plea bargain, the judge in the Broadcom case demonstrated once again the existence of the innocent defendant's dilemma.[147]

While the Gregory study attempted to capture the likelihood that an innocent defendant such as Dr. Samueli might falsely plead guilty, the study's utilization of hypotheticals prevented it from offering an accurate glimpse inside the mind of the accused.[148] Shortly before the Broadcom prosecution, however, a study regarding police interrogation tactics utilizing an experimental design similar to Gregory's second study offered a path forward for plea bargaining's innocence inquiry.[149] In 2005, Professors Melissa Russano, Christian Meissner, Fadia Narchet, and Saul Kassin initiated a study (Russano study) in which students were accused by a research assistant of working together after being instructed this was

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(noting that in an attempt to pressure defendant Nicholas, the government had "threatened to force Nicholas' [thirteen]-year-old son to testify about his father and drugs"). Judge Carney listed some of the prosecution's misconduct as the following:

> Among other wrongful acts, the Government, one, unreasonably demanded that Dr. Samueli submit to as many as 30 grueling interrogations by the lead prosecutor.
>
> Two, falsely stated and improperly leaked to the media that Dr. Samueli was not cooperating in the Government's investigation.
>
> Three, improperly pressured Broadcom to terminate Dr. Samueli's employment and remove him from the board.
>
> Four, misled Dr. Samueli into believing that the lead prosecutor would be replaced because of misconduct.
>
> Five, obtained an inflammatory indictment that referred to Dr. Samueli 72 times and accused him of being an unindicted coconspirator when the government knew, or should have known, that he did nothing wrong.
>
> And six, crafted an unconscionable plea agreement pursuant to which Dr. Samueli would plead guilty to a crime he did not commit and pay a ridiculous sum of $12 million to the United States Treasury.

Transcript of Proceedings, Ruehle, *supra* note 145, at 5198.

[147] *See* Koehler, *supra* note 142, at 941 ("In pleading guilty, Samueli did what a 'disturbing number of other people have done: pleaded guilty to a crime they didn't commit or at least believed they didn't commit' for fear of exercising their constitutional right to a jury trial, losing, and 'getting stuck with a long prison sentence.'" (citation omitted)); Ribstein, *supra* note 94, at 630 ("In the Broadcom backdating case, particularly egregious prosecutorial conduct caused defendants to plead guilty to crimes they knew they had not committed . . . ."); Ashby Jones, *Are Too Many Defendants Pressured into Pleading Guilty?*, WALL ST. J.L. BLOG (Dec. 21, 2009, 8:50 AM), http://blogs.wsj.com/law/2009/12/21/are-too-many-defendants-pressured-into-pleading-guilty/ ("Samueli did what lawyers and legal scholars fear a disturbing number of other people have done: pleaded guilty to a crime either they didn't commit or at least believed they didn't commit.").

[148] *See supra* notes 127 and 133 and accompanying text.

[149] *See* Melissa B. Russano et al., *Investigating True and False Confessions with a Novel Experimental Paradigm*, 16 PSYCHOL. SCI. 481 (2005).

prohibited.[150] Some of the students accused of this form of "cheating" were, in fact, guilty of the charge, while others were not.[151] Russano wanted to test the effect of two types of police interrogation on the rates of guilty and innocent suspects confessing to the alleged crime.[152] The first interrogation tactic utilized to exact admissions from the students was minimization.[153] Minimization is the process by which interrogators minimize the seriousness and anticipated consequences of the suspect's conduct.[154] The second interrogation tactic utilized to exact admissions from the students involved offering the students a "deal."[155] Students were told that if they confessed, the matter would be resolved quickly and they would merely be required to return to retake the test at a later date.[156] If the students rejected the offer, the consequences were unknown and would be decided later by the course's professor.[157] Russano found that utilizing these tactics together, 43% of students falsely confessed and 87% of students truthfully confessed.[158] When only the "deal" was offered, however, only 14% of the students in Russano's study falsely confessed.[159]

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[150] *See id.* at 481.

[151] *See id.* at 482 ("In the current paradigm, participants were accused of breaking an experimental rule, an act that was later characterized as 'cheating.'").

[152] *See id.* at 481 ("In the first demonstration of this paradigm, we explored the influence of two common police interrogation tactics: minimization and an explicit offer of leniency, or a 'deal.'").

[153] *See id.* at 482.

[154] *See id.*

> Researchers have categorized the interrogation methods promoted by interrogation manuals into two general types, namely, *maximization* and *minimization*. Maximization involves so-called scare tactics designed to intimidate suspects: confronting them with accusations of guilt, refusing to accept their denials and claims of innocence, and exaggerating the seriousness of the situation. This approach may also include presenting fabricated evidence to support the accusation of guilt (e.g., leading suspects to think that their fingerprints were lifted from the murder weapon). In contrast, minimization encompasses strategies such as minimizing the seriousness of the offense and the perceived consequences of confession, and gaining the suspect's trust by offering sympathy, understanding, and face-saving excuses.

Id. (citations omitted) (internal quotation marks omitted).

[155] *See id.*

[156] *See id.* at 483.

[157] *See id.* ("They were also told that if they did not agree to sign the statement, the experimenter would have to call the professor into the laboratory, and the professor would handle the situation as he saw fit, with the strong implication being that the consequences would likely be worse if the professor became further involved.").

[158] *See id.* at 484.

[159] *See id.*

Condition	**True Confessions**	**False Confessions**
No Tactic	46%	6%

In 2011, utilizing the Russano study as a guide, we constructed a new investigatory paradigm that would better reflect the mechanics of the criminal justice system and more precisely focus the inquiry on the innocent defendant's dilemma.[160] The new study was administered to eighty-two students from a small, southeastern, private technical university.[161] The results of the study were significant and established what Gregory and Russano had hinted at in their earlier forays into the plea-bargaining machine.[162]

A. STUDY METHODOLOGY—CONFRONTING A DEVIL'S BARGAIN

Participants in the study were all college students at a small technical university in the southeastern United States.[163] The study participants had each signed up for what they believed was a psychological inquiry into individual versus group problem-solving performance. When a study participant arrived for the problem-solving experiment, he or she was met by another student pretending to be participating in the exercise also. Unbeknownst to the study participant, however, the second student was actually a confederate working with the authors.[164] At this point, a research assistant, also working with the authors, led the two students into a private room and explained the testing procedures.[165] The research assistant

Deal	72%	14%
Minimization	81%	18%
Minimization + Deal	87%	43%

Id. at tbl.1.

[160] *See infra* Part III.B (discussing the results of the authors' plea-bargaining study).

[161] *See id.*

[162] *See id.*

[163] *See* Vanessa A. Edkins & Lucian E. Dervan, Pleading Innocents: Laboratory Evidence of Plea Bargaining's Innocence Problem 9 (2012) (unpublished short research report) (on file with authors). The study was administered to eighty-two students. *Id.* Six students were removed from the study because of their suspicion as to the study's actual focus, an inability to complete the study, or a refusal to assist the confederate when asked to render assistance in answering the questions. *Id.* Thus, seventy-six participants remained. *Id.* Of this number, thirty-one indicated they were female and forty-five indicated they were male. *Id.* Of the study population, 52.6% identified as Caucasian, 21.1% identified as African-American, 13.2% identified as Hispanic, 5.3% identified as Asian, and 7.9% identified as "Other." *Id.* at 10. Forty-eight students identified themselves as U.S. citizens, while twenty-eight students identified themselves as non-U.S. citizens. *Id.*

[164] *See id.* Two female students served as confederates in the study. One was twenty years of age and the other was twenty-one years of age.

[165] *See id.* Two research assistants were used in this experiment. One research assistant was a twenty-seven-year-old male. The other was a twenty-four-year-old female.

informed the students that they would be participating in an experiment about performance on logic problems. According to the research assistant, the two students would be left alone to complete three logic problems together as a team.[166] The research assistant then informed them that after the first problems were completed, the students would receive three additional logic problems that must be completed individually. When these problems were distributed, the research assistant's script required the following statement, "Now I will hand out the individual problems, remember that you are to work alone. I will give you 15 minutes to complete these."

While the study participant and the confederate were solving the individual logic problems, one of two conditions would occur. In half of the cases, the confederate asked the study participant for assistance in answering the questions, a clear violation of the research assistant's explicit instructions. First, the confederate asked the study participant, "What did you get for number 2?" If the study participant did not respond with the answer, the confederate followed up by saying, "I think it is 'D' because [some scripted reasoning based on the specifics of the problem]." Finally, if necessary, the confederate would ask, "Did you get 'E' for # 3?"[167] It is worth noting that all but two study participants asked by the confederate to offer assistance violated the requirement that each student work alone.[168] Those study participants offering assistance were placed in the "guilty condition," because they had "cheated" by violating the research assistant's instructions. In the other half of the cases, the confederate sat quietly and did not ask the study participant for assistance.[169] The study participants in

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[166] *See* Application by Vanessa A. Edkins & Lucian E. Dervan to the Florida Institute of Technology Institutional Review Board, The Function of Sentence Disparity on Plea Negotations 16 (Nov. 3, 2009) (on file with authors). The research script required the research assistants to make the following statement during the introduction:

> We are studying the performance of individuals versus groups on logic problems. You will be given three logic problems to work through together and then three problems to work through on your own. It is very important that you work on the individual problems alone. You have 15 minutes for each set of problems. Even if you run out of time, you must circle an answer for each question. First, you'll be working on the group problems. I will leave the room and be back in 15 minutes. If you finish before that time, one of you can duck your head out the door and let me know.

Id.

[167] *See id.* at 20. The study protocols also instructed the confederate that "[i]f they [the study participant] refuse after this prodding, stop asking and record (on the demographic sheet, at the end of the study) that the individual was in the cheat condition but refused to cheat. Give specific points explaining what you tried to do to instigate the cheating." *Id.*

[168] *See* Edkins & Dervan, *supra* note 163, at 10. The two students who refused to offer assistance were removed from the study.

[169] *See* Edkins & Dervan, *supra* note 166, at 20. The study protocol stated:

this scenario were placed in the "innocent condition," because they had not "cheated" by violating the research assistant's instructions.

After completing the second set of logic problems, the research assistant, who did not know whether cheating had occurred, collected the logic problems and asked that the students remain in the room for a few minutes while the problems were graded.[170] Approximately five minutes later, the research assistant reentered the room and said, "We have a problem. I'm going to need to speak with each of you individually." The research assistant looked at the sign-in sheet and read off the confederate's name and the two then left the room together. Five minutes later, the research assistant reentered the room, sat down near the student, and made the following statement.

> You and the other student had the same wrong answer on the second and third individual questions. The chances of you both getting the exact same *wrong* answer are really small—in fact they are like less than 4%—because of this, when this occurs, we are required to report it to the professor in charge and she may consider this a form of academic dishonesty.[171]

In early trials of the study design, it was determined that study participants did not understand how getting the same wrong answer on questions two and three indicated they may have cheated. As a result, there was a perception that no actual evidence of guilt existed. Because actual criminal trials involve evidence of guilt, even trials where the individual is actually innocent, it was determined that the study would more accurately capture the criminal process if one piece of evidence leading to the accusation was explained. Therefore, as described above, the subject was informed that statistically, given that there were five available choices for each question, there was only a 4% chance that the students provided the same incorrect answers by coincidence. This explanation of the logic behind the research assistant's accusation certainly did not mean the subject was guilty. To the contrary, the research assistant actually noted that there

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> Do not speak to the participant and do not respond if they ask for assistance.
>
> Be sure that the participant cannot see what answers you are choosing—he/she needs to believe that you both answered two questions the same way and if they see your paper they may know that this was not the case. We need to make sure that no matter what, cheating does NOT occur in this condition.

Id.

[170] *See* Edkins & Dervan, *supra* note 163, at 10–11. The research assistants were not informed of whether cheating had occurred to ensure that their approach to each study participant—during the plea-bargaining component of the study—was consistent and not influenced by omnipotent knowledge of guilt or innocence that would not be available to a prosecutor or investigator in the actual criminal justice system.

[171] *Id.* at 11.

was a 4% chance there was no cheating. As with all studies of this nature, difficult decisions must be made in an effort to create as realistic an environment as possible. While some might argue that mentioning the statistical evidence leading to the accusation might lead to a perception of an overly strong case against the study participant, it was decided that the benefits of explaining the reasoning for the charge outweighed any potential influence this data might have on the study results.[172]

To ensure the study participant was unable to argue that he had answered questions two and three correctly, the second set of logic questions were designed to have no correct answer. The research assistant then informed the student that this had occurred before and she had been given authority to offer two alternatives.[173] The first alternative the research assistant offered was a "plea" in which the study participant would be required to admit he or she cheated and, as punishment, would lose all compensation promised for participating in the experiment.[174] This particular offer was made to all study participants and was constructed to be akin to an offer of probation or time served in the actual criminal justice system.[175] The research assistant then offered each study participant one of

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[172] This conclusion was reached for several reasons. First, an actual criminal case should not reach the trial stage without at least one piece of significant evidence or a multitude of smaller pieces of evidence. As such, in designing the study, we did not believe offering this single piece of evidence would unduly influence the subject's decisionmaking or unreasonably influence the study's results. Second, it is difficult in a short study to build the same, often complex, foundation that is inherent in a criminal case. To rectify this inherent design limitation, we devised one simple piece of evidence to explain the basis for the accusation. The offered explanation, however, did leave room for the possibility that the individual was innocent, thus allowing the subject an argument upon which to rely in professing their innocence during the plea-negotiation process or during a trial before the ARB. Third, even though many innocent defendants may not be confronted with as strong an indicator of guilt, it does not change the fact that any innocent defendant, no matter the evidence, necessarily falls within the margins of a case where there is evidence pointing to guilt, but the defendant is, in fact, innocent. Even if our margin is smaller than most, the argument could be made that it does not change the fact that the person is innocent and, according to many commentators, should be motivated to maintain that innocence and proceed to trial.

[173] *See id.* The research assistants also informed the study participants that this situation had arisen before and that the described protocol must be followed or the research assistants might lose their research positions.

[174] *See id.* at 12. The compensation offered for participating in the study was research participation credit—something required for students to successfully complete their Introduction to Psychology course.

[175] *See id.*; *see also* Bowers, *supra* note 102, at 1136–37.

> The trial course is long; even if convicted, the defendant often has already served any postconviction sentence, and then some. In this way, conviction may counterintuitively inaugurate freedom. Moreover, the costs of conviction are minimal; an additional misdemeanor

two alternative options if the plea offer was rejected.

In roughly half of the cases (referred to as the "harsh sentencing condition"), the research assistant informed the student that if the "deal" was not accepted, the professor leading the experiment would bring the matter before the Academic Review Board (ARB). The research assistant explained that the ARB was a group of ten to twelve faculty and staff members that ruled on such matters. To make the ARB sound similar to a jury in an actual criminal trial, the research assistant described it as being a forum in which the student had the option of telling his or her version of events, presenting evidence, and arguing for his or her position. Again, to better reflect the actual mechanics of the criminal justice system, the research assistant also informed the student that "the majority of students, like 80–90%, are usually found guilty" before the ARB. This percentage was selected and communicated because it is consistent with the actual current conviction rate of defendants proceeding to trial in the United States.[176] While it is impossible to predict how common it is for defense counsel to relate such statistics to their clients, we believed that this information would, at a minimum, be considered by counsel during their own assessment of the case and in preparing to advise their clients of the risks and rewards of each option. As such, we felt it important to offer this information to the participants in this study to utilize during their personal assessment processes. The research assistant then informed the student that if he or she were "convicted" by the ARB, she would lose her study compensation, her faculty advisor would be notified, and she would have to enroll in an ethics course that met for three hours each week during the semester. The course was described as a pass/fail class that would be offered free of charge, but it would require mandatory weekly attendance and the completion of a paper and a final examination.

In roughly the other half of the cases (referred to as the "lenient sentencing condition"), the research assistant provided the same information to the student regarding the ARB process, but informed the student that if he was "convicted" by the ARB, he would lose his study

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> conviction does little to further mar an already-soiled record because the recidivist defendant has already suffered most of the corollary consequences that typically stem from convictions. If the defendant can get a plea to a misdemeanor and time served, then the process constitutes the whole punishment. Any plea that frees this defendant may be more than advisable—it may be salvation. No matter how certain of acquittal, she is better off pleading guilty. She is the defendant who benefits most from plea bargaining, and she is the very defendant who most frequently is innocent in fact.

Bowers, *supra* note 102, at 1136–37 (footnotes omitted).

[176] *See* Edkins & Dervan, *supra* note 163, at 12; *see also* Gregory et al., *supra* note 125, at 1529.

compensation, his faculty advisor would be notified, and he would undergo nine hours of ethics training in the form of three three-hour seminars. The seminars were described as free of charge but requiring mandatory attendance and the completion of a final examination. Half the students were offered the harsh sentencing condition and the other half were offered the lenient sentencing condition to test the impact of "sentencing differentials" on the rate of innocent and guilty students accepting the plea offer rather than proceeding to trial before the ARB.

Once the study participants were presented with their options of pleading guilty or proceeding to the ARB, the research assistant presented them each with a piece of paper. The paper outlined their options and asked that they circle their selection.[177] To ensure study participants did not become distraught under the pressure of the scenario, the research assistant was instructed to terminate the experiment and debrief the student regarding the true nature of the study if he or she took too long to select an option, seemed overly stressed, or tried to leave the room.[178]

B. STUDY RESULTS—THE INNOCENT DEFENDANT'S DILEMMA EXPOSED

While academic discipline is not precisely equivalent to traditional criminal penalties, the anxiety experienced by students anticipating punishment is similar in form, if not intensity, to the anxiety experienced by an individual charged with a criminal offense. As such, this study sought to recreate the innocent defendant's dilemma in as real a manner as possible by presenting two difficult and discernible choices to students and asking them to make a decision. This is the same mentally anguishing decision defendants in the criminal justice system must make every day.[179] While it

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[177] *See* Edkins & Dervan, *supra* note 166, at 17–18. The research assistants had scripted answers to common questions that might be asked while the students deliberated on their choices. For example, answers were prepared for questions such as "I didn't do it," "What did the other person say?" "How can I be in trouble if this isn't a class?" etc. This was done to ensure the research assistants' interactions with the study participants were uniform and consistent. *See* Edkins & Dervan, *supra* note 163, at 12.

[178] *See id.* After making their selection, the study participants were probed for suspicion and eventually debriefed regarding the true nature of the experiment. During this debriefing process, the students were informed that helping other students outside the classroom setting was a very kind action and that they were, in fact, in no trouble. The research assistants ensured that prior to leaving the room, the study participants understood that the nature of the study needed to remain confidential.

[179] *See id.* One important distinction between the experimental methodology used in the authors' study and previous studies is that the former included a definitive top end to the sentencing differential. This better reflects the reality of modern sentencing, particularly in jurisdictions utilizing sentencing guidelines, and thus better captures the decisionmaking

was anticipated that this plea-bargaining study would reveal that innocent students, just like innocent defendants, sometimes plead guilty to an offense they did not commit in return for promises of leniency, the rate at which such false pleas occurred exceeded our estimations and should lead to a reevaluation of the role and method of plea bargaining today.

1. *Pleading Rates for Guilty and Innocent Students*

As had been anticipated, both guilty and innocent students accepted the plea bargain and confessed to the alleged conduct.[180] In total, almost nine out of ten guilty study participants accepted the deal, while slightly fewer than six out of ten innocent study participants took the same path.[181]

Figure 1

Number and Percentage of Students by Condition (Guilty or Innocent) Rejecting and Accepting the Plea Offer

Condition	*Rejected Plea Offer*		*Accepted Plea Offer*	
	No.	%	No.	%
Guilty	4	10.8	33	89.2
Innocent	17	43.6	22	56.4

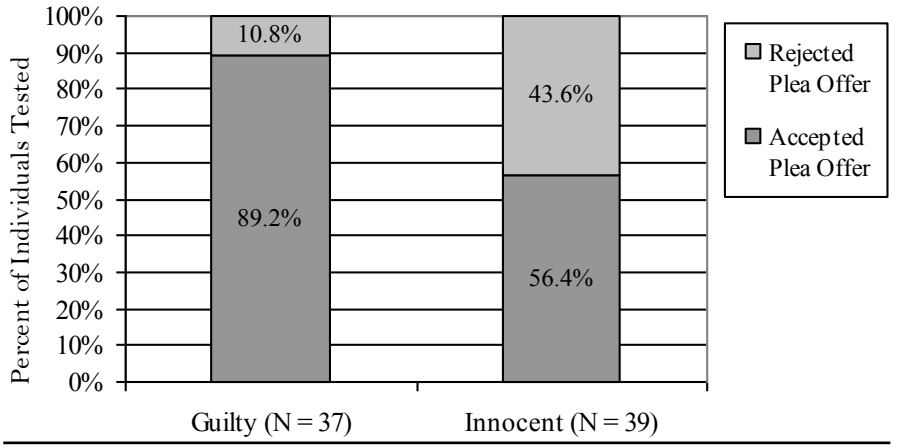
processes of criminal defendants faced with plea-bargaining decisions. *See* Russano et al., *supra* note 149, at 483 (discussing the lack of a definitive sentence for those who failed to accept the deal).

[180] *See* Edkins & Dervan, *supra* note 163, at 12–14. We first tested our sample to see if there were any demographic differences with regards to the decision to accept a plea. Participants did not differ in their choices based on gender, $\chi^2(1, N = 76) = 0.24$, $p = 0.63$ (continuity correction applied), ethnicity $\chi^2(4, N = 76) = 0.51$, $p = 0.97$, citizenship status $\chi^2(1, N = 76) = 0.16$, $p = 0.90$ (continuity correction applied), or whether or not English was the participant's first language $\chi^2(1, N = 76) = 0.34$, $p = 0.56$ (continuity correction applied). We also ensured that the decision of the participants did not differ by the experimenter $\chi^2(1, N = 76) = 0.83$, $p = 0.36$. Reported results, therefore, are collapsed across all of the previously mentioned groups.

[181] *See id.* at 13. We conducted a three-way loglinear analysis to test the effects of guilt (guilt vs. innocence) and type of sanction (lenient vs. harsh) on the participant's decision to accept the plea bargain. The highest order interaction (guilt x sanction x plea) was not significant, $\chi^2(1, N = 76) = 0.26$, $p = 0.61$. What was significant was the interaction between guilt and plea, $\chi^2(1, N = 76) = 10.95$, $p < 0.01$. To break down this effect, a separate chi-square test was performed looking at guilt and plea, collapsed across type of sanction. Applying the continuity correction for a 2 x 2 contingency table, there was a significant effect of guilt, $\chi^2(1, N = 76) = 8.63$, $p < 0.01$, with the odds ratio indicating that those who were guilty were 6.38 times more likely to accept a plea than those who were innocent.

Two important conclusions stem from these results.[182] First, as had been predicted by others, guilty defendants are more likely to plead guilty than innocent defendants.[183] In our study, guilty defendants were 6.39 times more likely to accept a plea than innocent defendants given the same sentencing options.[184]

Figure 2
Percentage of Students by Condition (Guilty or Innocent) Accepting the Plea Offer



Interestingly, these results are consistent with predictions made by other scholars relying on case studies to predict the impact of innocence on plea-bargaining decisions.[185]

[182] *See id.* at 13–14.

[183] *See id.*; *see also* Tor et al., *supra* note 102, at 113 (arguing that innocent defendants tend to reject plea offers more than guilty defendants); Covey, *supra* note 116, at 34.

[184] *See* Edkins & Dervan, *supra* note 163, at 13.

[185] *See* Covey, *supra* note 116, at 1.

In his recent article entitled *Mass Exoneration Data and the Causes of Wrongful Convictions*, Professor Covey examined two mass-exoneration cases and predicted, based on the choices of defendants in those cases, that innocence mattered.[186] While Professor Covey concedes that his examination of case studies only permits "some tentative comparisons," it is fascinating to observe that the actions of the defendants in these two mass-exoneration cases mirror the actions of our study participants.[187]

Figure 3

Percentage of Individuals by Condition (Guilty or Innocent) Accepting the Plea Offer in the Study and in Professor Covey's Studies on Mass Exonerations

Condition	*Dervan/Edkins Study*	*Covey Mass Exonerations Studies*
	%	%
Guilty	89.2	89.0
Innocent	56.4	77.0

As the numbers reflect, guilty defendants in Professor Covey's mass exoneration cases acted almost exactly as did guilty students in our experiment.[188] In both cases, nine out of ten guilty individuals accepted the deal.[189] While not as precise, in both the mass-exoneration cases and the plea-bargaining study, well over half of innocent individuals also selected the bargain over proceeding to trial.[190] These similarities not only lend credibility to the results of our new study, but once again support the arguments of those who previously predicted that plea bargaining's

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[186] *See id.* (examining the mass exonerations in the *Rampart* case in California and the *Tulia* case in Texas).

[187] *See id.* at 34.

> Although the numbers are small, they are large enough to permit some tentative comparison. With respect to plea rates, the data show that innocence does appear to make some difference . . . . Actually innocent exonerees thus plead guilty at a rate of 77%. In comparison, 22 of those who were not actually innocent pled guilty while 3 were convicted at trial. In other words, 88% of those who were not innocent pled guilty. Finally, of the remaining group of "may be innocents," 17 pled guilty while two were convicted at trial, providing an 89% guilty plea rate.

Id.

[188] *See id.*

[189] *See id.*; Edkins & Dervan, *supra* note 163, at 13.

[190] *See* Covey, *supra* note 116, at 34; Edkins & Dervan, *supra* note 163, at 13.

innocence problem affected more than just an isolated few.[191]

The second and, perhaps, more important conclusion stemming from the study is that well over half of the innocent study participants, regardless of whether the lenient or harsh sentencing condition was employed, were willing to falsely admit guilt in return for a reduced punishment.[192] Previous research has argued that plea bargaining's innocence problem is minimal because defendants are risk prone and willing to defend themselves before a tribunal.[193] Our research, however, demonstrates that when study participants are placed in real, rather than hypothetical, bargaining situations and are presented with accurate information regarding their statistical probability of success, just as they might be so informed by their attorneys or the government during criminal plea negotiations, innocent individuals are actually highly risk averse.[194]

Based on examination of the detailed notes compiled during the debriefing of each study participant, two common concerns drove the participants' risk-averse behavior. First, study participants sought to avoid the ARB process and move directly to punishment.[195] Second, study

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[191] *See* Bowers, *supra* note 102, at 1136–37.

[192] *See* Edkins & Dervan, *supra* note 163, at 5. While design constraints prevented the incorporation of counsel into our study, we believe that this omission does not lessen the significance of these findings. First, while the presence of counsel may have resulted in a slight shift in outcomes, it is unlikely such representation would have dramatically altered the study results because the underlying decisionmaking factors presented to the participants would remain the same. Second, it is important to note that many individuals in the U.S. criminal justice system proceed without counsel. *See* SMITH & MADDAN, *supra* note 67, at 9. Finally, the results of this study are relevant for other institutions employing models based on the criminal justice system, many of which do not utilize an equivalent to counsel. That students will acquiesce in such a manner should not only bring the criminal justice system's use of plea bargaining into question, but also all other similar forms of adjudication throughout society. For example, this would include reevaluation of student conduct procedures that contain offers of leniency in return for admissions of guilt.

[193] *See* Tor et al., *supra* note 102, at 106 (arguing based on a study utilizing an email questionnaire that innocent defendants are risk prone and on average were willing to proceed to trial rather than accept a plea); *see also* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2507 (2004) ("Defendants' attitudes toward risk and loss will powerfully shape their willingness to roll the dice at trial.").

[194] *See* Edkins & Dervan, *supra* note 163, at 6; *see also* Bibas, *supra* note 193, at 2509 (discussing risk aversion and loss aversion). Professor Bibas notes that "most people are inclined to gamble to avoid sure losses and inclined to avoid risking the loss of sure gains; they are risk averse, but they are even more loss averse. When these gains and losses are uncertain probabilities rather than certain, determinate amounts, the phenomenon is reversed." *Id.*

[195] *See* Edkins & Dervan, *supra* note 163, at 6; *see also* Bowers, *supra* note 102, at 1136–37.

Likewise, over fifty percent of all misdemeanor charges that ended in conviction resulted in

participants sought a punishment that would not require the deprivation of direct future liberty interests.[196] Further research is necessary in this area to fully understand these motivations, but one key trend is worth noting at this juncture. The study participants' actions appear to be directly mimicking a phenomenon that has drawn much debate and concern in recent years[197]: the students appear to have been selecting "probation" and immediate release rather than risking further "incarceration" through forced participation in a trial and, if found guilty, "confinement" in an ethics course or seminar.[198] In essence, the study participants simply wanted to go home.[199] This study suggests, therefore, that one needs to be concerned not only that significant sentencing differentials might lead felony defendants to falsely condemn themselves through plea bargaining, but also that misdemeanor defendants might be pleading guilty based on factors wholly distinct from their actual factual guilt.[200]

2. *The Impact of Sentencing Differentials*

One goal of the study was to offer two distinct punishments as a result of conviction by the ARB to determine if the percentage of guilty and innocent study participants accepting the plea offer rose as the sanction they risked if they lost at trial increased.[201] As discussed previously, approximately half of the study participants were informed of the harsh sentencing condition and the other half were informed of the lenient sentencing condition.[202]

> nonjail dispositions. Of the so-called jail sentences, fifty-seven percent were sentences of time served. Even for defendants with combined felony and misdemeanor records, the rate of time-served sentences dropped only to near fifty percent. Further, the percentage of *express* time-served sentences significantly underestimates the number of sentences that were in fact *equivalent to* time served, because most defendants with designated time sentences actually had completed those sentences at disposition.

Bowers, *supra* note 102, at 1144.

[196] *See* Edkins & Dervan, *supra* note 163, at 16.

[197] *See* Bibas, *supra* note 193, at 2492–93 (noting that pretrial detention can exceed the eventual prison sentence after trial); SMITH & MADDAN, *supra* note 67, at 7 ("But even where no jail time is imposed, and the court and the prosecutor keep their promises and allow a defendant to pay his fine and return to his home and job the same day, there are real punishments attendant to a misdemeanor conviction that have not yet begun.").

[198] *See* Bowers, *supra* note 102, at 1136–37.

[199] *See id.*

[200] *See* SMITH & MADDAN, *supra* note 67, at 7 (discussing concerns regarding uncounseled defendants pleading guilty in quick arraignments and returning home the same day without understanding the collateral consequences of their decisions).

[201] *See* Edkins & Dervan, *supra* note 163, at 3.

[202] *See id.*

Figure 4
Percentage of Students by Condition (Guilty or Innocent) and Sentencing Condition (Harsh or Lenient) Accepting the Plea Offer

Condition	*Rejected Plea Offer*		*Accepted Plea Offer*	
	Harsh %	Lenient %	Harsh %	Lenient %
Guilty	5.9	15.0	94.1	85.0
Innocent	38.9	47.6	61.1	52.4
Diagnosticity			1.54	1.62

As the table above demonstrates, the subjects facing the harsh sentencing condition, regardless of guilt or innocence, accepted the plea offer at a rate almost 10% higher than the subjects facing the lenient sentencing condition.[203] Unfortunately, this shift is not statistically significant due to the limited size of the study population, but the data does demonstrate that perhaps the study was on the right track; more research with a larger pool of participants and a greater "sentencing differential" is needed to examine this phenomenon further.[204] Significant questions remain regarding how large a sentencing differential can become before the rate at which innocent and guilty defendants plead guilty becomes the same and regarding how sentencing differentials that include probation, as opposed to a prison sentence, influence a defendant's decisionmaking. Such questions, however, must be reserved for future study.

Just as interesting as the above shift in the percentage of study participants pleading guilty, perhaps, is the diagnosticity data collected during this portion of the study.[205] Diagnosticity, as used in this study, is a calculation that ascertains whether one action or decision (e.g., the decision to accept a plea bargain) is indicative of some truth (e.g., guilt); in other words, acceptance of a plea bargain would be diagnostic of guilt if it was significantly more likely to occur with guilty defendants than with innocent defendants.[206] Akin to an odds ratio, diagnosticity levels can be quite high, but commonly numbers hover around the single digits or low double digits. For example, a similar test was applied in the Russano study of

[203] *See id.*

[204] *See id.*

[205] *See id.*

[206] *See id.*; *see also* Russano et al., *supra* note 149, at 484 (noting that diagnosticity in that study illustrated the "ratio of true confessions to false confessions").

interrogation tactics.[207] When Russano's interrogators did not use any tactics to elicit a confession, the diagnosticity of the interrogation process was 7.67.[208] By comparison, when Russano's interrogators applied two interrogation tactics, the number of false confessions jumped to almost 50% and the diagnosticity of the process dropped to 2.02.[209] This drop in diagnosticity meant that as Russano applied various interrogation tactics, the ability of the interrogation procedure to identify only guilty subjects diminished.[210] Taken to the extreme, if one were to torture a suspect during interrogation, one would anticipate a diagnosticity of 1.0, which would indicate that the process was just as likely to capture innocent as guilty defendants.[211]

In our study, the diagnosticity of the plea-bargaining process utilized was extremely low, a mere 1.54.[212] That the diagnosticity of our plea-bargaining process was considerably lower than the diagnosticity of Russano's combined interrogation tactics is significant.[213] First, it is important to note that plea bargaining's diagnosticity in this study was strikingly low, despite the fact that our process did not threaten actual prison time or deprivations of significant liberty interests as happens every day in the actual criminal justice system.[214] Further, this diagnosticity result indicates that innocent defendants may be more vulnerable to coercion in the plea-bargaining phase of their proceedings than even during a police interrogation. While much focus has been given to increasing constitutional protections during police interrogations over the last half-century, perhaps the Supreme Court should begin focusing more attention on creating protections within the plea-bargaining process.[215]

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[207] *See* Russano et al., *supra* note 149, at 484.

[208] *See id.* (7.67 diagnosticity was the result of only 6% of test subjects falsely confessing). The Russano study stated, "[D]iagnosticity was highest when neither of the techniques was used and lowest when both were used. More specifically, diagnosticity was reduced by nearly 40% with the use of a single interrogation technique . . . and by 74% when both techniques were used in combination." *Id.*

[209] *See id.*

[210] *See id.*

[211] *See id.*

[212] *See* Edkins & Dervan, *supra* note 163, at 14.

[213] Russano et al., *supra* note 149, at 484; Edkins & Dervan, *supra* note 163, at 14.

[214] John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 12–13 (1978) (arguing that plea bargaining's sentencing differential means "[p]lea bargaining, like torture, is coercive").

[215] *See* Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 495–96 (1998) ("When police are trained to seek both independent evidence of a suspect's guilt and internal corroboration for every

The other important aspect of our study's diagnosticity data is that the diagnosticities of the harsh and lenient sentencing conditions were very similar.[216] This was surprising, because it had been anticipated that the efficiency of the process would suffer greatly as we increased the punishment risked at trial.[217] That the diagnosticity did not drop in this way when the harsh sentencing condition was applied means further research is necessary to better understand the true impact of sentencing differentials.

Though further research is warranted, we suggest two hypotheses that might offer an explanation of the diagnosticity element of this study. First, perhaps future studies will demonstrate that diagnosticity here did not drop significantly because it had little place left to go.[218] The diagnosticity for the lenient sentencing condition was already at 1.62, which, as discussed above, is exceptionally low. That it did not drop meaningfully below this threshold when the sentencing differential was increased, therefore, may not be surprising, particularly given that a diagnosticity of 1.0 would mean that sentence severity had no ability to predict truthful plea deals.[219] Second, perhaps future studies will reveal that the diagnosticity of our plea-bargaining process began so low and failed to drop significantly when a harsher sentencing condition was applied because sentencing differentials operate in a manner other than previously predicted.[220] Until now, many observers have predicted that sentencing differentials operate in a linear fashion (Figure 5), which means there is a direct relationship between the size of the sentencing differential and the likelihood a defendant will accept the bargain.[221]

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confession before making an arrest . . . the damage wrought and the lives ruined by the misuse of psychological interrogation methods will be significantly reduced."); Russano et al., *supra* note 149, at 485 ("[W]e encourage police investigators to carefully consider the use of interrogation techniques that imply or directly promise leniency, as they appear to reduce the diagnostic value of an elicited confession."); *see also* Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) ("Because ours 'is for the most part a system of pleas, not a system of trials,' it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process.") (citation omitted).

[216] *See* Edkins & Dervan, *supra* note 163, at 3, 5.

[217] *See id.*

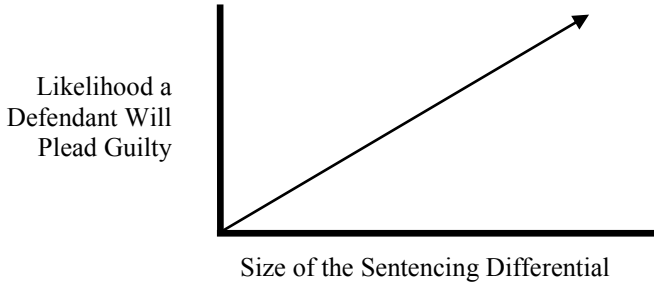
[218] *See* Dervan, *supra* note 34, at 475 (discussing a similar phenomenon with regard to plea-bargaining rates, which are now in excess of 96% at the federal level).

[219] *See* Langbein, *supra* note 214, at 12–13.

[220] *See* Dervan, *supra* note 88, at 282 ("[I]n a simplistic plea bargaining system the outcome differential and the sentencing differential track closely."); Yin, *supra* note 89, at 443 ("Curiously, the arena of plea bargaining pits the concepts of duress and consideration against each other: a large sentencing differential makes it more likely that a defendant is coerced into pleading guilty, and yet it also increases the benefit offered in exchange for the guilty plea.").

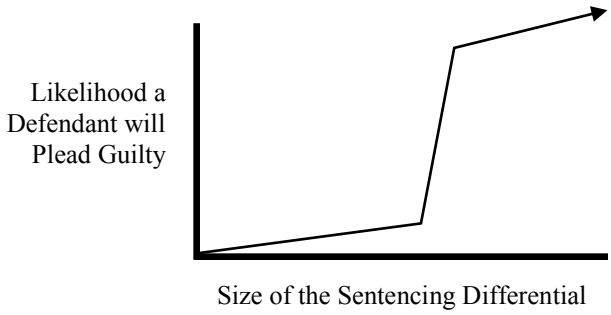
[221] *See* Dervan, *supra* note 88, at 282–83; Yin, *supra* note 89, at 443.

Figure 5
Predicted Linear Relationship
Between Plea-Bargaining Rates and Sentencing Differentials



It may be the case, however, that plea bargaining actually operates as a "cliff." This means that a particularly small sentencing differential may have little to no likelihood of inducing a defendant to plead guilty (Figure 6). However, once the sentencing differential reaches a critical size, its ability to immediately and markedly influence the decisionmaking process of a defendant, whether guilty or innocent, becomes almost overwhelming.[222] Such a cliff effect would result in similar diagnosticities for both the harsh and lenient sentencing conditions because, once the critical size is reached, there is little additional impact that can be gained from further increasing the size of the differential.

Figure 6
Possible "Cliff" Relationship
Between Plea-Bargaining Rates and Sentencing Differentials



[222] There are many factors that might shift when this cliff is reached for a particular defendant. *See* Bibas, *supra* note 193 (discussing factors that influence a particular defendant's decision to plead guilty).

If future research indicates that this cliff effect is occurring, then these findings will be significant for at least three reasons. First, this might mean that while research suggesting that the answer to plea bargaining's innocence problem is better control of sentencing differentials is on the right track, such proposals will have to account for the cliff effect in selecting precisely how significant a differential to permit.[223] Without such consideration, it is possible that a proposed limitation on sentencing differentials that permitted incentives beyond the cliff would have little positive impact on the coercive nature of subsequent plea offers. Second, if such cliffs exist and are reached relatively quickly, as was the case in this study, consideration must be given to limiting the size of sentencing differentials more drastically then previously proposed.[224] Finally, future research regarding such cliffs might reveal precise mechanisms through which to increase the efficiency of the plea-bargaining system. For example, if it were revealed that guilty defendants required a smaller sentencing differential to reach their cliff, limiting sentencing differentials to such a size would simultaneously create a significant enough incentive for most guilty defendants to plead and not so great an incentive as to capture innocent ones. While further research is necessary to understand this possible phenomenon better, consideration must now be given to the implications of a possible finding that small sentencing differentials are more powerful than previously predicted and operate in a very different way than previously assumed.

IV. THE CONSTITUTIONALITY OF THE INNOCENT DEFENDANT'S DILEMMA

In 1970, the same year the Supreme Court ruled that plea bargaining was a permissible form of justice in the *Brady* decision, the Court also accepted the case of *North Carolina v. Alford*.[225] In *Alford*, the defendant

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[223] *See* Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1245 (2008) (discussing the benefits of fixed-plea discounts, including that such fixed discounts "prevent prosecutors from offering discounts so large that innocent defendants are essentially coerced to plead guilty to avoid the risk of a dramatically harsher sentence"); *see also* Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 81 ("Dean Vorenberg suggests that a sentence discount of ten or twenty percent should encourage the requisite number of desired pleas. This figure appears to be a reasonable one with which to begin . . . . Excessive sentence discounts should be constitutionally suspect because they place a burden on the defendant's exercise of constitutional rights and negate the voluntary nature of his plea.").

[224] Gifford, *supra* note 223, at 81.

[225] North Carolina v. Alford, 400 U.S. 25 (1970).

was indicted for first-degree murder.[226] After Alford's attorney questioned witnesses in the case and determined that there was a strong indication of guilt, he recommended Alford plead guilty to the prosecution's offer of second-degree murder.[227] Alford agreed but, during the plea hearing, continued to declare his innocence and stated that he was pleading guilty only to avoid the possibility of the death penalty.[228] Despite the proclamations from Alford, the trial judge accepted the plea and sentenced the defendant to thirty years in prison.[229] In approving of the trial court's actions, the Supreme Court stated that it was permissible for a defendant to plead guilty even while maintaining his or her innocence.[230] The Court stated, however, that there must be a "record before the judge contain[ing] strong evidence of actual guilt" to ensure the rights of the truly innocent are protected and guilty pleas are the result of "free and intelligent choice."[231] Forty years later, three men serving sentences ranging from life in prison to death would use this form of bargained justice to walk free after almost two decades in prison for a crime they may never have committed.[232]

In May 1993, the mutilated bodies of three eight-year-old boys were discovered in a drainage canal in Arkansas.[233] Spurred by growing concern regarding satanic cults, police desperately searched for the killer or killers.[234] As part of their investigation, police focused on a seventeen-year-old named Jessie Lloyd Misskelley Jr. Subjected to a twelve-hour interrogation, Misskelley eventually confessed to committing the killings

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[226] *See id.* at 26–27.

[227] *See id.* at 27.

[228] *See id.* at 28.

[229] *See id.* at 29.

[230] *Id.* at 37; *see also* Leipold, *supra* note 95, at 1156 ("An *Alford* plea, where the defendant pleads guilty but simultaneously denies having committed the crime, clearly puts the court on notice that this guilty plea is problematic . . . .").

[231] *Alford*, 400 U.S. at 37, 38 n.10. Currently, the federal system, the District of Columbia, and forty-seven states permit Alford pleas. *See* Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of* Alford *and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1372–73 n.52 (2003).

[232] *See* Campbell Robertson, *Rare Deal Frees 3 in '93 Arkansas Child Killings*, N.Y. TIMES, Aug. 20, 2011, at A1; *see also* Paul G. Cassell, *The Guilty and the 'Innocent': An Examination of Alleged Cases of Wrongful Conviction from False Confessions*, 22 HARV. J.L. & PUB. POL'Y 523, 557–60 (1999) (discussing facts of the case); Leo & Ofshe, *supra* note 215, at 461–62 (discussing the Misskelley confession); Mara Leveritt, *Are 'Voices For Justice' Heard? A Star-Studded Rally on Behalf of the West Memphis Three Prompts the Delicate Question*, 33 U. ARK. LITTLE ROCK L. REV. 137, 150–53 (2011) (discussing publicity surrounding the case).

[233] *See* Robertson, *supra* note 232, at A1, A12.

[234] *See id.* at A12.

along with two others teenagers, Damien Echols and Jason Baldwin, though his confession was "inconsistent with the facts of the case, was not supported by any evidence, and demonstrated that he lacked personal knowledge of the crime."[235] Though Misskelley later recanted his statement, all three teenagers were convicted at trial and became known as the "West Memphis Three."[236] Misskelley and Baldwin received life sentences, while Echols received the death penalty.[237]

Following their convictions, the three young men continued to maintain their innocence and gradually, publicity regarding the case began to grow.[238] Though many had argued for years that the West Memphis Three were innocent of the alleged offense, concern regarding the case reached a crescendo in 2007 after DNA testing conducted on items from the crime scene failed to match any of the three.[239] Significantly, however, the DNA testing did find a match.[240] Hair from the ligatures used to bind one of the victims matched Terry Hobbs, one of the victims' stepfathers.[241] Though Hobbs had claimed not to have seen the murdered boys at all on the day of their disappearance, several witnesses came forward after the DNA test results were released to say they had seen him with the boys shortly

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[235] *See* Leo & Ofshe, *supra* note 215, at 461.

[236] *See* Robertson, *supra* note 232, at A12.

[237] *See id.*

[238] *See id.*

[239] *See* Leveritt, *supra* note 232, at 151–52. In considering the significance of plea bargaining's innocence problem, one must also consider how likely it is that police inadvertently target the wrong suspect in a particular case—something that might eventually lead to an innocent suspect being offered a plea bargain in return for a false confession. *See* Thomas, *supra* note 111, at 576.

> Despite Risinger's wisdom about not attempting a global estimate of how many innocents are convicted, I continue to try to at least surround the problem. We do know some things for certain. An Institute of Justice monograph published in 1999 contained a study of roughly 21,000 cases in which laboratories compared DNA of the suspect with DNA from the crime scene. Remarkably, the DNA tests exonerated the prime suspect in 23% of the cases. In another 16%, the results were inconclusive. Because the inconclusive results must be removed from the sample, the police were wrong in one case in four. *The prime suspect was innocent in one case out of four!*

Id.

[240] *See* Leveritt, *supra* note 232, at 151.

[241] *See id.* (discussing the release of this DNA evidence by singer Natalie Maines during a rally for the West Memphis Three). Further evidence in the case came to light as a result of a defamation lawsuit filed by Hobbs against Maines. *Id.* at 151–52. During a deposition in the defamation case, Hobbs stated that he had not seen the victims on the day of the murders. *Id.* When this information was released to the public, several witnesses came forward to state that they had seen Hobbs with the victims shortly before their disappearance. *Id.*

before their murder.[242]

By 2011, the newly discovered evidence in the case was deemed sufficient to call a hearing to determine if there should be a new trial.[243] For the prosecution, however, the prospect of retrying the defendants given the weak evidence offered at the original trial and the new evidence indicating the three might be innocent was unappealing.[244] According to the lead prosecutor, there was no longer sufficient evidence to convict the three at trial.[245] Despite the strong language in *Alford* indicating that it was appropriate only in cases where the evidence of guilt was overwhelming and conviction at trial was almost ensured, the government offered the West Memphis Three a deal.[246] They could continue to maintain their innocence, but would be required to enter an Alford plea of guilty to the 1993 murders of the three boys.[247] In return, they would be released immediately.[248] While Baldwin was reluctant to accept the offer, he agreed to ensure Echols would be released from death row.[249] Baldwin stated, "[T]his was not justice. However, they're trying to kill Damien."[250] On August 19, 2011, the West Memphis Three walked out of an Arkansas courtroom free men, though they will live with the stigma and collateral consequences of their guilty pleas for the rest of their lives.[251] Whether they were guilty of the charged offenses may never be truly known, but it is clear that despite insufficient evidence to convict them at trial and strong indications that they were innocent, the three were enticed by the power of the plea-bargaining machine.[252]

While the Supreme Court acknowledged the need for plea bargaining in *Brady* and approved bargained justice as a form of adjudication in the American criminal justice system, the Court also offered a cautionary note regarding the role of innocence.[253] At the same time the Court made clear

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[242] *See id.*

[243] *See* Robertson, *supra* note 232, at A12.

[244] *See id.*

[245] *See id.*

[246] *See id.*

[247] *See id.*

[248] *See id.* ("Under the seemingly contradictory deal, Judge David Laser vacated the previous convictions, including the capital murder convictions for Mr. Echols and Mr. Baldwin. After doing so, he ordered a new trial, something the prosecutors agreed to if the men would enter so-called Alford guilty pleas.").

[249] *See id.*

[250] *Id.*

[251] *See id.*

[252] *See id.*

[253] *See* Brady v. United States, 397 U.S. 742, 752–58 (1970).

its belief that innocent defendants were not vulnerable to the powers of bargained justice, the Court reserved the ability to reexamine the entire institution should it become evident it was mistaken.[254] The Court stated:

> For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious—his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated. For the State there are also advantages—the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, *scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof.*[255]

Continuing to focus more directly on the possibility of an innocence issue, the Court stated:

> This is not to say that guilty plea convictions hold no hazards for the innocent or that the methods of taking guilty pleas presently employed in this country are necessarily valid in all respects. This mode of conviction is no more foolproof than full trials to the court or to the jury. Accordingly, we take great precautions against unsound results, and we should continue to do so, whether conviction is by plea or by trial. *We would have serious doubts about this case if the encouragement of guilty pleas by offers of leniency substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves*.[256]

This caveat about the power of plea bargaining has been termed the *Brady* safety valve, because it allows the Supreme Court to reevaluate the constitutionality of bargained justice if the persuasiveness of plea offers becomes coercive and surpasses a point at which it begins to ensnarl an unacceptable number of innocent defendants.[257]

Interestingly, *Brady* is not the only Supreme Court plea-bargaining case to include mention of the innocence issue and the safety valve.[258] In

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[254] *See id.* at 757–58; *see also* Dervan, *supra* note 26, at 87–88.

[255] *Brady*, 397 U.S. at 752 (emphasis added).

[256] *Id.* at 757–58 (emphasis added).

[257] *See* Dervan, *supra* note 26, at 88.

> Safety-valves are intended to relieve pressure when forces within a machine become too great and, thereby, preserve the integrity of the machine. The *Brady* safety-valve serves just such a purpose by placing a limit on the amount of pressure that can constitutionally be placed on defendants to plead guilty. According to the Court, however, should plea bargaining become so common that prosecutors offer deals to all defendants, including those whose guilt is in question, and the incentives to bargain become so overpowering that even innocent defendants acquiesce, then the *Brady* safety-valve will have failed and the plea bargaining machine will have ventured into the realm of unconstitutionality.

Id.

[258] *See id.* at 88–89.

Alford, for instance, the Court made clear that this form of bargained justice was reserved only for cases where the evidence against the defendant was overwhelming and sufficient to overcome easily the defendant's continued claims of innocence.[259] Where any uncertainty remained, the Supreme Court expected the case to proceed to trial to ensure that "guilty pleas are a product of free and intelligent choice," rather than overwhelming force from the prosecution.[260] The same language requiring that plea bargaining be utilized in a manner that permits defendants to exercise their free will was contained in the 1978 case of *Bordenkircher v. Hayes*.[261] In *Bordenkircher*, the Court stated that the accused must be "free to accept or reject the prosecution's offer."[262] Just as the Court had stated in *Brady* and *Alford*, it concluded its discussion in *Bordenkircher* by assuring itself that as long as such free choice existed and the pressure to plead guilty was not overwhelming, it would be unlikely that an innocent defendant might be "driven to false self-condemnation."[263]

As is now evident from the study described herein, the Supreme Court was wrong to place such confidence in the ability of individuals to assert their right to trial in the face of grave choices.[264] In our research, more than half of the study participants were willing to forgo an opportunity to argue their innocence in court and instead falsely condemned themselves in return for a perceived benefit.[265] That the plea-bargaining system may operate in a manner vastly different from that presumed by the Supreme Court in 1970 and has the potential to capture far more innocent defendants than predicted means that the *Brady* safety valve has failed. Perhaps, therefore, it is time for the Court to reevaluate the constitutionality of the institution with an eye towards the true power and resilience of the plea-bargaining machine.

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[259] North Carolina v. Alford, 400 U.S. 25, 37 (1970); *see also* ABA PROJECT, *supra* note 69, at 2 ("Moreover, the limited use of the trial process for those cases in which the defendant has grounds for contesting the matter of guilt aids in preserving the meaningfulness of the presumption of innocence.").

[260] *Alford*, 400 U.S. at 38 n.10.

[261] Bordenkircher v. Hayes, 434 U.S. 357 (1978).

[262] *Id.* at 363.

[263] *Id.*

[264] *See supra* Part III (discussing the plea-bargaining study).

[265] *See* Edkins & Dervan, *supra* note 163, at 13.