

**The Innocent Defendant’s Dilemma:  
An Innovative Empirical Study of Plea Bargaining’s Innocence Problem**

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and

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**INTRODUCTION**

In 1989, Ada JoAnn Taylor sat quietly in a nondescript chair contemplating her choices.<sup>3</sup> On a cold February evening four years earlier, a sixty-eight year old woman was brutally

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victimized in Beatrice, Nebraska.<sup>4</sup> Police were now convinced that Taylor and five others were responsible for the woman’s death.<sup>5</sup> The options for Taylor were stark.<sup>6</sup> If she pleaded guilty and cooperated with prosecutors, she would be rewarded with a sentence of ten to forty years in prison.<sup>7</sup> If, however, she proceeded to trial and was convicted, she would likely spend the rest of her life behind bars.<sup>8</sup>

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.<sup>9</sup> 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 were enticing.<sup>10</sup> 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.<sup>11</sup> The alternative, a lifetime behind bars, was grim by comparison.<sup>12</sup> After contemplating the options, Taylor pleaded guilty to aiding and abetting

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<sup>4</sup> *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.”).

<sup>5</sup> *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.’”).

<sup>6</sup> *See id.*

<sup>7</sup> *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.”).

<sup>8</sup> *See id.*

<sup>9</sup> *See infra* Section II (discussing the plea bargaining study).

<sup>10</sup> *See* THE INNOCENCE PROJECT – TAYLOR, *supra* note 3.

<sup>11</sup> *See id.*

<sup>12</sup> *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

second-degree murder.<sup>13</sup> Twenty years later, the college student made a similar calculation.<sup>14</sup> While the loss of compensation for participating in the study was a significant punishment, it was certainly better than being forced to enroll in a time consuming ethics course.<sup>15</sup> Just as Taylor had decided to control her destiny and accept the certainty of the lighter alternative, the college student admitted she had knowingly cheated on the test.<sup>16</sup>

That Taylor and the college student both pleaded guilty is not the only similarity between the cases. Both were also innocent of the offenses for which they had been accused.<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup> 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 revealed that plea bargaining’s innocence problem is not isolated to an obscure and rare set of cases.<sup>20</sup> Strikingly,

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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?

*See 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))).

<sup>13</sup> *See infra* section II (discussing the plea bargaining study).

<sup>14</sup> *See id.*

<sup>15</sup> *See id.*

<sup>16</sup> *See id.*

<sup>17</sup> *See* THE INNOCENCE PROJECT – TAYLOR, *supra* note 3.

<sup>18</sup> *See id.* It should also be noted that five of the six defendants in the Wilson murder case pleaded guilty. As described above, all six defendants were innocent and played no role in the sexual assault or murder of Wilson. *See id.*; *see also* THE INNOCENCE PROJECT – KNOW THE CASES: DEBRA SHELDEN, available at [www.innocenceproject.org/Content/Debra\\_Shelden.php](http://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.”); THE INNOCENCE PROJECT – KNOW THE CASES: JAMES DEAN, available at [www.innocenceproject.org/Content/James\\_Dean.php](http://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.”).

<sup>19</sup> *See infra* section II (discussing the plea bargaining study).

<sup>20</sup> *See id.*

the study demonstrated that more than half of innocent defendants will falsely admit guilt in return for a perceived benefit.<sup>21</sup> This finding not only brings finality to the long-standing debate regarding the possible extent of plea bargaining’s innocence problem, but also ignites a fundamental constitutional question regarding an institution the Supreme Court reluctantly approved of in 1970 in return for an assurance it would not be used to induce innocent defendants to falsely admit guilt.<sup>22</sup>

This article will first examine the history of plea bargaining in the United States, including examination of the current debate regarding the prevalence of plea bargaining’s innocence problem.<sup>23</sup> Second, this article will discuss the groundbreaking psychological study of plea bargaining conducted by the authors.<sup>24</sup> This section will include examination of the methodology and results of the study.<sup>25</sup> Finally, this article will analyze the constitutional limits placed on plea bargaining by the Supreme Court in its landmark 1970 decision, *Brady v. United States*.<sup>26</sup> In this decision, the Supreme Court stated that plea bargaining was a tool for use only when the evidence was overwhelming and the defendant might benefit from the opportunity to bargain.<sup>27</sup> According to the Court, if it became evident that plea bargaining was being used more broadly to create incentives for defendants of questionable guilt to “falsely condemn themselves,” the entire institution of plea bargaining and its constitutionality would require reexamination.<sup>28</sup> Perhaps, as a result of this new study, such a time for reevaluation has arrived.

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<sup>21</sup> *See id.*

<sup>22</sup> *See id.*

<sup>23</sup> *See infra* section I (discussing the historical rise of plea bargaining and its innocence problem).

<sup>24</sup> *See infra* section II (discussing the plea bargaining study).

<sup>25</sup> *See id.*

<sup>26</sup> *See* *Brady v. United States*, 397 U.S. 742 (1970).

<sup>27</sup> *Id.* at 752.

<sup>28</sup> *Id.* at 757-58; *see also* Lucian E. Dervan, *Bargained Justice: Plea Bargaining’s Innocence Problem and the Brady Safety-Valve*, -- UTAH LAW REVIEW -- (forthcoming 2012) (discussing the “Brady Safety-Valve.”).

## I. 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.<sup>29</sup> Three days after the attack, and again a month later, the victim identified John Dixon as the perpetrator from a photo array.<sup>30</sup> Dixon was arrested on January 18, 1991, and ventured down a road familiar to criminal defendants in the United States.<sup>31</sup> 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.<sup>32</sup> He received a sentence of forty-five years in prison.<sup>33</sup> Ten year later, however, Dixon was released from prison after DNA evidence established that he could not have been the perpetrator of the crime.<sup>34</sup> 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.<sup>35</sup>

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<sup>29</sup> THE INNOCENCE PROJECT – KNOW THE CASES: JOHN DIXON, [http://www.innocenceproject.org/Content/John\\_Dixon.php](http://www.innocenceproject.org/Content/John_Dixon.php) (last visited January 23, 2012) (describing the story of John Dixon, who pleaded guilty to rape charges for fear he would receive a harsher sentence if he proceeded to trial, but was later exonerated by DNA evidence).

<sup>30</sup> *See id.*

<sup>31</sup> *See id.*

<sup>32</sup> *See id.*; see also Richard Klein, *Due Process Denied: Judicial Coercion in the Plea 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.*; see also Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 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.”).

<sup>33</sup> *See* THE INNOCENCE PROJECT – DIXON *supra* note 29.

<sup>34</sup> *See id.*

<sup>35</sup> *See* United States Sentencing Commission, *2010 Sourcebook of Federal Sentencing Statistics*, Figure C, available at [http://www.ussc.gov/Data\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2010/FigureC.pdf](http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/FigureC.pdf) (last

Plea bargaining, however, was not always such a dominant force in the United States.<sup>36</sup> 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.<sup>37</sup> Despite these early judicial rebukes, plea bargaining continued to linger in the shadows as a tool of corruption.<sup>38</sup> Then, in response to growing pressures on American courts due to overcriminalization in the early twentieth century, plea bargaining gradually moved into the light and began a spectacular rise to power.<sup>39</sup> That today almost 97% of defendants in the federal system plead guilty, just as John Dixon did in New Jersey in 1991, is both a testament to the institution’s resilience and a caveat about its power of persuasion.<sup>40</sup>

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visited January 2, 2012) (documenting that almost 97% of defendants in the federal criminal justice system plead guilty).

<sup>36</sup> See Dervan, *Bargained Justice*, *supra* note 28, at --; Lucian E. Dervan, *Plea Bargaining’s Survival: Financial Crimes Plea Bargaining, A Continued Triumph in a Post-Enron World*, 60 OKLAHOMA LAW REVIEW 451, 478 (2007); 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 and Michael McConville, *Plea Bargaining and Plea Negotiation in England*, 13 LAW & SOC’Y REV. 287 (1978).

<sup>37</sup> See Dervan, *Bargained Justice*, *supra* note 28, at --.

<sup>38</sup> See Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 19-24 (1979).

<sup>39</sup> George Fisher, *Plea Bargaining’s Triumph*, 109 YALE L.J. 857, 859 (2000) (hereinafter “*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. . . . [V]ictory goes to the powerful.

*Id.*; see also George Fisher, *PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* (2003) (hereinafter “*PLEA BARGAINING’S TRIUMPH*”).

<sup>40</sup> See United States Sentencing Commission, *2010 Sourcebook of Federal Sentencing Statistics*, Figure C, available at [http://www.ussc.gov/Data\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2010/FigureC.pdf](http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/FigureC.pdf) (last visited January 2, 2012).

**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.<sup>41</sup> 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.’”<sup>42</sup> Interestingly, early legal precedent regarding confessions prohibited the offering of any inducement to prompt the admission.<sup>43</sup> 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.”<sup>44</sup> 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.<sup>45</sup>

The first appellate influx of plea bargaining cases in the United States occurred shortly after the Civil War.<sup>46</sup> 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.<sup>47</sup> These early American appellate decisions,

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<sup>41</sup> See Alschuler, *supra* note 38, at 12.

<sup>42</sup> See *id.* at 13.

<sup>43</sup> See *id.* at 12.

<sup>44</sup> 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.”).

<sup>45</sup> See Dervan, *Bargained Justice*, *supra* note 28, at – (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. Unless the advocates of plea bargaining contend that defendants should be misled, they apparently must defend the proposition that these defendants’ pleas should make some difference in their sentences.

*Id.* (footnotes omitted).

<sup>46</sup> See Alschuler, *supra* note 38, at 19-21.

<sup>47</sup> See *id.* Alschuler provides several examples of statements made by the appellate courts examining plea bargains in the late nineteenth century.

however, did not prevent plea bargaining from continuing to operate in the shadows.<sup>48</sup> That plea bargains continued to be used despite strong precedential condemnation can be traced, at least in part, to the need for plea bargaining as a tool of corruption during this period.<sup>49</sup> As an example, and as Professor Alschuler has noted previously, 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.”<sup>50</sup> Such bargains were not limited to New York.<sup>51</sup> One commentator wrote the following in 1928 regarding plea bargaining in Chicago, Illinois:<sup>52</sup>

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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.

*See id.* at 20. 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 Hopkins, *Withdrawal of Plea of Guilty*, 11 CRIM. L. MAGAZINE 479, 484 (1889)).

<sup>48</sup> *See id.* at 22.

<sup>49</sup> *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.

*See id.*

<sup>50</sup> *Id.*

<sup>51</sup> *See id.*

<sup>52</sup> *See id.* at 25. (this cite seems unnecessary to me)



When the plea of guilty is found in records it is almost certain to have in the background, particularly in Cook County, a session of bargaining with the State’s Attorney. . . . These approaches, particularly in Cook County, are frequently made through another person called a “fixer.” 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.<sup>53</sup>

The use of plea bargaining by such “fixers” ensured it would continue to survive despite judicial repudiation, though another phenomenon would be needed to bring it out of the shadows.<sup>54</sup>

While corruption kept plea bargaining alive during the late nineteenth and early twentieth centuries, overcriminalization necessitated plea bargaining’s emergence into the mainstream of criminal procedure and its rise to dominance.<sup>55</sup> According to one analysis of individuals arrested

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<sup>53</sup> *Id.* This quotation is attributed to Albert J. Harno, Dean, University of Illinois Law School. *See id.*

<sup>54</sup> *See* Dervan, *Bargained Justice*, *supra* note 28, at – (“While corruption introduced plea bargaining to the broader legal community, it was the rise in criminal cases during prohibition that spurred its growth and made it a legal necessity.”).

<sup>55</sup> *See id.* at –.

Between the early twentieth century and 1916, the number of cases in the federal system resulting in pleas of guilty rose sharply from fifty to seventy-two percent. In return for defendants’ assistance in moving a flood of cases through an overwhelmed system, they were often permitted to plead guilty to lesser charges or given lighter sentences. 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.

*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, *Over-Criminalization 2.0: The Symbiotic Relationship Between Plea Bargaining and Overcriminalization*, 7 J. L. ECON. & POL’Y 645, 645-46 (2011) (discussing overcriminalization).

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

in Chicago in 1912, “more than one half were held for violation of legal precepts which did not exist twenty-five years before.”<sup>56</sup> As the number of criminal statutes and, as a result, criminal defendants swelled, court systems became overwhelmed.<sup>57</sup> 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.<sup>58</sup> The reliance on bargains during this period is evidenced by the observed rise in plea bargaining rates.<sup>59</sup> Between the early twentieth century and 1916, the number of defendant’s pleading guilty rose from fifty percent to seventy-two percent.<sup>60</sup>

The passage of the Eighteenth Amendment and advent of the prohibition era in 1919 only exacerbated the overcriminalization problem and further required reliance on plea bargaining to ensure the continued functionality of the justice system.<sup>61</sup> 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.<sup>62</sup>

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staggering sentencing differentials that coerce defendants, even innocent ones, to falsely confess in return for leniency.

*Id.*

<sup>56</sup> See Alschuler, *supra* note 38, at 32.

<sup>57</sup> See Dervan, *supra* note 55, at 649-50.

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.<sup>57</sup> 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.

*Id.* at 650.

<sup>58</sup> See *id.*

<sup>59</sup> See Alschuler, *supra* note 38, at 33.

<sup>60</sup> See *id.*

<sup>61</sup> 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).

<sup>62</sup> See Fisher, PLEA BARGAINING’S TRIUMPH, *supra* note 39, at 210; see also Alschuler, *supra* note 38, 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.”).

[F]ederal prosecutions under the Prohibition Act terminated in 1930 had become nearly eight times as many as the total number 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 the 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.<sup>63</sup>

By 1925, almost ninety percent of criminal convictions were the result of a plea of guilty.<sup>64</sup> By the end of the prohibition era, plea bargaining had successfully emerged from the shadows of the American criminal justice system to take its place as an indispensable solution for an overwhelmed system.<sup>65</sup>

Though plea bargaining rates rose significantly in the early twentieth century, appellate courts were still reluctant to approve such deals when appealed.<sup>66</sup> For example, in 1936, Jack Walker was charged with armed robbery.<sup>67</sup> 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.<sup>68</sup>

[The District Attorney] told him to plead guilty, warning him that he would be sentenced to twice as great a term if he did not so plead. ... In view of the District Attorney’s warning, and in fear of a heavy prison term, he told the District Attorney he would plead guilty.<sup>69</sup>

Walker later appealed his sentence and the United States Supreme Court found the bargain constitutionally impermissible, noting that the threats and inducements had made Walker’s plea involuntary.<sup>70</sup>

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<sup>63</sup> *Id.* at 32.

<sup>64</sup> *See id.* at 33.

<sup>65</sup> *See* Dervan, *supra* note 28, at – (“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.”).

<sup>66</sup> *See e.g.* Walker v. Johnston, 312 U.S. 275, 279-80 (1941).

<sup>67</sup> *See id.*

<sup>68</sup> *See id.* at 280.

<sup>69</sup> *Id.* at 281.

[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.<sup>71</sup>

Once again, despite plea bargaining’s continued presence in the court system, the appellate courts were reluctant to embrace the notion of bargained justice and coerced confessions.

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 institution.<sup>72</sup> In a

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<sup>70</sup> See *id* at 279-86; see also *Hallinger v. Davis*, 146 U.S. 314 (1892) (requiring that the defendant voluntarily avail himself of the option to plead guilty).

<sup>71</sup> *Walker*, 312 U.S. at 286; see also Alisa Smith and Sean Maddan, *Three-Minute Justice: Haste and Waste in Florida’s Misdemeanor Courts*, NACDL, 15 (July 2011) (noting that a study of misdemeanor cases in Florida courts found that 66% of defendants appeared at arraignment without counsel and 70% of defendants pleaded guilty at arraignment).

Trial judges failed to advise the unrepresented defendants of their right to counsel in open court (i.e., not by way of an announcement by the public defenders, written waiver form, or video-recorded information) only 27% of the time. Judges asked defendants if they wanted to hire a lawyer or if they wanted counsel less than half of the time. And 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.*

<sup>72</sup> See American Bar Association Project on Standards for Criminal Justice, *Pleas of Guilty 2* (Approved Draft 1968). During the period between 1941 and 1970, several additional appellate cases challenged the constitutionality of plea bargaining. See also *United States v. Jackson*, 390 U.S. 570 (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 (1962) (finding a prosecutor’s offer of leniency and threats of additional charges an improper inducement that stripped the defendant’s plea of guilty of voluntariness); see also *Shelton v. United States*, 242 F.2d 101 (5th Cir. 1957), *judgment set aside*, 246 F.2d 571 (5th Cir. 1957) (en banc), *rev’d per curiam on confession of error*, 356 U.S. 26 (1958) (involving a defendant the court determined had been induced to plead guilty by the promise of a light sentence and the dismissal of other pending charges). In *Shelton*, the court stated:

There is no doubt, indeed it is practically conceded, that the appellant pleaded guilty in reliance on the promise of the Assistant United States Attorney that he would receive a sentence of only one year. The court, before accepting the plea, did not ascertain that it was in truth and in fact a voluntary plea not induced by such promise. It necessarily follows that the judgment of conviction must be set aside and the plea of guilty vacated.

*Id.* at 113. The court went on to state, “Justice and liberty are not the subjects of bargaining and barter.” *Id.*

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, something necessary given the system’s lack of resources.<sup>73</sup> 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.”<sup>74</sup>

Three years after the ABA embraced plea bargaining as a necessary tool of an overburdened system, the United States Supreme Court finally directly addressed the constitutionality of modern day plea bargaining in the case of *Brady v. United States*.<sup>75</sup> The case involved a defendant charged with kidnapping in violation of federal law.<sup>76</sup> The law permitted the death penalty, but only where recommended by a jury.<sup>77</sup> This meant that a defendant could avoid capital punishment by pleading guilty.<sup>78</sup> Realizing his chances of success at trial were

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<sup>73</sup> See *supra* note 72.

<sup>74</sup> See ABA Project on Standards for Criminal Justice, *supra* note 72, at 2.

[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. Moreover, the limited use of the trial process for those cases in which the defendant has grounds for contesting the matter of guilty aids in preserving the meaningfulness of the presumption of innocence.

*Id.*

<sup>75</sup> See *Brady v. United States*, 397 U.S. 742, 743 (1970).

<sup>76</sup> 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 *United States v. Jackson*, 390 U.S. 570 (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.”); see also Dervan, *Bargained Justice*, *supra* note 28, at – (“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.”).

<sup>77</sup> The law, 18 U.S.C. section 1201(a), read as follows:

Whoever knowingly transports in interstate \* \* \* commerce, any person who had been unlawfully \* \* \* kidnapped \* \* \* and held for ransom \* \* \* or otherwise \* \* \* shall be punished (1) by death if the kidnapped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of year or for life, if the death penalty is not imposed.

*Jackson*, 390 U.S. at 570-71.

minimal given that his co-defendant had agreed to testify against him at trial, Brady pleaded guilty and was sentenced to fifty years in prison.<sup>79</sup> He later changed his mind, however, and sought to have his plea withdrawn, arguing his act was induced by his fear of the death penalty.<sup>80</sup>

While all prior precedent regarding plea bargaining up to this point indicated that the Supreme Court would look with disfavor upon the defendant’s decision to plead guilty in return for the more lenient sentence, plea bargaining’s rise during the previous century and unique role by 1970 protected it from absolute condemnation.<sup>81</sup> Instead of finding plea bargaining unconstitutional, the Court acknowledged the necessity of the institution to protect crowded court systems from collapse.<sup>82</sup> The Court then went on to describe the type of bargains that would be acceptable:<sup>83</sup>

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.<sup>84</sup>

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

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<sup>78</sup> See *Brady*, 397 U.S. at 743.

<sup>79</sup> See *id.* at 743-44.

<sup>80</sup> See *id.* at 744.

<sup>81</sup> See *supra* notes 46 to 71 and accompanying text.

<sup>82</sup> See *Brady*, 397 U.S. at 752-58; see also Dervan, *Bargained Justice*, *supra* note 28, at –.

As if the criminal justice system were not already bogged down with growing case loads, in part due to over-criminalization, the Supreme Court had just finished handing defendants a number of significant victories during the Due Process Revolution of the 1960s. For instance, the 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.

*Id.*; see also *Mapp v. Ohio*, 367 U.S. 643 (1961) (exclusionary rule); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel); *Miranda v. Arizona*, 384 U.S. 436 (1966) (self- incrimination).

<sup>83</sup> See *Brady*, 397 U.S. at 750-51.

<sup>84</sup> *Id.*

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).<sup>85</sup>

After *Brady*, plea bargaining was permitted and could fully emerge into the mainstream of the American criminal justice system.<sup>86</sup> 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.<sup>87</sup>

Plea bargaining continued its rise over the next four decades and, today, over ninety-six percent of defendants in the federal system plead guilty rather than proceed to trial.<sup>88</sup> While plea bargaining was a 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.<sup>89</sup> As one commentator explained:

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<sup>85</sup> *Id.* at 755. Interestingly, the language used by the Supreme Court in *Brady* is similar to 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 (5th Cir. 1957), *judgment set aside*, 246 F.2d 571 (5th Cir. 1957) (en banc), *rev’d per curiam on confession of error*, 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.

Interestingly, the panel decision from the Fifth Circuit was later overturned *en banc*, and the case proceeded to the Supreme Court. The Court never addressed the challenge to plea bargaining, however, because the government filed an admission that the guilty plea may have been improperly obtained and the case was remanded to the District Court without further discussion. 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.

Dervan, *Bargained Justice*, *supra* note 28, at –.

<sup>86</sup> See *Brady*, 397 U.S. at 750-55 (permitting the use of plea bargaining).

<sup>87</sup> See *id.* at 750.

<sup>88</sup> See United States Sentencing Commission, *2010 Sourcebook of Federal Sentencing Statistics*, Figure C, available at [http://www.ussc.gov/Data\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2010/FigureC.pdf](http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/FigureC.pdf) (last visited January 2, 2012).

<sup>89</sup> See Fisher, PLEA BARGAINING’S TRIUMPH, *supra* note 39, 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 P. Brown and Stevan E. Bunnell, *Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia*, 43 AM. CRIM. L. REV. 1063, 1066-1067 (2006) (“Like most plea agreements in federal or state courts, the

Before the advent of modern sentencing guidelines, both prosecutor and judge held some power to plea bargain without the other’s cooperation.... Today, however, sentencing guidelines have recast whole chunks of the criminal code.... 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. Guidelines have unsettled the old balance of bargaining power among prosecutor, judge, and defendant by ensuring that the prosecutor, who always had the strongest interest in plea bargaining, now has almost unilateral power to deal.<sup>90</sup>

Through charge selection and manipulation of 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.<sup>91</sup> Many have surmised that the larger the

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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.”); Joy A. Boyd, *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.”); Geraldine S. Moohr, *Prosecutorial Power in an Adversarial System: Lessons from Current White Collar Cases and the Inquisitorial Model*, 8 BUFF. CRIM. L.R. 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.”); Jon J. Lambiras, *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.”).

<sup>90</sup> Fisher, PLEA BARGAINING’S TRIUMPH, *supra* note 39, at 17; *see also* Boyd, *supra* note 89, 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.”); *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.”).

<sup>91</sup> *See* Alschuler, *supra* note 45, at 652-53 (“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 this perception is justified.”); *see also* Dervan, *Bargained Justice*, *supra* note 28, at –.

Plea 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. Today, sentencing differentials have reached new heights and, as a result, the incentives for defendants to plead guilty are greater than at any previous point in the history of our criminal justice system.



sentencing differential, the greater the likelihood a defendant will forego his or her right to trial and accept the deal.<sup>92</sup>

### **b. PLEA BARGAINING’S INNOCENCE DEBATE**

In 2004, Lea Fastow, wife of former Enron Chief Financial Officer Andrew Fastow, was accused of engaging in ninety-eight counts of criminal conduct related to the collapse of the Texas energy giant.<sup>93</sup> Though conviction at trial under the original indictment carried a prison

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*Id.*; see also Lucian E. Dervan, *The Surprising Lessons from Plea Bargaining in the Shadow of Terror*, 27 GA. ST. U. L. REV. 239, 245 (2010) (“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.”); 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.”).

<sup>92</sup> 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 and 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 (1981-82); see also 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.”); Tung Yin, *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.”); H. Joo Shin, *Do Lesser Pleas Pay? Accommodations in the Sentencing and Parole Process*, 1 J. CRIM. JUST. 27 (1973) (finding that charge reduction directly results in reduction of the maximum sentence available and indirectly results in lesser actual time served). 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 and Casper, *supra* note 92, at 69.

<sup>93</sup> See Department of Justice Indictment of Lea Fastow, available at <http://f11.findlaw.com/news.findlaw.com/hdocs/docs/enron/usleafstw43003ind.pdf> (last visited July 13, 2010); 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; Former Enron CFO’s Wife Could Get 5-Month Term but Deal Faces Hurdles*, HOUSTON CHRONICLE at A1 (Nov. 7, 2003).

sentence of ten years, the government offered Fastow a plea bargain.<sup>94</sup> In return for assisting in their prosecution, she would receive a mere five months in prison.<sup>95</sup> With small children to consider and a husband who would certainly receive a lengthy prison sentence, Fastow accepted the offer.<sup>96</sup> The question that remained, however, was whether Fastow had pleaded guilty because she had in fact committed the alleged offenses, or whether the plea bargaining machine had become so powerful since its difficult beginnings following the American Civil War that even innocent defendants were now becoming mired in its powerful grips.<sup>97</sup>

It is unclear how many of the more than 96% of defendants pleading guilty each year are actually innocent of the charged offenses, but it is clear that plea bargaining has an innocence problem.<sup>98</sup> As Professor Russell D. Covey has stated:

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<sup>94</sup> 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, 3-4 (2004).

<sup>95</sup> See *id.* 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; Feds Now Focus on Skilling, Lay*, HOUSTON CHRONICLE at A1 (Jan. 14, 2004).

<sup>96</sup> See Greg Farrell and Jayne O’Donnell, *Plea Deals Appear Close for Fastows*, USA TODAY at 1B (Jan. 8, 2004) (“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 95 at A1 (Jan. 14, 2004) (“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.”).

<sup>97</sup> Dervan, *Bargained Justice*, *supra* note 28, at – (“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.”); Dervan, *supra* note 55, at 645 (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.”); see also Larry E. Ribstein, *Agents Prosecuting Agents*, 7 J.L. ECON. & POL’Y 617 (2011).

<sup>98</sup> 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 and 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 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 for a partial ban on plea bargaining to reduce the likelihood innocent defendants will plead guilty); Andrew D. Leipond, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1154 (2005).

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. The risk of inaccurate results in the plea bargaining system thus seems substantial.<sup>99</sup>

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.<sup>100</sup>

Some argue that plea bargaining’s innocence problem is significant and brings into question the legitimacy of the entire criminal justice system.<sup>101</sup> Professor Ellen S. Podgor wrote recently of plea bargaining:

[I]nnocence is no longer the key determinant in some aspects of the federal criminal justice system.... Rather, our existing legal system places the risk of

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<sup>99</sup> Russell D. Covey, *Longitudinal Guilt: Repeat Offenders, Plea Bargaining, and the Variable Standard of Proof*, 63 FLA. L. REV. 431, 450 (2011); 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.

*Id.*; see also Gazal-Ayal, *supra* note 98 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.”); Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1154 (2005) (“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.”).

<sup>100</sup> It is worth mention that even Joan of Arc and Galileo Galilei fell victim to the persuasions of plea bargaining. See Kathy Swedlow, *Pleading Guilty v. Being Guilty: A Case for Broader Access to Post-Conviction DNA Testing*, 41 CRIM. L. BULL. 1, 1 (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); Alschuler, *supra* note 38, at 41 (“[Joan of Arc] demonstrated that even saints are sometimes unable to resist the pressures of plea negotiation.”).

<sup>101</sup> See Dervan, *Bargained Justice*, *supra* note 28, at – (“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 99, 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 and Reshma 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.”).

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.<sup>102</sup>

For those who believe plea bargaining may lead to large numbers of innocent defendants pleading guilty, an uncertainty persists regarding exactly how susceptible innocent defendants are to bargained justice.<sup>103</sup> This is troubling, because it prevents an accurate assessment of what must be done in response to this perceived injustice.<sup>104</sup>

Others argue, however, that plea bargaining’s innocence problem is “exaggerated” and the likelihood of persuading an innocent defendant to falsely confess is minimal.<sup>105</sup> This

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<sup>102</sup> Ellen S. Podgor, *White Collar Innocence: Irrelevant in the High Stakes Risk Game*, 85 CHI.-KENT L. REV. 77, 77-78 (2010); *see also* Russell D. Covey, *supra* note 98, at 80.

In short, as 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 guilty. This latter point forms the root of plea-bargaining’s “innocence problem,” which refers here not merely to the fact that innocent people plead guilty, but that the economics of plea bargaining drives them to do so.

*Id.*

<sup>103</sup> *See* Dervan, *Bargained Justice*, *supra* note 28, at – (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.”).

<sup>104</sup> *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, since it can achieve the same result with far fewer resources. 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.

*Id.*

<sup>105</sup> *See* Avishalom Tor, Oren Gazal-Ayal, and Stephen M. Garcia, *Fairness and the Willingness to Accept Plea Bargain Offers*, 7 J. EMPIRICAL L. STUDIES 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 and Limor Riza, *Plea Bargaining and Prosecution* 13 (European Association of Law and Economics Working Paper No. 013-2009, April 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 them.”); Shapiro, *supra* note 98, at 40 (“[Plea bargaining’s] defenders deny that the chances of convicting the innocent are substantial....”); *see also* Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1165 (2008).

argument rests, in part, on a perception that innocent defendants will reject prosecutors’ advances and proceed to trial backed by the belief that their factual innocence will protect them from conviction.<sup>106</sup> 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.”<sup>107</sup>

Such skeptics are in good company. Even the U.S. Supreme Court in its landmark *Brady* decision permitting bargained justice rejected concerns that innocent defendants would falsely confess to a crime they did not commit.<sup>108</sup> 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.<sup>109</sup>

This sentiment was expressed by the Court again eight years later in the *Bordenkircher v. Hayes* plea bargaining decision.<sup>110</sup> 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 would be “driven to false self-condemnation.”<sup>111</sup> Even those who argue that plea

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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.

*Id.*

<sup>106</sup> See Gazal-Ayal, *supra* note 98, at 2298.

<sup>107</sup> See *id.*

<sup>108</sup> See *Brady v. United States*, 397 U.S. 742, 757-58 (1970).

<sup>109</sup> *Id.* at 758.

<sup>110</sup> *Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

<sup>111</sup> *Bordenkircher*, 434 U.S. 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.”).

bargaining’s innocence problem is exaggerated, however, rely mainly on speculation regarding how innocent defendants will respond in such situations.<sup>112</sup>

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.<sup>113</sup> Several legal scholars have conducted examinations of exoneration statistics in an effort to identify examples where innocent defendants were convicted by their pleas of guilty rather than at trials.<sup>114</sup> One of the most comprehensive studies was conducted by Professor Samuel Gross in 2005.<sup>115</sup> While Professor Gross’s research explored exonerations in the United States broadly, he also specifically discussed plea bargaining’s innocence problem:<sup>116</sup>

Only twenty of the [340] exonerees in our database pled guilty, less than six percent of the total: fifteen innocent murder defendants and four innocent rape defendants who took deals that included long prison terms in order to avoid the risk of life imprisonment or the death penalty, and one innocent defendant pled guilty to gun possession to avoid life imprisonment as a habitual criminal.<sup>117</sup>

That professor Gross found so few innocent defendants who falsely pleaded guilty could be utilized as support for those who believe the innocence problem is exaggerated.<sup>118</sup> Upon closer

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<sup>112</sup> See *supra* notes 105 to 107 and *infra* notes 113 to 126 and accompanying text.

<sup>113</sup> See *infra* note 114.

<sup>114</sup> See 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.”); 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 plead 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); Samuel R. Gross et al., *Exonerations in the United States 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 524 (2005) (examining the number of persons exonerated who pleaded guilty); John Baldwin and Michael McConville, *Plea Bargaining and Plea Negotiation in England*, 13 LAW & SOC’Y REV. 287, 296-98 (1978) (discussing plea bargaining’s innocence problem in England).

<sup>115</sup> See Gross et al., *supra* note 114, at 523.

<sup>116</sup> See *id.* at 536.

<sup>117</sup> *Id.* 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.”).

examination of this and other exoneration studies, however, 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 plead guilty.<sup>119</sup>

As noted by other scholars in the field, three problems exist with exoneration data when applied to plea bargaining research.<sup>120</sup> 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.<sup>121</sup> This focus means that the data cannot incorporate the role of innocence and plea bargaining in the vast majority of criminal cases, those not involving murder or rape, including misdemeanor cases.<sup>122</sup> Second, because many individuals who plead guilty do so in return for a reduced sentence, it is highly likely that most innocent defendants who plead guilty might not have an incentive or sufficient time to receive exoneration.<sup>123</sup> Finally, even if some innocent

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<sup>118</sup> See Howe, *supra* note 103, 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 following to a conviction by trial. See *id.*

<sup>119</sup> See Russell Covey, *Mass Exoneration Data and the Causes of Wrongful Convictions*, p.1, available at [ssrn.com/abstract=1881767](http://ssrn.com/abstract=1881767) (last visited January 1, 2012); Howe, *supra* note 103, at 631.

<sup>120</sup> See Covey, *supra* note 119, at 1; Howe, *supra* note 103, at 631.

<sup>121</sup> See Covey, *supra* note 119, at 1.

What we currently know about wrongful convictions is based largely on exonerations resulting from post-conviction testing of DNA. Study of those cases has produced a dataset regarding the factors that contribute to wrongful convictions and the procedures relied upon both to convict and then, later, to exonerate these innocent defendants. While critically important, this 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.

*Id.*

<sup>122</sup> 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 in 2010. See U.S. Department of Justice, *Crime in the United States*, Table 1, 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> (last visited January 22, 2012). Of this number, murder accounted for 1.2 percent and forcible rape accounted for 6.8 percent 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 71. 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.

defendants who pleaded guilty had the desire and time to move for exoneration, most would be prohibited from challenging their convictions by the mere fact that they had pleaded guilty in the first place.<sup>124</sup> As such, innocent defendants who plead guilty are not accurately captured by the exoneration data sets and, therefore, it is highly likely that the true extent of plea bargaining’s innocent problem is significantly underrepresented and, therefore, underestimated by these studies.<sup>125</sup> As such, one must look elsewhere to determine the true likelihood an innocent

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<sup>123</sup> See Howe, *supra* note 103, 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.”)

The greater difficulty has two explanations. First, a guilty-plea conviction, as opposed to a trial conviction, may leave fewer avenues for challenge on legal grounds, and, thus, fewer opportunities for a retrial at which evidence of innocence will exonerate the defendant. Second, there may also be a widespread sense that innocent persons rarely plead guilty but that persons convicted at trial are more frequently innocent, which could make voluntary legal and investigatory assistance after direct appeal less forthcoming to those who have pled guilty.

*Id.* at 631 n. 170.

<sup>124</sup> See J.H. 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, 50-51 (2010) (discussing restrictions on the ability of defendants who pleaded guilty to utilize post-conviction DNA testing).

<sup>125</sup> Even Professor Gross acknowledges that his study fails to capture many innocent defendants who plead guilty. In concluding his discussion referenced above regarding the Tulia and Rampart mass exoneration cases, he states:

They were exonerated because the false convictions in their cases were produced by systematic programs of police perjury that were uncovered as part of large scale investigations. 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 114, at 536-37; see also Allison D. Redlich and Asil Ali Ozdogru, *Alford Pleas in the Age of Innocence*, 27 BEHAV. SCI. & L. 467, 467-68 (2009).

Exonerations, a once rare occurrence, are now becoming commonplace... [and] the number of identified miscarriages of justice in the United States continues to rise... 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.

*Id.*



defendant might falsely condemn himself or herself in return for an offer of leniency in the form of a plea bargain.<sup>126</sup>

One such source of information are psychological studies regarding plea bargaining and the decision-making processes of defendants in the criminal justice system.<sup>127</sup> Unfortunately, these studies are also problematic and fail to definitively resolve 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.<sup>128</sup> As a result of the utilization of such imaginary and hypothetical scenarios, these studies are unable to capture the full impact of a defendant’s knowledge that he or she is factually innocent or the true gravity of the choices one must make when standing before the criminal justice system accused of a crime he or she did not commit.<sup>129</sup> Nevertheless, these studies do offer some preliminary insights into the world of the innocent defendant’s dilemma.

One of the first such psychological studies to attempt to understand a defendant’s plea bargaining decision-making process through the use of vignettes was conducted by Professors Larry Gregory, John Mowen, and Darwyn Linder in 1984 (“Gregory”).<sup>130</sup> In the Gregory study, students were asked to “imagine that they were innocent or guilty of having committed an armed robbery.”<sup>131</sup> The students were then presented with the evidence against them and asked to

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<sup>126</sup> See *infra* notes 127 to 143 (discussing psychological studies of plea bargaining).

<sup>127</sup> The majority of psychological studies to date have only looked at the phenomenon from the perspective of the attorney and his or her decision-making 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); Greg M. Kramer, Melinda Wolbransky, and Kirk Heilbrun, *Plea Bargaining Recommendations by Criminal Defense Attorneys: Evidence Strength, Potential Sentence, and Defendant Preference*, 25 BEHAV. SCI. & L. 573, 573 (2007); Hunter A. McAllister and Norman J. Bregman, *Plea Bargaining by Prosecutors and Defense Attorneys: A Decision Theory Approach*, 71 J. APPLIED PSYCHOL. 686, 686 (1986).

<sup>128</sup> See Tor et al., *supra* note 105, at 103-109 (discussing the methodology of the study); Kenneth S. Bordens, *The Effects of Likelihood of Conviction, Threatened Punishment, and Assumed Role on Mock Plea Bargaining Decisions*, 5 BASIC AND APPLIED SOC. PSYCHOL. 59, 63-65 (1984) (discussing the methodology of the study); W. Larry Gregory, John C. Mowen, and Darwyn E. Linder, *Social Psychology and Plea Bargaining: Applications, Methodology, and Theory*, 36 J. PERSONALITY AND SOC. PSYCHOL. 1521, 1522-28 (discussing the methodology of the study) (1978).

<sup>129</sup> See *supra* note 128.

<sup>130</sup> See Gregory et al., *supra* note 128.

<sup>131</sup> *Id.* at 1522. The Gregory et al. 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.

make a decision regarding whether they would plead guilty or proceed to trial.<sup>132</sup> 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.<sup>133</sup> In the experiment, 18% of the “innocent” students and 83% of the “guilty” students pleaded guilty.<sup>134</sup> While these results might lend support to the argument that few innocent defendants in the criminal justice system falsely condemn themselves – even if you can consider 18% to be an insignificant number – the study suffered from its utilization of hypotheticals.<sup>135</sup> As has been shown in social psychological studies for decades, what people say they will do in a hypothetical situation and what they would do in reality are two very different things.<sup>136</sup>

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.<sup>137</sup> In the study, students were administered a “difficult exam after being given prior information by a confederate that most of the answers

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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 (10 to 15 years in prison versus 1 to 2 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 were their defense attorney and the judge of their innocence or guilt.

*Id.*

<sup>132</sup> *Id.* The study also discussed the results of different students being faced with differing punishments and number of charges. Interestingly, the study found that the severity of punishment and number of charges only effected the guilty condition, not the innocent condition. The results were as follows:

| Severity | Innocent Defendants |          |            |          | Guilty Defendants |          |            |          |
|----------|---------------------|----------|------------|----------|-------------------|----------|------------|----------|
|          | High Charge         |          | Low Charge |          | High Charge       |          | Low Charge |          |
|          | %                   | <i>n</i> | %          | <i>n</i> | %                 | <i>n</i> | %          | <i>n</i> |
| High     | 33                  | 18       | 12         | 17       | 100               | 19       | 82         | 17       |
| Low      | 11                  | 18       | 13         | 15       | 83                | 23       | 63         | 16       |

*Id.* at 1524, Table 1.

<sup>133</sup> *See id.* at 1524-26.

<sup>134</sup> *See id.*

<sup>135</sup> *See supra* notes 128-29 and accompanying text.

<sup>136</sup> *See* Richard E. Nisbett and Timothy D. Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 PSYCHOL. REV. 231 (1977).

<sup>137</sup> *See* Gregory et al., *supra* note 128, at 1526-27.

were ‘B’ (guilty condition) or after being given no information (innocent condition).”<sup>138</sup> 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.<sup>139</sup> The participants were then offered a plea bargain that required their immediate admission of guilt in return for a less severe punishment.<sup>140</sup> Unfortunately, the second study was only successfully administered to sixteen students, too few to draw any significant conclusions.<sup>141</sup> 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?<sup>142</sup> It would take another thirty years for a study to successfully create an environment in which this question could be definitively answered, a study that should forever change the way plea bargaining and innocence are viewed in the American criminal justice system.<sup>143</sup>

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<sup>138</sup> *See id.* at 1526.

<sup>139</sup> *See id.*

<sup>140</sup> *See id.*

<sup>141</sup> *See id.* at 1528. The results of the second Gregory et al. study were that six of eight guilty students accepted the deal and zero of eight innocent defendants 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, supra* note 105, at 113-14.

<sup>142</sup> *See infra* Section IV (discussing the results of the authors’ plea bargaining study).

<sup>143</sup> *See id.*

## II. LABORATORY EVIDENCE OF PLEA BARGAINING’S INNOCENCE PROBLEM

In 2006, a wave of new accounting scandals pervaded the American corporate landscape.<sup>144</sup> 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 Securities and Exchange Commission regulations.<sup>145</sup> One such company, according to federal prosecutors, was Broadcom, a large semiconductor manufacturer in California.<sup>146</sup> After Broadcom restated \$2.2 billion in charges because of backdating in January 2007, the government indicted Dr. Henry Samueli, co-founder of the company and former Chief Technical Officer.<sup>147</sup> Dr. Samueli pleaded guilty and, as part of his deal, agreed to testify for the prosecution against Henry T. Nicholas III, Broadcom’s other co-founder, and William J. Ruehle, the company’s Chief Financial Officer (“CFO”).<sup>148</sup> 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.<sup>149</sup> The judge stated in open court:

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<sup>144</sup> Companies including Broadcom, Brocade Communications, McAfee, and Comverse Technologies were targeted by the government during the stock options backdating investigations. See Peter Henning, *How the Broadcom Backdating Case Went Awry*, N.Y. TIMES DEALBOOK BLOG, available at <http://dealbook.nytimes.com/2009/12/14/how-the-broadcom-backdating-case-has-gone-awry/> (last visited January 25, 2012).

<sup>145</sup> See L.A. TIMES, *Events in the Broadcom Backdating Case* (Dec. 16, 2009), available at <http://articles.latimes.com/2009/dec/16/business/la-fi-broadcom-timeline16-2009dec16> (last visited March 29, 2011).

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. Backdating was legal as long as the expense was disclosed publicly.

*Id.*

<sup>146</sup> See Ribstein, *supra* note 97, at 630 (discussing the Broadcom case); Mike Koehler, *The Facade of FCPA Enforcement*, 41 GEO. J. INT’L L. 907, 940-41 (2010) (discussing the Broadcom case).

<sup>147</sup> See Department of Justice Press Release, *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> (last visited January 25, 2012).

<sup>148</sup> See Stuart Pfeifer and E. Scott Reckard, *Judge Throws Out Stock Fraud Charges Against Broadcom Co-Founder, Ex-CFO*, L.A. TIMES (Dec. 16, 2009), available at <http://articles.latimes.com/2009/dec/16/business/la-fi-broadcom16-2009dec16> (last visited January 25, 2012); see also Department of Justice Indictment of Henry T. Nicholas, III, available at [http://lawprofessors.typepad.com/whitecollarcrime\\_blog/files/broadcom\\_nicholasruehle\\_indictment.pdf](http://lawprofessors.typepad.com/whitecollarcrime_blog/files/broadcom_nicholasruehle_indictment.pdf) (last visited January 25, 2012).

The uncontroverted evidence at trial established that Dr. Samueli was a brilliant engineer and a man of incredible integrity. 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.

...

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].

Needless to say, the government’s treatment of Dr. Samueli was shameful and contrary to American values of decency and justice.<sup>150</sup>

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<sup>149</sup> See Reporter’s Transcript of Proceedings, *United States v. William J. Ruehle*, No. 8008-00139-CJC, 5195 (D.C.D. Dec. 15, 2009). The judge stated:

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.

To submit this case to the jury would make a mockery of Mr. Ruehle’s constitutional right to compulsory process and a fair trial.

*Id.*

<sup>150</sup> *Id.* at 5197-99; see also Michael Hilzik, *Judicial System Takes a Hit in Broadcom Case*, L.A. TIMES (July 18, 2010), available at <http://articles.latimes.com/print/2010/jul/18/business/la-fi-hilzik-20100718> (last visited January 25, 2012) (noting that in an attempt to pressure defendant Nicholas, the government had “threatened to force Nicholas’ 13-year-old son to testify about his father and drugs.”). Judge Carney listed some of the prosecutions misconduct during his statement.

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.

With this unusual public rebuke of prosecutorial tactics that forced an innocent defendant into a plea bargain, the judge in the Broadcom case demonstrated once again the existence of the innocence defendant’s dilemma.<sup>151</sup>

While the Gregory study attempted to capture the likelihood an innocent defendant such as Dr. Samueli might falsely plead guilty thirty years before the Broadcom case, that study’s utilization of hypotheticals prevented it from offering an accurate glimpse inside the mind of the accused.<sup>152</sup> 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.<sup>153</sup> In 2005, Professors Melissa Russano, Christian Meissner, Fadia Narchet, and Saul Kassin (“Russano”) initiated a study in which students were accused by a research assistant of working together after being instructed this was prohibited.<sup>154</sup> Some of the students accused of this form of “cheating” were, in fact, guilty of the charge, while others were not.<sup>155</sup> 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.<sup>156</sup> The

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Five, obtained an inflammatory indictment that referred to Dr. Samueli 72 times and accused him of being an unindicted coconspirator when the government new (sic), or should have known, that he did nothing wrong.

And seven (sic), 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.

Reporter’s Transcript of Proceedings, *United States v. William J. Ruehle*, No. 8008-00139-CJC at 5198.

<sup>151</sup> See Ribstein, *supra* note 97, at 630 (“In the Broadcom backdating case, particularly egregious prosecutorial conduct caused defendants to plead guilty to crimes they knew they had not committed. . . .”); Koehler, *supra* note 146, 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.’”); Ashby Jones, *Are Too Many Defendants Pressured into Pleading Guilty?*, THE WALL ST. J. LAW BLOG (Dec. 21, 2009), available at <http://blogs.wsj.com/law/2009/12/21/are-too-many-defendants-pressured-into-pleading-guilty/> (last visited January 25, 2012) (“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.”).

<sup>152</sup> See *supra* notes 130 and 136 and accompanying discussion.

<sup>153</sup> Melizza B. Russano, Chrisitan A. Meissner, Fadia M. Narchet, and Saul M. Kassin, *Investigating True and False Confessions with a Novel Experimental Paradigm*, 16 PSYCHOL. SCI. 481 (2005).

<sup>154</sup> See *id.* at 481.

<sup>155</sup> See *id.* at 482 (“In the current paradigm, participants were accused of breaking an experimental rule, an act that was later characterized as ‘cheating.’”).

first interrogation tactic utilized to exact an admission from the students was minimization.<sup>157</sup> Minimization is the process by which interrogators minimize the seriousness and anticipated consequences of the conduct.<sup>158</sup> The second interrogation tactic utilized to exact an admission from the students involved offering the students a “deal.”<sup>159</sup> 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.<sup>160</sup> If the students rejected the offer, the consequences were unknown and would be decided later by the course’s professor.<sup>161</sup> Russano found that utilizing these tactics together, forty-three percent of the students falsely confessed and eighty-seven percent of students truthfully confessed.<sup>162</sup> Interestingly, however, when only the “deal” was offered, only fourteen percent of the students in Russano’s study falsely confessed.<sup>163</sup>

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<sup>156</sup> *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.’”).

<sup>157</sup> *See id.* at 482.

<sup>158</sup> *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.* (internal quotations omitted) (emphasis in original).

<sup>159</sup> *See id.* 483.

<sup>160</sup> *See id.*

<sup>161</sup> *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.”).

<sup>162</sup> *See id.* at 484.

<sup>163</sup> *See id.*

| <b>Condition</b>           | <b>True Confessions</b> | <b>False Confessions</b> |
|----------------------------|-------------------------|--------------------------|
| <i>No Tactic</i>           | 46%                     | 6%                       |
| <i>Deal</i>                | 72%                     | 14%                      |
| <i>Minimization</i>        | 81%                     | 18%                      |
| <i>Minimization + Deal</i> | 87%                     | 43%                      |

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.<sup>164</sup> The new study was administered to eighty-two students from a small, southeastern, private technical university.<sup>165</sup> The results of the study were groundbreaking and established what Gregory and Russano had hinted at in their earlier forays into the plea bargaining machine.<sup>166</sup> Plea bargaining has a significant innocence problem because innocent defendants are more likely than not to falsely confess guilt in return for an incentive.<sup>167</sup>

**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.<sup>168</sup> 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 also be participating in the exercise. Unbeknownst to the study participant, however, the second student was actually a confederate working with the authors.<sup>169</sup> At this point, a research assistant, also working with the authors, led the two students into a private room and explained the testing procedures.<sup>170</sup> The research assistant informed the students that they would be participating in an experiment about performance on logic problems. According to the

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*See id.* at Table 1.

<sup>164</sup> *See infra* sections IV(a) and (b) (discussing the results of the authors’ plea bargaining study).

<sup>165</sup> *See id.*

<sup>166</sup> *See id.*

<sup>167</sup> *See id.*

<sup>168</sup> *See* Vanessa A. Edkins & Lucian E. Dervan, *Pleading Innocents: Laboratory Evidence of Plea Bargaining’s Innocence Problem*, Unpublished Short Research Report (2012). The study was administered to eighty-two students. Six students were removed from the study because of 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. Thus, seventy-six participants remained. Of this number, thirty-one indicated they were female and forty-five indicated they were male. 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.” Forty-Eight students identified themselves as U.S. citizens, while twenty-eight students identified themselves as non-U.S. citizens.

<sup>169</sup> *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.

<sup>170</sup> *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.



research assistant, the two students would be left alone to complete three logic problems together as a team.<sup>171</sup> 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 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 number 3?”<sup>172</sup> It is worth noting that all but two study participants approached to offer assistance by the confederate violated the requirement that each student work alone.<sup>173</sup> 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.<sup>174</sup> The study participants in this

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<sup>171</sup> *See id.* 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.

<sup>172</sup> *See id.* 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.”

<sup>173</sup> *See id.* The two students who refused to offer assistance were removed from the study.

<sup>174</sup> *See id.* The study protocol stated:

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.

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.<sup>175</sup> 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 then 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.

We have a problem. 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.

To ensure the study participant was unable to argue he or she had answered the question 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.<sup>176</sup>

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.<sup>177</sup> 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.<sup>178</sup> The research assistant then offered each study participant one of two alternative options if the plea offer was rejected.

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<sup>175</sup> *See id.* The research assistants were not informed regarding 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.

<sup>176</sup> *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.

<sup>177</sup> *See id.* The compensation offered for participating in the study was research participation credit, something required for students to successfully complete their Introduction to Psychology course.

<sup>178</sup> *See* Edkins & Dervan, *supra* note 168; *see also* Bowers, *supra* note 105, 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

In roughly half of the cases (hereinafter 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 ARB was described as 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.<sup>179</sup> The research assistant then informed the student that if he or she were “convicted” by the ARB, he or she would lose his or her study compensation, his or her faculty advisor would be notified, and he or she would have to enroll in a three credit hour ethics course. The course was described as a pass/fail class that would be offered free of charge, but which would require mandatory weekly attendance and the completion of a paper and a final examination. In roughly the other half of the cases (hereinafter 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 or she was “convicted” by the ARB, he or she would lose his or her study compensation, his or her faculty advisor would be notified, and he or she 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 option of pleading guilty or proceeding to the ARB, the research assistant presented them with a piece of paper. The paper outlined their options and asked that they circle their selection.<sup>180</sup> To ensure study participants

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inaugurate freedom. Moreover, the costs of conviction are minimal; an additional misdemeanor 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.

*Id.*

<sup>179</sup> See Edkins & Dervan, *supra* note 168; see also Gregory et al., *supra* note 128.

<sup>180</sup> See Edkins & Dervan, *supra* note 168. The research assistants had scripted answers to common questions that might be asked while the students deliberated 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

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.<sup>181</sup>

## **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.<sup>182</sup> While it 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 a promise of leniency, the rate at which such false pleas occurred was beyond anticipation and should lead to a reevaluation of the role and method of plea bargaining today.

### *i. 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.<sup>183</sup> In total, almost nine out of ten guilty study participants

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if this isn’t a class?” etc. This was done to ensure the research assistants’ interactions with the study participants were uniform and consistent.

<sup>181</sup> *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 because of their actions. The research assistants ensured that prior to leaving the room the study participants understood that the nature of the study needed to remain confidential

<sup>182</sup> *See id.* One important distinction between the experimental methodology used in the authors’ study and previous studies is that the new study 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 decision-making process of criminal defendants faced with a plea bargaining decision. *See* Russano et al., *supra* note 153, at 483 (discussing the lack of a definitive sentence for those who failed to accept the deal).

<sup>183</sup> *See id.* 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.

accepted the deal, while slightly less than six out of ten innocent study participants took the same path.<sup>184</sup>

*Figure 1.*

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

| <i>Condition</i> | <i>Rejected Plea Offer</i> |      | <i>Accepted Plea Offer</i> |      |
|------------------|----------------------------|------|----------------------------|------|
|                  | No.                        | %    | No.                        | %    |
| Guilty           | 4                          | 10.8 | 33                         | 89.2 |
| Innocent         | 17                         | 43.6 | 22                         | 56.4 |

Two important conclusions stem from these results.<sup>185</sup> First, as had been predicted by others, guilty defendants are more likely to plead guilty than innocent defendants.<sup>186</sup> In our study, guilty defendants were 6.38 times more likely to accept a plea than innocent defendants given the same sentencing options.<sup>187</sup>

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<sup>184</sup> *See id.* 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.

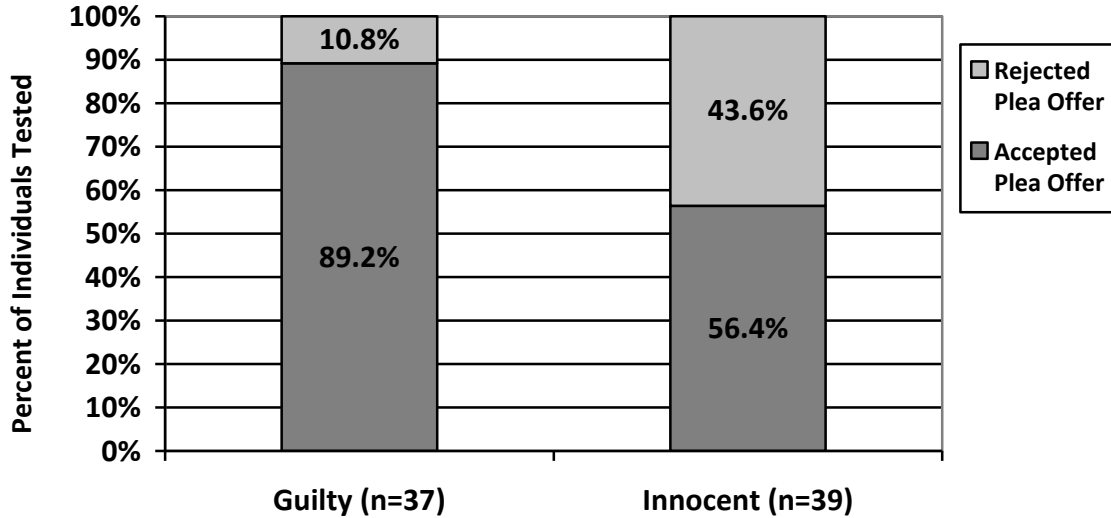
<sup>185</sup> *See id.*

<sup>186</sup> *See id.*; *see also* Covey, *supra* note 119, at 34; Tor, *supra* note 105, at 113 (arguing that innocent defendants tend to reject plea offers more than guilty defendants).

<sup>187</sup> *See* Edkins & Dervan, *supra* note 168.

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.<sup>188</sup>

In his recent article entitled *Mass Exoneration Data and the Causes of Wrongful Convictions*, Professor Russell Covey examined two mass exoneration cases and predicted, based on the choices of defendants in those cases, that innocence mattered.<sup>189</sup> 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 cases mirror the actions of our study participants.<sup>190</sup>

<sup>188</sup> See Covey, *supra* note 119, at 1.

<sup>189</sup> See *id.* (examining the mass exonerations in the Rampart case in California and the Tulia case in Texas); see also Edkins & Dervan, *supra* note 168.

<sup>190</sup> See Covey, *supra* note 119, 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.*

Figure 3.

*Percentage of Students by Condition (Guilty or Innocent)  
Accepting the Plea Offer in the Study and in Prof. Covey’s Mass Exonerations*

| <i>Condition</i> | <i>Dervan/Edkins Study</i> | <i>Covey Mass Exonerations Case Studies</i> |
|------------------|----------------------------|---|
|                  | %                          | %   |
| 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.<sup>191</sup> In both cases, nine out of ten guilty individuals accepted the deal.<sup>192</sup> 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.<sup>193</sup> These similarities not only lend credibility to the results of the new study, but once again support the concerns of those who previously predicted that plea bargaining’s innocence problem affected more than just an isolated few.<sup>194</sup>

The second, and, perhaps, most important conclusion stemming from the study is that plea bargaining has a significant innocence problem and those who argue the matter is “exaggerated” have drastically underestimated the likelihood an innocent person will falsely condemn themselves before a court.<sup>195</sup> In our study, 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.<sup>196</sup> Previous research has argued that the innocence problem is minimal because defendants are risk-prone and willing to defend

<sup>191</sup> *See id.*

<sup>192</sup> *See id.*; Edkins & Dervan., *supra* note 168.

<sup>193</sup> *See* Covey, *supra* note 119, at 34; Edkins & Dervan., *supra* note 168.

<sup>194</sup> *See* Bowers, *supra* note 105, at 1136-37.

<sup>195</sup> *See* Tor, *supra* note 105, at 113 (arguing that plea bargaining’s innocence problem is “exaggerated.”).

<sup>196</sup> *See* Edkins & Dervan., *supra* note 168. This finding is not only important for legal research, but is also of vital importance for those studying other institutions employing models based on the criminal justice system. 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.

themselves before a tribunal.<sup>197</sup> 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 attorney or the government during a criminal plea negotiation, innocent defendants are highly risk-averse.<sup>198</sup>

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 Academic Review Board process and move directly to punishment.<sup>199</sup> Second, study participants sought a punishment that would not require the deprivation of direct future liberty interests.<sup>200</sup> Further research is necessary in this area to fully understand these motivations, but one key aspect of this trend is worth noting at this juncture. The study participants’ actions in this regard appear to be directly mimicking a phenomenon that has drawn much debate and concern in recent years.<sup>201</sup> The students appear to have been

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<sup>197</sup> See Tor, *supra* note 105, 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. 2463, 2507 (“Defendants’ attitudes toward risk and loss will powerfully shape their willingness to roll the dice at trial.”).

<sup>198</sup> See Edkins & Dervan., *supra* note 168; see also Bibas, *supra* note 197, at 2511 (discussing risk aversion and loss aversion).

In short, 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.

<sup>199</sup> See Edkins & Dervan., *supra* note 168; see also Bowers, *supra* note 105, at 1136-37.

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

*Id.* at 1144.

<sup>200</sup> See Edkins & Dervan., *supra* note 168.

<sup>201</sup> See Smith & Maddan, *supra* note 71, 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.”); Bibas, *supra* note 197, at 2492-93.



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.<sup>202</sup> In essence, the study participants simply wanted to go home.<sup>203</sup> This study demonstrates, therefore, that one need not only be concerned that significant offers of leniency might lead defendants in large felony cases to falsely condemn themselves through plea bargaining, but one must also be concerned that the millions of misdemeanor defendants cycled through the criminal justice system each year are pleading guilty based on factors wholly distinct from their actual factual guilt.<sup>204</sup>

ii. *The Impact of Sentencing Differentials*

One goal of the study was to offer two distinct punishments as a result of conviction by the Academic Review Board 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.<sup>205</sup> 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.<sup>206</sup>

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The pretrial detention can approach or even exceed the punishment that a court would impose after trial. So even an acquittal at trial can be a hollow victory, as there is no way to restore the days already spent in jail. The defendant's best-case scenario becomes not zero days in jail, but the length of time already served.

*Id.*

<sup>202</sup> See Bowers, *supra* note 105, at 1136-37.

<sup>203</sup> See *id.*

<sup>204</sup> See Smith & Maddan, *supra* note 71, 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 decision).

<sup>205</sup> See Edkins & Dervan., *supra* note 168.

<sup>206</sup> See *id.*

Figure 4.

*Percentage of Students by Condition (Guilty or Innocent)  
And Sentencing Condition (Harsh or Lenient) Accepting the Plea Offer*

| <i>Condition</i> | <i>Rejected Plea Offer</i> |         | <i>Accepted Plea Offer</i> |         |
|------------------|----------------------------|---------|----------------------------|---------|
|                  | 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.<sup>207</sup> 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 and more research with a larger pool of participants and a greater “sentencing differential” is needed to further examine this phenomenon.<sup>208</sup> 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 decision-making. Such questions, however, must be reserved for future study, research that is vital now that plea bargaining’s innocence problem has been squarely established.

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.<sup>209</sup> Diagnosticity, as used in this study, is a calculation that ascertains whether a process (e.g. plea bargaining) is efficient at identifying truthful pleas by guilty defendants or whether the process is inefficient because it also inadvertently leads to false pleas by the innocent.<sup>210</sup> A similar test was applied in the Russano study of interrogation tactics.<sup>211</sup> When Russano’s interrogators did not

<sup>207</sup> *See id.*

<sup>208</sup> *See id.*

<sup>209</sup> *See id.*

<sup>210</sup> *See id.*; *see also* Russano, *supra* note 153, at 484 (noting that diagnosticity in that study illustrated the “ratio of true confessions to false confessions.”).

<sup>211</sup> *See* Russano, *supra* note 153, at 484.

use any tactics to elicit a confession, the diagnosticity of the interrogation process was 7.67.<sup>212</sup> By comparison, when Russano’s interrogators applied two interrogation tactics the number of false confessions jumped to almost fifty percent and the diagnosticity of the process dropped to 2.02.<sup>213</sup> This drop in diagnosticity meant that as Russano applied various interrogation tactics, the efficiency of the interrogation procedure at identifying only guilty subjects diminished.<sup>214</sup> 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.<sup>215</sup>

In our study, the diagnosticity of the plea bargaining process utilized was extremely low, standing at a mere 1.58.<sup>216</sup> That the diagnosticity of our plea bargaining process was considerably lower than the diagnosticity of Russano’s combined interrogation tactics is significant.<sup>217</sup> First, it is important to note that plea bargaining’s diagnosticity in this study was hovering dangerously close to that which would be expected from torture, 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.<sup>218</sup> Further, this diagnosticity result

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<sup>212</sup> See *id.* (the 7.67 diagnosticity was the result of only 6% of test subjects falsely confessing).

Given the goal of identifying techniques that might yield a high rate of true confessions and a low rate of false confessions, we felt it was also important to examine diagnosticity.... [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.*

<sup>213</sup> See *id.*

<sup>214</sup> See *id.*

<sup>215</sup> See *id.*

<sup>216</sup> See Edkins & Dervan., *supra* note 168.

<sup>217</sup> See *id.*; Russano, *supra* note 153, at 484.

<sup>218</sup> John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 12-13 (1978).

We coerce the accused against whom we find probable cause to confess his guilt. To be sure, our means are much politer; we use no rack, no thumbscrew, no Spanish boot to mash his legs. But like the Europeans of distant centuries who did employ those machines, we make it terribly costly for an accused to claim his right to the constitutional safeguard of trial. We threaten him with a materially increased sanction if he avails himself of his right and is thereafter convicted. This sentencing differential is what makes plea bargaining coercive. There is, of course, a difference between having your limbs crushed if you refuse to confess, or suffering some extra years of imprisonment if you

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.<sup>219</sup>

The other interesting aspect of our study’s diagnosticity data is that the diagnosticity of the harsh and lenient sentencing conditions were very similar.<sup>220</sup> This was surprising, because it had been anticipated that the efficiency of the process would greatly suffer as we increased the punishment risked at trial.<sup>221</sup> 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, the diagnosticity element of this study does warrant discussion of two important possibilities. First, perhaps future studies will demonstrate that diagnosticity here did not drop significantly because it had little place left to go.<sup>222</sup> The

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refuse to confess, but the difference is of degree, not kind. Plea bargaining, like torture, is coercive.

*Id.*

<sup>219</sup> 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 confession before making an arrest . . . the damage wrought and the lives ruined by the misuse of psychological interrogation methods will be significantly reduced.”); Russano, *supra* note 153, 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 diagnosticity of an elicited confession.”).

<sup>220</sup> See Edkins & Dervan, *supra* note 168.

<sup>221</sup> See *id.*

<sup>222</sup> See Dervan, *supra* note 36, at 488 (discussing a similar phenomenon with regard to plea bargaining rates, which are now in excess of 96% at the federal level).

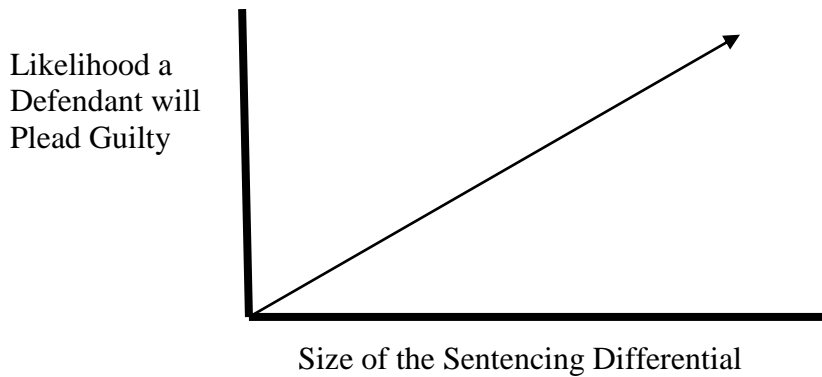
With more tools and increased control, prosecutors have increased differentials in financial crimes cases to staggering new levels by offering plea bargains carrying sentences similar to the pre-Enron era while threatening sentences following trial that take full advantage of SOX and the new Sentencing Guidelines structure. While it is possible that these new powers could actually result in more defendants accepting plea offers in the future, plea bargaining rates have been so high in recent years there is little room left for expansion.

*Id.*

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 represents the utilization of a process akin to torture.<sup>223</sup> 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.<sup>224</sup> Until now, many observers have predicted that sentencing differentials operate in a linear fashion, which means there is a direct relationship between the size of the sentencing differential and the likelihood a defendant will accept the bargain.<sup>225</sup>

Figure 5.

*Graph Illustrating Predicted Linear Relationship  
Between Plea Bargaining Rates and Sentencing Differentials*



It may be the case, however, that plea bargaining actually operate as a “cliff.” This means that a particularly small sentencing differential may have little to no likelihood of inducing a defendant to plead guilty. However, once the sentencing differential reaches a critical size, its ability to immediately and markedly influence the decision-making process of a defendant, whether guilty or innocent, becomes almost overwhelming.<sup>226</sup> Such a “cliff” effect would result in a similarity

<sup>223</sup> See Langbein, *supra* note 210, at 12-13 .

<sup>224</sup> See Dervan, *supra* note 91, at 282 (“[I]n a simplistic plea bargaining system the outcome differential and the sentencing differential track closely.”); Yin, *supra* note 92, 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.”).

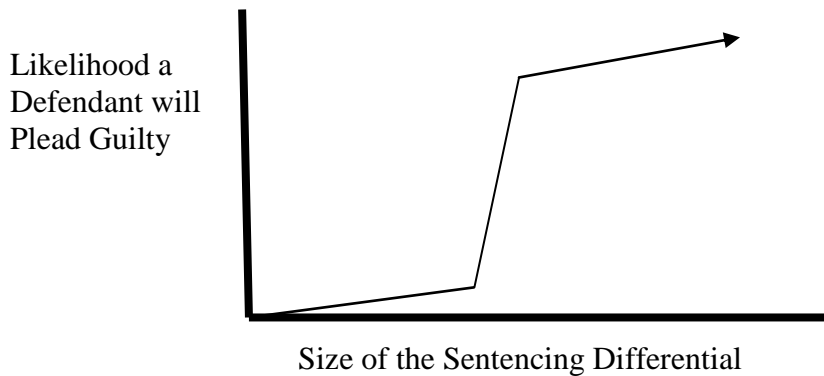
<sup>225</sup> See *id.*

<sup>226</sup> There are many factors that might shift when this “cliff” is reached for a particular defendant. See Bibas, *supra* note 197 (article discussing factors that influence a particular defendant’s decision to plead guilty).

in diagnosticity for both a harsh and lenient sentencing condition, 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.

*Graph Illustrating Possible “Cliff” Relationship  
Between Plea Bargaining Rates and Sentencing Differentials*



If future research indicates that this “cliff” effect is occurring, then there are two reasons for concern. First, this might mean that research suggesting that the answer to plea bargaining’s innocence problem is merely better control of sentencing differentials is based on an incorrect assumption regarding the operation and effect of such differentials.<sup>227</sup> Second, it should be of concern that a minimal sentencing differential, such as was present in our study, may be sufficient to reach this “cliff” and overwhelm the study participants’ free will and decision-making processes. While further research is necessary to better understand this possible phenomenon, consideration must now be given to the possibility that small sentencing

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<sup>227</sup> 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.”).

In a fixed-discount system, defendants who plead guilty receive a set reduction in sentence in exchange for their guilty plea. To be effective, the fixed discount must be large enough to provide an incentive for guilty defendants to plea guilty, but it must not be so large that it induces all defendants, guilty and innocent alike, to relinquish their trial rights.

*Id.* at 1240; see also Donald G. Gifford, *Meaningful Reform of Plea Bargaining: Control of Prosecutorial Discretion*, 1983 UNIV. OF ILL. L.R. 37, 81-82 (1983) (“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.”).

differentials are more powerful than previously predicted and operate in a very different way than previously assumed.

### III. 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*.<sup>228</sup> In *Alford*, the Court stated that it was permissible for a defendant to plead guilty even while maintaining his or her innocence.<sup>229</sup> The Court stated that there must, however, 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.”<sup>230</sup> 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.<sup>231</sup>

In May 1993, the mutilated bodies of three eight-year-old boys were discovered in a drainage canal in Arkansas.<sup>232</sup> Spurred by growing concern regarding satanic cults, police desperately searched for the killer or killers.<sup>233</sup> 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 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

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<sup>228</sup> *North Carolina v. Alford*, 400 U.S. 25 (1970).

<sup>229</sup> *Id.* at 37; *see also* Andrew D. Leipond, *supra* note 98, at 1156 (2005) (“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....”).

<sup>230</sup> *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).

<sup>231</sup> Campbell Roberts, *Deal Frees ‘West Memphis Three’ in Arkansas*, N.Y. TIMES (Aug. 19, 2011), available at [www.nytimes.com/2011/08/20/us/20arkansas.html](http://www.nytimes.com/2011/08/20/us/20arkansas.html) (last visited January 31, 2012); *see also* 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); 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 219, at 461-62 (discussing the Misskelley confession).

<sup>232</sup> *See* Roberts, *supra* note 231.

<sup>233</sup> *See id.*

the crime.”<sup>234</sup> Though Misskelley later recanted his statement, all three teenagers were convicted at trial and became known as the “West Memphis Three.”<sup>235</sup> Misskelley and Baldwin received life sentences, while Echols received the death penalty.<sup>236</sup>

Following their convictions, the three young men continued to maintain their innocence and, gradually, publicity regarding the case began to grow.<sup>237</sup> 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.<sup>238</sup> Interestingly, however, the DNA testing did find a match.<sup>239</sup> Hair from the ligatures used to bind one of the victims matched Terry Hobbs, one of the victims’ step-fathers.<sup>240</sup> 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 before their murder.<sup>241</sup>

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.<sup>242</sup> For the prosecution, however, the prospect

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<sup>234</sup> See Leo & Ofshe, *supra* note 231, at 461.

<sup>235</sup> See Roberts, *supra* note 231.

<sup>236</sup> See *id.*

<sup>237</sup> See *id.*

<sup>238</sup> See Leveritt, *supra* note 231, at 151-52.

<sup>239</sup> See *id.* at 151.

<sup>240</sup> See *id.* (discussing the release of this DNA evidence by singer Natalie Maines during a rally for the “West Memphis Three.”)

Hobbs sued Maines for defamation. When her lawyers deposed Hobbs in preparing to defend her, he told them that he had not seen the victims at all on the day they died. When news of that statement was made public, two women who lived near Hobbs at the time of the killings came forward. The women subsequently signed affidavits saying that they, in fact, had seen Hobbs with the children a short time before the boys disappeared. When asked why they had not reported the fact before, the women said that police had never questioned them and that, until the recent news report, they had not known that Hobbs had denied having seen the children that day. In December 2009, U.S. District Justice Brian Miller dismissed Hobbs’s lawsuit against Maines, but by then, the new witnesses against Hobbs had come forth.

*Id.* at 151-152.

<sup>241</sup> See *id.*



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.<sup>243</sup> According to the lead prosecutor, there was no longer sufficient evidence to convict the three at trial.<sup>244</sup> Despite the strong language in *Alford* indicating that it was appropriate only in cases where the evidence was overwhelming and conviction at trial was almost ensured, the government offered the “West Memphis Three” a deal.<sup>245</sup> They could continue to maintain their innocence, but would be required to enter an *Alford* plea of guilty to the murder of the three boys in 1993.<sup>246</sup> In return, they would be immediately released.<sup>247</sup> While Baldwin was reluctant to accept the offer, he agreed to ensure Echols would be released from death row.<sup>248</sup> Baldwin stated, “[T]his was not justice. However, they’re trying to kill Damien.”<sup>249</sup> 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.<sup>250</sup> Whether they were guilty of the charged offenses may never truly be known, but it is clear that despite insufficient evidence to convict them at trial and strong indications they were innocent the three were enticed by the power of the plea bargaining machine.<sup>251</sup>

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

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<sup>242</sup> See Roberts, *supra* note 231.

<sup>243</sup> See *id.*

<sup>244</sup> See *id.*

<sup>245</sup> See *id.*

<sup>246</sup> See *id.*

<sup>247</sup> 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. These pleas allow people to maintain their innocence and admit frankly that they are pleading guilty because they consider it in their best interest.

*Id.*

<sup>248</sup> See *id.*

<sup>249</sup> See *id.*

<sup>250</sup> See *id.*

<sup>251</sup> See *id.*

Court also offered a cautionary note regarding the role of innocence.<sup>252</sup> At the same time the Court made clear its belief that innocent defendants were not vulnerable to the powers of bargained justice, the Court reserved for itself the ability to reexamine the entire institution should it become evident they were mistaken.<sup>253</sup> 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.*<sup>254</sup>

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.*<sup>255</sup>

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 the offers are coercive and surpass a point at which they begin to ensnarl an unacceptable number of innocent defendants.<sup>256</sup>

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<sup>252</sup> *Brady v. United States*, 397 U.S. 742, 752-58.

<sup>253</sup> *Id.* at 757-58; *see also* Dervan, *supra* note 28, at --.

<sup>254</sup> *Brady*, 397 U.S. at 752 (emphasis added).

<sup>255</sup> *See id.* at 757-58 (emphasis added).

<sup>256</sup> *see* Dervan, *supra* note 28, at --.

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

Interestingly, *Brady* is not the only Supreme Court plea bargaining case to include mention of the innocence issue and the safety-valve.<sup>257</sup> In *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 easily overcome the defendant’s continued claims of innocence.<sup>258</sup> 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.<sup>259</sup> 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*.<sup>260</sup> In *Hayes*, the Court stated that the accused must be “free to accept or reject the prosecution’s offer.”<sup>261</sup> Just as the Court had stated in *Brady* and *Alford*, the *Hayes* Court concluded its discussion 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.”<sup>262</sup> As is now evident from the study described herein, the Supreme Court was wrong to place such confidence

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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.*

<sup>257</sup> *See id.* at --.

<sup>258</sup> *North Carolina v. Alford*, 400 U.S. 25, 37 (1970); *see also American Bar Association Project on Standards for Criminal Justice, Pleas of Guilty 2* (Approved Draft 1968).

[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 [due to the use of plea bargains], 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.*

<sup>259</sup> *Alford*, 400 U.S. at 38 n. 10.

<sup>260</sup> *Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

<sup>261</sup> *Id.* at 363.

<sup>262</sup> *Id.*

in the ability of defendants to assert their constitutional right to trial in the face of grave choices.<sup>263</sup>

As our research demonstrates, more than half of innocent defendants are willing to falsely condemn themselves in return for a perceived benefit.<sup>264</sup> That the plea bargaining system operates 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 previously predicted, means that the *Brady* Safety-Valve has failed and 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.<sup>265</sup>

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<sup>263</sup> See *supra* section II (discussing the plea bargaining study).

<sup>264</sup> See Edkins & Dervan,, *supra* note 168.

<sup>265</sup> 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 114, 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.*