

REGULATORY CRIME: SOLUTIONS

HEARING
BEFORE THE
OVER-CRIMINALIZATION TASK FORCE OF 2013
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ONE HUNDRED THIRTEENTH CONGRESS
FIRST SESSION

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CONTENTS

NOVEMBER 14, 2013

	Page
OPENING STATEMENTS	
The Honorable F. James Sensenbrenner, Jr., a Representative in Congress from the State of Wisconsin, and Chairman, Over-Criminalization Task Force of 2013	1
The Honorable Robert C. “Bobby” Scott, a Representative in Congress from the State of Virginia, and Ranking Member, Over-Criminalization Task Force of 2013	2
The Honorable Bob Goodlatte, a Representative in Congress from the State of Virginia, and Chairman, Committee on the Judiciary	4
The Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary	5
WITNESSES	
John S. Baker, Jr., Ph.D., Visiting Professor, Georgetown Law School, Visiting Fellow, Oriel College, University of Oxford, and Professor Emeritus, LSU Law School	
Oral Testimony	7
Prepared Statement	9
Lucian E. Dervan, Assistant Professor of Law, Southern Illinois University School of Law	
Oral Testimony	17
Prepared Statement	19
APPENDIX	
MATERIAL SUBMITTED FOR THE HEARING RECORD	
Additional Material submitted by Lucian E. Dervan, Assistant Professor of Law, Southern Illinois University School of Law	44

REGULATORY CRIME: SOLUTIONS

THURSDAY, NOVEMBER 14, 2013

HOUSE OF REPRESENTATIVES

OVER-CRIMINALIZATION TASK FORCE OF 2013

COMMITTEE ON THE JUDICIARY

Washington, DC.

The Task Force met, pursuant to call, at 10:40 a.m., in room 2237, Rayburn Office Building, the Honorable F. James Sensenbrenner, Jr., (Chairman of the Task Force) presiding.

Present: Representatives Sensenbrenner, Goodlatte, Bachus, Labrador, Holding, Scott, Conyers, and Jeffries.

Staff present: (Majority) Daniel Huff, Counsel; and (Minority) Ron LeGrand, Counsel.

Mr. SENSENBRENNER. The Task Force will be in order. Let me thank the Members and witnesses for their indulgence since I have to deal with the EPA administrator upstairs at the Science Committee.

Welcome to the Over-Criminalization Task Force's fourth hearing. These hearings have followed a logical progression. At the first hearing, the witness panel flagged two priority issues for the Task Force's consideration: the need for a default *mens rea* standard and the need to address regulatory crime. The Task Force followed that road map, and that is why we are here today.

The second hearing held on July 19 studied the lack of consistent and adequate *mens rea* requirement in the Federal criminal law. In its third and fourth hearings, the Task Force turned to the second issue flagged by the experts, that of regulatory crimes. Our work is not done.

We expect that the full Committee will vote to reauthorize the Task Force next week. In the ensuing 6 months of work, the Task Force will address issues including reforms to Title 18, whether some crimes are left better to State law, the manner in which Federal criminal laws are codified, and whether the proscribed punishments fit the crimes.

In the meantime, today's hearing continues the discussion of regulatory crimes. It focuses on solutions to address potentially vague and overbroad criminal provisions triggered by regulation. These include a default *mens rea* requirement that would apply to regulations carrying criminal penalties. Another suggestion is codifying the rule of lenity, which dictates that courts should construe ambiguity in criminal statutes in the defendant's favor. I am interested

in exploring how the rule of lenity would operate in the regulatory context where the Chevron deference ordinarily demands that courts defer to the agency's interpretation of an ambiguous statute.

Another possibility is requiring agencies to identify which new regulations should carry criminal penalties. Federal law could provide that these tag regulations have no criminal effect until Congress approves them as such. To ensure regulatory or agency enforcement is not stymied in the meantime, the regulations would still have immediate civil effect. These are just some of the solutions the Task Force will be considering today. Our distinguished panel of experts comes armed with ideas, and I look forward to hearing them.

It is now my pleasure to recognize for his opening statement the Ranking Member of the Task Force, the gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman. Mr. Chairman, at our first hearing, this Task Force received testimony, which provided an overview of the problem of over-criminalization. Expert witnesses provided their insight on how we got there and why. They left no doubt that over-criminalization is a serious problem and in need of immediate attention and solutions.

When asked to identify the two most pressing issues facing the Task Force, the witnesses unanimously agreed that the first priority is a lack of a consistent, adequate *mens rea* requirement in the Federal criminal statutory and regulatory law. They identified a second major issue as overregulation. We asked these experts their opinion, and they gave it to us, and to that end our first two hearings focused on *mens rea* and looked at regulatory crime and its effects.

We have invited today's witnesses to discuss solutions. And while the title of this hearing may be regulatory crime solutions, I would suggest that the solutions that we discuss should address more than just regulatory crime. The real question before us is how to address not only the regulations that carry criminal sanctions, but also numerous provisions throughout the Criminal Code that also have inadequate or no *mens rea* requirement. What is the appropriate standard for establishing the guilty mind? Is knowing enough, or should it be willful, and what have the courts observed as the meaning of willful? Many courts have come up with different interpretations. When should strict liability be applied? Is there a place for negligence?

The solutions that we are here to discuss must help everyone charged with violating a regulatory or statutory offense, which has a vague or no *mens rea*. That is part of the charge of the Task Force, and we are not working solely on regulatory over-criminalization. Addressing and resolving the issue of inadequate or absent *mens rea* and in all of the criminal code would benefit everyone.

I need to emphasize here that the aspects of over-criminalization that have been discussed during the first three hearings are not confined to the Regulatory Code. Overbroad, poorly-defined crimes exist throughout our system. Unnecessary laws and duplicative Federal crimes that overlap State criminal justice systems create a network of criminal statutes that geometrically increase our citizens' exposure to prosecution. It does not matter whether you look

at the Federal Code or the Federal regulations to impose criminal sanctions, the entire system is in need of repair.

We imprison more per capita in the United States and more in actual numbers than any other Nation. We have two and a half million people behind bars. The United States represents 5 percent of the world's population, but we have got 25 percent of the world's prison population. We have made some very bad choices, adopted some well-meaning, but wrongheaded, policies that have turned America's criminal justice system into one overridden with slogans and sound bites that do nothing to reduce crime.

Yesterday, the ACLU published an in-depth study of people in prison in the United States with no chance of parole for nonviolent offenses. These offenses include relatively minor drug and property crimes, such as taking a wallet from a hotel room or serving as a middleman in the sale of \$10 worth of marijuana. That report, titled "A Living Death: Life Without Parole for Nonviolent Offenses," found over 3,000 prisoners serving these sentences in Federal and State prisons combined.

Sentencing someone to life without the possibility of parole is the harshest punishment except for the death penalty. And yet the Federal Government and some States impose this punishment on people for nonviolent drug offenses. According to the report, the Federal courts account for almost two-thirds of the life without parole sentences for nonviolent offenses. In the Federal system, 96 percent of prisoners serving life without parole for nonviolent offenses were sentenced for drug offenses. More than 18 percent of Federal prisoners surveyed by the ACLU who are serving the life without parole sentences were serving sentences for their first offense.

While much time has been spent documenting the importance of convicting persons only when they exhibit the requisite level of culpable intent, I would also urge the Task Force to explore current sentencing policies that place a premium on lengthy sentencing, lengthy imprisonment, use the jail as a punishment of first choice, drain precious resources from the public treasury when less costly alternatives would be as effective as a deterrent and more productive for society. I would also urge the Task Force to continue to convene more hearings on the impact of over-criminalization on our Nation by exploring the collateral consequences facing individuals and families after conviction.

There are, in fact, many aspects of the problem of over-criminalization that the Task Force has yet to discuss. Such issues must consider—could I have another 30 seconds?

Mr. SENSENBRENNER. Without objection.

Mr. SCOTT. Thank you. There are, in fact, many aspects of the problem of over-criminalization the Task Force has yet to discuss. Such issues must include, but are not limited to, mandatory minimum sentences, alternatives to incarceration, such as civil penalties and fines. We also have to discuss the failed war on drugs, which costs us annually \$51 billion. There must be better, more effective ways to address that problem.

So I look forward to the testimony of today's witnesses regarding some of the proposed suggestions and to our future meetings.

Mr. SENSENBRENNER. The gentleman's time has expired.

The Chair of the full Committee, the gentleman from Virginia, Mr. Goodlatte, is recognized for 5 minutes.

Mr. GOODLATTE. Thank you, Chairman Sensenbrenner, for holding this hearing on solutions to address regulatory crimes. Often in Congress we hear a great deal about problems. There is something very satisfying to be holding a hearing on solutions. I want to commend the Task Force on the bipartisan nature of these proceedings. As I stated when this Task Force was formed, over-criminalization is an issue of liberty, and it is reassuring to see that we can find common ground when it comes to fundamental principles of American democracy.

The testimony from the Task Force's first regulatory hearing demonstrated the problems associated with agency regulations that carry criminal penalties. The Task Force heard testimony from two ordinary citizens who described their respective ordeals, noting that "If this can happen to us, it can happen to anyone."

There are several issues for us to consider today. I think there is wide, bipartisan agreement that the Judiciary Committee should consider enacting a default *mens rea* standard for the Federal Code. However, there are many more areas to explore and solutions to consider. For example, I am interested in further examining the propriety of criminal sanctions rather than stiffer civil penalties for *malum prohibitum* offenses that society does not consider inherently wrong. I am also interested in hearing our witnesses' perspective on whether Congress should consider codifying the common law rule of lenity to ensure that courts apply it regularly and consistently.

And again, I commend the Task Force for its efforts to date to closely analyze the growing problem of over-criminalization. I am confident the Task Force will continue its bipartisan and effective analysis of this issue in the future. I am also very pleased to note the progress that the Task Force has made and would note my strong support for reauthorization of the Task Force for an additional 6 months.

At the beginning of this process, we heard from a panel of expert witnesses setting out some of the most pressing issues facing the Task Force, and that agenda has been followed to this point. However, I also know that there are Members of the Task Force, and the gentleman from Virginia just referenced, who note that we have not gotten to some of the issues that are on that agenda. And I very strongly support moving onto examining those issues as well, including the issue of over-criminalization as it relates to other types of crimes covered in the Federal Criminal Code.

Finally, the Crime Subcommittee has primary legislative jurisdiction over Federal sentencing policy, including mandatory minimums. However, not every Member of the Crime Subcommittee serves on the Task Force, and we would be doing a disservice to the Crime Subcommittee Members who do not serve on the Task Force by limiting consideration of this issue solely to the Task Force. So whether it be the Crime Subcommittee, which has the same leadership as this Task Force, or it be the Task Force itself, I do very much support and anticipate that we will be examining issues like prison overcrowding and mandatory minimums, and

look forward to that examination of the overall over-criminalization issue. And I yield back to the Chairman.

Mr. SENSENBRENNER. The time of the gentleman has expired.

The Chair recognizes the Ranking Member of the full Committee for 5 minutes, the gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Chairman Sensenbrenner. First of all, my congratulations to you and to our colleague, Bobby Scott, who began this inquiry even when he was Chair of the Subcommittee on Crime. And I think that it is extremely important. This takes on significance as other studies come out, including the ACLU study of yesterday, and it leads to even further inquiry. And today's hearing about regulatory crime and possible solutions are certainly important and a very significant part of this entire study.

It is imperative that the Task Force consider not only crimes that impact white-collar defendants, but those that truly contribute to over-criminalization. For example, more than 60 percent of those serving in Federal prisons are there as a result of convictions for drug and immigration offenses. And yet, less than 1 percent of those in Federal prison are there as a result of regulatory crime prosecutions, and I know that we will hear more about that today.

This bipartisan Over-Criminalization Task Force was established in recognition of the fact that Congress for a number of decades has increasingly resorted to criminalizing actions as the solution to many various problems, as evidenced by the explosive growth of the Federal Criminal Code. And so, the attention mentioned by our previous speakers this morning is the need to focus on the Nation's war on drugs. And if we have learned anything over the last 4 decades is that locking people up for minor drug offenses and throwing away the key is the one way not to solve the Nation's drug problems. Nevertheless, we spend \$51 billion annually on the war on drugs. A couple of years ago, one and a half million people were imprisoned for nonviolent drug charges. In the same year, 757,000 people were charged and arrested for marijuana law violations.

Finally, we need to take a long, hard look at the scourge of mandatory minimums. Eliminating judicial discretion has not made our system more fair. Currently, more than 200,000 individuals are incarcerated in Federal prison. Nearly two million are being held in State and local prisons and jails. These appalling statistics give the United States the dubious distinction, as has been observed, the highest incarceration rate in the world.

The last embarrassing point that has to be made here is that the racial disparities are overwhelming, African-American citizens making up 38 percent of the prison population, 6 times the rate among Whites. And we have got some further examinations to make. I like some of the ideas that are being brought forward already about where we go from here. But the disproportionate impact upon minority Americans is incredible, and I think that that will be continually revealed in these excellent hearings.

I urge the Task Force to broaden its consideration for over-criminalization in future hearings, and I commend the Members and originators of this very important Committee, and yield back the balance of my time. Thank you.

Mr. SENSENBRENNER. I thank the gentleman. Without objection, other Members' opening statements will be made part of the record.

Mr. BACHUS. Mr. Chairman, just a point of personal privilege, if I could take 15 seconds. Dr. Baker testified in a previous hearing that he favors the term "strict construction" as opposed to "lenity." And since we get there, we might, I think——

Mr. SENSENBRENNER. The gentleman will have his 5 minutes to explore that. Be warned.

And also, without objection, the Chair is authorized to declare a recess during votes on the House floor.

I will introduce today's witnesses.

Dr. John S. Baker, Jr. is a visiting professor at Georgetown Law School, a visiting fellow at Oriel College at Oxford, and professor emeritus at LSU Law School. He also teaches short courses on separation of power for the Federalist Society with Supreme Court Justice Antonin Scalia.

Dr. Baker previously worked as a Federal court clerk and an assistant district attorney in New Orleans. He joined the LSU faculty in 1975. He has served as a consultant to the U.S. Department of Justice, the U.S. Senate Judiciary Subcommittee on Separation of Powers, the White House Office of Planning, USIA, and USAID. He was a Fulbright scholar in the Philippines and a Fulbright specialist in Chile. He also served on an American Bar Association task force which issued the report, "The Federalization of Crime," in 1998.

He received his bachelor of arts degree from the University of Dallas and his juris doctor from the University of Michigan Law School, and his doctor of philosophy and political thought from the University of London.

Lucian E. Dervan is an assistant professor at Southern Illinois University School of Law and served as a visiting faculty member at the University of Georgia Law School. In 2011, Professor Dervan was appointed to the Advisory Committee of the NACDL, White Collar Criminal Defense College at Stetson. He also served as a faculty member in the program.

Prior to joining the SIU Law School, Professor Dervan served as a law clerk to the Honorable Phyllis A. Kravitch of the United States Court of Appeals for the 11th Circuit. He spent 6 years in private practice with King & Spaulding LLP and Ford & Harrison LLP.

He received his bachelor of arts degree from Davidson College and his juris doctor from Emory University School of Law.

I would like to ask each of the witnesses to summarize their testimony in 5 minutes or less. And without objection, the full testimony will be included in the record at the part where each of you gives your verbal remarks.

Dr. Baker, you are first.

TESTIMONY OF JOHN S. BAKER, JR., Ph.D., VISITING PROFESSOR, GEORGETOWN LAW SCHOOL, VISITING FELLOW, ORIEL COLLEGE, UNIVERSITY OF OXFORD, AND PROFESSOR EMERITUS, LSU LAW SCHOOL

Mr. BAKER. Mr. Chairman, Members of the Committee—Task Force, that is—thank you for having me back. I must say that I have written and spoken on this subject for many, many years. And as I recorded the increase in Federal crimes, I really never believed Congress would do anything about this, so I am thrilled to find such bipartisan support for doing something. And I must say my approach today on solutions really tilts toward what Mr. Scott said. I am not limiting what I am talking about really to regulatory crimes because I think it is much more fundamental than that.

The solutions really have to come from what the problem is, and we know what the problem is. It is consensus, fundamentally two things. One is the *mens rea* problem, which we have heard over and over again. The second one is the notice problem. How do you know what is a crime? And that has to do with two things. One, there are too many crimes, so you cannot know what the law is, and, two, the way they are defined. You cannot really understand if you are an ordinary citizen what is prohibited. So that is what the problem is, so, therefore, the solutions have to identify and respond to those.

Now, we have heard two things repeated quite often. One is the default *mens rea*. I am just repeating that. I am not going to go into it. I am happy to discuss it, but we have heard plenty about that. Second, I have already mentioned before, and it was just brought out, about the question of rule of construction. I always say the rule of strict construction because that is what John Marshall said. And it was not just because of the common law criminal interpretation. That came from the common law, but he grounded it also in separation of powers.

It is one thing to delegate noncriminal matters over to executive agencies. It is a totally separate issue to delegate criminal matters over to executive agencies. At the founding, they had a clear distinction that only the sovereign, meaning the legislature, can define the crime at the Federal level. That was critical. So Congress coming back and taking over the definition of crime is very important.

Now, there was some mention about maybe repealing some crimes. That would be wonderful, but my solutions do not necessarily focus on that because I know how difficult it actually is to repeal anything, much less asking a Member to say he or she voted to repeal a crime and then have to run for office saying you are soft on crime. That is a difficult thing.

So my solutions focus on much more fundamental things that have to do with the definition and Congress' business. The first one that I mentioned is the definition of crime. When you look at the general section of Title 18, you have got a definition of petty offenses, which blurs what is really a crime and what is not a crime, and then have the definition of a crime of violence. Any criminal code has a basic definition of it, what is and what is not a crime.

And so, this is where you could put in, depending on the other choices you make in the definition, a clear statement that to be a

crime includes not only the act, but it includes the *mens rea*. That is one way to deal with it. If you want to say that while there are other crimes that do not have a *mens rea*, then the second solution, I would say or related to that is, okay, it is a crime, but no jail time unless you actually prove a *mens rea*, which would address the point over here by Mr. Conyers that there is too much incarceration. That is a way to cut down on a lot of that incarceration.

The whole issue of Congress defining the crime is critical. Mr. Sensenbrenner mentioned that about the question of the criminal as opposed to the administrative being done by the Congress. The Congress really needs to define these things, and if the penalties are too high, then that is the job of Congress. The difficulty is when you turn it over to an administrative agency, they do not have the same kind of concerns and accountability that you have. So that is the basic solution as far as I can see definitionally.

But beyond that, you have to think like the actors involved in the criminal prosecution think. And this, in part, addresses the question of mandatory minimums. I was a prosecutor, and we had mandatory minimums, and I know what it does. What it does is it does not eliminate discretion. It shifts the discretion from the judge to the prosecutor. And a big part of the difficulty where people do not go to trial is due to the fact that they know they are facing mandatory minimums, so that the prosecutor has a terrible hammer over their head, and they cannot afford in many cases to go forward.

The other part you have to understand is the mindset of a Federal district judge. I do not care what party, what president, put them on the bench, and they have one thing in common: none of them want to be reversed. And the key on this is to understand that when you have legal issues that the defense raises on a motion that would kick out the case, the judge is looking at that and thinking—and I know this happens—they are thinking, if I rule for the defendant and this thing goes up, I might get reversed. If I rule for the government, it goes forward, maybe there is a plea 95 percent of the time. If it goes to trial, maybe he is convicted. That is where the real pressure is.

So if you really want to make effective the rule of strict construction and courts reading what you write and construing it narrowly, you have got to give them the incentive to do it. Remember, under separation of powers, you write the law, but they interpret it. And if you want to give them the incentive to interpret it the way you want to do it, you allow the defendants in certain cases—and I am not saying this is easy to draft—the ability to take it up immediately if the defendant loses. If that happens, then the judge is in equipoise. That is, he or she could get reversed either way, so let us take a good look at what are the merits of this.

Those are my suggestions in brief. I am happy to answer any questions. Thank you for the time.

[The prepared statement of Mr. Baker follows:]

LEGISLATIVE TESTIMONY

Regulatory Crime: Solutions

Testimony before the Committee on the Judiciary

U.S. House of Representatives

Task Force on Over-criminalization

November 14, 2013

Dr. John S. Baker, Jr.
Visiting Professor, Georgetown Law School;
Professor Emeritus, LSU Law School

Mr. Chairman, Mr. Ranking Member, and other Members of Congress:

Thank you for inviting me to return to testify before the Task Force. When I appeared before you on July 19th, we discussed the fundamental principle of *mens rea*. This hearing today addressing possible ways to correct the danger of convicting innocent persons due to the absence, or the inadequacy, of a *mens rea*, especially in regulatory offenses, naturally follows from your earlier hearings. Again, I applaud the House Judiciary Committee for creating the Task Force to study these issues.

My name is John Baker. I am a Visiting Professor at Georgetown Law School; a Visiting Fellow at Oriel College, University of Oxford; and Emeritus Professor at LSU Law School. In the past, I have been a consultant to the U.S. Senate Judiciary Committee Subcommittee on Separation of Powers, and to the U.S. Department of Justice. Prior to teaching, I prosecuted criminal cases in New Orleans and have since been involved in the defense of a few federal criminal cases. I have written extensively on state and federal criminal law,¹ including a criminal law casebook.² I was a member of the ABA Task Force that issued the report “The Federalization of Crime” (1998).

POSSIBLE REMEDIES FOR THE
NOTICE AND MENS REA PROBLEMS
IN FEDERAL CRIMES AND REGULATORY OFFENSES

The tremendous number of federal crimes³ and the astronomical and unknown number of federal regulatory offenses⁴ makes remedying the notice and *mens rea* problems extremely challenging. Obviously, it is not possible to amend all the statutes so that they provide clear definitions of criminal conduct as well as an adequate *mens rea*. Rather, as mentioned in my previous testimony, protecting the principle of *mens rea* in federal criminal law could be accomplished through an interpretive rule that, like *Morissette v. United States*,⁵ reads in a *mens rea* where one is not literally provided in the statutory language. Such a rule could be similar to

¹ See, e.g., John S. Baker, Jr., *Mens Rea and State Crimes: 50 Years Post-Promulgation of the Model Penal Code*, 92 CRIM. L. REP. (BNA) 248 (Nov. 28, 2012); see also John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, The Heritage Foundation, Legal Memorandum No. 26 (2008), http://s3.amazonaws.com/thf_media/2008/pdf/lm26.pdf.

² John S. Baker, Jr., Daniel H. Benson, Robert Force, B.J. George, Jr., HALL'S CRIMINAL LAW: CASES AND MATERIALS (5th ed. 1993).

³ See generally AM. BAR ASS'N TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIME (1998) (discussing the remarkable growth of federal criminal law since 1970).

⁴ See John C. Coffee Jr., *Does “Unlawful” Mean “Criminal”?* Reflections on the Disappearing Tort/Crime Distinction in American Law, 71 B.U. L. Rev. 193, 216 (1991) (estimating, as of 1991, over 300,000 regulatory offenses capable of being the basis of criminal prosecution).

⁵ See 342 U.S. 246, 250-52 (1951).

the approach suggested by the Model Penal Code.⁶ One or more proposals have suggested taking an analogous approach to federal criminal law.⁷ Given the differences terminology, the exact default language of the MPC would not work well in federal criminal law.⁸

Rules of construction, like the one suggested, aid operationally in protecting the principle of *mens rea*. Another rule of construction, mentioned in my previous testimony, is that of “strict construction,” usually referred to in federal court opinions – I think inaccurately – as “the rule of lenity.” As the Supreme Court noted in 2008, the judicial rule of lenity exists because “no citizen should be held accountable [to] a statute whose commands are uncertain, or subjected to punishment that is not clearly proscribed.”⁹ Courts may prefer to speak of “the rule of lenity” because it makes the rule appear to have only criminal law significance. As such, federal judges tend to view it as a judge-made rule that they can expand or contract. The “rule of strict construction,” however, has an important separation of powers significance. As Chief Justice Marshall wrote the rule of “strict construction” of penal laws is not only rule favoring a criminal defendant, but one limiting the courts: “[the principle] is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislature, not in the judicial department.”¹⁰ Congress not only has the power, but also the obligation, to define criminal laws. Having done an inadequate job with so many criminal statutes, Congress could and should at least give clear guidance to the federal courts through a rule of construction that broad and ambiguous criminal statutes should be strictly construed.

In addition to these two possible solutions that were mentioned in my previous testimony, I will add three additional possibilities. As emphasized in my previous and current testimony, the fundamental criminal law (as opposed to federalism) issue with federal crimes is definitional.

⁶ The Model Penal Code’s (MPC) default provision desired to ensure a culpability element in all crimes. See Model Penal Code § 2.02(4) (1962) (directing courts to apply general *mens rea* terms in a criminal offense to each element of the offense – striving for a “default” *mens rea* term in each statute). Many states adopting parts of the MPC did not include its default-*mens rea* provision. In part, this failure may have been due to the MPC’s decision to codify particular mental states (purposely, knowingly, recklessly, and negligently) without mentioning the traditional, normative basis of *mens rea*. That is, state legislators may have viewed the default provisions as optional, rather than fundamental – as the drafters intended. The net effect was to caveat the impact the MPC had on preserving the foundations for *mens rea*, making it easier for legislatures to rationalize an offense without it. See John S. Baker, Jr., *Mens Rea and State Crimes: 50 Years Post-Promulgation of the Model Penal Code*, 92 CRIM. L. REP. (BNA) 248 (Nov. 28, 2012).

⁷ See, e.g., Brian W. Walsh and Tiffany M. Joslyn, Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law, The Heritage Foundation and the National Association of Criminal Defense Lawyers 27 (2010), <http://www.nacd.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=17613>. The report identifies the following recommended initiatives:

- Enact default rules of interpretation to ensure that *Mens Rea* requirements are adequate to protect against unjust conviction;
- Codify the common-law rule of lenity, which grants defendants the benefit of the doubt when Congress fails to legislate clearly;
- Require judiciary committee oversight of every bill that includes criminal offenses or penalties;
- Provide detailed written justification for and analysis of all new federal criminalization; and
- Draft every federal criminal offense with clarity and precision.

⁸ See *supra* note 6.

⁹ *United States v. Santos*, 533 U.S. 507, 514 (2008).

¹⁰ *United States v. Willberger*, 18 U.S. 5 Wheat 76, 95 (1820).

That is to say, so many federal crimes fail to define the prohibited conduct in language ensuring that persons have clear notice of what is prohibited and that they cannot be convicted without a *mens rea*. Therefore, the Task Force might wish to consider: (1) Adding a definition of “crime” in the General Provisions of Title 18; (2) Preventing the Executive Branch for defining regulatory crimes; and (3) allowing interlocutory appeals of expansive court interpretations of federal crimes.

I. Definitions to Distinguish “Crime” from Non-Criminal Offenses on the Basis of a *Mens Rea* and Punishment.

Chapter 1, Part I, of Title 18, entitled “General Provisions,” contains some definitions, but does not define “crime,” “felony,” or “misdemeanor.” The closest it comes to these terms are its definitions of “crime of violence,” Section 16, and “petty offense,” Section 19. The necessity of certain basic definitions is reflected by the fact that the Sentencing Commission has adopted its own definitions of felony and misdemeanor.¹¹ The Commission’s definitions cover state and local, as well as federal, law because the purpose of the definitional distinctions is to determine sentencing ranges based on a convicted person’s criminal history.¹²

Congress’s failure to enact adequate definitions is the source of much of the confusion with which this Task Force is attempting to grapple. As reflected in Title 18’s definition of “petty offense,” federal statutory law blurs the distinction between criminal and non-criminal, illegal conduct.¹³ That is to say, the definition of petty offense includes certain classes of misdemeanors as well as “infractions.” In the language of the criminal law, however, a misdemeanor is a crime but an infraction is not a crime.¹⁴ The Sentencing Commission has implicitly recognized this problem by counting, for purposes of criminal histories, certain misdemeanors but not infractions.¹⁵ Minor traffic violations such as running a stop sign (when it does not amount to reckless driving) are “illegal,” such “infractions” have been labeled “petty offenses,” but they are not “crimes.” My previous testimony discusses the issue at length.¹⁶

¹¹ U.S. Sentencing Comm’n Office of Gen. Counsel, Criminal History Primer April 2013, Parts II. B. 3-4.

¹² *Id.*

¹³ 18 U.S.C. § 19.

¹⁴ Many state statutes and cases – where the bulk of criminal prosecution occurs – explicitly denote the distinction. See, e.g., Mo. Rev. Stat. §§ 569.140, 569.150 (noting that an infraction is not criminal, but can provide the basis for probable cause); see also Haw. Rev. Stat. § 291-58 (classifying the failure to provide parking for disabled persons as cause for “a civil action,” not a criminal prosecution).

¹⁵ As Part II. B. 4 explains:

Certain misdemeanors — careless or reckless driving, gambling, driving without a license, disorderly conduct, prostitution, resisting arrest, trespassing — are counted only if they resulted in a prison sentence of at least thirty days or more than one year of probation, or they are similar to the instant offense. Other petty offenses — fish and game violations, juvenile status offenses, hitchhiking, loitering, minor traffic infractions, public intoxication, vagrancy — are never counted. Convictions for driving while intoxicated and other similar offenses are always counted.

See *supra* note 11 at Part II. B. 4 (internal citations omitted).

¹⁶ See *Mens Rea: The Need for a Meaningful Intent Requirement in Federal Criminal Law: Hearing Before the Over-Criminalization Task Force of the H. Comm. on the Judiciary*, July 19, 2013,

The Task Force may wish to consider first defining the term “crime,” and doing so in a way that clearly distinguishes felonies, misdemeanors, and non-criminal offenses, which could be labeled as “infractions,” or “violations.” The definition of “crime,” I submit, should include the requirement of a *mens rea*. Such a definition would be coordinated with the proposal, discussed above and in my previous testimony, for a default *mens rea*.¹⁷

Some offenses have been drafted in such a way that the government can choose to proceed civilly and/or criminally, such as retaliation against whistleblowers prohibited by the Sarbanes-Oxley Act.¹⁸ Without redrafting such legislation, the definition of crime applicable to all statutes could specify that no imprisonment could be imposed unless a *mens rea* is actually proved.

II. Criminal Penalties and Regulations

For reasons discussed in my previous testimony, regulatory offenses – often strict liability offenses – are not actually crimes and, I submit, should not be so treated.¹⁹ Nevertheless, the Department of Justice takes the position that it is perfectly legitimate to prosecute as “strict liability” offenses.²⁰ In fact, however, the Supreme Court’s treatment of strict liability offenses has been more guarded. It has refused to declare them unconstitutional, but in doing so has said they do not violate due process if certain conditions exist.²¹ In fact, prosecutions by the Justice Department are not limited to those conditions.²²

<http://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=101161> at 5 (statement of John S. Baker, Ph.D.) (“For *malum prohibitum* crimes and petty offenses, *mens rea* requirements are needed in order to protect individuals who have accidentally or unknowingly violated the law” as such conduct is not wrong in itself).

¹⁷ See *id.* at 10-12.

¹⁸ See Sarbanes-Oxley Act of 2002 806(e)(1), 18 U.S.C. 1514A(c)(1); Sarbanes-Oxley Act of 2002 1107, 18 U.S.C. 1513(e).

¹⁹ This critique of strict liability offenses is hardly novel. See, e.g., Laurie L. Levenson, *Strict Liability Offenses: Are They Real Crimes?*, 25 CRIM. JUST. 13, 13 (2010) (finding strict liability crimes to not be crimes at all, “having no moral or rational justification.”) (citing Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958)).

²⁰ A telling example in white-collar crime is the “Park Doctrine,” also known as the “Responsible Corporate Officer Doctrine.” The doctrine, rooted in *United States v. Park*, 421 U.S. 658 (1975), allows certain corporate officers to be criminally liable for conduct that occurred “on their watch,” irrespective of their lack of knowledge – turning the Food, Drug, and Cosmetic Act into a strict liability offense. Despite the limiting constructions imposed upon the Park Doctrine by certain federal appellate courts, the FDA announced in a letter to U.S. Senator Charles Grassley in March 2010 that it would work with the Justice Department to “increase the appropriate use of misdemeanor prosecutions . . . to hold responsible corporate officers accountable.” Letter from Margaret Hamburg, Commissioner of Food and Drugs, to Sen. Charles E. Grassley, Ranking Member, Senate Committee on Finance (Mar. 4, 2010), available at <http://www.grassley.senate.gov/about/upload/FDA-3-4-10-Hamburg-letter-to-Grassley-rc-GAO-report-on-OCI.pdf> (last visited Nov. 12, 2013). Assistant Attorney General Tony West buttressed the increased interest in prosecuting via the Park Doctrine in a November 2011 speech at the Annual Pharmaceutical Regulatory and Compliance Conference. He stated that “demanding accountability means we will consider prosecutions against individuals, including misdemeanor prosecutions under the Park Doctrine, which provides . . . strict[] liability for criminal violations of the Food, Drug, and Cosmetic Act.” Tony West, Assistant Attorney General, Address at the 12th Annual Pharmaceutical Regulatory and Compliance Congress (November 2, 2011), available at www.justice.gov/iso/opa/civil/speeches/2011/civ-speech-111102.html (last visited Nov. 12, 2013).

²¹ See *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 438 (1978) (“While strict-liability offenses are not unknown to the criminal law and do not invariably offend constitutional requirements, . . . the limited circumstances in which

This situation exists, in large part, because the Executive Branch has been allowed to define crimes by issuing regulations.²³ Such a practice is actually a violation of separation of powers. Unfortunately, at a time when it was not as concerned about separation of powers as it is currently, the Supreme Court upheld the practice.²⁴ That decision certainly flies in the face of Chief Justice Marshall's insistence in the *Willberger* case that legislating crime is strictly within the power of Congress.²⁵

Allowing the Executive Branch to both define a crime and then prosecute it presents the very danger that separation of powers was adopted to prevent. As James Madison wrote in *Federalist* #47, "there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates[.]"²⁶

In order to guard against this very real threat to liberty, per *Willberger*, it is for Congress only to define a crime. But how can Congress address the current situation where countless regulatory offenses have been defined by Executive Branch agencies? Consistent with the approach mentioned above, Congress could specify in a definitional section placed in the General Provisions of Title 18 that regulatory offenses can be prosecuted and punished as crimes only if Congress has actually enacted legislation which defines the elements of the criminal offense.

III. An Interlocutory Appeal for Novel Prosecution Theories

Congress has created and this Court has recognized such offenses . . . attest to their generally disfavored status.") (internal citations omitted); *see also* *Staples v. United States*, 511 U.S. 600, 606 (1994) (presuming that, in the absence of a contrary legislative judgment, some *mens rea* is an element of the crime at issue); *id.* at 616-17 ("[T]he small penalties attached to [strict liability] offenses complemented the absence of a *mens rea* requirement: In a system that generally requires a 'vicious will' to establish a crime, . . . imposing severe punishments for offenses that require no *mens rea* would seem incongruous.") (quoting 4 William Blackstone, *COMMENTARIES ON THE LAW OF ENGLAND* *21 (1769)); *cf.* *Park*, 421 U.S. at 666 (noting that *Park*'s punishment was only a fine of \$50 for each of his five counts).

²² *See, e.g.,* *Friedman v. Sebelius*, 686 F.3d 813 (D.C. Cir. 2012). The D.C. Circuit upheld the Health and Human Services' decision to punish three executives who pleaded guilty to misdemeanor charges under the Park Doctrine by excluding them from federal health programs for 20 years. Given the age of the executives, this amounted to a lifetime ban from participation in the pharmaceutical industry. The court's majority rejected their due process challenge that characterized such a sentence as contrary to the requirement that severe punishments emanate from crimes requiring proof of a *mens rea*.

²³ *See, e.g.,* *Mens Rea: The Need for a Meaningful Intent Requirement in Federal Criminal Law: Hearing Before the Over-Criminalization Task Force of the H. Comm. on the Judiciary*, July 19, 2013, <http://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=101161> (statement of John S. Baker, Ph.D.) (discussing the authority possessed by the U.S. Department of the Interior to implement regulations defining the criminal conduct of the Migratory Bird Act); *see also* FDA, *Inspections, Compliance, Enforcement, and Criminal Investigations: Special Procedures and Considerations for Park Doctrine Prosecutions* § 6-5-3, available at <http://www.fda.gov/CECI/ComplianceManuals/RegulatoryProceduresManual/ucm176738.htm#SUB6-5-3> (defining criteria for recommendation of criminal prosecution under the Park Doctrine).

²⁴ *See* *Touby v. United States*, 500 U.S. 160, 166-67 (1991) (rejecting the argument that "greater congressional specificity [to administrative agencies that could contemplate criminal sanctions in their regulations] is required in the criminal context" based on that argument not being established in post-New Deal case law).

²⁵ *United States v. Willberger*, 18 U.S. 5 Wheat 76, 95 (1820).

²⁶ *THE FEDERALIST* No. 47, at 303 (Clinton Rossiter ed., 1961).

As previously discussed, so many federal crimes are broadly and ambiguously defined. The proposed rule of strict construction could do much to rectify the problem. An additional measure, however, would likely make such a rule of construction more effective. In the first and most important instance, the federal district judge will be the one to apply the rule of strict construction. Congress could enact such a rule and some district judges might neutralize it. A natural response might be that appellate courts would correct misapplications by district judges. In fact, however, appellate courts have relatively few opportunities to do so.

No matter what president appointed them, federal district judges have one thing in common: they do not like to be reversed. As a result, some number of them will decide issues in ways that procedurally will avoid reversal. In federal criminal prosecutions, pretrial motions by defendants often pose purely legal issues which might end the prosecution. If a district judge rules for the defendant, the Government can appeal and might win a reversal. If the district judge rules for the Government, the chances are very high that the defendant will end up pleading guilty – if for no other reason than that he or she cannot afford the expense of trial. After a plea, unless the defendant has been able to preserve the legal issue for appeal, the matter is ended and the judge will not be reversed.

This reality emboldens federal prosecutors to “push the envelope” by inventing novel theories to prosecute ambiguously worded statutes. Federal prosecutors have often done so with their favorite statutes, the mail and wire fraud statutes. Prosecutors are especially fond of the mail and wire fraud statutes because they are so malleable.²⁷ That malleability means that, as applied, the statutes fail to give adequate notice of what business practices are and are not criminal. That situation can deter legitimate and ethical risk-taking. If federal prosecutors think that certain types of conduct are unethical and therefore should be criminalized, then the appropriate course is to bring the issue up for legislative debate both as to the merits of criminalizing the conduct and also as to whether Congress has the constitutional authority to do so. Instead, for decades, federal prosecutors have been using the mail and wire fraud statutes, as well as other statutes, retroactively to legislate what they consider to be unethical conduct and therefore -- in their minds -- criminal.²⁸

The Supreme Court has often rejected the Justice Department’s theories used to prosecute for mail and wire fraud.²⁹ Nevertheless, the Justice Department has largely prevailed in the lower courts. The district courts, ever looking to avoid reversal, rarely rule against the Government on substantive law issues. As a result, the government achieves a very high level of guilty pleas as defendants weigh the exorbitant costs of a federal trial and the potentially increased sentences for exercising their right to a jury trial against the lower sentences offered by plea deals. A clearer definition of fraud and other crimes would be the best approach. In the absence of narrowed

²⁷ See Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 Duq. L. Rev. 771, 771-72 (1980); see also Geraldine Szott Moohr, *Mail Fraud Meets Criminal Theory*, 67 U. Cin. L. Rev. 1, 1 (1998-1999).

²⁸ See Mike Koehler, *Foreign Corrupt Practices Act Enforcement as Seen Through Wal-Mart’s Potential Exposure*, 7 White Collar Crim. Rep. 19 (Sept. 21, 2012) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2145678 (explaining, in the context of the Foreign Corrupt Practices Act, how prosecutors use non-prosecution and deferred prosecution agreements to pursue conduct that, based on congressional intent, is not actually criminalized by the statute).

²⁹ See *McNally v. United States*, 483 U.S. 350 (1987); *Cleveland v. United States*, 531 U.S. 12 (2000); *Skilling v. United States*, 130 S. Ct. 2896 (2010).

definitions for federal crimes, the possibility of interlocutory appeals would make it more likely that district courts would fairly judge whether particular prosecutions actually fall within Congress's definition of the crime and within the constitutional jurisdiction of the federal courts.

CONCLUSION

The several hearings of this Task Force have, from various perspectives, addressed two fundamental themes: 1) the lack, or the inadequacy, of a *mens rea* in many federal crimes and regulations; and 2) the impossibility of knowing what conduct is criminal under federal law due a) to the vast number of crimes and the uncountable number of regulations with criminal penalties and b) the length and ambiguity of these criminal statutes and regulations. This paper has suggested several strategies that Congress might consider as solutions: 1) a default *mens rea*; 2) a rule of strict construction; 3) a definition of "crime," in the "General Provisions" of Title 18; 4) a prohibition of criminal penalties for violation of any administrative regulation unless the definition has gone through the legislative process; and 5) an interlocutory appeal for expansive interpretations of federal crimes and regulations carrying criminal penalties.

Mr. SENSENBRENNER. Thank you.
Mr. Dervan?

**TESTIMONY OF LUCIAN E. DERVAN, ASSISTANT PROFESSOR
OF LAW, SOUTHERN ILLINOIS UNIVERSITY SCHOOL OF LAW**

Mr. DERVAN. Thank you, Mr. Chairman, Ranking Member Scott, Members of the Task Force. Let me begin by commending you for your work on this very important issue of over-criminalization in the American criminal justice system. There has been much attention during these hearings to the issue of regulatory offenses, and so I feel I should offer my own anecdote in that regard regarding the sheer volume of these offenses.

As one of my courses I teach white-collar crime, and we talk about regulatory crimes in that course. And inevitably as we began to move into the materials, the students will ask, how many of these crimes are there. And the answer is always the same: we just do not know. And that is a very troubling thing for me to have to say about American criminal law. It is troubling to me as a law professor. It is troubling to the students who may one day have to either prosecute or defend someone alleged to have violated these. And it should be troubling to the American people who may one day innocently and without a guilty mind violate one of these obscure offenses.

As evidenced by the work of this Task Force, there is now a deep and bipartisan appreciation for the significance of over-criminalization in our criminal justice system, and, therefore, let us consider some solutions, solutions that will reduce the negative impact of past over-criminalization and also prevent a return to over-criminalization in the future. Now, while this hearing is focused on solutions to regulatory offenses, it is important to note that the solutions I will propose apply to all criminal offenses in the Federal system, and should, therefore, be considered a possible solution to the broader issue of over-criminalization and not just regulatory over-criminalization.

First, as has been mentioned before, *mens rea* is a cornerstone of our criminal justice system, yet today as a result of over-criminalization, there are many Federal offenses for which there is no *mens rea* or only a weak *mens rea*. And, therefore, to correct this problem, Congress should consider adoption of a default *mens rea* rule. Such a rule would correct unintentional omissions of *mens rea* in existing and future legislation and ensure that those without a guilty mind are protected from unwarranted prosecution.

In addition to adoption of a default *mens rea* rule, consideration must be given to codification of rules of construction that will assist in protecting the constitutional rights of defendants. As one such example, the Task Force should consider adoption of a provision requiring courts to apply any *mens rea* term contained in or applicable to a statutory or regulatory offense to all material elements of that offense. There are several advantages to adopting such a rule, which is already a well-accepted provision of the Model Penal Code. These advantages include assisting in clarifying ambiguities if a default *mens rea* rule is adopted, assisting in preventing costly litigation regarding existing statutes, assisting in creating greater uniformity amongst the various courts, and finally, furthering the

goals of this Task Force by helping to ensure that individuals are not prosecuted where they have not acted with a guilty mind.

As a second rule of construction, the Task Force should consider codifying the rule of lenity, a doctrine with a long and respected history in American law. The rule of lenity states that ambiguous criminal laws are to be interpreted in favor of defendants subjected to them. Unfortunately, the application of this rule of lenity by lower courts has not been consistent. Therefore, the codification of this vital doctrine is necessary to ensure its uniform and appropriate application. Importantly, however, codification of the rule of lenity alone is not sufficient to correct the problems emanating from over-criminalization; rather, codification should be viewed only as an additional safeguard in combination with the previously proposed solutions.

In addition to these three solutions to the issue of over-criminalization and its impact on statutory and regulatory offenses, I believe consideration should also be given to several other ideas which I discuss briefly in my written statement.

In closing, I would like to address one additional issue. Today, almost 97 percent of criminal cases in the Federal system are resolved through a plea of guilty. As the number, breadth, and sentencing, severity of Federal criminal statutes increased over the last century because of over-criminalization, prosecutors gained increased ability to create overwhelming incentives for defendants to waive their constitutional right to trial by jury and plead guilty. At the same time, the financial and emotional cost to defendants and their families of proceeding to trial have grown into often insurmountable obstacles. The result is a system in which even the innocent will plead guilty. We know this from both actual cases and from new research in the field, including the findings of a study conducted by Dr. Vanessa Edkins and myself in which we discovered that more than half of the innocent participants in our study were willing to falsely admit guilt in return for a perceived benefit.

I hope that this Task Force and the Committee on the Judiciary will next turn its attention to modern day plea bargaining, one of the many outgrowths of the over-criminalization phenomenon. Along with plea bargaining, there are many other issues that are ripe for investigation and analysis by this Task Force, including collateral consequences of conviction, mandatory minimum sentences, forfeiture provisions, and conspiracy laws. I look forward to this Task Force's continued good works, and I hope to have the opportunity to return to focus more specifically on plea bargaining and these other issues of importance at a future hearing.

Thank you for the opportunity to testify today. I welcome any questions the Task Force might have regarding my comments.

[The prepared statement of Mr. Dervan follows:]

Written Testimony of Lucian E. Dervan
Assistant Professor of Law
Southern Illinois University School of Law

Before the House Committee on the Judiciary
Over-Criminalization Task Force,
United States House of Representatives

“Regulatory Crime: Solutions”

Delivered November 14, 2013

CONGRESSIONAL TESTIMONY

Statement of Assistant Professor Lucian E. Dervan
Southern Illinois University School of Law

Before the House Committee on the Judiciary
Over-Criminalization Task Force,
United States House of Representatives

“Regulatory Crime: Solutions”

Delivered November 14, 2013

Thank you Mr. Chairman, Ranking Member Scott, and members of the Task Force.

My name is Lucian Dervan, and I am an assistant professor of law at the Southern Illinois University School of Law.¹ Before joining Southern Illinois University, I practiced law for seven years, including as a member of the white collar criminal defense team at King & Spalding LLP and as a law clerk on the United States Court of Appeals for the Eleventh Circuit. I currently write and teach in the area of criminal law, including sentencing, and I appreciate the invitation to speak today.

Let me begin by commending the members of this task force for the important work you have undertaken regarding the significant and pressing issue of overcriminalization in the American criminal justice system.² As has been noted by many individuals testifying before this body,

¹ The views expressed in this testimony are my own and should not be construed as representing any official view of Southern Illinois University.

² “Overcriminalization” refers to the claim that governments create too many crimes, including crimes that are duplicative and overlapping, crimes that are vague and overly broad, and crimes that lack sufficient *mens rea* to protect innocent conduct. See *Reining in Overcriminalization: Assessing the Problem, Proposing Solutions*, Written Statement of Jim E. Lavine, President, National Association of Criminal Defense Lawyers, Before the Subcommittee on Crime, Terrorism, and Homeland Security of the House Committee on the Judiciary, 111th Cong. (2010), available at http://judiciary.house.gov/hearings/printers/111th/111-151_58476.PDF (last visited Nov. 12, 2013).

[The trend of overcriminalization] takes many forms, but most frequently occurs through: (i) enacting criminal statutes absent meaningful *mens rea* requirements; (ii) imposing vicarious liability for the acts of others with insufficient evidence of personal awareness or neglect; (iii) expanding criminal law into economic activity and areas of the law traditionally reserved for regulatory and civil enforcement agencies, (iv) creating mandatory minimum sentences that fail to reflect actual culpability; (v) federalizing crimes traditionally reserved for state jurisdiction; and (vi) adopting duplicative and overlapping statutes.

there are currently over 4,450 criminal offenses in the United States Code and as many as 300,000 federal regulatory crimes.³ Not only are these criminal laws expansive, they are often drafted in ways that are broad, vague, and lack a specific *mens rea* element to ensure that these provisions are only applicable to culpable defendants and not innocent citizens.⁴ Finding a solution to this issue is of vital importance and must be accomplished to affirm our commitment to the American tradition of justice.

As much attention during these hearings has focused on the issue of regulatory crimes, I feel it is important to offer my own anecdote regarding the sheer volume of these offenses. As part of my white collar crime course at Southern Illinois University School of Law, I teach a section regarding regulatory crimes. Inevitably, as the class begins to work through various examples of these criminal provisions, a student will ask, "How many regulatory crimes are there?" My answer is always the same. "We just don't know." My response is not that I personally don't know, rather I am forced to admit to the students that we as legal professionals and we as a country don't know. That is a very troubling thing to have to say about our criminal laws. It is troubling to me as a law professor who studies this area, it is troubling to the students as future lawyers who may one day be asked to prosecute or defend someone for violating such a regulation, and it should be troubling to the American people who may one day innocently and without a guilty mind violate one of these obscure crimes.

And so again, I commend the Task Force for its work, shining a light on the issue of overcriminalization and working to correct this fundamental problem in our criminal justice system.

Before beginning a discussion of the possible solutions to the numerous problems associated with overcriminalization that have been identified by this Task Force during prior hearings, I think it is also important to consider once again the far reaching consequences stemming from the phenomenon of overcriminalization. As reported by the American Bar Association in a 1998 study, forty-percent of the criminal laws passed since the Civil War were enacted after 1970.⁵ Since the release of this ABA report, it is estimated that the federal government has created

Id.; see also Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 704 (2005) ("Over time, however, the United States has experienced a dramatic enlargement in governmental authority and the breadth of law enforcement prerogatives."); Brian W. Walsh & Tiffany M. Joslyn, *Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law* 5-6, available at <http://www.nacdl.org/criminaldefense.aspx?id=10287&terms=withoutintent> (2010)

³ See John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, THE HERITAGE FOUNDATION LEGAL MEMORANDUM No. 26 (June 16, 2008); Task Force on Federalization of Criminal Law, Criminal Justice Section, Am. Bar Ass'n, *The Federalization of Criminal Law*, at 9 n.11, app. C (1998); John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U.L. Rev. 193, 216 (1991).

⁴ See Ellen S. Podgor, *Laws Have Overcriminalized Business Behavior*, NEW YORK TIMES ROOM FOR DEBATE, available at <http://www.nytimes.com/roomfordebate/2013/11/10/prosecuting-executives-not-companies-for-wall-street-crime/laws-have-overcriminalized-business-behavior> (Nov. 10, 2013).

⁵ See American Bar Association, *The Federalization of Criminal Law* 7 (1998).

hundreds of additional criminal statutes and untold numbers of additional criminal regulatory provisions.⁶

One of the most visible results of overcriminalization in the last forty years has been the growth in the size of the American prison population.⁷ In a report released in March 2009, the Pew Center on the States concluded that 2.3 million adults in the United States were in prison or jail.⁸ This represented 1 out of every 100 adults. Further, when adults in the United States who were on probation or parole were included, the total number under correctional control reached 7.3 million, or 1 out of every 31 adults. Finally, as noted in a 2011 study, an estimated 65 million adults in the United States, which represents more than 1 in 4, have a criminal record.⁹ Given these statistics, it should come as no surprise that the United States has the world's largest prison population. Though we represent only 5% of the world's population, we have "almost a quarter of the world's prisoners."¹⁰

It is also important to remember in this context that the consequences of conviction do not end when a prison sentence is completed. There are hundreds of collateral consequences that can flow from a misdemeanor or felony conviction, regardless of whether a prison or jail sentence is ever served. Further, such collateral consequences can impact not only the convicted but their family and community as well. The breadth and significance of these collateral consequences

⁶ See John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, HERITAGE FOUNDATION L. MEMO. No. 26, 1 (June 16, 2008). In this report, it was estimated that from 2000 to 2007, the Congress enacted criminal provisions at an average of 56.6 crimes per year. See *id.*

⁷ As noted by Professor Rachel E. Barkow, it is estimated that less than 0.8% of federal prison inmates are serving a sentence for a regulatory crime. See Statement of Rachel E. Barkow, Before the House Committee on the Judiciary, Task Force on Over-Criminalization, "Regulatory Crime: Overview – Defining the Problem," (Oct. 30, 2013). Nevertheless, even if the number of individuals serving a prison sentence for violations of regulatory offenses is low compared to other federal offenses, these defendants are still subject to criminal punishment in the form of probation or fines, along with the stigma and collateral consequences of conviction. Further, the potential solutions to overcriminalization offered today are applicable to both the issue of regulatory overcriminalization as well as the broader issue of overcriminalization in federal law generally.

⁸ Pew Charitable Trusts, *One in 31: The Long Reach of American Corrections*, available at http://www.pewcenteronthestates.org/uploadedFiles/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf (2009).

⁹ See Rodriguez, Michelle N., and Maurice Emsellem, *65 Million 'Need Not Apply': The Case for Reforming Criminal Background Checks for Employment*, New York: National Employment Law Project, March 2011; see also Amy L. Solomon, *In Search of a Job: Criminal Records as barriers to Employment*, 270 NATIONAL INSTITUTE OF JUSTICE JOURNAL, 42, Office of Justice Programs, available at <http://www.nij.gov/journals/270/criminal-records.htm#noteReference29> (June 2012).

¹⁰ Adam Liptak, *U.S. Prison Population Dwarfs that of Other Nations*, NEW YORK TIMES, available at http://www.nytimes.com/2008/04/23/world/americas/23iht-23prison.12253738.html?pagewanted=all&_r=0 (April 23, 2008).

cannot be understated, and I believe this is an important issue that this Task Force should consider addressing at a future hearing.

As evidenced by the work of this Task Force, there is now a deep and bipartisan appreciation for the significance of overcriminalization in our criminal justice system. Therefore, let us consider several solutions that might be adopted by Congress to both reduce the negative impacts of past overcriminalization and prevent a return to overcriminalization in the future. While this hearing is focused on solutions to regulatory crime, it is important to note that the solutions I propose below are applicable to all criminal offenses in the federal system and should be considered potential solutions to the broader issue of overcriminalization, not just regulatory overcriminalization.

Adopt a Default Rule for *Mens Rea*

First, *mens rea* is a cornerstone of our criminal justice system and conveys the idea that individuals should be prosecuted where they have acted with a guilty mind. As Justice Jackson wrote in *Morrisette v. United States* in 1952, “The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.”¹¹ Today, as a result of overcriminalization, there are many federal offenses for which there is no *mens rea* or only weak *mens rea*.¹² Where adequate *mens rea* is lacking, innocent and mistaken conduct can be criminalized under circumstances in which Congress never intended a person’s liberty to be put in jeopardy.

To correct this problem, Congress should adopt a default *mens rea* rule. Such a rule would correct unintentional omissions of a *mens rea* term in existing and future legislation and ensure that those without a guilty mind are protected from unwarranted prosecutions. When adopting such a default rule, the Task Force should carefully consider the appropriate level of *mens rea* for incorporation as the default. While many current federal criminal statutes utilize the lower-level *mens rea* standard of “knowingly,” this term generally only requires proof that the defendant had “knowledge of the facts that constitute the offense.”¹³ Therefore, the utilization of the term “knowingly” will likely fail to achieve the Task Force’s goal of preventing application of regulator crimes and other offenses to individuals unless they intentionally engaged in inherently wrongful conduct or acted with knowledge that their conduct was unlawful. A stronger and more appropriate term for utilization would likely be the term “willfully,” which would require some proof that the individual was aware his or her “conduct was unlawful.”¹⁴

¹¹ *Morrisette v. United States*, 342 U.S. 246, 250 (1952).

¹² See Walsh & Joslyn, *Without Intent*, *supra* note 2, at IX.

¹³ *Dixon v. United States*, 548 U.S. 1, 5 (2006) (quoting *Bryan v. United States*, 524 U.S. 184, 193 (1998)).

¹⁴ *Bryan v. United States*, 524 U.S. 184, 193 (1998).

Adopt a Default Rule Applying *Mens Rea* to All Material Elements of an Offense

In addition to adoption of a default *mens rea* rule as described above, consideration must be given to codification of rules of construction that will assist in protecting the constitutional rights of defendants. As one such example, the Task Force should consider adoption of a provision requiring courts to apply any *mens rea* term contained in or applicable to a statutory or regulatory offense to all material elements of that offense.¹⁵

There are several advantages to adopting such a rule. First, this type of provision will assist in clarifying ambiguities if a default *mens rea* rule is adopted. Second, such a provision will assist in preventing costly litigation regarding existing statutes that already contain a *mens rea* requirement but which are vague as to whether the *mens rea* applies to each of the material elements of the offense. Third, adoption of a default rule will assist in creating greater uniformity amongst the various courts and their interpretations of statutes containing ambiguities as to the *mens rea* element. Finally, such a provision will further the goals of this Task Force by helping to ensure that individuals are not prosecuted where they have not acted with a guilty mind.

As an example of the need for the codification of the Rule of Lenity, consider the case of *Flores-Figueroa v. United States*, which was decided by the United States Supreme Court in 2009.¹⁶ The case involved a prosecution for aggravated identity theft under 18 U.S.C. section 1028A(a)(1) and whether a *mens rea* term applied to the last three words in the statute. The statute created an offense where an individual “knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person.” The government argued that the term “knowingly” applied only to the first portion of the statute, requiring that the defendant “knowingly transfers, possesses, or uses, without authority, a means of identification.” The government argued, however, that the term “knowingly” did not apply to the last three words of

¹⁵ Such a provision is contained in the Model Penal Code, which states in subsection 2.02(4):

When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.

Under the Model Penal Code, the term “material element of an offense” means “an element that does not relate exclusively to the statute of limitations, jurisdiction, venue or to any other matter similarly unconnected with (i) the harm or evil, incident to conduct, sought to be prevented by the law defining the offense, or (ii) the existence of a justification or excuse for such conduct.” Model Penal Code section 1.13(10). In the comments to the Model Penal Code, the drafters acknowledged the need for such a clarifying rule given the ambiguities that might exist as to the application of culpability requirements to various elements of an offense. The drafters stated, “The Model Penal Code agrees... that these ‘problems can and should be taken care of in the definition of criminal intent.’” See Model Penal Code 2.02 comment 6.

¹⁶ See *Flores-Figueroa v. United States*, 556 U.S. 646, 648 (2009).

the statute. Thus, the government believed it was not required to prove that the defendant knew the identification belonged to “another person.” Disagreeing with government, the Supreme Court applied the *mens rea* term to both elements of the offense and ruled that the government must prove that the “defendant knew that the means of identification at issue belonged to another person.”

Another example of a case in which the government argued for a restricted application of the *mens rea* term in a statute was *United State v. Bronx Reptiles, Inc.*¹⁷ In this case, the defendant was charged with a violation of a portion of the Lacey Act that made it a crime “for any person, including any importer, knowingly to cause or permit any wild animal or bird to be transported to the United States, or any Territory or district thereof, under inhumane or unhealthful conditions or in violation of such requirements’ as the Secretary of the Interior may prescribe. The government argued that the term “knowingly” only applied to the transportation of a wild animal or bird. In ruling that the *mens rea* term also required that the defendant knew the conditions of the transportation were “inhumane and unhealthful,” the Second Circuit Court of Appeals stated that the government’s interpretation of the statute would result in a “vast range of remarkably innocuous behavior [being] rendered criminal.”¹⁸ The costly and unnecessary litigation present in the *Flores-Figueroa* and *Bronx Reptile* cases can be prevented through adoption of a default rule applying *mens rea* to all material elements of an offense.

It is important to note, of course, that Congress could still limit the application of a particular *mens rea* term in a particular statutory or regulatory offense. In such cases, the specific legislation would simply need to include a clear indication of Congressional intent to limit the applicability of the *mens rea* term. The default rule as described above would only apply in those cases where no such indication was present.

Adopt a Codification of the Rule of Lenity

As a second rule of construction, the Task Force should consider codifying the Rule of Lenity, a doctrine with a long and respected history in American law.¹⁹ The Rule of Lenity states that “ambiguous criminal laws [are] to be interpreted in favor of the defendants subjected to them.”²⁰

¹⁷ See *United State v. Bronx Reptiles, Inc.*, 217 F.3d 82 (2d Cir. 2000).

¹⁸ See *id.* at 86.

¹⁹ The Rule of Lenity has already been codified in some state statutes. See e.g. F.S.A. section 775.021(1) (1988) (“The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.”). The Rule of Lenity has also been adopted in the international setting. See e.g. The Rome Statute of the International Criminal Court, Art. 22(2) (“The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definitional shall be interpreted in favour of the person being investigated, prosecuted or convicted.”).

²⁰ *United States v. Santos*, 553 U.S. 507, 513 (2008) (citing *United States v. Gradwell*, 243 U.S. 476, 485 (1917)). The Rule of Lenity is a common law doctrine described by Chief Justice Marshall in the 1820 case of *United States v. Wiltberger*, 18 U.S. 76 (1820).

Recently, in the case of *United States v. Santos*, Justice Scalia remarked regarding the Rule of Lenity:

This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead.²¹

Unfortunately, the application of the Rule of Lenity by lower courts has not been consistent. Therefore, the codification of this important doctrine is necessary to ensure its uniform application consistent with the doctrines that the government must sustain its burden of proof and defendants are presumed to be innocent. Importantly, codification of the Rule of Lenity alone is not sufficient to correct the problems emanating from overcriminalization. Rather, codification of the Rule of Lenity should be viewed only as an additional safeguard in combination with the above proposed solutions.

Additional Possible Solutions

In addition to the above three solutions to the issue of overcriminalization and its impact on statutory and regulatory offenses, I believe consideration should also be given to several other ideas. These include passage of a Congressional rule requiring every law that adds or modifies criminal offenses or penalties be subject to automatic referral to the relevant judiciary committee, enactment of a law that would require the federal government to produce a public report that assesses the justification, costs, and benefits of any new criminalization, and enactment of a law that would require Congress to approve any new or modified regulatory criminal offenses or penalties proposed by the Executive Branch.

Plea Bargaining

In closing, I would like to address one additional issue.

Today, almost 97% of criminal cases in the federal system are resolved through a plea of guilty. As the number, breadth, and sentencing severity of federal criminal statutes increased over the last century because of overcriminalization, prosecutors gained increased ability to create

The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.

See id.; see also Written Statement of Ellen S. Podgor, Before the House Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security, "Reining in Overcriminalization: Assessing the Problems and Proposing Solutions," (Sept. 28, 2010).

²¹ *United States v. Santos*, 553 U.S. 507 (2008).

overwhelming incentives for defendants to waive their constitutional right to a trial by jury and plead guilty. The power of the prosecution in this context has been made even greater by the presence of vague and esoteric regulatory offenses that require little or no *mens rea*. At the same time, the financial and emotional costs to defendants and their families of proceeding to trial have grown into often insurmountable obstacles.

Consider the examples already described in testimony before this Task Force.

In Mr. Lewis's testimony regarding allegations he committed a felony violation of the Clean Water Act related to a blocked sewage line at work, he offered the Task Force a clear glimpse at the options he believed he had after being accused of a crime. He stated, "I wound up pleading guilty to a federal misdemeanor because the prosecutors said that if I pled guilty, they wouldn't oppose probation. As a single dad, I was worried that if I went to prison there would be nobody to raise my children or care for my mother."²²

Ms. Kinder's testimony regarding allegations that she had committed a felony violation of the Lacey Act related to the harvesting of paddlefish from the wrong side of the Ohio river also included a discussion of plea bargaining.²³ She stated, "We felt, and we still feel now, that we did nothing wrong. But, on January 17, 2012, we made the painful and humiliating decision to plead guilty because we didn't think we had a choice. We were facing a maximum penalty of up to five years in prison, a \$250,000 fine, or both, on each of four counts... We couldn't suffer the emotional and financial trauma of a trial, and we didn't want to risk losing our freedom as well as our property." As a result, Ms. Kinder pleaded guilty to a misdemeanor.

In each of these cases, one is offered insights into the various issues that prevent individuals from challenging criminal allegations today and exercising their constitutional right to put the government to its burden of proof at trial. These challenges include steep sentencing differentials and penalties for proceeding to trial, along with significant financial and familial considerations.²⁴

As the examples offered by the witnesses before this committee demonstrate, we must recognize that a symbiotic relationship exists between overcriminalization and plea bargaining. Plea bargaining and overcriminalization have perpetuated each other. Plea bargaining has shielded overcriminalization from scrutiny. At the same time, overcriminalization has provided the laws

²² See Written Statement of Lawrence Lewis, Before the House Judiciary Committee, Task Force on Over-Criminalization, "Regulatory Crime: Identifying the Scope of the Problem," (October 30, 2013).

²³ See Written Statement of Joyce Kinder, Before the House Judiciary Committee, Task Force on Over-Criminalization, "Regulatory Crime: Identifying the Scope of the Problem," (October 30, 2013).

²⁴ "Sentencing differential" is 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. See Lucian E. Dervan, *The Surprising Lessons from Plea Bargaining in the Shadow of Terror*, 27 GA. ST. U. L. REV. 239, 245 (2011) ("Key to the success of prosecutors' use of increasing powers to create incentives that attracted defendants was their ability to structure plea agreements that included significant differences between the sentence one received in return for pleading guilty and the sentence one risked if he or she lost at trial.").

that allow prosecutors such wide discretion in selecting charges and creating significant incentives for defendants to plead guilty. This relationship has led us to our current state and created an environment in which we have jeopardized the accuracy of our criminal justice system in favor of speed and convenience.²⁵

And this is not only occurring in regulatory cases. It is occurring in all manner of criminal cases throughout the country.

Consider for example, the nationally publicized case of Brian Banks.²⁶ In 2002, Banks, who was sixteen years old at the time, was a top college football prospect. His world came crashing down, however, when he was wrongfully accused of sexual assault and kidnapping by an acquaintance. After his arrest, Banks was offered a choice. If he pleaded guilty, the government would recommend a three year sentence. Should he proceed to trial, he could risk receiving a sentence of 41 years to life. Banks, who some reports indicate was given only 10 minute to decide his fate, took the plea offer. After serving five years in prison, Banks was contacted by the accuser who admitted that she had lied about the incident. She allegedly refused to inform authorities of the falsity of her original allegations, however, because of a large financial settlement previously awarded to her in the case. After secretly taping the accuser's admission that the assault had not occurred, Banks was exonerated in 2012.

Consider also the case of Ada JoAnne Taylor.²⁷ In 1989, Taylor and five others were accused of killing a sixty-eight-year-old woman in Beatrice, Nebraska. The options offered to Taylor were starkly different. If she pleaded guilty and cooperated with prosecutors, she would be rewarded with a sentence of ten to forty years in prison. If, however, she proceeded to trial and was convicted, she would likely spend the rest of her life behind bars. The choice was difficult, but the incentives to admit guilt were enticing. 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. The alternative, a lifetime behind bars, was grim by comparison. After contemplating the options, Taylor pleaded guilty to aiding and abetting second-degree murder. In reality, however, she was innocent. 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.

Through academic study, we now know that the actions of Brian Banks, Ada JoAnne Taylor and many others are not anomalies. Factually and morally innocent people facing tough circumstances, such as penalties for proceeding to trial or a realization of the financial costs of challenging an indictment, will falsely confess to something they have not done. As an example, in a recent article written by Dr. Vanessa Edkins (Assistant Professor, Department of Psychology, Florida Institute of Technology) and myself and published in the *Journal of*

²⁵ See Lucian E. Dervan, *Over-Criminalization 2.0: The Role of Plea Bargaining*, 7 THE JOURNAL OF LAW, ECONOMICS, AND POLICY 645 (2011) (See Attachment Page).

²⁶ See Ashley Powers, *A 10-Year Nightmare Over Rape Conviction is Over*, L.A. TIMES, available at <http://articles.latimes.com/2012/may/25/local/la-me-rape-dismiss-20120525> (May 25, 2012).

²⁷ See *Know the Cases: Ada JoAnn Taylor*, THE INNOCENCE PROJECT, www.innocenceproject.org/Content/Ada_JoAnn_Taylor.php (last visited November 11, 2013).

Criminal Law and Criminology, we discovered that more than half of the innocent participants in our study were willing to falsely admit guilt in return for a perceived benefit.²⁸

As we now know the true power of plea bargaining from both actual criminal cases and from academic research, we must begin to examine the impact that overcriminalization has had on this most fundamental aspect of the American criminal justice system. I hope, therefore, that this Task Force and the Committee on the Judiciary will next turn its attention to modern day plea bargaining, one of the many outgrowths of the overcriminalization phenomenon.

Along with plea bargaining, there are many other issues currently being debated in the legal academy and legal profession that are appropriate for this Task Force's review. Those might include issues related to collateral consequences of conviction, mandatory minimum sentences, forfeiture provisions, and conspiracy laws. While those are not the topics of today's proceedings, I think they are topics ripe for investigation and analysis at future hearings considering overcriminalization and the state of the American criminal justice system.

Thank you for the opportunity to testify today. I welcome any questions the Task Force might have regarding my remarks.

²⁸ See Lucian E. Dervan and Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 JOURNAL OF CRIMINAL LAW & CRIMINOLOGY 1 (2013) (See Attachment Page).

Mr. SENSENBRENNER. Thank you, Professor. And I will recognize myself for 5 minutes to start the questions.

Both of you have alluded to the fact that we do not know how many regulations have criminal penalties attached to them. We tried to get an answer to that and asked the Congressional Research Service to provide the answer, and they said they did not have the staff to be able to give us a complete and accurate list. That is a problem.

So I have been trying to think of a way to get at this problem in a way that maybe the agencies would be forced to tell us what criminal statutes they enforce. And let me toss this question out to both of you. Say, for example, the Task Force recommended and the Congress enacted legislation that says that all criminal penalties, not civil, but criminal penalties would sunset in a period of time somewhere between 3 and 5 years, and then would have to be affirmatively reenacted by Congress, otherwise they would go away. This way each one of the agencies that does have criminal enforcement authority would come before the Judiciary Committee and explain all of what they would like to throw people in jail for doing, and it would be up to the Congress to make a determination of whether that regulatory criminal penalty would remain on the books or not.

Is this an effective way to go about it, and what do you see the pitfalls in doing this are?

Mr. BAKER. Well, I certainly support anything along that line, and I know without identifying the agency, I know that, in fact, an agency with broad rules was requested internally to do something to restrict those rules, and they declined.

I think what would be very interesting is to simply send requests to agencies and asking them not only what statutes they apply criminally, but have they been asked to, in fact, include a *mens rea*. Have they been asked to use less ambiguous language?

I remember hearing the general counsel of the Treasury talking about what he did after 9/11 when he drafted the rules on money laundering, and I have quoted it a number of times in law review articles. It was chilling.

Mr. SENSENBRENNER. The Chair will direct the staff to draft the appropriate oversight letters. You know what Dr. Baker suggests we ask them, and I agree with you.

Mr. Dervan?

Mr. DERVAN. I would just add that it makes a lot of sense, I think, to ask the agencies to identify those regulations which they believe are important to enforce and criminalize.

Mr. SENSENBRENNER. Well, if you will yield, do you not think we ought to find out all of the regulations that have criminal penalties rather than allowing the agencies to pick and choose?

Mr. DERVAN. I wholeheartedly agree—

Mr. SENSENBRENNER. Okay.

Mr. DERVAN [continuing]. Because on the one hand, if the agency itself is unable to identify all of the regulations at issue, that speaks volumes to the issues that this Task Force has reviewed. Secondly, to the extent that the agency believes that there are just a handful of regulations that they have actually been enforcing and that they believe are important, they will be able to identify those

for the Judiciary Committee and this Task Force's review. And then you can make that affirmative decision which of these will be criminalized. And again, as has been said in previous testimony, those are the types of decisions with regards to criminal sanctions that should be made by the Congress. And I believe that the procedure that you have identified is one by which you can place that decision before the Congress with adequate information to make a recommendation.

Mr. SENSENBRENNER. Thank you. I yield back the balance of my time.

The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman. I would just like to ask the witnesses whether or not civil fines can be effective as criminal sanctions in coercing compliance with regulations.

Mr. DERVAN. Well, I think that civil fines certainly have a place, and they can deter. Clearly in the United States we rely both on traditional criminal penalties in the sense of imprisonment in the individual cases as well as fines. And so, we have to consider in which cases are one or the other more appropriate. Obviously with regards to regulatory offenses, there are many arguments that a fine is sufficient to deter.

I think what is interesting here is if we go back to the issue of *mens rea* and the idea that we are going to impose a default *mens rea*, in those cases where the act of the individual is actually innocent, that is one where there would still be the option to impose a fine or an administrative sanction, and that would, one, punish in one way, and it would also deter. But interestingly, if we think about it with regards to recidivism, if that individual were to commit that offense again, there would be no argument essentially that they were unaware that this regulation, that this law existed. And so, therefore, we could satisfy the willful *mens rea*, and we could utilize more traditional punishments for a second offense. So I think there is a very strong place for the use of fines in this area.

Mr. SCOTT. Let me follow up on that point. The SEC has a no knowledge defense. How would that work, particularly in light of the possible willful ignorance of people not doing due diligence, should have known? How would that work?

Mr. DERVAN. Right. Well, the notion of willful ignorance is one that has been misinterpreted and misapplied by many courts, so it is one that should be looked at very carefully. Many courts have misapplied the idea of willful ignorance and said that it is essentially a negligence standard, but of course that is wrong and that is a very low *mens rea* requirement, and that is not the way that it is meant to be applied.

But the Supreme Court has spoken to this issue directly. In 2011 in the Global-Tech case, for instance, the Supreme Court indicated that even when utilizing a willfulness standard of *mens rea*, there can still be an argument of willful ignorance. And the standard is a high one, but it is one that applies, I think, very appropriately to the types of cases that you may be concerned about.

The standard is that the person had a subjective belief of a high probability that the fact existed, in this case, that there was a law prohibiting their conduct, and they took a deliberate act to avoid learning that fact. And in that case, the Supreme Court said the

deliberate act of avoidance essentially means that we can almost say they had actual knowledge of that crime. And so, I would say that that type of a case is one that would still be captured, even if we were to apply willfulness as the default *mens rea*.

Mr. SCOTT. Dr. Baker, you might want to comment on the other two questions. But is it feasible for each and every regulatory crime to be individually passed by Congress? Is that feasible, and what would that do to the timeliness of the prohibition?

Mr. BAKER. Well, since there are at least 300,000 regulations that carry criminal penalties, I cannot imagine that Congress, except in very large bills, would approve these things. But at least it would have the formality of coming through the Congress. We know that Congress does not read every bill that comes through, and Members would not necessarily read all these things. Hopefully, members of the staff would read it. But I think for separation of powers purposes and for the purpose of restraining the executive agency, it is important.

But I want to go back, if I could, to, I think, what was implied in part of your question, which Mr. Dervan answered. Are civil penalties as effective? That is an empirical question. There have been studies on it, and I am not prepared really to take sides on that. But I would say this: the idea that by criminalizing everything that you are through a deterrent effect changing behavior is false. What happens is that it loses the sting. It loses the sting. You can go to other countries where everything is criminal, and so people kind of laugh at it. And you want to save the criminal for the really criminal. Felony used to have a stigma. We have people on television who are convicted felons. It was only a speed bump. Being a convicted felon does not mean what it used to mean because we have so many of them, and we have so many crimes.

If you want the conviction to mean something, and to have some deterrent effect, it cannot be applicable to everything.

Mr. SCOTT. In mine safety, Mr. Chairman, we on the Education and Workforce Committee put in some civil fines because the choice of the regulation was either essentially a capital offense, criminal, or nothing.

Mr. BAKER. Yeah.

Mr. SCOTT. And so, no sanctions were being applied at all, and the ability of the civil fines gave some meaningful sanction.

Mr. SENSENBRENNER. The time of the gentleman has expired.

The gentleman from Alabama, Mr. Bachus.

Mr. BACHUS. Thank you. Is the microphone working? All right. We have discussed a default *mens rea* statute. Would you gentlemen maybe submit to the Task Force maybe how you would draft that?

Mr. BAKER. Wow. I have looked at a draft that came out of Heritage, and I sent a complimentary note to them because it had a lot of nuances in it that took a lot of work. I can tell you, I have drafted legislation, and legislation, I do not have to tell you, is difficult. But Federal criminal legislation is so much more difficult than State criminal legislation.

And that is why, although I did not support it, in the 1980's the Judiciary Committee considered a criminal code for the Federal Government, and that was not an easy thing to write. And it is just

very complicated because when you talk about *mens rea* and whether this willfulness or knowing is adequate, it is really impossible to say unless you look at the act of the particular crime, because the *mens rea* is meaningless without regard to the act and the consequence. And that is what the Model Penal Code did was break things down. But in Federal criminal law, it is complicated by jurisdictional things and other things. That is why you have such long statutes.

So I could not easily draft one for you. It would take a long time, and it would take a Committee basically.

Mr. BACHUS. And, you know, you are an expert, and of course we are dealing with—

Mr. BAKER. An expert is somebody from out of town with a briefcase. Yeah, I will accept that. [Laughter.]

Mr. BACHUS. Where would we go in town or out of town to find the right people to—

Mr. BAKER. Well, when we did the ABA task force, we had prosecutors, defense attorneys, Republicans, Democrats, liberals, conservatives, and we came to an amazing consensus. I think if you take technically competent people who are committed to the end, that they will come up with something that may have to be compromised here and there, but will basically do the job.

Mr. BACHUS. I agree, but, you know, this is long past due, and I—

Mr. BAKER. Oh, I know. I know. I wrote about this in 1984.

Mr. BACHUS. Yeah.

Mr. DERVAN. I will just echo Professor Baker's sentiments that it has to be done very carefully, obviously. And I agree also that in drafting such legislation, the more parties who are in the room to examine it from different perspectives, the more likely it is that any potential issues would be identified in the beginning and corrected before it was finalized.

Mr. BACHUS. Well, maybe what we could do is what you have suggested and the Chairman of the Task Force has agreed to do, and that is write every agency. And maybe we could write them and say, are there any criminal—I mean, what are you enforcing criminally, and what do you consider the elements of that crime, and is *mens rea* on each element of the crime necessary. And then maybe pass a statute that says if it is not on this list, you know, let the agencies come back. It is not a crime.

Mr. BAKER. Well, you might also ask them this. If it is a strict liability offense, when do they decide and whom do they decide to prosecute as opposed to those that they do not prosecute? What are the factors involved in a prosecution?

Mr. BACHUS. But I wonder if there is some stop gap definition that we could use, and if we do, it would have to include, I guess, every element of the crime. What is your thought on that?

Mr. DERVAN. Well, my position is that, to the extent that we are going to utilize a stop gap, that it should be willfulness because that is the highest level of *mens rea*. And we are talking about cases presumably where the *mens rea* has been left out inadvertently. So I think the idea is that we should use, for instance, the principles of the rule of lenity which say that we should give the defendant the benefit of the doubt there. Of course that does not

mean that in any specific case Congress could not make a decision to utilize a different *mens rea*, but that would have to be an affirmative decision.

Mr. BACHUS. What about considering codifying a mistake or an ignorance of law as a defense in a regulatory offense?

Mr. BAKER. Well, if you had a *mens rea*, it would not be as much of a problem. Certainly as, I think, I watched Professor Barkow testify last time, when you have so many regulations and if they have strict liability, it is very difficult to know what the law is. You know, the principal—

Mr. BACHUS. That is why I am saying if we as an interim measure, we just said—

Mr. BAKER. Well, what happens in certain industries, I mean, if you are in the financial world, if you go in your training is going to be such that you are put on notice. So the question is, are they issuing regulations in areas where people are not likely to be informed. That is the real problem, or is it—go ahead.

Mr. DERVAN. I was just going to add, if I may, one other thing to consider is that, of course, that is an affirmative defense, and it is a defense that would often be done at trial. And, of course, there are very few trials. As I mentioned, 97 percent of defendants in the Federal system are convicted through a plea of guilty. So I think that is something to consider if we are going to rely on a mistake of law defense.

Mr. BACHUS. And let me just say that—

Mr. SENSENBRENNER. The time of the—

Mr. BACHUS [continuing]. Maybe a jury charge or maybe we could come up with two jury charges that have to be given in these cases.

Mr. SENSENBRENNER. The time of the gentleman has expired.

The gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Chairman Sensenbrenner, I applaud you and my dear friend, Bobby Scott, from Virginia because this subject matter, this series of hearings are of such incredible importance. I think it is important, I agree with you, that we ought to find a way to continue because each hearing brings forward even more challenging questions than we have gotten to before.

I want to start off with something that I had on my mind because since 2008, we have had the Wall Street scandals, which billions, if not trillions, of dollars have been revealed to have been improperly and illegally taken out of the system. And I am wondering if you can start off, Doctor, with an overview of how that episode in American financial history plays into these series of hearings of Sensenbrenner and Scott.

Mr. BAKER. Well, that is an interesting question. When I looked back at this issue some years ago, I saw that until the early 80's, the public was not much concerned about so-called white-collar crime. And it began really with the savings and loan business, and then with the publicity of various events that have occurred since then, and that has grown. As people have had money in the stock market and they have been more affected by it, there has been more of a demand that something be done.

I mean, you also have to recognize that fundamentally our financial system runs on trust, and when people lose trust in the sys-

tem, it is damaging all the way around. But in the end, if there is widespread dishonesty throughout the financial system, which is really what you are suggesting, I suggest to you that there is ultimately not that much even the strongest enforcement is going to do. You have got a moral problem because remember, the criminal law there is really a backstop on the assumption that most people voluntarily obey the law. If we have a country in which large numbers of people are routinely disobeying the law, we have got serious problems, much more than that.

You have talked about widespread incarceration, and this is especially true in the large cities. As large as the incarceration is, though, the actual percentage of people doing it in the community is relatively small. If that percentage grows by any significant rate, we would have to have a police state.

The founders of this country believed that a republic could only function if people were virtuous; that is, that they voluntarily obey the law, that they are honest. The law cannot solve that problem ultimately. So that is not a complete answer to what you want, but I think it is the truth.

Mr. CONYERS. Well, it is a beginning. And, Professor Dervan, would you weigh in on that as well, please?

Mr. DERVAN. Well, I will relate it to an earlier financial scandal with regard to the issue of over-criminalization, and that is a paper that I have recently published looked at the response by Congress to the Enron collapse in the early 2000's and some of the legislation, including Sarbanes-Oxley, that resulted.

And as an example, there were contained in Enron the passage of a number of additional obstruction of justice laws, which were thought to sort of cure this issue. And I went back and looked to see if the creation of these new crimes, which I interpreted as essentially being overlapping of crimes that already existed, did, in fact, result in more prosecutions. Did they actually fill a gap that was there? And my research showed it did not.

What it did do is it gave prosecutors a broader statute to apply to essentially the same class of defendants that they were applying the law to be previously. And what does that do? Well, it brings up this issue of prosecutorial discretion, and that plays directly into plea bargaining and the idea that the broader a prosecutor's discretion is to select from a number of different laws, including some laws that carry mandatory minimum sentences, the more likely it is that they are able to convince someone to give up their constitutional right to trial and plead guilty. And I think that is exactly what we are seeing.

And so, I think that is perhaps an example where a response to a well-publicized white-collar crime results in over-criminalization, which does not necessarily achieve the results Congress had hoped, but does add to the relationship between plea bargaining and over-criminalization.

Mr. SENSENBRENNER. The time of the gentleman has expired.

The gentleman from North Carolina, Mr. Holding.

Mr. HOLDING. Thank you, Mr. Chairman. Both of you gentlemen have touched upon the topic of discretion. And it is my belief that discretion and who should be allowed discretion, whether a judge has the discretion or the prosecutor has the discretion, is the thing

that drives the political decisions, you know. Congress reacts to someone as perceived having abused their discretion.

So mandatory minimums or the sentencing guidelines, I mean, they are enacted by Congress because we believe that the judges have abused their discretion or they are not giving high enough sentences. Or in the current Administration under the new Attorney General guidelines, prosecutors are instructed to, you know, do not charge drug weights. You know, do not put the drug weights in your indictment because you do not want to trigger the mandatory minimums. You want to take the discretion away from prosecutors to trigger the mandatory minimums, thereby giving judges the discretion to give sentences that are not bound by the mandatory minimums.

So I want you all, starting with you, Dr. Baker, to delve into discretion and the role that discretion should play in the criminal process. You know, should the judges have more discretion? I think the founding fathers thought that judges ought to have ultimate discretion because they are appointed for life, you know. They should be free from any concerns other than just doing what is right and what is just. Or should prosecutors have more discretion, you know, when you have crimes where you do not have to have a *mens rea*, or it is in the discretion of the prosecutor whether to charge the crime or not.

So just delve into that a little bit more. I think it is interesting in how it drives the political process.

Mr. BAKER. Well, I am happy to. I mean, in the rule of law, which is a term used so often, there is by nature the role of the legislature, which is to legislate for the future. But somebody has to deal with the particular case, and those are what come into court. There will always be some discretion. The question is where it is placed. The whole business of the right to jury trial is that ultimately discretion is supposed to be in the jury, and the discretion both of the judge and of the prosecutor is supposed to be relatively limited.

Now, you know, I have worked with judges who did not want to go to trial, and I have worked with a judge who did not want plea bargaining, and they are two different extremes. And there is no way to completely control the courts because of what the system is. But there is the question of accountability, and one of the reasons to have this as the founders had it, the power in the local area, is because elected officials ultimately have to be accountable. U.S. attorneys are not accountable except maybe to the senator who was responsible for their appointment. They are not really terribly accountable to Washington and the DoJ. I mean, they do their own thing in many districts out there. So there is going to be discretion. What you want to do is you want to limit it, and you want to be able to check it in what they do.

And the other thing you have to think about is discretion is different in a big city than it is in a rural area. You know, a judge from the country once said to us, you know, in the country I could put a marijuana defendant in jail, and I could go look at him every day in jail, and I knew nothing was going to happen to him. Now, down here in the big city, my choice is do I put him in prison

where he is going to get a graduate degree in crime, or do I let him go. The two choices were not great. They were both bad.

So it is difficult from Washington to do anything that is not uniform. The basis of our Federal system is to allow different places to do different things tailored to their circumstances.

Mr. HOLDING. Thank you. Do you want to chime in for about 15 seconds before my time expires?

Mr. DERVAN. I will just add that discretion is an issue that differs depending on who we are talking about. I mean, discretion is an important thing for prosecutors to have. Prosecutors cannot charge everybody with every offense. There are too many offenses on the books obviously. So it is an important mechanism for them to utilize. It is important obviously for judges because they need to in sentencing decide between defendant A and defendant B, and there may be some very significant differences between those individuals that would require the utilization of that idea to distinguish between the two.

Where you run into problems is when we have so many laws that prosecutors can choose from. Their exercise of discretion is not so much as to which is the most appropriate statute, but rather if we are going to target this defendant, let us go find one that applies, and they will.

And there is a very interesting story told in a book that discusses this issue, and it says that in a particular U.S. attorney's office, they used to get together on Friday afternoons and they would pick someone. And the challenge was you would pick someone that would be very hard to indict presumably. And then the challenge was for the other assistant U.S. attorneys to think up what charge they could levy against them. And from my understanding of the story, they always came up with something.

Mr. SENSENBRENNER. Well, the time of the former U.S. attorney from North Carolina has expired.

And the Chair now recognizes the gentleman from New York, Mr. Jeffries.

Mr. JEFFRIES. Let me first just thank the distinguished Chairman Sensenbrenner and distinguished colleague in government, Representative Scott, for their tremendous leadership on this very important series of hearings that we have had, and thank the witnesses for their insightful observations.

Let me start with Professor Dervan. You mentioned something earlier in your testimony that was very disturbing for me to hear, though I believe it to be the case. And you indicated, I believe, that even the innocent will plead guilty in the system that we currently have right now. Now, that is a far departure from how the founders and others have conceived our system of justice where innocence is presumed until guilt is proven. And I believe it has often been stated that the guidepost for us historically has been that we as a country would rather see 10 guilty folks be let go rather than put one innocent person behind bars, stripping away their liberty.

How is it that we have arrived at a place where in your testimony you have concluded that even innocent individuals in the face of the weight of a prosecution and the loss of liberty have concluded that their best course of option is to plead guilty?

Mr. DERVAN. Well, it is something that happened gradually over time. If we go back and we look at the founding period, is fairly clear, particularly from appellate court decisions at the end of the 1800's, that the idea of creating strong incentives for individuals to plead guilty was thought to be unconstitutional. That line of cases slowly shifted in part because of pressure on criminal dockets and a realization by judges that they had to use plea bargaining to sort of push these cases through the system lest the entire criminal justice structure collapse overnight.

And so eventually in 1970, the Supreme Court in the Brady decision signs off on plea bargaining. And what begins to happen over time is that as this sort of becomes the mainstay in the way that we prosecute cases in the United States, prosecutors began to become very effective at creating very strong incentives for individuals to plead guilty. And when you combine those incentives, which are traditionally related to the sentence that the individual received and what we call either the sentencing differential or the trial penalty, in combination with the expense and impact on families and such by going to trial, you create a system in which there are very strong incentives to plead guilty and not go to trial.

And we have lots of examples of these. I mean, we heard from, you know, two individuals, Mr. Lewis and Ms. Kinder, who testified before this Committee previously that they felt very strongly that they had no choice but to plead guilty, either because they could not afford to risk going to prison or they could not afford to go to a trial. And we know from other cases, you know. One that has received a lot of attention in the last couple of years is the Brian Banks case. Brian Banks out in California was headed to a football career. He had been scouted by a number of schools. He was then accused of committing sexual assault, and by many accounts was given roughly 10 to 15 minutes to decide whether to take a deal. The deal was that if you plead guilty, you will get 3 years in prison, and if you do not, then we will go to trial, and you will be sentenced to 41 years to life.

Mr. JEFFRIES. Well, that is extreme. I appreciate your observations, but my time is limited, and so I want to follow up on that. Do we think, Dr. Baker, that looking at leveling the playing field in terms of the resources that prosecutors can bring to bear on advancing a case seem to be uneven as it relates to the ability for most defendants to effectively defend themselves at trial? And are there ways in which we can balance the playing field that would limit the coercive power of a prosecution?

Mr. BAKER. Well first of all, I do not like plea bargaining, one. Two, Congress has put in so many resources since the beginning of the '70s to the prosecutorial side, law enforcement generally, that it has tilted the balance, there is no question about it, whereas they were fairly well balanced when I was a law clerk watching the two sides in big cases, and we had a lot of big cases. They are no longer balanced. That is one thing.

But the big thing is the complexity because the complexity creates more lawyer time. More lawyer time creates more expense. You know, I told you about this judge I was working with where we did not do plea bargaining. We were trying cases like that, and we had a lower docket than anybody else, but it was in a simple

system. State court systems generally are a whole lot simpler than the Federal court system. If you can cut down on the time it takes to pick a jury and you can cut down on the jury charge, you can collapse the time it takes to try a case if you have got a judge who wants to try the case fast.

Mr. JEFFRIES. Thank you.

Mr. SENSENBRENNER. The time of the gentleman has expired.

The gentleman from Idaho, Mr. Labrador.

Mr. LABRADOR. Thank you, Mr. Chairman, thank you, gentlemen, for being here. I just want to follow up on something you just said, Dr. Baker. One of the concerns I have, and I am trying to do sentencing reform and all of those things. But there is an argument being made against sentencing reform that we have so many people in prison now, which I think is a bad thing. But some people think that the crime rate has actually gone down because the bad people are in prison. Even if they are in prison for, you know, low-level offenses, at least we have them incarcerated as opposed outside in the real world. What do you both think about that?

Mr. BAKER. Well, that was the theory when I was a prosecutor and DoJ was funding my State prosecution office. And basically, the attitude is so-called career offenders, 2 to 4 percent of the population, we are going to warehouse them and take them off the streets, and it will change things. We know the crime rate is down. I do not know exactly all of the reasons for it.

I think what States are finding, certainly Louisiana is finding, that a lot of these get tough on crime approaches have resulted in a prison population that the State cannot afford. And so, for purely economic reasons, you are finding the former hard-liners rethinking it in a lot of States. In Texas there is a big movement to rethink things there. I think that we are out of balance, and we need a balance, and we are not there.

Mr. LABRADOR. Mr. Dervan, do you have—

Mr. DERVAN. Well, I think it is worth looking at those numbers more specifically, too, and I think we have to consider how many of the individuals who are in prison today are in prison and have received very long sentences for first-time offenses. And so, that is very different from talking about career criminals who have been through the system many times and we have been unable to rehabilitate them.

When we put people in prison for decades at a time for a single offense, I think that contributes in a very significant way to a very large prison population, and I think it is hard to make an argument that we have definitively reduced crime because of the incarceration of those particular individuals.

Mr. LABRADOR. Okay, thank you. Dr. Baker, you talked about interlocutory appeals, and that is the first time I heard of that concept. I was a criminal defense attorney, so I am thinking, you know, number one, how long would a trial take if you are having all of the interlocutory appeals?

Mr. BAKER. You would have to draft it in such a way that it only applied to novel legal theories put forward by the prosecution. If it is a prosecution that does not involve a real debate over what the statute means, then it would not be permitted.

Mr. LABRADOR. Okay. Can you give an example of what you mean by that?

Mr. BAKER. Well, sure. I mean, I was involved in litigation over the DoJ's salary theory of mail fraud, which was just another end run to get around Supreme Court decisions that went the wrong way for them. And the district judge ruled our way, so it went up and we won. In the 6th Circuit, the defendant also won, but after a long trial and everything else.

Most people cannot afford to go through the trial and then take it on appeal. That is why these issues, the legal issues do not get up there, or when they get up there, the Court often is influenced by this is a bad actor, therefore, we cannot interpret the statute in a way that will benefit this bad actor, when, in fact, you are not there just to interpret it for this defendant. It is a question of how the statute should be interpreted.

Mr. LABRADOR. For everyone, yeah. Mr. Dervan, is there any reason why most regulatory crimes cannot be handled through the civil system? Why do we need a criminal regulatory system?

Mr. DERVAN. Well, I think there is little question that there is a particular stigma that comes from criminal offense, and that is true for both individuals and for corporations. So to refer to my previous statements, I think that fines and civil sanctions, administrative sanctions, can certainly deter, and they can certainly serve as punishment. But I think there are—

Mr. LABRADOR. So you talked about fines. What other kinds of civil sanctions would you recommend?

Mr. DERVAN. Well, I mean, there is a lot of sort of oversight that could be in place. There are debarment issues that could be in play, all of the types of things that create incentives for individuals to act within the confines of the law. But when we say, you know, are there any examples where he might want to have criminal liability in the regulatory setting, I mean, I think there are some regulations obviously, that are very important, for instance, health and safety issues, and I think that those may be areas to consider.

But again, those are decisions for Congress to make, not for regulators to decide. And so, Congress should be deciding which of these issues are so important that we need to criminalize them, and which can be best handled civilly. And as it stands today, those decisions are not really being made on an individual basis.

Mr. LABRADOR. Dr. Baker, can you address that issue for a while? You know, we can have criminal fines, but what else could we—

Mr. BAKER. Here is what my concern is. You cannot put a corporation in jail, okay? So if you want to attach stigma, fine. Figure out a way to do it. My concern is for the individual, because if corporations can be criminals and you do it on a strict liability basis in reality, then we tend to take that attitude toward individuals. I am concerned about the individuals.

I mean, big corporations can take care of themselves, and they do not really do a good job of taking care of themselves. That is their problem. The corporations that you might be concerned about are the little ones that are not really, I mean, they are corporate and formed for tax purposes, but they are really mom and pop op-

erations. They are really individuals. But then there are the individuals who are popped. They are the ones to be concerned with.

Mr. LABRADOR. Okay, thank you.

Mr. SENSENBRENNER. The gentleman's time has expired.

This concludes today's hearing, and I would like to thank all of the Members and witnesses for attending.

Without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

And without objection, the hearing is adjourned.

[Whereupon, at 11:50 a.m., the Task Force was adjourned.]

A P P E N D I X

MATERIAL SUBMITTED FOR THE HEARING RECORD

**Additional Material submitted by Lucian E. Dervan,
Assistant Professor of Law, Southern Illinois University School of Law**

CONGRESSIONAL TESTIMONY

Statement of Assistant Professor Lucian E. Dervan
Southern Illinois University School of Law

Before the House Committee on the Judiciary
Over-Criminalization Task Force,
United States House of Representatives

“Regulatory Crime: Solutions”

Delivered November 14, 2013

ATTACHMENTS

Lucian E. Dervan, *Over-Criminalization 2.0: The Symbiotic Relationship Between Plea Bargaining and Overcriminalization*, 7 *TILE JOURNAL OF LAW, ECONOMICS, AND POLICY* 645 (2011) (George Mason University School of Law) (solicited response to article by Prof. Larry Ribstein, Univ. of Illinois College of Law), also available at <http://ssrn.com/abstract=1916148>

Lucian E. Dervan and Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 *JOURNAL OF CRIMINAL LAW & CRIMINOLOGY* 1 (2013), also available at <http://ssrn.com/abstract=2071397>

2011]

645

OVERCRIMINALIZATION 2.0:
THE SYMBIOTIC RELATIONSHIP BETWEEN PLEA BARGAINING
AND OVERCRIMINALIZATION

*Lucian E. Dervan**

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

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

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

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

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

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

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

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

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

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

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

⁵ *Kumar*, 617 F.3d at 617.

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

⁷ Morvillo & Anello, *supra* note 4.

2011]

THE SYMBIOTIC RELATIONSHIP

647

pose of which was to support their false denials of the 35-day month practice. Kumar and others knew, and in fact intended, that the company's law firm would present these false justifications to the United States Attorney's Office, the SEC and the FBI so as to obstruct and impeded (sic) the government investigations.

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

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

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

⁸ Indictment, *supra* note 3.

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

¹⁰ Indictment, *supra* note 3.

¹¹ *Id.* at 38.

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

Defense lawyers and civil libertarians are expressing alarm at the government's aggressive use of obstruction of justice laws in its investigation of accounting improprieties at Computer Associates . . .

. . . .
 . . . The Computer Associate executives were never accused of lying directly to federal investigators or a grand jury. Their guilty pleas were based on the theory that in lying to Wachtell

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

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

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

Berenson, *supra* note 6.

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

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

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

Harkness & LaVerne, *supra* note 9.

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

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

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

¹⁶ *Kumar*, 617 F.3d at 617.

2011]

THE SYMBIOTIC RELATIONSHIP

649

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

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

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

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

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

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

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

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

²¹ *Id.* at 5, 19, 27.

²² *Id.* at 32.

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

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

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

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

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

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

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

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

²⁶ Alschuler, *supra* note 19, at 27.

²⁷ *Id.*

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

2011]

THE SYMBIOTIC RELATIONSHIP

651

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

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

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

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

²⁹ *Id.*

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

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

³² *Brady*, 397 U.S. at 743.

³³ See *id.*

³⁴ *Id.* at 743-44.

³⁵ *Id.* at 747, 751.

³⁶ *Id.* at 752.

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

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

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

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

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

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

³⁹ *Id.* at 758.

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

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

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

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

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

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

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

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

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

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

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

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

⁴⁴ *Id.* at 856-57.

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

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

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

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

⁴⁷ Flood, *supra* note 44, at A1.

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

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

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

Id.

2011]

THE SYMBIOTIC RELATIONSHIP

655

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

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

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

And so we wait.

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

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

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

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

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

⁵⁵ Flood & Pugh, *supra* note 50.

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

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

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103 | Issue 1

3

Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining as a Justice Problem

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CRIMINAL LAW

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

LUCIAN E. DERVAN*

AND

VANESSA A. EDKINS, Ph.D.**

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

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

TABLE OF CONTENTS

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

I. INTRODUCTION

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

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

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

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

⁴ See *id.*

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

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

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

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

⁶ See *id.*

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

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

⁹ See *id.*

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

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

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

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

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

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

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

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

¹³ See *infra* Part III.

¹⁴ See *infra* Part III.

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

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

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

¹⁸ See *infra* Part III.

¹⁹ See *infra* Part III.

²⁰ See *infra* Part III.

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

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

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

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

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

²³ See *infra* Part III.

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

²⁵ *Id.* at 752.

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

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

²⁸ See *id.*

²⁹ See *id.*

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

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

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

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

By the time of the plea allocation 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 allocation procedure is "close to being a new kind of 'pious fraud.'"

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

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

³² See *id.*

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

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

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

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

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

A. THE RISE OF PLEA BARGAINING

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

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

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

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

⁴⁰ See *id.* at 13.

⁴¹ See *id.* at 12.

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

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

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

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

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

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

The least surprise or influence causing [the defendant] to plead guilty when he had any defense at all should be sufficient cause to permit a change of the plea from guilty to not guilty.

...

No sort of pressure can be permitted to bring the party to forego any right or advantage however slight. The law will not suffer the least weight to be put in the scale against him.

[W]hen there is reason to believe that the plea has been entered through inadvertence . . . and mainly from the hope that the punishment to which the accused would otherwise be exposed may thereby be mitigated, the Court should be indulgent in permitting the plea to be withdrawn.

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

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

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

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

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

⁴⁸ *Id.* (citations omitted).

⁴⁹ See *id.* at 24–25.

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

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

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

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

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

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

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

Id. at 645–46.

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

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

⁵⁵ *See id.*

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

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

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

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

⁵⁷ See *id.* at 27.

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

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

⁶⁰ Alschuler, *supra* note 36, at 27.

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

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

⁶³ See *id.*

⁶⁴ See *id.* at 280.

⁶⁵ *Id.* at 281.

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

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

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

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

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

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

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

⁷⁰ See *id.*

⁷¹ *Id.*

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

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

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

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

Id.

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

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

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

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

Jackson, 390 U.S. at 570–71.

⁷⁵ See *Brady*, 397 U.S. at 743.

⁷⁶ See *id.* at 743–44.

⁷⁷ See *id.* at 744.

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

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

describe the type of bargains that would be acceptable⁸⁰:

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

The Court continued:

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

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

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

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

⁸⁰ See *Brady*, 397 U.S. at 750–51.

⁸¹ *Id.*

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

⁸³ See *Brady*, 397 U.S. at 750–55.

⁸⁴ *Id.* at 750.

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

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

Reports_and_Sourcebooks/2011/FigureC.pdf.

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

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

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

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

B. PLEA BARGAINING'S INNOCENCE DEBATE

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

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

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

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

Brereton & Casper, *supra*, at 89.

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

⁹⁰ See Indictment, *United States v. Fastow*, Cr.No. H-03- (S.D. Tex. Apr. 30, 2003), available at <http://l1.findlaw.com/news.findlaw.com/ldocs/docs/enron/usleafstw43003ind.pdf>; see also Michelle S. Jacobs, *Loyalty's Reward—A Felony Conviction: Recent Prosecutions of High-Status Female Offenders*, 33 *FORDHAM URB. L.J.* 843 (2006); Mary Flood, *Lea Fastow in Plea-Bargain Talks*, *HOUS. CHRON.*, Nov. 7, 2003, at 1A.

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

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

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

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

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

Some argue that plea bargaining’s innocence problem is significant

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

We would have serious doubts about this case if the encouragement of guilty pleas by offers of leniency substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves. But our view is to the contrary and is based on our expectations that courts will satisfy themselves that pleas of guilty are voluntarily and intelligently made by competent defendants with adequate advice of counsel and that there is nothing to question the accuracy and reliability of the defendants' admissions that they committed the crimes with which they are charged.¹⁰⁵

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

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

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

Bowers, *supra*, at 1165.

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

¹⁰⁴ See *id.*

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

¹⁰⁶ *Id.* at 758.

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

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

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

The need by both sides of the innocence debate to gather more data regarding the extent to which innocent defendants might be vulnerable to the persuasive power of plea bargaining has led to numerous studies.¹¹⁰ Several legal scholars have conducted examinations of exoneration statistics in an effort to identify examples where innocent defendants were convicted by guilty pleas.¹¹¹ Professor Samuel Gross conducted one of the most comprehensive studies in 2005.¹¹² While Professor Gross's research explored exonerations in the United States broadly, he also specifically discussed plea bargaining's innocence problem.¹¹³ His study stated that twenty of 340 exonerees had pleaded guilty.¹¹⁴ Although Professor Gross found a relatively low number among those exonerated who falsely pleaded guilty, there are significant limitations to using this study to disprove the innocence problem surrounding guilty pleas.¹¹⁵ Upon closer examination of this and other exoneration studies, one realizes that while exoneration data is vital to our understanding of wrongful convictions generally, it cannot accurately or definitively explain how likely innocent defendants are to

¹¹⁰ See *infra* note 111.

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

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

¹¹³ See *id.* at 524, 536.

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

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

plead guilty.¹¹⁶

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

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

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

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

¹¹⁹ The Federal Bureau of Investigation crime statistics indicate that in 2010 there were 1,246,248 violent crimes and 9,082,887 property crimes in the United States. See U.S. DEPT. OF JUSTICE, F.B.I., *CRIME IN THE UNITED STATES*, at tbl.1 (2010), available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.2010/tables/10tb101.xls>. Of this number, murder accounted for 1.2% and forcible rape accounted for 6.8% of the violent crimes. See *id.* Further, in 2011, the National Association of Criminal Defense Attorneys released a report regarding misdemeanor cases in Florida. See SMITH & MADDAN, *supra* note 67. The report noted that nearly a half-million misdemeanor cases are filed in Florida each year, and over 70% of those cases are resolved with a guilty plea at arraignment. See *id.* at 10.

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

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

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

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

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

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

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

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

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

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

¹²⁶ See *supra* note 125.

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

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

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

Id.

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

¹³⁰ See *id.* at 1524–26.

¹³¹ See *id.*

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

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

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

III. LABORATORY EVIDENCE OF PLEA BARGAINING'S INNOCENCE PROBLEM

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

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

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

¹³⁵ *Id.* at 1526.

¹³⁶ *See id.*

¹³⁷ *See id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

Among other wrongful acts, the Government, one, unreasonably demanded that Dr. Samueli submit to as many as 30 grueling interrogations by the lead prosecutor.

Two, falsely stated and improperly leaked to the media that Dr. Samueli was not cooperating in the Government's investigation.

Three, improperly pressured Broadcom to terminate Dr. Samueli's employment and remove him from the board.

Four, misled Dr. Samueli into believing that the lead prosecutor would be replaced because of misconduct.

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

And six, crafted an unconscionable plea agreement pursuant to which Dr. Samueli would plead guilty to a crime he did not commit and pay a ridiculous sum of \$12 million to the United States Treasury.

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

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

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

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

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

¹⁵⁰ See *id.* at 481.

¹⁵¹ See *id.* at 482 (“In the current paradigm, participants were accused of breaking an experimental rule, an act that was later characterized as ‘cheating.’”).

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

¹⁵³ See *id.* at 482.

¹⁵⁴ See *id.*

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

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

¹⁵⁵ See *id.*

¹⁵⁶ See *id.* at 483.

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

¹⁵⁸ See *id.* at 484.

¹⁵⁹ See *id.*

Condition	True Confessions	False Confessions
<i>No Tactic</i>	46%	6%

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

A. STUDY METHODOLOGY—CONFRONTING A DEVIL'S BARGAIN

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

<i>Deal</i>	72%	14%
<i>Minimization</i>	81%	18%
<i>Minimization + Deal</i>	87%	43%

Id. at tbl.1.

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

¹⁶¹ See *id.*

¹⁶² See *id.*

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

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

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

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

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

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

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

Id.

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

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

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

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

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

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

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

Do not speak to the participant and do not respond if they ask for assistance.

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

Id.

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

¹⁷¹ *Id.* at 11.

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

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

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

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

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

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

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

two alternative options if the plea offer was rejected.

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

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

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

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

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

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

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

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

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

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

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

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

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

1. *Pleading Rates for Guilty and Innocent Students*

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

Figure 1
Number and Percentage of Students by Condition (Guilty or Innocent) Rejecting and Accepting the Plea Offer

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

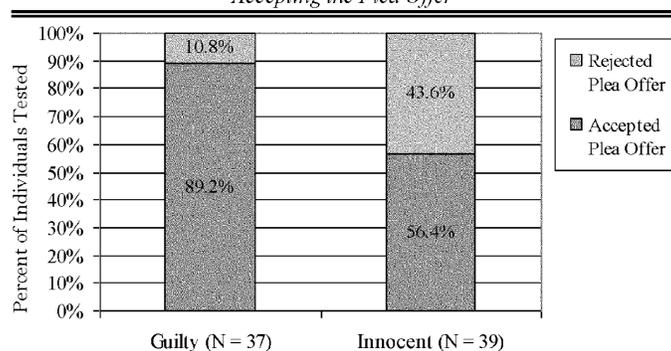
processes of criminal defendants faced with plea-bargaining decisions. See Russano et al., *supra* note 149, at 483 (discussing the lack of a definitive sentence for those who failed to accept the deal).

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

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

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

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



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

¹⁸² See *id.* at 13–14.

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

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

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

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

Figure 3
Percentage of Individuals by Condition (Guilty or Innocent)
Accepting the Plea Offer in the Study and in Professor Covey’s Studies on
Mass Exonerations

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

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

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

¹⁸⁷ See *id.* at 34.

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

Id.

¹⁸⁸ See *id.*

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

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

innocence problem affected more than just an isolated few.¹⁹¹

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

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

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

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

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

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

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

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

participants sought a punishment that would not require the deprivation of direct future liberty interests.¹⁹⁶ Further research is necessary in this area to fully understand these motivations, but one key trend is worth noting at this juncture. The study participants' actions appear to be directly mimicking a phenomenon that has drawn much debate and concern in recent years¹⁹⁷: the students appear to have been selecting "probation" and immediate release rather than risking further "incarceration" through forced participation in a trial and, if found guilty, "confinement" in an ethics course or seminar.¹⁹⁸ In essence, the study participants simply wanted to go home.¹⁹⁹ This study suggests, therefore, that one needs to be concerned not only that significant sentencing differentials might lead felony defendants to falsely condemn themselves through plea bargaining, but also that misdemeanor defendants might be pleading guilty based on factors wholly distinct from their actual factual guilt.²⁰⁰

2. *The Impact of Sentencing Differentials*

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

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

Bowers, *supra* note 102, at 1144.

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

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

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

¹⁹⁹ See *id.*

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

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

²⁰² See *id.*

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

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

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

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

²⁰³ See *id.*

²⁰⁴ See *id.*

²⁰⁵ See *id.*

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

interrogation tactics.²⁰⁷ When Russano's interrogators did not use any tactics to elicit a confession, the diagnosticity of the interrogation process was 7.67.²⁰⁸ By comparison, when Russano's interrogators applied two interrogation tactics, the number of false confessions jumped to almost 50% and the diagnosticity of the process dropped to 2.02.²⁰⁹ This drop in diagnosticity meant that as Russano applied various interrogation tactics, the ability of the interrogation procedure to identify only guilty subjects diminished.²¹⁰ Taken to the extreme, if one were to torture a suspect during interrogation, one would anticipate a diagnosticity of 1.0, which would indicate that the process was just as likely to capture innocent as guilty defendants.²¹¹

In our study, the diagnosticity of the plea-bargaining process utilized was extremely low, a mere 1.54.²¹² That the diagnosticity of our plea-bargaining process was considerably lower than the diagnosticity of Russano's combined interrogation tactics is significant.²¹³ First, it is important to note that plea bargaining's diagnosticity in this study was strikingly low, despite the fact that our process did not threaten actual prison time or deprivations of significant liberty interests as happens every day in the actual criminal justice system.²¹⁴ Further, this diagnosticity result indicates that innocent defendants may be more vulnerable to coercion in the plea-bargaining phase of their proceedings than even during a police interrogation. While much focus has been given to increasing constitutional protections during police interrogations over the last half-century, perhaps the Supreme Court should begin focusing more attention on creating protections within the plea-bargaining process.²¹⁵

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

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

²⁰⁹ See *id.*

²¹⁰ See *id.*

²¹¹ See *id.*

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

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

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

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

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

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

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

²¹⁶ See Eddins & Dervan, *supra* note 163, at 3, 5.

²¹⁷ See *id.*

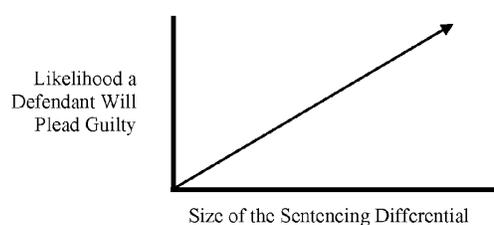
²¹⁸ See Dervan, *supra* note 34, at 475 (discussing a similar phenomenon with regard to plea-bargaining rates, which are now in excess of 96% at the federal level).

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

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

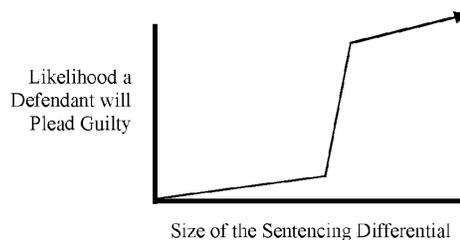
²²¹ See Dervan, *supra* note 88, at 282–83; Yin, *supra* note 89, at 443.

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



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

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



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

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

IV. THE CONSTITUTIONALITY OF THE INNOCENT DEFENDANT'S DILEMMA

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

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

²²⁴ Gifford, *supra* note 223, at 81.

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

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

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

²²⁶ See *id.* at 26–27.

²²⁷ See *id.* at 27.

²²⁸ See *id.* at 28.

²²⁹ See *id.* at 29.

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

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

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

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

²³⁴ See *id.* at A12.

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

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

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

²³⁶ See Robertson, *supra* note 232, at 112.

²³⁷ See *id.*

²³⁸ See *id.*

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

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

Id.

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

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

before their murder.²⁴²

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

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

²⁴² *See id.*

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

²⁴⁴ *See id.*

²⁴⁵ *See id.*

²⁴⁶ *See id.*

²⁴⁷ *See id.*

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

²⁴⁹ *See id.*

²⁵⁰ *Id.*

²⁵¹ *See id.*

²⁵² *See id.*

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

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

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

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

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

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

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

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

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

²⁵⁶ *Id.* at 757–58 (emphasis added).

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

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

Id.

²⁵⁸ See *id.* at 88–89.

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

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

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

²⁶⁰ *Alford*, 400 U.S. at 38 n.10.

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

²⁶² *Id.* at 363.

²⁶³ *Id.*

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

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