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

Before the Subcommittee on Crime, Terrorism, and Homeland Security,
Judiciary Committee,
United States House of Representatives

"Hearing on Stolen or Counterfeit Goods Legislation"

March 28, 2012

CONGRESSIONAL TESTIMONY

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Thank you Mr. Chairman and members of the Subcommittee.

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 regarding the important work of this Subcommittee in seeking to eradicate the significant issue of counterfeit drugs and large-scale medical product theft.

As representatives from communities around our nation can attest, these offenses pose substantial risks to the public. It is, therefore, a vital undertaking to explore ways in which to reduce the prevalence of these crimes, and I am honored for the opportunity to lend my expertise to this endeavor.

The *Safe Doses Act* (H.R. 4223) and the *Counterfeit Drug Penalty Enhancement Act of 2011* (H.R. 3668) are offered as a means to address the epidemic of counterfeit drugs and large-scale medical product theft by significantly increasing penalties in hopes that these new provisions will "deter and punish such offenses, and appropriately account for the actual harm to the public...."

In my limited time today, I would like to focus my statement on several specific issues in hopes that my insights might further assist this Subcommittee in achieving its goals.[2]

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[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] I would also encourage the Subcommittee to examine the draft language in section four of the *Safe Doses Act*, which proposes to increase the applicable statutory maximum sentences for various federal offenses if the offense involves a "pre-retail medical product." Because this provision creates a new offense with an increased statutory maximum, it will implicate the requirements established in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), regarding the distinction between elements of an offense and sentencing factors. Further, I would encourage the Subcommittee to consider whether it is prudent to create such a special offense under 18

First, does the proposed criminal statute targeting *Theft of Medical Products* (proposed 18 U.S.C. section 670) in the *Safe Doses Act* include adequate *mens rea*?

A cornerstone of the American criminal justice system is *mens rea* or the idea that to be convicted of a crime one must have acted with a guilty mind. In many instances, however, new legislation fails to require adequate *mens rea* for conviction. The result is that innocent conduct may become criminalized.[3]

In reviewing the proposed language in the *Theft of Medical Products* provision of the *Safe Doses Act*, I believe the statute should be amended to more precisely incorporate a *mens rea* requirement. For example, the proposed language in section (a)(1) of the statute would merely require an individual to "carr[y] away... a pre-retail medical product" for conviction.[4] The lack of a specific *mens rea* requirement in this provision means that innocent conduct, including the unknowing carrying of pre-retail medical products by a postal official, could result in criminal sanctions. To better clarify the scope and intent of this and other provisions in the legislation, the statute should require that the individual know both that they are engaged in an unlawful theft and that the materials taken are pre-retail medical products. Through such amendments to the proposed legislation, the statutory language might better clarify the type of conduct being prohibited and might more effectively protect innocent behavior from overcriminalization.[5]

Second, does increasing the severity of sentences for criminal conduct result in general deterrence of those who might engage in this criminal behavior?

Both the *Safe Doses Act* and the *Counterfeit Drug Penalty Enhancement Act of 2011* contain significantly increased penalties. The *Safe Doses Act* contains increased statutory maximums for six existing federal statutes if the violation involves a "pre-retail medical product."[6] Similarly,

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U.S.C. section 1957 (Money Laundering), particularly given that no other such special offense exists in this general money laundering statute and prosecutors already have the ability to charge money laundering in addition to any underlying predicate offenses. Finally, I would encourage the Subcommittee to consider whether these types of offenses are appropriately added to the list of offenses for which mandatory restitution is prescribed under 18 U.S.C. section 3663A.

[3] *See* Brian W. Walsh and Tiffany M. Joslyn, *Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law* (2011).

[4] While the term "carry-away" could be interpreted as a term-of-art that embodies the common law requirements of larceny, such vagueness is not necessary and is easily resolved through the additional of specific *mens rea* provisions.

[5] "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.

the *Counterfeit Drug Penalty Enhancement Act of 2011* contains a proposed twofold increase in the applicable statutory maximum (from imprisonment for not more than 10 years to imprisonment for not more than 20 years) for individuals convicted of trafficking in counterfeit goods if the violation involves a drug as defined in the Federal Food, Drug, and Cosmetic Act.

Studies regarding the impact of increasing the severity of sentences for criminal offenses, particularly where the offense already carries a significant sentence, indicate that such policies, though well intentioned and meant to create a strong deterrent effect, unfortunately do not have the desired impact.

For instance, a 1999 comprehensive review of research regarding the deterrent effect of increases in sentences by the *Institute of Criminology at Cambridge University* found that there was no basis for "inferring that increasing the severity of sentences generally is capable of enhancing deterrent effects."[7] Interestingly, the review noted that studies indicate that the likelihood of apprehension and conviction does deter criminal behavior, a proposition supported by the research of Professors Daniel Nagin and Greg Pogarsky, leaders in the field of deterrence research.[8] As indicated by these studies, increased focus on and funding of the investigation and prosecution of certain classes of offenses may be more effective at curbing such criminal behavior than increasing the statutory maximums for such offenses.

The third issue I would like to address is whether increasing the statutory maximum penalty for existing offenses results in significantly lengthier sentences for individuals subsequently convicted of the crime?

This is an area in which I have conducted research directly on point. In 2007, I published an article examining the impact of the fourfold statutory maximum increase for mail and wire fraud

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[6] The following are the federal statutes the legislation proposes to amend by increasing the applicable statutory maximum if the offense of conviction involves a "pre-retail medical product": Interstate of Foreign Shipments by Carrier (18 U.S.C. section 659); Travel Act Violations (18 U.S.C. section 1952); Money Laundering (18 U.S.C. section 1957(b)(1)); Breaking or Entering Carrier Facilities (18 U.S.C. section 2117); Transportation of Stolen Goods and Related Offenses (18 U.S.C. section 2314); Sale or Receipt of Stolen Goods and Related Offenses (18 U.S.C. section 2315).

[7] *See* Andrew von Hirsh, Anthony Bottoms, Elizabeth Burney, and P.O. Wikstrom, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research*, Oxford: Hart Publishing (1999).

[8] Daniel Nagin and Greg Pogarsky, *Integrating Celerity, Impulsivity, and Extralegal Sanction Threats into a Model of General Deterrence: Theory and Evidence*, Criminology, 39(4) (2001) ("[P]unishment certainty is far more consistently found to deter crime than punishment severity....").

found in the *Sarbanes-Oxley Act of 2002*.[9] The study suggests that changing the statutory maximum penalty for mail and wire fraud convictions from five years to twenty years in prison had little significant impact on individuals' sentences. For instance, in 2001 and 2002, the median sentences for fraud were ten months and eight months in prison, respectively. Since the passage of *Sarbanes-Oxley*, the median sentence has fluctuated between six and twelve months in prison and currently stands at ten months. While a more significant increase was seen with regard to the mean sentence for mail and wire fraud following the passage of *Sarbanes-Oxley*, this was likely not the result of increases to the statutory maximum. Rather, I hypothesize that much of the increase in the mean sentences is attributable to a skewing effect resulting from a handful of defendants who engaged in large frauds and who received enormous sentences.

The results of this research indicate that focus on increasing statutory maximums in an effort to significantly increase the punishment for specific offenses is often ineffective. As discussed more fully in my article, this is due, at least in part, to the utilization of such new criminal statutes and enhanced sentencing provisions by prosecutors during plea bargaining. Often, instead of using these new tools to secure increased sentences, as intended by the legislature, prosecutors use such provisions to create significant and powerful incentives for defendants to accept plea offers. The result is that those defendants who proceed to trial risk facing the full force of the new provisions, even when such punishment is disproportionate to their harm, while those defendants who accept the government's advances receive deals that carry sentences much unchanged by the new legislative enactments.

Even the United State Supreme Court has recognized the role of increased statutory maximums in our current criminal justice system. In fact, just last week, the majority opinion in *Lafler v. Cooper* cited to a *Stanford Law Review* article which states, "[Defendants] who do take their case to trial and lose receive longer sentences than even Congress or the prosecutor might think appropriate, because the longer sentences exist on the books largely for bargaining purposes."[10]

Given the evidence that increasing sentencing severity is often ineffective at deterring criminality generally and the evidence that increasing statutory maximum sentences does not translate into significantly increased sentences for convicted individuals, perhaps consideration should be given to other mechanisms by which to achieve the goal of eradicating counterfeit drugs and large-scale medical product theft.

One proposition that is supported by research in the field of criminal justice is to increase enforcement actions against those engaging in these offenses, rather than increasing the number of federal statutes or the length of applicable sentencing provisions. As I described previously,

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[9] *See* Lucian E. Dervan, *Plea Bargaining's Survival: Financial Crimes Plea Bargaining, A Continued Triumph in a Post-Enron World*, 60 OKLAHOMA LAW REVIEW 451 (2007) (*Attached*). The Sarbanes-Oxley Act of 2002 increased the statutory maximum punishment for from five to twenty years in prison.

[10] Missouri v. Frye, 566 U.S. ___ (2012) (citing Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 1034 92006)).

studies indicate that increasing the likelihood of apprehension and conviction can have a significant deterrent effect.

In preparing for today's hearing, I examined a list of recent major incidents of medical product cargo theft. In case after case, the issue was not an inability to charge those responsible because of the lack of an applicable federal statute. Further, it was not the lack of twenty-year statutory maximum punishments that created a roadblock to adequate enforcement or proportional punishment. Rather, in case after case, the description of the offense ended with the statement, "No arrests have been made."

Further, additional mechanisms by which to advance the mission of this Subcommittee might include requiring manufacturers and distributors of pre-retail medical products to increase security at storage facilities and during the transportation of these materials. It might also be advisable to consider ways in which pre-retail medical products might be better tracked during manufacture and transportation. Such a tracking system might better enable law enforcement and the industry to identify compromised materials. Further, such a system might allow for more accurate and swifter notification to the public when a breach has occurred, thus empowering consumers with information to better protect themselves.

I commend the Subcommittee for its focus on this issue and encourage it to consider what course of action might offer the greatest chance of success in reaching the common goal of protecting American citizens from counterfeit drugs and large-scale medical product theft.

In closing, I would like to address one additional issue. While creating additional overlapping federal criminal statutes and significantly increasing the statutory maximum penalties for offenses related to prescription drug offenses may not result in greater deterrence of potential offenders or significantly increase sentences for those convicted, such legislation will perpetuate the phenomenon of overcriminalization and with it the continued deterioration of our constitutionally protected right to trial by jury.

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 continue to increase through overcriminalization, prosecutors gain increased ability to create overwhelming incentives for defendants to waive their constitutional right to a trial by jury and plead guilty. As my research has shown, a symbiotic relationship exists between overcriminalization and plea bargaining. This relationship has lead 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.[11] In my most recent article, written in collaboration with Dr. Vanessa Edkins (Assistant Professor, Department of Psychology, Florida Institute of Technology), we discovered that more than half of innocent defendants will falsely admit guilt in return for a perceived benefit.[12] As overcriminalization continues to create the incentives that make plea bargaining so

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

prevalent and powerful, we must ask ourselves as a country what constitutional price is being paid when, even though we act with good and noble intentions, we create yet another law or increase yet another statutory maximum where is it not absolutely necessity to achieve our goals.

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

[12] *See* Lucian E. Dervan and Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, Work in Progress (2012) (*Attached*).

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ATTACHMENTS

Lucian E. Dervan, *Plea Bargaining's Survival: Financial Crimes Plea Bargaining, A Continued Triumph in a Post-Enron World*, 60 OKLAHOMA LAW REVIEW 451 (2007).

Lucian E. Dervan, *Over-Criminalization 2.0: The Role of Plea Bargaining*, 7 THE 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).

Lucian E. Dervan and Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, Work in Progress (2012).

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PLEA BARGAINING'S SURVIVAL: FINANCIAL CRIMES PLEA BARGAINING, A CONTINUED TRIUMPH IN A POST-ENRON WORLD

LUCIAN E. DERVAN*

Introduction

Occasionally, an event occurs which seems to mark the beginning of a new era, an irreversible shift in both perception and focus that changes the way we view the past and the present. When, in October of 2001, Enron collapsed as a result of corporate accounting fraud, many believed just such a day had arrived, and the quick succession of corporate scandals that followed only served to reinforce this belief.[1] WorldCom, Adelphia, Symbol Technologies, Dynegy, HealthSouth, and others combined to create a blinding image of greed

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1. *See* Kathleen F. Brickey, *Enron's Legacy*, 8 BUFF. CRIM. L. REV. 221 (2004) (describing the various corporate scandals following Enron); Michael A. Perino, *Enron's Legislative Aftermath: Some Reflections on the Deterrence Aspects of the Sarbanes-Oxley Act of 2002*, 76 ST. JOHN'S L. REV. 671, 671 (2002) ("Since Enron's implosion, an astounding string of accounting scandals have stunned the securities markets.").

and corruption that drew America into yet another war, a war on financial crimes.[2]

The government wasted no time responding to growing angst amongst investors and outrage throughout the country as thousands lost their life savings. The President, Congress, Department of Justice (DOJ), and United States Sentencing Commission (Sentencing Commission) all acted to "get tough" on corporate criminals.[3] Predominantly these government institutions focused on two reforms aimed at restoring confidence in the American financial system: increasing the number of criminal offenses available to prosecutors to fight fraud and increasing the prison sentences for those convicted. With these new tools, the government assured America that enforcement would increase and punishments would grow steadily more severe. So convincing were such proclamations, some in the legal community actually became concerned that increasing enforcement and lengthening sentences would lead to decreasing rates of plea bargaining. Seven years later, one must wonder whether all the predictions have become reality. It is certainly true that reforms in the shape of statutes and policies flowed from all sectors of American government following Enron. But such efforts mean little if the machine of federal prosecution did not change in response.

A review of statistics tracking government prosecutions, prison sentences, and rates of plea bargaining reveals that not only has the government's focus on financial crimes not increased, but prison sentences for fraud have remained stagnant. Furthermore, the fears of those who believed plea bargaining was in jeopardy were unfounded. Plea bargaining continues to succeed in over 95% of federal cases. Why then did the predicted revolution in financial crimes prosecution not take shape, and why did so much effort die in the trenches of this American war? The answer, it appears, may be plea bargaining itself.

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2. *See* President George W. Bush, Remarks at the Presentation of the Malcolm Baldrige National Quality Awards, 1 PUB. PAPERS 356 (Mar. 7, 2002), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=2002_public_papers_vol1_misc&age=356position=all.

> XXYou know, we're passing through extraordinary times here in America. We fight a war—a real war—to protect our homeland by bringing terrorists to justice. . . .
>
> XXAmerica is [also] ushering in a responsibility era, a culture regaining a sense of personal responsibility, where each of us understands we're responsible for the decisions we make in life. And this new culture must include a renewed sense of corporate responsibility.

Id. at 358.

3. Stephanos Bibas, *White-Collar Plea Bargaining and Sentencing After* Booker, 47 WM. & MARY L. REV. 721, 721 (2005) ("As the media exposed ever more corporate corruption and shady dealing, lawmakers competed to prove their toughness on crime by raising sentences.").

While prosecutors could have chosen to use new statutes and amendments to the United States Sentencing Guidelines (Sentencing Guidelines) passed in the wake of Enron to increase prosecutions and sentences, they did not. Instead, prosecutors are using their new tools to encourage defendants to accept plea agreements that include sentences similar to those offered before 2001, while simultaneously threatening to use these same powers to secure astounding sentences if defendants force a trial. The result is that the promises of post-Enron reforms aimed at financial criminals were unfulfilled and served only to reinforce plea bargaining's triumph.

Part I of this article examines the changes implemented by the government following the corporate scandals of 2001, many of which were directed at all manner of financial crimes, not just catastrophic corporate fraud. Part II discusses the proclamations made by the government regarding the success of the war on financial crimes and the predictions by the public, scholars, and the defense bar regarding the impact of post-Enron reforms. Part III analyzes Sentencing Commission statistics from 1995 through 2006 and reveals that since Enron, the government's focus on financial crimes has actually decreased, prison sentences for those convicted of fraud have remained stagnant, and the percentage of federal cases resulting in plea agreements has remained above 94.5%. Finally, Part IV postulates that, after all the government did in response to corporate accounting scandals, little has actually changed because prosecutors are using post-Enron reforms to encourage defendants to enter into plea agreements.

I. A Quick Road to the Front

On July 9, 2002, President Bush created the Corporate Fraud Task Force, an organization of government agencies formed to "investigate and prosecute significant financial crimes, recover the proceeds of such crimes, and ensure just and effective punishment of those who perpetrate financial crimes."[4] In a speech describing the new Task Force, the President summarized the war that was taking place on Wall Street and in board rooms across the country.

> Today, by executive order, I create a new Corporate Fraud Task Force, headed by the Deputy Attorney General, which will target major accounting fraud and other criminal activity in corporate finance. The task force will function as a financial crimes SWAT

4. Exec. Order No. 13,271, 3 C.F.R. 245 (2003), *reprinted as amended in* 28 U.S.C. § 509 (Supp. IV 2004).

> team, overseeing the investigation of corporate abusers and bringing them to account.[5]

This new financial SWAT team was only the beginning of a campaign of reforms aimed at increased prosecutions and sentences. While particular reforms, such as the creation of the Corporate Fraud Task Force itself, focused exclusively on catastrophic corporate fraud, many of the changes impacted financial crimes and fraud more generally. By implementing broad reforms alongside more targeted initiatives, the government took aim at all manner of economic wrongdoing in an effort to "win the war" on financial crimes.[6]

A. Congress

As one scholar aptly stated of Congress's reaction to Enron and other corporate scandals, "Congress got in a tizzy over the crime *du jour*."[7] The result of this frantic effort was the Sarbanes-Oxley Act of 2002 (SOX).[8]

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5. President George W. Bush, Remarks on Corporate Responsibility in New York City, 2 PUB. PAPERS 1194, 1196 (July 9, 2002), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all&page=1196&dbname=2002_public_papers_vol2_misc.

6. *See* Letter from Eric H. Jaso, Counselor to the Assistant Att'y Gen., to Diana E. Murphy, U.S. Sentencing Comm'n Chair (Dec. 18, 2002), *reprinted in* 15 FED. SENT'G REP. 278, 278 (2003) [hereinafter December Letter from Eric H. Jaso] (discussing proposed amendments to the Sentencing Guidelines).

> As we [the DOJ] have stated consistently, we believe that these penalty increases should apply not only to the billion-dollar cases that have dominated the news headlines in recent months, but also to the many so-called "lower-loss" criminal fraud cases that make up the bulk of federal prosecutions across the country. In addition to the WorldComs and Enrons, the Department prosecutes many smaller-scale frauds around the country that, while evidently less newsworthy, nonetheless constitute heart-rending calamities for their victims. Congress did not intend to ignore such cases and reserve severe punishment only for those whose illegal deeds make the front page.

Id.

7. Frank O. Bowman, III, Pour Encourager Les Autres?: *The Curious History and Distressing Implications of the Criminal Provisions of the Sarbanes-Oxley Act and the Sentencing Guidelines Amendments that Followed*, 1 OHIO ST. J. CRIM. L. 373, 435 (2004).

8. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15 & 18 U.S.C.); *see also* Perino, *supra* note 1, at 672 ("[SOX] moved with [lightning] speed through the legislature and only seemed to pick up momentum with the revelation of each new accounting restatement.").

XXPresident Bush signed SOX into law on July 30, 2002. *See* President George W. Bush, Remarks on Signing the Sarbanes-Oxley Act of 2002, 2 PUB. PAPERS 1319, 1319 (July 30, 2002), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=2002_public_papers_vol2_misc&page=1319&position=all. The three titles most relevant to prosecution and punishment of financial crimes are Titles VII, IX, and XI of SOX. Title VII created new obstruction of justice statutes, protected employees who reported criminal conduct up the

Heralded by President Bush as one of "the most far-reaching reforms of American business practices since the time of Franklin Delano Roosevelt," the law sought to restore investor confidence through sweeping changes to corporate structure and criminal statutes.[9]

As described by the DOJ, SOX contains provisions that reached white-collar crime on all levels, not just the small class of corporate malfeasance that ignited the rush to reform.

> Central to [SOX] were substantial increases in the statutory penalties for the crimes most commonly charged by federal prosecutors in corporate fraud and obstruction-of-justice cases (so-called "white collar" crimes); [SOX] included specific and general directives to the United States Sentencing Commission to implement amendments to the sentencing guidelines responsive to these changes, and provided emergency amendment authority to underscore the urgency of taking prompt and substantive action.[10]

By creating new laws and amending old fraud provisions, SOX took aim at all financial crimes in an effort to increase prosecutions and prison sentences for an enormous class of defendants, not just the limited number of officers and directors involved in the major scandals of the day.

SOX's first sweeping reform was to impose a fourfold increase in the maximum punishments for mail and wire fraud.[11] Prior to SOX, the maximum penalty for these commonly charged fraud statutes was five years. Under the revised statute, the maximum penalty skyrocketed to twenty years.[12] Similarly, SOX also increased the maximum penalty for attempt and conspiracy to defraud to twenty years.[13] Finally, SOX created the first criminal code

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ladder, and created a Title 18 Securities and Exchange commission offense. Title IX enhanced punishments for already existing crimes, created new criminal statutes, and directed the Sentencing Commission to amend the Sentencing Guidelines to reflect the seriousness of the crimes addressed in the legislation. Title XI also addressed obstruction of justice and retaliation by employers. *See generally* Sarbanes-Oxley Act of 2002.

9. Bush, *supra* note 8, at 1319.

10. December Letter from Eric H. Jaso, *supra* note 6, at 278.

11. *See* 18 U.S.C. §§ 1341, 1343 (2006) (imposing criminal penalties for mail and wire fraud); *see also* Kathleen F. Brickey, *From Enron to WorldCom and Beyond: Life and Crime After Sarbanes-Oxley*, 81 WASH. U. L.Q. 357, 378-79 (2003) (comparing pre-SOX and post-SOX penalties for fraud).

12. *See* 18 U.S.C. §§ 1341, 1343; *see also* Perino, *supra* note 1, at 672 ("In addition to creating new crimes, [SOX] beefs up the penalties for certain existing crimes. Maximum penalties for mail and wire fraud are increased from five to twenty years.").

13. *See* 18 U.S.C. § 1349 (defining punishment for attempts and conspiracies to commit criminal fraud offenses). SOX mandates:

> Any person who attempts or conspires to commit any offense under this chapter

provision for securities fraud.[14] Mimicking the language used in the wire and mail fraud statutes, the securities provision created an offense for knowingly executing a scheme or artifice to defraud any person in connection with any security or in the purchase or sale of any security.[15] Perhaps believing a twenty year sentence for an offense so closely linked with the ongoing scandals unsuitable, SOX prescribed a maximum sentence of twenty-five years for this crime.[16] For prosecutors, SOX offered new tools to fight fraud inside and outside of corporate America and signaled that so-called white-collar criminals would no longer enjoy preferential treatment in a criminal justice system that had been wildly increasing sentences for varying types of offenses for over a decade.

B. Department of Justice

Similar to Congress, the DOJ did not limit its reforms after Enron to catastrophic corporate fraud, though reforms such as the creation of the Corporate Fraud Task Force were certainly specifically directed at this area. Rather, many of the DOJ's most important new policies affected defendants throughout the federal system.

The first significant reform came in response to the PROTECT Act and the Feeney Amendment in 2003.[17] The Feeney Amendment prohibited federal judges from making downward departures during sentencing for any reason other than those specifically enumerated in the Sentencing Guidelines.[18]

> shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt of conspiracy.

Id.

14. *See* 18 U.S.C. § 1348; *see also* Brickey, *supra* note 1, at 231 ("[SOX] adds the first securities fraud crime to be codified in the federal criminal code . . . .").

15. *See* 18 U.S.C. § 1348.

16. *See id.*

17. *See* Prosecution Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act, Pub. L. No. 108-21, 117 Stat. 650 (codified as amended in scattered sections of 18, 21, 28 & 42 U.S.C.).

18. PROTECT Act § 401(b)(1). The Department of Justice reiterated this policy in its September 22, 2003, memorandum regarding plea bargaining and charging decisions. *See* Memorandum from Attorney General John Ashcroft to All Federal Prosecutors (Sept. 22, 2003), *reprinted in* 16 FED. SENT'G REP. 129, 132 (2003) [hereinafter September Memorandum] (regarding the Department of Justice policy concerning charging criminal offenses, disposition of charges and sentencing) ("Accordingly, federal prosecutors must not request or accede to a downward departure except in the limited circumstances specified in this memorandum and with authorization from an Assistant Attorney General, United States Attorney, or designated supervisory attorney."); *see also* Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1248 (2004) ("The Feeney Amendment, as enacted in the PROTECT Act, revealed deep Congressional dissatisfaction with the operation of the

Furthermore, the amendment required that when such departures were made, the departing judge had to place the reasons for the decision in writing.[19] On July 28, 2003, the DOJ clarified its support for the Feeney Amendment's restrictions on judicial discretion and instructed federal prosecutors regarding new procedures which would be implemented to ensure compliance.[20] The memorandum required prosecutors to vigorously oppose court actions that were inconsistent with the goals of the Feeney Amendment and to report federal judges who violated the Amendment's prohibitions.[21] The goal of the Department's memorandum was, in essence, to further restrict a defendant's ability to receive departures and, thus, increase prison sentences.[22]

The second major reform came on September 22, 2003, when Attorney General John Ashcroft issued a memorandum to all United States Attorneys clarifying the government's position on plea bargaining and the charging of criminal offenses.

> It is the policy of the Department of Justice that, in all federal criminal cases, federal prosecutors must charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case . . . . The most serious offense or offenses are those that generate the most substantial sentence under the Sentencing Guidelines, unless a mandatory minimum sentence or count requiring a consecutive sentence would generate a longer sentence.[23]

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federal guidelines system it had created.").

19. PROTECT Act § 401(c)(1); *see also* Joy Anne Boyd, Commentary, *Power, Policy, and Practice: The Department of Justice's Plea Bargain Policy as Applied to the Federal Prosecutor's Power Under the United States Sentencing Guidelines*, 56 ALA. L. REV. 591, 602 (2004) ("The practical effect of this portion of the Feeney Amendment is to drastically reduce the opportunity for federal defendants to obtain more lenient sentences.").

20. *See* Memorandum from Attorney General John Ashcroft to All Federal Prosecutors (July 28, 2003), *reprinted in* 15 FED. SENT'G REP. 375 (2003) [hereinafter July Memorandum] (regarding the Feeney Amendment to the PROTECT Act); *see also* Miller, *supra* note 18, at 1246 ("The Act directed the Department to adopt policies that discourage downward departures and encourage appeals of downward departures.").

21. *See* Miller, *supra* note 18, at 1255.

22. *See* Stephanos Bibas, *The Feeney Amendment and the Continuing Rise of Prosecutorial Power to Plea Bargain*, 94 J. CRIM. L. & CRIMINOLOGY 295, 308 (2004) ("The politics of being tough on crime trumps the [Sentencing] Commission's technocratic expertise. The obvious result is more rules and fewer unilateral judicial departures. The less obvious result is a transfer of even more plea-bargaining power from judges to prosecutors, resulting in higher sentences on prosecutors' terms.").

23. September Memorandum, *supra* note 18, at 130 (regarding the Department of Justice policy concerning charging criminal offenses, disposition of charges, and sentencing).
XXThe government's aversion to charge bargaining and fact bargaining was revealed in the

The memorandum dictated that prosecutors stop offering reduced sentences in return for plea agreements if such deals excluded a readily provable offense for which the sentence was greater.[24] While many United States Attorney's Offices disputed the claim that this policy was not already in place, the reality of the plea bargaining machine before this memorandum was issued necessitated charge bargaining that led to a reduction in sentence.[25] If this were not the case, little incentive would have existed to encourage defendants to accept the government's offer.[26] Once again, through DOJ policy memoranda, the government implemented reforms aimed at increasing the average sentence of everyone in the criminal system, including financial criminals.

July Memorandum from Attorney General Ashcroft regarding the Feeney Amendment, though this aversion was not discussed in as extensive detail as it was in the subsequent September Memorandum.

> Similarly, in negotiating plea agreements that address sentencing issues, federal prosecutors may not "fact bargain," or be party to any plea agreement that results in the sentencing court having less than a full understanding of all readily provable facts relevant to sentencing. Nor may prosecutors reach agreements about Sentencing Guidelines factors that are not fully consistent with the readily provable facts.

July Memorandum, *supra* note 20, at 376 (regarding the Feeney Amendment to the PROTECT Act).

24. *See* Miller, *supra* note 18, at 1254 ("The memorandum includes fierce language mandating charges and limiting various kinds of plea bargains, subject only to 'certain limited exceptions.'"); *see also* Boyd, *supra* note 19 (discussing the September Memorandum).

25. 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, 1077 (2006) ("Although there are some limited exceptions to this 'no charge bargaining' policy, the duty to charge 'the most serious, readily provable offense(s)' impacts the kind of plea offers an [Assistant United States Attorney] may make or what counter-offers an [Assistant United States Attorney] may accept." (footnotes omitted)); Miller, *supra* note 18, at 1256 ("It is striking that in 2003, after fifteen years of directing line prosecutors to make consistent, fully revealed and tough judgments, the Attorney General would think it necessary to *again* forbid concealment of facts, fact bargains, and agreements 'not fully consistent with the readily provable facts.'").

26. Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652, 657 (1981).

> Plea negotiation works . . . only because defendants have been led to believe that their bargains are in fact bargains. If this belief is erroneous, it seems likely that the defendants have been deluded into sacrificing their constitutional rights for nothing. Unless the advocates of plea bargaining contend that defendants should be misled, they apparently must defend the proposition that these defendants' pleas should make some difference in their sentences.

Id. (footnotes omitted).

C. United States Sentencing Commission

The final piece of the revolution regarding financial crimes came from the Sentencing Commission. Demands to increase sentences for financial crimes, however, predated the calamities of 2001. Responding to pressures that had begun in the mid-1990s—and shortly before Enron's collapse—the Sentencing Commission adopted significant changes to the Sentencing Guidelines with the implementation of the 2001 Economic Crime Package.[27] The reform package, which included consolidating fraud guidelines, amending loss tables, and modifying various other provisions, focused on significantly raising the sentencing ranges for mid-level and high-level fraud.[28] While the government seemed satisfied with these amendments at the time of their passage, the DOJ expressed concern that defendants charged with low-level fraud would not also face steeper sentences.[29] The government did not have to wait long to correct this perceived oversight.

The ink had barely dried on the 2001 Economic Crime Package when the Enron scandal revealed itself.[30] In an approach quite opposite to the six years

27. For a thorough examination of the 2001 Economic Crime Package, see Frank O. Bowman, III, *The 2001 Federal Economic Crime Sentencing Reforms: An Analysis and Legislative History*, 35 IND. L. REV. 5, 7 (2001) [hereinafter Bowman, *Sentencing Reforms*] ("These measures, known collectively as the 'economic crime package,' were the culmination of some six years of consultation and debate by the Sentencing Commission, the defense bar, the Justice Department, probation officers, the Criminal Law Committee of the U.S. Judicial Conference (CLC), and the occasional academic commentator."); Frank O. Bowman, III, *The Sarbanes-Oxley Act and What Came After*, 15 FED. SENT'G REP. 231, 231-32 (2003) [hereinafter Bowman, *Sarbanes-Oxley Act*] ("A year before the corporate scandals of 2002, the Sentencing Commission passed the so-called Economic Crime Package, a set of guidelines amendments effective in November 2001 that completely overhauled the sentencing of economic crime offenses. This package was the product of more than five years of careful study, consultation, and negotiation among the Commission, judges, probation officers, defense counsel, and the Department of Justice.").

28. Bowman, *supra* note 7, at 389 ("The practical result was to slightly lower the sentences of some classes of low-loss offenders, while raising significantly the sentences of most mid- to high-loss offenders.").

29. *See* Letter from Eric H. Jaso, Counselor to the Assistant Att'y Gen., to Diana E. Murphy, U.S. Sentencing Comm'n Chair (Oct. 1, 2002), *reprinted in* 15 FED. SENT'G REP. 270, 271 (2003) [hereinafter October Letter from Eric H. Jaso] ("[W]e remain concerned that the November 2001 amendments, which decreased sentences for lower-loss offenses, in particular for those offenders responsible for losses under $70,000, will have a widespread detrimental affect [on] our ability to punish, and, as a result, to deter, such crimes."); *see also* Bowman, *supra* note 7, at 412 ("In June 2002, the Department had pronounced itself happy with the 2001 Economic Crime Package, saving only its sentences for low-loss offenders.").

30. *See* Bowman, *supra* note 7, at 392 ("On December 2, 2001, barely a month after the new economic crime guideline amendments became effective, the Enron Corporation filed the

of painstaking work that had gone into crafting measured and calculated reforms for the 2001 Economic Crime Package, the government's reaction to the new barrage of corporate scandals came in a blurred rush as Washington institutions fought for center stage.[31] As the dust settled, Sarbanes-Oxley emerged. While SOX is perhaps best known for the creation of new statutes and the amendment of statutory sentencing maximums, the law's more important legacy is its direction to the Sentencing Commission to review and amend the Guidelines within 180 days to "reflect the serious nature of the offenses and penalties set forth in [the] Act."[32] The message was clear, Congress had increased sentences for fraud by four times and expected the Sentencing Commission to make a similar demonstration of its commitment to increasing punishments for financial criminals.

By October 2002, the DOJ was calling on the Sentencing Commission to respond to the directions of SOX by increasing the applicable base offense level for all fraud defendants from six points to seven points.[33] The goal of the proposal was to correct the 2001 Economic Crime Package's lenient treatment of low-loss fraud and to increase both the number of defendants serving prison time and the length of such sentences.[34] This seems a strange focus for the DOJ given that the country was reacting to crimes involving hundreds of millions of dollars. For the DOJ, however, Enron created an opportunity to group all financial crimes together and force reforms that touched all levels of fraud. The Sentencing Commission responded to the pressure and implemented the requested change, though it limited the increase in base offense level to defendants convicted of an offense carrying a maximum sentence of twenty

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largest bankruptcy petition in U.S. history."); Bowman, *Sarbanes-Oxley Act*, *supra* note 27, at 232 ("[W]hen corporate scandal began dominating the news in early 2002, the Sentencing Commission was ahead of the curve.").

31. *See* Bowman, *supra* note 7, at 404 ("[I]n the weeks prior to Sarbanes-Oxley's enactment, a bidding war broke out between the House and Senate in which each chamber vied for the honor of raising statutory maximum sentences for fraud-related crimes the farthest. During the reconciliation process, the conferees simply accepted whichever figure was highest.").

32. *See* Mary Kreiner Ramirez, *Just in Crime: Guiding Economic Crime Reform After the Sarbanes-Oxley Act of 2002*, 34 LOY. U. CHI. L.J. 359, 386 (2003); *see also* Sarbanes-Oxley Act of 2002 § 905, 28 U.S.C. § 994 (Supp. IV 2004).

33. *See* October Letter from Eric H. Jaso, *supra* note 29, at 270 (discussing proposed amendments).

34. *See id.* at 271 ("We suggest . . . that the Commission modify the fraud loss table . . . in a manner that will ensure that incarceration is the rule, rather than the exception, in cases involving losses up to $120,000. Our proposal is that the table be revised such that probationary sentences are reserved for truly minor offenders."); *see also* Bowman, *supra* note 7, at 416 ("[B]y raising the base offense level and changing the low end of the loss table, the Department sought to increase the number of defendants *required* to serve prison time.").

years or more.[35] Since SOX had increased the maximum sentence for the most commonly charged fraud provisions to twenty years, the Guideline's reform impacted almost every financial crimes case.[36] Commenting on the increase, Frank Bowman, a noted academic who has published voluminously on the subject of the Guidelines and who has previously served as Special Counsel to the Sentencing Commission, described the significance of the one point change in the loss table.

> [T]hough a one-base-offense-level increase may seem insignificant, it actually has profound effects on thousands of individual defendants. It bumps up the sentencing range of every federal fraud defendant by one level, thus increasing the minimum guideline sentence of defendants subject to imprisonment by roughly ten percent. Even more importantly, it limits judicial choice of sentence *type* in four out of ten fraud cases prosecuted in federal court.[37]

Thus, while SOX led to numerous changes in the Sentencing Guidelines for catastrophic financial crimes, its more resounding impact was to create an atmosphere in which the DOJ could compel the Sentencing Commission to increase sentences for fraud generally.[38]

The reform of financial crimes enforcement had come to fruition and the tools to fight this war had been made available by the President, Congress, the

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35. *See* Bowman, *supra* note 7, at 432 ("Faced with the prospect that a Justice Department appeal to Congress would receive support not only from Republicans but also from a prominent Judiciary Committee Democrat [Senator Biden], the Commission voted for a broad-based, albeit small and curiously structured, sentence increase.").

36. *See* U.S. SENTENCING COMM'N, FINAL POST-SARBANES-OXLEY AMENDMENTS (2003), *reprinted in* 15 FED. SENT'G REP. 301 (2003) [hereinafter FINAL SOX AMENDMENTS].

37. Bowman, *supra* note 7, at 433 (footnote omitted); *see also* Bowman, *Sarbanes-Oxley Act*, *supra* note 27, at 231 ("And the apparently insignificant one-base-offense-level increase for fraud offenders will preclude probationary, home or community confinement, or split sentences for thousands of low-loss defendants.").

38. *See* Bowman, *Sarbanes-Oxley Act*, *supra* note 27, at 231 (2003).

> The Justice Department, which in June 2002 had pronounced itself happy with the Economic Crime Package, in October 2002 discovered in Sarbanes-Oxley a mandate from Congress to the Commission to increase economic crime sentences on both corporate bigwigs and ordinary middle and low level fraud and theft defendants. DOJ proposed both specific enhancements for characteristically corporate crime, and a loss table amendment significantly increasing sentences for every defendant sentenced under Section 2B1.1 who caused a loss greater than $10,000.

Id. at 232-33; *see also* John R. Steer, *The Sentencing Commission's Implementation of Sarbanes-Oxley*, 15 FED. SENT'G REP. 263 (2003) (discussing the numerous amendments to the Sentencing Guidelines resulting from the passage of SOX, including more general across the board enhancements for fraud).

DOJ, and the Sentencing Commission. As prosecutors reviewed all they had been given, the highest levels of government and the public itself waited anxiously for news of the results. The expectations were clear: America wanted news of increased prosecutions and staggering sentences.

II. From Those to Whom Much Is Given . . .

During the post-Enron reform period, few days passed without a pronouncement from the government regarding a new corporate investigation, a victorious financial crimes trial, or a significant fraud sentence being handed down. From the beginning of the movement, Attorney General John Ashcroft set the tone by proclaiming that the future would include increased focus on financial crimes and increasingly harsh punishments for those convicted. Shortly before SOX became final, he stated that the proposed reforms would "make[] it clear that executives and companies will face tough penalties including longer jail sentences for individuals."[39] Deputy Attorney General Larry Thompson, head of the Corporate Fraud Task Force, also reinforced the government's message.

> [T]hese [financial] crimes are particularly pernicious and appropriately the subject of intense—and that is what they are getting—law enforcement focus and action. . . .
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> . . . .
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> . . . Our goal is to separate the offenders from law-abiding companies. In many cases, that separation will be physical and for an extended term of years. My hope is that comprehensive enforcement efforts will restore investor confidence in the integrity of the market by demonstrating that financial criminals will pay—and they will pay with more than financial penalties.[40]

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39. Press Release, Dep't of Justice, Attorney General Statement on Corporate Responsibility and the Creation of the Corporate Fraud Task Force (July 9, 2002), *available at* http://www.usdoj.gov/opa/pr/2002/Jul/02_ag-388.htm.

40. Larry D. Thompson, Deputy Att'y Gen., A Day with Justice (Oct. 28, 2002) (transcript available at http://www.usdoj.gov/archive/dag/speech/2002/102802daywithjustice.htm); *see also* Christopher Wray, *Prosecuting Corporate Crime*, ECON. PERSPECTIVES, Feb. 2005, at 12, 15, *available at* http://usinfo.state.gov/journals/ites/0205/ijee/ijee0205.pdf ("Much has been accomplished in the Department of Justice's ongoing campaign against corporate fraud; however, much remains to be done. In order to restore full public confidence in the financial markets, continued strong enforcement will be necessary to increase the level of transparency of corporate conduct and of financial reporting and to strengthen the accountability of corporate officials.").

Change was coming swiftly, argued the government, because the public's calls for change had been answered through legislation and policy initiatives.

It did not take long for the government to move beyond predicting success as a result of the government's new war on financial crimes and to begin proclaiming victory. Only a year after the formation of the Corporate Fraud Task Force, the financial SWAT team's first-year report to the President read like a recruiting poster.

> Although our task was daunting, it was not impossible. On this one-year anniversary of the Corporate Fraud Task Force, I am pleased to report that the Task Force has responded to the President's call for action with impressive results. . . .
>
> . . . .
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> . . . Since its creation, the Task Force has been involved in well over 320 criminal investigations involving more than 500 individual subjects. As of May 31, 2003, criminal charges were pending against 354 defendants. And 250 individuals have been convicted or pled guilty to corporate fraud charges.[41]

As the number of prosecutions being touted by the government swelled, public confidence in the markets grew and the public began to cheer the government's harsh response to the corporate improprieties that had permeated the country.[42]

The government was not resigned, however, to simply discussing the growing number of financial crimes cases being disposed of each year. Specific examples also existed to demonstrate the success of SOX and the Sentencing Guidelines amendments in increasing prison time. One of the most well-publicized cases was that of Dynegy's mid-level executive, Jamie Olis. Olis refused to enter into a plea agreement and was convicted in a $105 million stock fraud scheme. Though his sentence was later reversed, the district court initially sentenced Olis to twenty-four years and four months in prison.

> Only days and weeks before in the same district, drug dealers, a corrupt public official, a kiddie-porn collector and a six-time felon

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41. CORPORATE FRAUD TASK FORCE, FIRST YEAR REPORT TO THE PRESIDENT, at iii (2003), *available at* http://www.usdoj.gov/dag/cftf/first_year_report.pdf. The second such report read much the same, proclaiming over 900 defendants had been charged within the Task Force's first two years. *See* CORPORATE FRAUD TASK FORCE, SECOND YEAR REPORT TO THE PRESIDENT, at iii (2004) [hereinafter SECOND YEAR REPORT], *available at* http://www.usdoj.gov/dag/cftf/2nd_yr_fraud_report.pdf.

42. *See* Tracy L. Coenen, *Enron: The Good, the Bad, and the Ugly*, WIS. L.J., June 7, 2006, *available at* http://www.wislawjournal.com/archive/2006/0607/coenen-060706.html (discussing public confidence in the markets as a result of the government's prosecutions).

> caught possessing a gun all received less time behind bars. After Olis was sentenced, prosecutors were quick to mount soapboxes and proclaim that the days had ended when button-down crooks could expect little more than a sharp rap on the knuckles.[43]

The government praised the case as an example of the tough new punishments criminals faced, while the public watched with vindictive glee with memories still fresh of all that had been lost to such villains.[44]

The public was not the only group soaking up the government's claims that the new tools granted by Congress, the DOJ, and the Sentencing Commission were changing the face of financial crimes enforcement. Scholars also began writing about the reforms and the government's claims of increasing prosecutions. In a 2004 article regarding Enron's legacy, one scholar wrote, "Unprecedented marshaling of federal regulatory and law enforcement resources has contributed to significant criminal enforcement levels in the post-Enron era."[45] Whether in response to specific reforms enacted after Enron or as a result of the compilation of changes from various government institutions,

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43. John Gibeaut, *Do the Crime, Serve More Time*, ABA J. E-REPORT, Apr. 2, 2004, *available at* Westlaw, 3 No. 13 ABAJEREP 1; *see also* Carrie Johnson & Brooke A. Masters, *Cook the Books, Get Life in Prison: Is Justice Served?*, WASH. POST, Sept. 25, 2006, at A1 (describing the staggering sentences received by Bernard Ebbers and Jamie Olis). It should be noted, though it will be discussed in greater detail during this article's examination of differentials in sentencing after plea agreements as opposed to trials, that Olis's boss was sentenced to fifteen months after pleading guilty and agreeing to testify against his subordinate. *See id.*

XXThe same type of comparison was made when Bernard Ebbers, former head of WorldCom, reported to prison to serve a twenty-five-year sentence that was akin to a life sentence for the sixty-five-year-old with heart ailments.

> In the category of longest prison sentence, WorldCom Inc. founder Bernard J. Ebbers recently bested the organizer of an armed robbery, the leaders of a Bronx drug gang and the acting boss of the Gambino crime family.

Carrie Johnson & Brooke A. Masters, *Paying the Price for Cooking the Books*, WASH. POST WKLY., Oct. 2-8, 2006, at 20.

44. *See* SECOND YEAR REPORT, *supra* note 41, at 3, 14 ("Following a trial and guilty verdict, on March 25, 2004, Dynegy's former Senior Director of Tax Planning/International Tax and Vice President of Finance was sentenced to more than 24 years for his role in a corporate fraud scheme."); *see also* 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, 188 (2004) ("The effect of the increased penalties following the 2001 reform is reflected in the sentence received by Jamie Olis, a mid-level executive at Dynegy, an energy trading firm.").

45. Brickey, *supra* note 1, at 246; *see also* Bowman, *supra* note 7, at 398-99 ("[I]n keeping with the emphasis on moral failure, the list of governmental actions proposed by the President was headed by a call for increased enforcement of criminal laws and for 'tough new criminal penalties for corporate fraud.'").

many scholars also predicted that sentences for financial criminals would increase. Stephanos Bibas, who has written extensively about the post-Enron period, concluded one article by stating that the Feeney Amendment would result in fewer departures and "a transfer of even more plea-bargaining power from judges to prosecutors, resulting in higher sentences on prosecutors' terms."[46] In an article discussing his experiences as a member of the DOJ Enron Task Force, John Kroger also estimated that higher sentences for a wide range of defendants would result from post-Enron reforms.

> The most important development has been in the area of criminal punishment. As noted above, white collar crimes have historically been punished very lightly in the United States. This scandalous practice has come to an end. Since late 2001, Congress and the United States Sentencing Commission have radically increased criminal penalties for persons convicted of white collar fraud. . . . The United States Sentencing Commission has completely rewritten the sentencing guidelines applicable to fraud cases in the last several years.[47]

Such views appear to have been widely embraced and well received. Given the statements emanating from the DOJ and the plethora of new statutes and Sentencing Guideline provisions available for use, however, it would have appeared counterintuitive to argue otherwise.

While the public cheered and scholars discussed the government's claims, some involved in the criminal system perceived another potential impact resulting from the government's alleged success. People began to question whether the new enforcement regime and sentencing structure would affect plea bargaining. One defense attorney summarized the undercurrent of concern when responding to the DOJ's policy regarding charging the most readily provable offense:

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46. Bibas, *supra* note 22, at 308. In discussing the 2001 Economic Crime Package amendments to the Sentencing Guidelines and the concurrent amendments to the Sentencing Guidelines for money laundering, another scholar stated, "Taken together, the amendments should provide greater clarity to sentencing courts, uniformity in longer terms of imprisonment for moderate and high levels of pecuniary harm, and specific deterrence to economic crime offenders." Ramirez, *supra* note 32, at 361.

47. John R. Kroger, *Enron, Fraud, and Securities Reform: An Enron Prosecutor's Perspective*, 76 U. COLO. L. REV. 57, 114-15 (2005); *see also* Bowman, *Sarbanes-Oxley Act*, *supra* note 27, at 232 (explaining that while increases in statutory maximums have little impact alone, these reforms coupled with amendments to the Sentencing Guidelines "add real years for real defendants").

> "Defense attorneys will recognize that the worst possible outcome at trial is the same as any settlement offer they get from prosecutors." As a result, he said, "they will be ethically mandated to take every case to trial." Federal courts could be overwhelmed with cases going to trial, Wallace said, pointing to a report by the U.S. Judicial Conference estimating that a five percent reduction in guilty pleas would result in a 33 percent increase in trials.[48]

This concern was also raised in another article regarding post-Enron sentencing reforms in which a partner at Steptoe & Johnson LLP observed, "[i]n terms of causing people to plead, you could make the argument that there are disincentives to plead because the guidelines cause sentences to be so onerous [now] that nobody can get around them, so you have to go try the case."[49] Finally, in an article dedicated to Sarbanes-Oxley, the former Principal Associate Deputy Attorney General in the Clinton administration commented that some believed the DOJ's policies after Enron would simply stifle plea bargaining in the federal system.[50]

Not everyone was convinced, however, that the flurry of activity after Enron would lead to lower rates of plea bargaining. Marc Miller, in an article discussing prosecutorial power in sentencing, questioned the legitimacy of these concerns and predicted a wildly different result.

> If many commentators who have praised the Department policies for restricting plea bargains are correct, then they should expect a reversal of the longstanding increase in guilty plea rates in the federal system. The availability of open pleas (pleas that are not the product of bargains) means that the guilty plea rate may remain high, but if the Attorney General has put a functioning brake on the habit of making deals defendants cannot refuse, then, other things being equal, some decrease in the guilty plea rate should result. If I am correct that the PROTECT Act simply increases prosecutorial power compared to all other actors and therefore the ability to

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48. *Attorney General Ashcroft Announces New Hardball Policy on Charging, Plea Bargaining*, 73 Crim. L. Rep. (BNA) 24 (2003) [hereinafter *Ashcroft Charging Policy*], *available at* http://litigationcenter.bna.com/pic2/lit.nsf/id/BNAP-5RPJKS?Opendocument.

49. Robert Pack, *Defense Lawyers and Federal Sentencing Guidelines*, WASH. LAW., Oct. 2003, at 26.

50. Gary G. Grindler & Jason A. Jones, *Please Step Away from the Shredder and the "Delete" Key: §§ 802 and 1102 of the Sarbanes-Oxley Act*, 41 AM. CRIM. L. REV. 67, 89 (2004) ("Skeptics, both within and outside of the DOJ, will no doubt argue that the policy will have the opposite result, effectively stifling plea bargains that are often pivotal in securing the information necessary to prosecute 'up the chain.' It is too early to tell.").

> control plea/trial differentials, the guilty plea rate will hold steady or continue to rise.[51]

Miller not only challenged the concerns of many in the defense bar regarding the impact of post-Enron reforms, he also raised an issue at the heart of this analysis: What has *actually* changed with regard to the focus on and sentencing of financial criminals since 2001?

If one takes Miller's statement one step further and argues that post-Enron reforms did little more than increase prosecutorial power, are any of the assumptions that have been made about the impact of SOX, the DOJ policies, or the Sentencing Guidelines amendments correct? Scholars, attorneys, and laypersons alike appear to have embraced the position that the government's war on financial crimes would result and, in fact, has resulted in increased focus on economic crimes and increasingly harsh sentences for all defendants caught under the purview of the Sentencing Guidelines applicable to fraud. Now that seven years have passed, the need for speculation is over and one can examine whether the Jamie Olis's of the world were merely a blip on the screen of federal enforcement or whether fundamental, broad-sweeping changes have actually occurred.

III. While Wars Wage Above, The Trenches Lay Silent

The Sentencing Commission makes available statistical data dating from 1995 through 2006 regarding an array of matters traceable under the Sentencing Guidelines.[52] If, as has been argued, fundamental shifts have occurred in financial crimes enforcement, such changes should be evident in the array of data collected in these studies. Furthermore, because these statistics pre-date the corporate scandals by several years, even a gradual shift in focus should become evident over time.

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51. Miller, *supra* note 18, at 1258.

52. The data are presented in annual reports that cover the federal fiscal year. Thus, the 2006 report includes data from October 1, 2005 through September 30, 2006. For purposes of this article, the year of the report will be used for both descriptive discussion and for graphing the data.

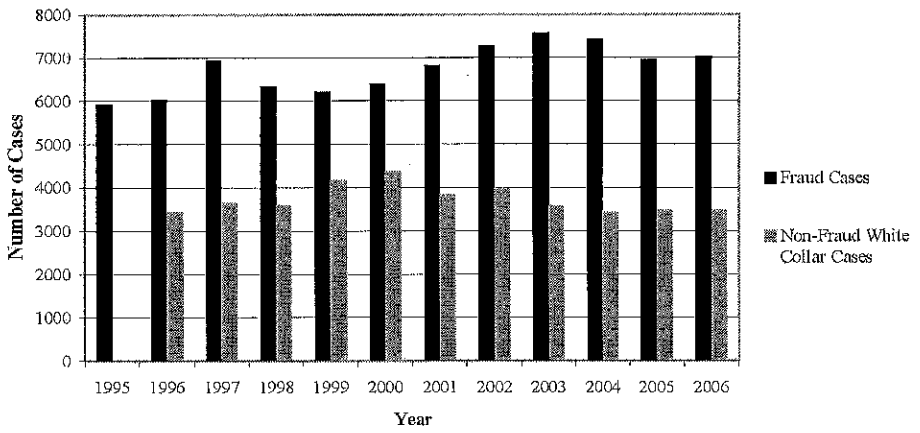
XXIt should also be noted that in the 2004 and 2005 reports, data were divided between pre- and post-*Blakely* and pre- and post-*Booker* time periods, respectively. *See* United States v. Booker, 543 U.S. 220 (2005); Blakely v. Washington, 542 U.S. 296 (2004). Where appropriate, this article will combine these statistics to create one data point for 2004 and one data point for 2005. Where this is not appropriate because of the nature of the data being examined, the discussion or graph will indicate such.

A. Has the Government's Focus on Financial Crimes Prosecutions Increased?

The first proposition advanced by the government following the collapse of Enron and the ensuing rush for reform was that the government's focus on financial crimes has dramatically increased. The Sentencing Commission tracks the number of prosecutions each year in two categories related to the government's claim. First, statistics are available for "Fraud" cases, which include fraud and deceit and insider trading. Second, statistics are available for "Non-Fraud White Collar Cases" cases, which include embezzlement, forgery, bribery, money laundering, and tax evasion. Below are the numbers of prosecutions for such offenses from 1995 through 2006.[53]

FIGURE 1

Total Number of Fraud and Non-Fraud White Collar Cases



What is evident from these statistics is that a major shift in the number of fraud cases has not occurred, and a reduction has actually resulted in the number of non-fraud white collar crime prosecutions since 2001. It is certainly worthy of mention that by 2003 the government did increase fraud prosecutions

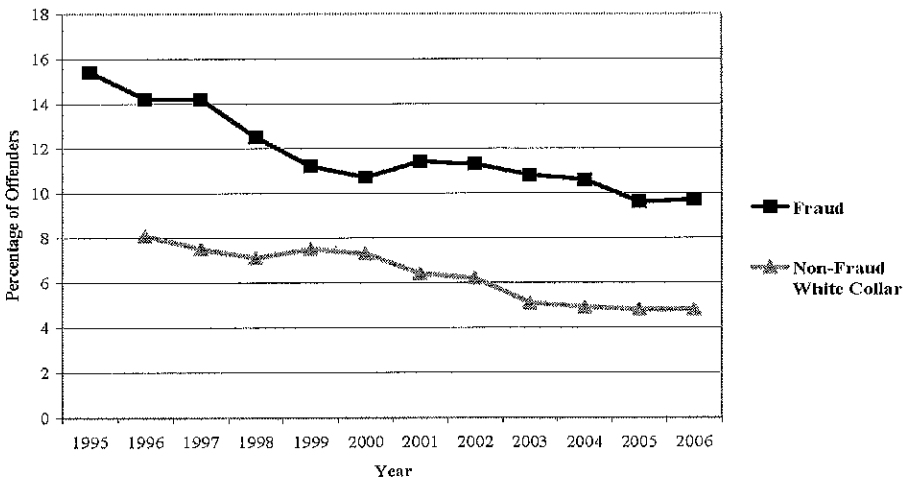
53. The Sentencing Commission offers their federal sentencing statistics for the years 1995-2006 online. *See* U.S. Sentencing Comm'n, Annual Reports and Statistical Sourcebooks, http://www.ussc.gov/annrpts.htm (last visited Nov. 16, 2007) [hereinafter U.S. Sentencing Comm'n Reports]. It should be noted that no data were available in 1995 for "non-fraud white collar crime." Furthermore, the Sentencing Commission calculated these percentages using the total number of guideline cases per year. In certain circumstances, an insignificant number of cases were removed from the data set because of missing primary offense categories. For purposes of calculating the total number of cases per year, however, this study utilizes the total number of guideline cases for consistency.

by 760 cases from the number of cases in 2001. This, coupled with the subsequent decline in fraud prosecutions to a low of 6956 in 2005, only 128 more than in 2001, does little to bolster the government's position that financial crimes prosecutions have become a high priority for the DOJ.

While the specific number of financial crimes prosecutions per year reveals a significant gap between the government's assertions and reality, even more telling is an analysis of the percentage of offenders in the federal system for whom fraud or non-fraud white collar crime was the primary offense category.[54] Through an examination of these data, one can trace the DOJ's commitment to a particular subset of criminal activity relative to other crimes in a particular year. While there are limitations to the strength of such an analysis, it does offer a glimpse at both the resources and the commitment of the government over time, whether by choice or by circumstance.

FIGURE 2

Percentage of Offenders in the Federal System for Whom Fraud/White Collar Crime was the Primary Offense Category



Between 2001 and 2006, the percentage of offenders in the federal system for whom fraud was the primary offense category declined from 11.4% to 9.7%. Similarly, the percentage of offenders for whom non-fraud white collar crime was the primary offense level declined from 6.4% to 4.8%. These declines continued a trend that had been present since 1995. While this appears counterintuitive given the government's statements regarding its renewed focus on financial crimes following Enron and similar corporate scandals, it appears that the bulk of federal enforcement resources have been placed elsewhere.

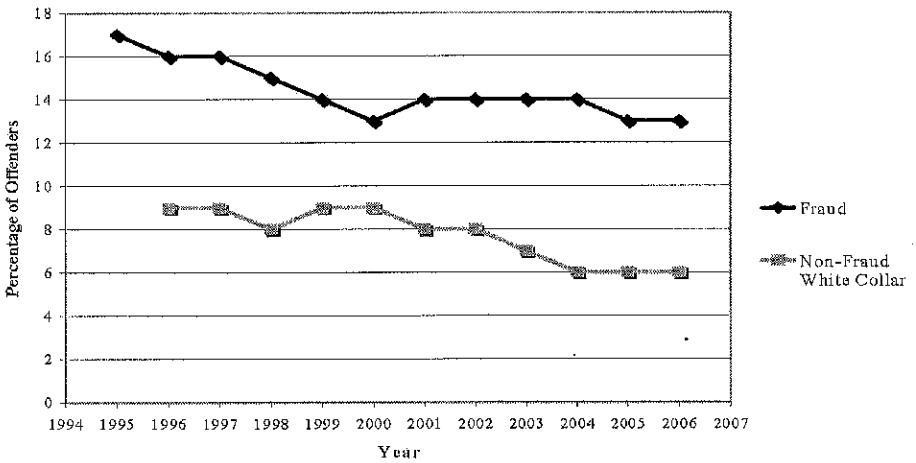
54. *Id.*

While many might assume that an increased focus on terrorism or drug cases may have resulted in this down-swing, the actual culprit is immigration cases. The percentage of offenders for whom an immigration violation was the primary offense category grew from 8.3% in 1995 to 24.5% in 2006.

It is difficult to know whether the increase in immigration cases represents a true focus of the federal government to the detriment of the war on financial crimes because immigration cases are often disposed of quickly through fast track systems. Therefore, it is worth examining the percentage of federal defendants for whom the primary offense category was fraud or non-fraud white collar crime from 1995 through 2006 when immigration cases are removed from the calculations.[55]

FIGURE 3

Percentage of Offenders in the Federal System for Whom Fraud/White Collar Crime was the Primary Offense Category (Excluding Immigration Cases)



These figures indicate that even when immigration cases are removed from the data sets, the government's focus on federal prosecution of financial crimes as compared with other offense categories has diminished since 1995, with no increase following Enron. When compared to the previous graph, this figure demonstrates a less abrupt decrease. But, it also lends further support for the position that the DOJ has not, as it claimed, increased fraud prosecutions. Based on these data, it appears that the government's new era in financial crimes enforcement has not materialized. Rather, perhaps it is more accurate

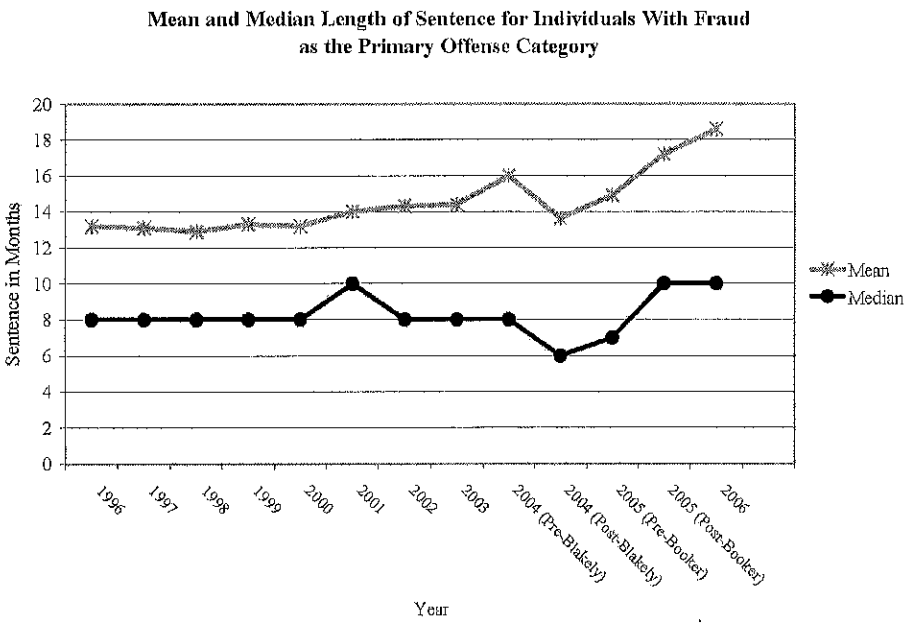
55. *Id.*

to state that there is a perception that enforcement has increased because the government has focused its efforts on a few high profile corporate scandals.

B. Have Sentences for Financial Crimes Increased?

With ever-increasing demands on the DOJ in various areas of federal criminal law enforcement, it may seem irrelevant to some that the DOJ has not increased the number of financial crimes cases since Enron. For those who embrace such an argument, perhaps there is a belief that increasing sentences resulting from the 2001 Economic Crime Package, SOX, DOJ policies, and subsequent Sentencing Guidelines amendments for fraud are sufficient to reign in those who perpetrate such offenses. As we have seen, however, predictions regarding the impact of post-Enron reforms and government claims of success do not necessarily equate into true change. It is necessary, therefore, to examine average and mean sentences of individuals convicted of fraud. Below is a graph demonstrating the mean and medium length of sentences for individuals with fraud as their primary offense category.[56]

FIGURE 4



56. *Id.* Figure 4 includes specific information for pre- and post-*Blakely* 2004 and pre-*Booker* 2005. Furthermore, data were only available from 1996 forward for average and mean sentences.

Again, the results are surprising. Where are the "radical increases" predicted by some as a result of SOX and the amendments to the Sentencing Guidelines?[57] In 2001, the average sentence for fraud was fourteen months, a 0.8 month increase from the year before. With the exception of one year, the average sentence then climbed slightly towards, but never reached, fifteen months until post-*Booker* 2005.[58] Remembering that the 2001 Economic Crime Package did not go into effect until November 2001 and would not have had an impact on sentencing until 2002, it appears that both the sweeping Sentencing Guidelines amendments made shortly before Enron and all of the post-Enron reforms from Congress, the DOJ, and the Sentencing Commission combined to increase sentences for economic crimes by less than one month in the years shortly after Enron.[59] When median sentences are examined, an even more significant trend appears. In 2001, before the impact of the 2001 Economic Crime Package or post-Enron reforms were realized, the median sentence for fraud increased to ten months for the first time since the Sentencing Commission began tracking this information. Following this brief spike, the median returned to eight months in 2002. Two years later, in the midst of the government's war on financial crimes, median sentences fell again to six months. An average defendant convicted of fraud, therefore, actually fared better following Enron and the subsequent reforms. Furthermore, that the median sentence decreased after 2001 may indicate that any increase in mean sentences resulted from only a select few staggering sentences in some of the more publicized catastrophic fraud cases.

It must be noted that beginning with post-*Booker* 2005, a clear upward trend begins to appear in the data, indicating that sentences for fraud are on the way up. To attribute this to reforms implemented years before and which were apparently ineffective for the first four years of the war on financial crimes, however, seems to ignore the more likely cause of this recent increase in sentence length. If one examines the data over time, it appears that the Supreme Court's decision in *Booker* had a much more significant and immediate impact on sentences than all of the post-Enron reforms combined. Apparently, Congress missed its mark by passing SOX and encouraging amendments to the sentencing guidelines, when all that was really necessary to meet their goals was to remove the mandatory nature of the sentencing

57. *See* Kroger, *supra* note 47, at 114-15.

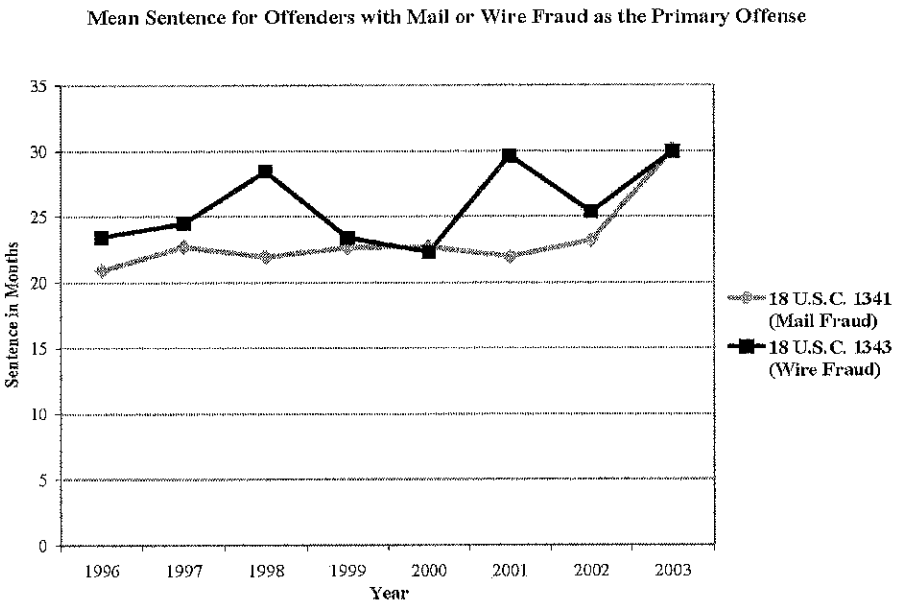
58. The graphs in this article discussing the length of sentences and plea bargaining rates include pre- and post-*Blakely* and pre- and post-*Booker* data points.

59. *See* Bowman, *Sarbanes-Oxley Act*, *supra* note 27, at 232 (stating that the Economic Crime Package went into effect in November 2001). The mean sentence for fraud for 2002 through pre-*Booker* 2005 was 14.84 months, a 0.84 month increase over the average sentence in 2001. *See supra* Figure 4.

guidelines. While it is still too early to make definitive conclusions about the impact of the Supreme Court's decision in *Booker*, it appears that making the sentencing guidelines advisory may be resulting in increasingly severe sentences. Regardless, and for purposes of this study, the increase in the length of sentences following the Supreme Court's actions in 2005 does not seem to cloud the more relevant determination that no "radical increases" in prison sentences resulted from the reforms implemented in response to Enron and other corporate scandals.

Looking more closely at what the DOJ itself described as the most commonly charged offenses for financial crimes, wire and mail fraud, one sees a slightly improved result.[60]

FIGURE 5



While data beyond 2003 are not available for these specific offenses, in the two years after Enron, only the mean sentence for mail fraud increased. Mail fraud sentences increased between 2001 and 2003 by more than ten percent.

60. *See* December Letter from Eric H. Jaso, *supra* note 6, at 278 ("Central to [SOX] were substantial increases in the statutory penalties for the crimes most commonly charged by federal prosecutors in corporate fraud and obstruction-of-justice cases (so-called 'white collar' crimes)."); *see also* Perino, *supra* note 1, at 684 ("In addition to creating new crimes, [SOX] beefs up the penalties for certain existing crimes. Maximum penalties for mail and wire fraud are increased from five to twenty years.").

Though these data are sparse, it does allow for some initial observations. Recall that Frank Bowen predicted that "though a one-base-offense-level increase [to section 2B1.1 of the Sentencing Guidelines] may seem insignificant, it actually has profound effects on thousands of individual defendants. It bumps up the sentencing range of every federal defendant by one level, thus increasing the minimum guideline sentence of defendants subject to imprisonment by roughly ten percent."[61] It is possible, therefore, that the ten percent increase in mail fraud sentences is a direct result of the one point increase in defendants' base offense levels. Curiously, if the one point increase in base offense level affected mail fraud, why did it not equally impact wire fraud and all other fraud offenses sentenced under section 2B1.1 of the Sentencing Guidelines? That there was no ten percent increase in fraud convictions generally indicates that perhaps some as of yet unidentified influence was at work for mail fraud between 2001 and 2003. Regardless, it must be noted that the base offense level amendment to section 2B1.1 was but one small act in a sea of changes following the corporate scandals beginning in 2001. If this Sentencing Guidelines amendment is responsible for the increase in prison time for defendants convicted of mail fraud, the looming question still remains: where may the impact of all the other reforms be seen and why, even here, an impact for financial crimes in general is absent.[62]

C. Have the Percentage of Cases Resulting in Plea Agreements Diminished?

Given that neither actual enforcement nor prison sentences for financial crimes appear to have increased dramatically since 2001, our final question seems already answered. Have the number of cases resulting in plea agreements decreased as many feared?[63] The answer is no.

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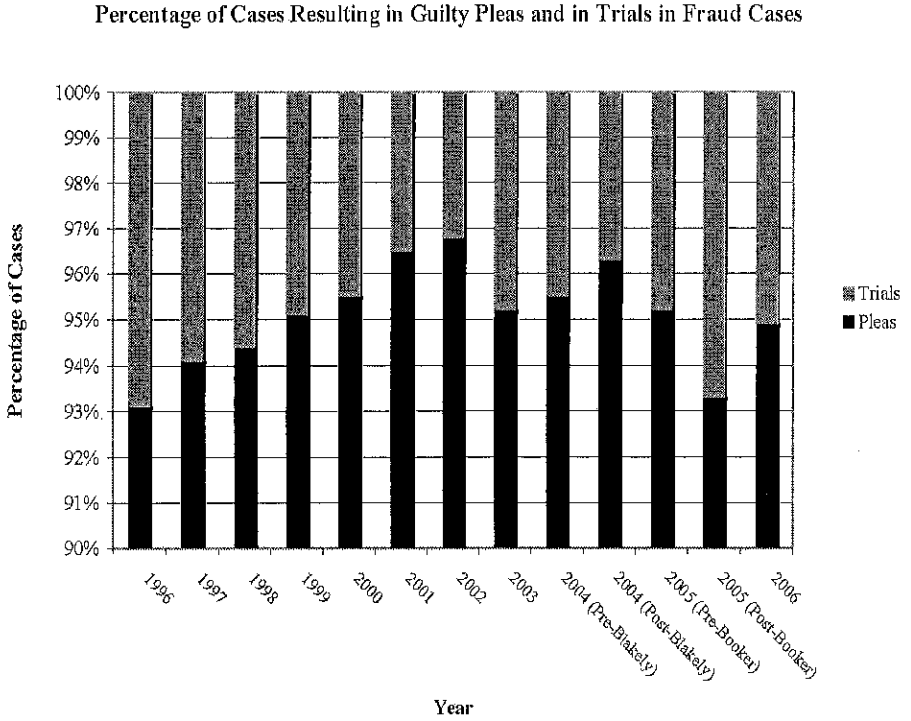
61. Bowman, *supra* note 7, at 433.

62. Some might argue that post-Enron reforms increased the number of defendants with low-loss levels receiving prison time rather than probation. *See supra* note 34 and accompanying text. As defendants who receive probation are not included in the Sentencing Commission's sentencing statistics, such a change might lower average sentences as more defendants with minimal prison time enter the statistical data sets. Review of the statistics tracking the number of fraud defendants receiving probation as opposed to prison sentences, however, reveals that the number of financial crimes defendants receiving probation has actually increased since 2000. *See* U.S. Sentencing Comm'n Reports, *supra* note 53. In 2000, 30.8% of fraud defendants received probation, as compared with 34.8% and 32.4% in 2004 and pre-*Booker* 2005 respectively. *See id.*

63. U.S. Sentencing Comm'n Reports, *supra* note 53.

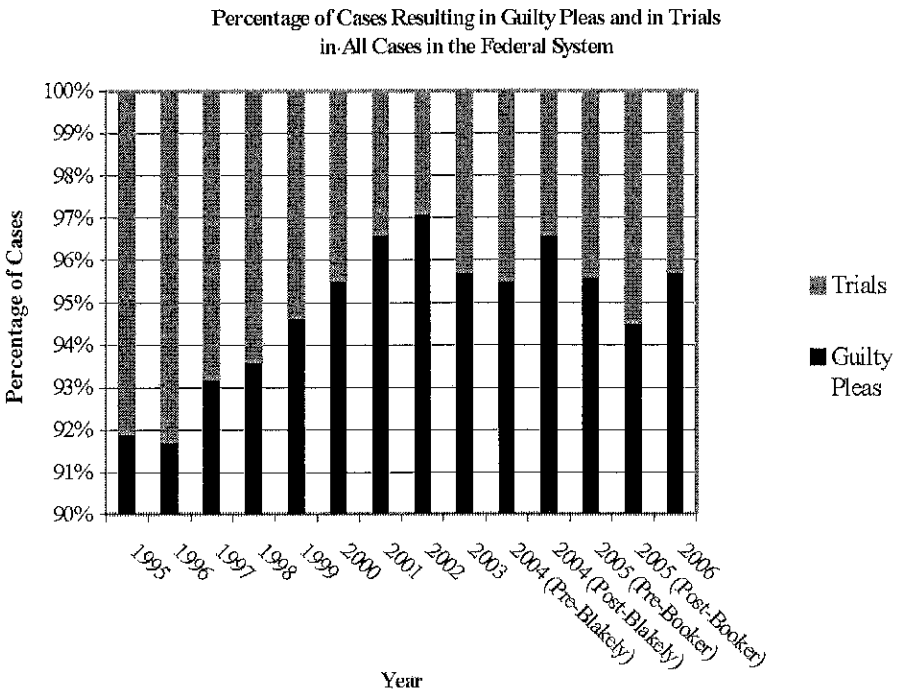
FIGURE 6



In the federal system as a whole, plea bargaining appears, as might have been expected, to be thriving at well over 94.5% since 1999. While minor fluctuations are to be expected, it is curious that, of the years in which the Sentencing Commission has kept data, the highest rate of plea bargaining occurred in 2002. After this spike, plea bargaining rates for each year for all federal crimes rested comfortably between 94.5% and 96.6%. These figures are for all federal crimes, and one might expect that the greater impact would be seen with regard to fraud cases specifically. In examining the percentage of plea bargaining in fraud cases, however, one does not find a significant impact from post-Enron reforms.[64]

64. *Id.*

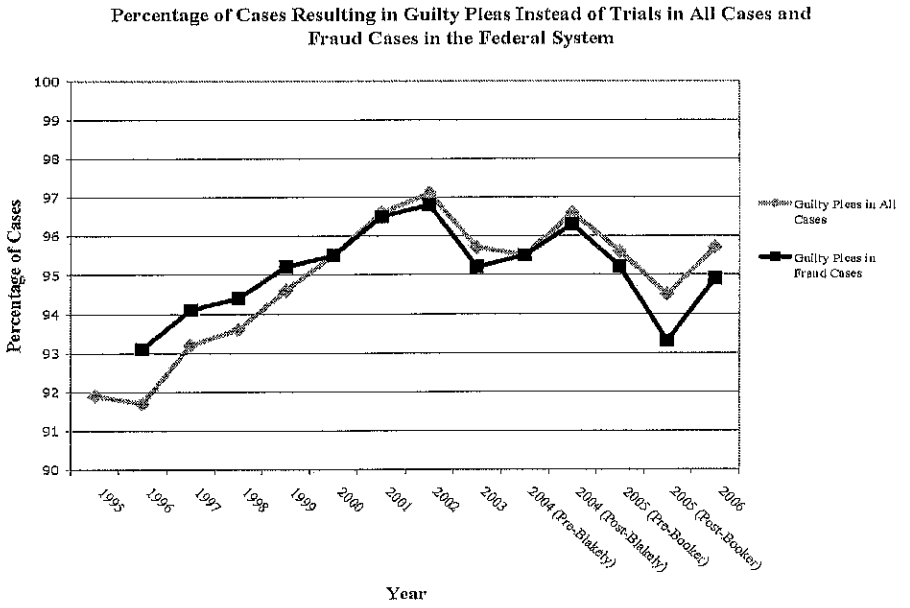
FIGURE 7



Strikingly, the percentage of fraud cases resolved through guilty pleas mimics the percentages for all federal criminal cases. These data tell us several important things about the impact of post-Enron reforms on financial crimes plea bargaining. First, any impact that may have occurred was minimal. As with federal criminal prosecutions generally, the percentage of defendants pleading guilty to fraud remained above 95% for every year since 1999, with the exception of post-*Booker* 2005. Second, the percentage of cases resulting in plea bargains is higher after 2001 than before, which is the opposite effect predicted by some in the defense bar.[65] Finally, as can be seen below, whatever forces acted upon plea bargains in fraud cases during these years impacted the entire institution of federal plea bargaining in the same manner.

65. *See Ashcroft Charging Policy*, *supra* note 48, at 24; Grindler & Jones, *supra* note 50, at 89 ("Skeptics, both within and outside of the DOJ, will no doubt argue that the policy will have the opposite result, effectively stifling plea bargains that are often pivotal in securing the information necessary to prosecute 'up the chain.' It is too early to tell."); Pack, *supra* note 49, at 26.

FIGURE 8



This means that if any of the reforms are directly attributable to these fluctuations, such as the spike in 2002, it would have to result from a reform that impacted not just financial crimes but all federal crimes. Regardless, plea bargaining remains alive and well, and the fears of those who believed the federal criminal system was about to come crashing down have not materialized.

Having examined the data, what must be asked is, after all that the government did in response to corporate scandals and all that has been said publicly about the war on financial crimes, why does it appear that little has actually changed? Why have financial crimes prosecutions not increased dramatically? Why are financial criminals receiving only marginally higher sentences? The answer may be found in the institution some felt was in jeopardy because of post-Enron reforms: plea bargaining. Prosecutors are not using their weapons in the war on financial crimes to increase prosecutions or prison sentences, but instead are using new statutes and the possibility of monumental sentences as tools to encourage defendants to accept plea agreements that include sentences similar to those offered before 2001. For those who refuse the government's advances, prosecutors are prepared to use all of their new powers to secure significantly higher sentences as both a

punishment for removing themselves from the plea bargaining machine and as an example to others who might be considering the same foolish course.

IV. Plea Bargaining's Continued Triumph

A. Plea Bargaining's Rise

The history of plea bargaining's growth is the history of prosecutors gaining increased leverage to bargain. George Fisher begins his seminal work on plea bargaining in America, *Plea Bargaining's Triumph*, with a somber expression of remorse over this machine's rise to prominence and with a single statement summarizing why this system in which rights are exchanged for concessions triumphed.

> There is no glory in plea bargaining. In place of a noble clash for truth, plea bargaining gives us a skulking truce. . . . But though its victory merits no fanfare, plea bargaining has triumphed. . . .
>
> The battle has been lost for some time. . . . *[V]ictory goes to the powerful.*[66]

Although plea bargaining, of course, pre-dates the American criminal justice system, its evolution into a force that consumes over 95% of defendants in America is a phenomenon confined predominantly to the nineteenth and twentieth centuries.[67] This rise can be attributed to various forces, but, as Fisher states above, the increasing power of prosecutors is the pinnacle reason for plea bargaining's success.

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66. George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 859 (2000) (emphasis added); *see also* GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA (2003) [hereinafter FISHER, HISTORY OF PLEA BARGAINING]. For a discussion of scholarship on plea bargaining generally and the debate over whether plea bargaining is an appropriate part of our criminal justice system, see Jacqueline E. Ross, *Criminal Law and Procedure: The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 AM. J. COMP. L. (SUPPLEMENT) 717 (2006).

67. *See* Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1 (1979) [hereinafter Alschuler, *Plea Bargaining*] (discussing the evolution of plea bargaining beginning with an examination of confessions in twelfth century England); *see also* Albert W. Alschuler, *Plea Bargaining and Its History*, 13 LAW & SOC'Y REV. 211 (1979) [hereinafter Alschuler, *Plea History*] (tracing the history of plea bargaining); Jeff Palmer, *Abolishing Plea Bargaining: An End to the Same Old Song and Dance*, 26 AM. J. CRIM. L. 505, 508-11 (1999) (describing plea bargaining's existence in early American history and its rise to prominence in more recent history); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992) (commenting that plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system").

Albert Alschuler, in discussing the history of plea bargaining, draws a similar conclusion. He states, the "history of plea negotiation [] is a history of mounting pressure for self-incrimination, and in explaining this phenomenon, a growth in the complexity of the trial process over the past two-and-one-half centuries seems highly relevant."[68] While Alschuler's article focuses on the impact of growing complexities, he alludes to the way these forces bestow power on prosecutors managing the criminal system and willing to offer significant incentives for those who will bypass a trial.[69] "When Joan of Arc yielded to the promise of leniency that this court made," comments Alshuler, "she demonstrated that even saints are sometimes unable to resist the pressures of plea negotiation."[70]

In *Plea Bargaining's Triumph*, Fisher further develops the idea that as the criminal system becomes more complex, prosecutors gain increased powers to offer significant incentives to defendants.[71] Through analysis of plea bargaining in Massachusetts, Fisher argues that as the criminal system becomes more sophisticated, prosecutors gain the power to use selective charge bargaining to offer reduced sentences for those who will negotiate.[72] The key element of this machine, of course, is prosecutorial discretion and the ability to select from various criminal statutes with significantly different sentences.[73]

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68. *See* Alschuler, *Plea Bargaining*, *supra* note 67, at 40; *see also* Alschuler, *Plea History*, *supra* note 67.

69. *See* Alschuler, *Plea Bargaining*, *supra* note 67, at 42 ("[T]he more formal and elaborate the trial process, the more likely it is that this process will be subverted through pressures for self-incrimination."); *see also* Alschuler, *Plea History*, *supra* note 67.

70. *See* Alschuler, *Plea Bargaining*, *supra* note 67, at 41.

71. *See* FISHER, HISTORY OF PLEA BARGAINING, *supra* note 66, at 23 (stating that plea bargaining is "an almost primordial instinct of the prosecutorial soul"); *see also* Stephanos Bibas, *Pleas' Progress*, 102 MICH. L. REV. 1024 (2004) (reviewing FISHER, HISTORY OF PLEA BARGAINING, *supra* note 66); Jennifer L. Mnookin, *Uncertain Bargains: The Rise of Plea Bargaining in America*, 57 STAN. L. REV. 1721 (2005) (reviewing FISHER, HISTORY OF PLEA BARGAINING, *supra* note 66).

72. FISHER, HISTORY OF PLEA BARGAINING, *supra* note 66, 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.").

73. For a discussion of charge bargaining and its use by prosecutors, see Boyd, *supra* note 19, at 592 ("Not only may a prosecutor choose whether to pursue any given case, but she also decides which charges to file."); Brown & Bunnell, *supra* note 25, at 1066-67 ("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."); Jon J. Lambiras, *White-Collar Crime: Why the Sentencing Disparity Despite Uniform Guidelines?*, 30 PEPP. L. REV. 459, 512 (2003) ("Charging decisions are a critical sentencing matter and are left solely to the discretion of the prosecutor. When determining which charges to bring, prosecutors may often choose from more than one statutory offense." (footnote omitted)); Moohr, *supra* note 44, at

Rather than arguing that this rise in power leveled off in the twentieth century when the rate of plea bargaining in federal cases began to top 80%, Fisher argues that the power to control the system and offer defendants deals has only continued to increase. As an example, he argues that the passage of the Sentencing Guidelines in the last decade of the twentieth century greatly increased prosecutors' control of the system, and therefore, increased their ability to force defendants into plea agreements.

> Before the advent of modern sentencing guidelines, both prosecutor and judge held some power to bargain without the other's cooperation. . . . Today, sentencing guidelines have recast whole chunks of the criminal code in the mold of the old Massachusetts liquor laws. By assigning a fixed and narrow penalty range to almost every definable offense, sentencing guidelines often empower prosecutors to dictate a defendant's sentence by manipulating the charges. Guidelines have unsettled the old balance of bargaining power among prosecutor, judge, and defendant by ensuring that the prosecutor, who always had the strongest interest in plea bargaining, now has almost unilateral power to deal.[74]

With prosecutors in firm control of the decision-making process, Fisher concludes that the plea bargaining machine is unlikely to fall from its triumphant state.[75]

The rise in prosecutorial power to manipulate an ever more complex criminal justice system and select from differing criminal statutes as a means of controlling sentencing explains only half of the plea bargaining machine. Without significant differences in the sentences available as a result of pleading guilty as opposed to risking trial, plea bargaining cannot contain enough of an incentive for defendants to give up the fight.[76] In a 1981 article on plea

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177 ("The power of the prosecutor to charge is two-fold; the power to indict or not . . . and the power to decide what offense to charge.").

74. FISHER, HISTORY OF PLEA BARGAINING, *supra* note 66, at 17; *see also* Boyd, *supra* note 19, at 591-92 ("While the main focus on 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."); Miller, *supra* note 18, at 1252 ("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.").

75. *See* FISHER, HISTORY OF PLEA BARGAINING, *supra* note 66, at 230 ("[P]lea bargaining grew so entrenched in the halls of power that today, though its patrons may divide its spoils in different ways, it can grow no more. For plea bargaining has won.").

76. 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

bargaining, Alschuler wrote of this "differential" and 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 this perception is justified."[77] Among such studies was an examination by David Brereton and Jonathan Casper that analyzed robbery and burglary defendants in three California jurisdictions.[78] The results were shocking and illustrated that defendants who exercised their constitutional right to a trial received significantly higher sentences than those who worked with prosecutors to reach an agreement.[79] Not limiting themselves to a mere observation of sentencing trends, the researchers also made an insightful statement regarding the impact of high differentials on the rates of plea bargaining:

> 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

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discounts to induce guilty pleas. Of course these discounts exert pressure on defendants to plead guilty."). Along with sentencing differentials, of course, are considerations by the defendant of the likelihood of success at trial. *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2465 (2004) ("In short, the classic shadow-of-trial model predicts that the likelihood of conviction at trial and the likely post-trial sentence largely determine plea bargains."). A prosecutor, however, has less control of a defendant's perceptions of these odds, and, as such, this topic is less applicable to our discussion.

77. Alschuler, *supra* note 26, at 652-53 (footnote omitted). Alschuler goes on to state: "Although the empirical evidence is not of one piece, the best conclusion probably is that in a great many cases the sentence differential in America assumes shocking proportions." *Id.* at 654-56; *see also* Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 251 (2006) ("While practitioners disagree about the acceptability of a large sentence differential between the post-plea and post-trial sentence, they agree that such a differential is common." (footnote omitted)).

78. *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 (1981-82); *see also* H. J. Shin, *Do Lesser Pleas Pay?: Accommodations in the Sentencing and Parole Process*, 1 J. CRIM. JUST. 27 (1973) (finding that charge reduction directly results in reduction of the maximum sentence available and indirectly results in lesser actual time served).

79. *See* Brereton & Casper, *supra* note 78, at 55-59; *see also* Daniel Givelber, *Punishing Protestations of Innocence: Denying Responsibility and Its Consequences*, 37 AM. CRIM. L. REV. 1363, 1382 (2000) ("The differential in sentencing between those who plead and those convicted after trial reflects the judgment that defendants who insist upon a trial are doing something blameworthy."); Tung Yin, *Not a Rotten Carrot: Using Charges Dismissed Pursuant to a Plea Agreement in Sentencing Under the Federal Guidelines*, 83 CAL. 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.").

> 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.[80]

Significant differentials, Brereton and Casper argued, are a tool used to increase plea bargaining rates by increasing the incentives for negotiation.[81]

Under the above theory, that as differentials increase so too do the incentives to accept a prosecutor's offer, it must also be true that at some point differentials are so extreme as to make rejection of a plea agreement irrational regardless of guilt or innocence.[82] Such realizations have led some to argue that plea bargaining is equivalent to torture.

> We coerce the accused against whom we find probable cause to confess his guilt. To be sure, our means are much politer; we use no rack, no thumbscrew, no Spanish boot to mash his legs. But like the Europeans of distant centuries who did employ these machines, we make it terribly costly for an accused to claim his right to the constitutional safeguard of trial. We threaten him with a materially increased sanction if he avails himself of his right and is thereafter convicted. The sentencing differential is what makes plea bargaining coercive. There is, of course, a difference between having your limbs crushed if you refuse to confess, or suffering some extra years of imprisonment if you refuse to confess, but the difference is of degree, not kind. Plea bargaining, like torture, is coercive.[83]

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80. *See* Brereton & Casper, *supra* note 78, at 69.

81. *See id.* at 45 ("It is this sentence differential (whether conceived of as a reward to guilty pleaders or as a punishment of those who waste the court's time by 'needless' trials) which has traditionally been seen as the engine driving the plea-bargaining assembly line."); *see also* Givelber, *supra* note 79, at 1382 ("The pragmatic justification for differential sentencing is simple and powerful: we want those charged with crimes to plead guilty, and differential sentencing provides an accused with a strong incentive to do just that.").

82. *See* Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 46 (1983) ("The sentencing differential between defendants who are convicted at trial and those who accept the prosecutor's offer to plead guilty is so pervasive and so substantial that few defendants are foolhardy enough to risk testing the prosecutor's determination of the 'value' of their case.").

83. John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 12-13 (1978) (footnote omitted). While some argue that increased differentials encourage innocent defendants to waive their right to a trial, thus producing an unjust result, Frank Easterbrook argues that this does not mean plea bargaining itself is an unacceptable institution.

> XXFrom a market perspective, acceptance of such pleas [from innocent defendants] is no mystery. Sometimes the evidence may point to guilt despite the defendant's factual innocence. It would do defendants no favor to prevent them

Regardless of the legitimacy of such a dramatic characterization of a mechanism which is a vital aspect of the American criminal justice system, statements such as the one above serve to reinforce the persuasive value of large sentencing disparities and remind us that prosecutors benefit from increased control and higher maximum sentences because these weapons allow them to increase differentials to encourage bargaining.

B. The Continued Triumph

As has been discussed, plea bargaining relies on two fundamental elements: a prosecutor's power to structure and offer a plea bargain and the significance of the differential between the sentence available through negotiations and the sentence a defendant risks if unsuccessful at trial. Through consideration of these two elements, the reasons for the failure of post-Enron reforms to result in increased prosecutions or prison sentences becomes clear, and the expectation of some that these reforms might lead to decreasing plea bargaining rates seems to ignore the true operation of the plea bargaining machine.

When examined in light of the discussion above, each post-Enron reform either serves to increase prosecutorial power to charge bargain and select sentencing ranges, increase the top end of differentials faced by defendants, or do nothing at all to impact prosecutors' ability to deal. Let us begin with the DOJ policies issued in 2003, aimed at ensuring the most readily provable offense is charged and enlisting prosecutors in the battle to frustrate the instances of downward departures.[84] As discussed previously, if the September 22 memorandum requiring that a prosecutor charge the most readily provable offense were followed, there would be little incentive for defendants to enter into plea bargains because the differential between the offered plea and the

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> from striking the best deals they could in such sorry circumstances. And if the probability of the defendant's guilt is indeed low even on evidence that would be placed before the court . . . the sentencing differential will be correspondingly steep.

Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 320 (1983); *see also* 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, 204 (2002) ("The innocent defendant [] may regard the incentives as holding more value because he perceives the system as unreliable."). What Easterbrook's discussion fails to recognize is the significant economic costs associated with taking a case to trial. As such, if the differential is significant enough, an individual might plead guilty to avoid the financial devastation that could result from forcing a trial he or she may actually win.

84. *See* September Memorandum, *supra* note 18, at 130 (regarding the Department of Justice policy concerning charging criminal offenses, disposition of charges, and sentencing); *see also* July Memorandum, *supra* note 20, at 376 (regarding the Feeney Amendment to the PROTECT Act).

sentence at trial would become inconsequential.[85] As plea bargains have not decreased, therefore, the logical conclusion is that prosecutors have ignored this memorandum in so far as it attempts to limit their discretion to create incentives for defendants. Prosecutors have themselves supported this conclusion by admitting that the memorandum has made no difference in their daily operations. Shortly after the memorandum's release, an article appearing in *The Champion* described the impact of the policy as "[n]ot much."[86] As the article highlights, USAO's responded to a survey by indicating that it was "still business as usual in the courthouse."[87] While most prosecutors argued that nothing had changed because they were abiding by the memorandum's dictates before its release, the true message being conveyed was that plea bargaining remained alive and well.[88] Of course, that plea bargaining and the status quo survived the DOJ mandate does not mean prosecutors were in open violation of the memorandum. Rather, the memorandum itself had been structured to allow prosecutors to attain compliance without amending their procedures because "the tough-sounding 2003 policies include exceptions that any wise prosecutor (and there are many wise prosecutors) could drive a truck through."[89] Whether this was purposeful or an inadvertent window through which business as usual could endure, the end result was that charge bargaining and the incentives created by this system continued to exist.

While it appears that the September 22 DOJ memorandum did little to change day-to-day operations, the July 28 DOJ memorandum enforcing the Feeney Amendment had an actual and significant impact. By removing the ability of judges to grant downward departures in certain cases and creating a system in which the DOJ would both monitor and challenge all unsupported downward departures, prosecutors gained further power to control the system in which they operate. George Fisher, with regard to the passage of the Sentencing Guidelines, argued that as judges lose the ability to influence sentences, prosecutors become the lone gatekeeper and controllers of the discretionary elements of the sentencing process.[90] It appears that the Feeney

85. *See* Alschuler, *supra* note 26, at 657; *Ashcroft Charging Policy*, *supra* note 48, at 24.

86. *See* G. Jack King, Jr., *NACDL Survey: USAOs Deny Ashcroft Memo Affecting Plea Bargaining*, CHAMPION, Dec. 2003, at 6.

87. *See id.*

88. *See id.*; *see also* Miller, *supra* note 18, at 1254.

89. Miller, *supra* note 18, at 1257.

90. *See* FISHER, HISTORY OF PLEA BARGAINING, *supra* note 66, at 17; *see also* Boyd, *supra* note 19, 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.").

Amendment has resulted in the same increase in prosecutorial discretion to the detriment of the judiciary.

> Even if prosecutors limit their reliance on the specified exceptions, prosecutorial power would still increase under the PROTECT Act. This is so because the restriction on visible downward departures that is the purpose of the Act gives prosecutors greater control over the likely sentencing range. Because prosecutors can control the sentencing range, they can control the likely (expected) differential in sentence after plea and after trial.[91]

The post-Enron DOJ policy regarding the Feeney Amendment, therefore, gave prosecutors enhanced abilities to structure the sentences resulting from plea bargaining and from trial to maximize the differential. While it is certainly true that prosecutors simply could have used these new powers to challenge downward departures in an effort to increase the average sentences for all those convicted in the federal system, statistics regarding prison sentences and plea bargaining rates in financial crimes cases do not support this conclusion. Rather, the data support an argument more consistent with the literature explaining the function of the plea bargaining machine. That is, prosecutors have continued to offer financial crimes defendants plea deals with pre-Enron sentences, while simultaneously using their new powers to increase the projected sentence if a defendant rejects the plea offer and risks trial.

Congressional action in the form of SOX and subsequent amendments to the Sentencing Guidelines were offered amidst the same discussion of increased enforcement and punishment as the DOJ memoranda above. It appears, however, that these post-Enron reforms have also failed to achieve their proposed effect, instead merely offering prosecutors more tools to perpetuate the dominance of plea bargaining. First, SOX offered prosecutors new crimes with which to charge defendants, presumably intended to assist in the expansion of financial crimes prosecutions. According to the statistical data, however, this did not occur. Second, SOX offered prosecutors a fourfold increase in the sentence for the most commonly charged fraud offenses, wire and mail fraud and conspiracy to commit fraud.[92] Again, however, the sentencing data do not reflect a significant increase in prison time for financial criminals as a result of these SOX measures. It appears, therefore, that once again prosecutors have chosen to use post-Enron reforms to increase their power and control of sentencing rather than to increase prosecutions and/or prison sentences.

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91. Miller, *supra* note 18, at 1257-58.

92. *See* Sarbanes-Oxley Act of 2002 § 903, 18 U.S.C. §§ 1341, 1343 (Supp. IV 2004) (listing criminal penalties for mail and wire fraud); *see also* Brickey, *supra* note 11, at 378-79 (comparing pre-SOX and post-SOX penalties for fraud).

Through SOX, prosecutors have gained the power to increase differentials by offering a defendant a plea agreement which does not include wire or mail fraud nor one of the newly created statutes carrying a large sentence. The result is that prosecutors have more discretion to choose between statutes with wildly different statutory maximums to increase the differential between the plea offer and the possible sentence resulting from trial. As an example, a prosecutor might agree to charge an offense that carries a maximum prison sentence of five years in return for a plea agreement, but threaten to charge the defendant with mail or wire fraud if she proceeds to trial.[93] If, as has been discussed, differentials are the key to a prosecutor's ability to plea bargain, SOX opened the door to staggering new prosecutorial power.

While increased statutory maximums are relatively meaningless without accompanying Sentencing Guidelines amendments, pre-Enron Sentencing reforms, SOX, and post-SOX Sentencing Guidelines initiatives addressed this issue.[94] Through passage of the 2001 Economic Crime Package, Congress significantly increased the sentencing range for fraud shortly before the corporate calamities of 2001.[95] Not satisfied, further amendments to the Sentencing Guidelines were adopted following SOX that, among other changes, added one point to the base offense level depending on the statutory charge in the case.[96] While many predicted that these initiatives would culminate in drastically increased sentences for financial criminals, the sentencing statistics show only a minor increase.[97] Again, it appears that while prosecutors could

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93. *See* Miller, *supra* note 18, at 1253.

> What the federal guidelines have allowed is vastly greater prosecutorial control not only over the actual sentences, but over the plea/trial differential. Even changes such as mandatory penalties that appear to reduce prosecutorial discretion in fact increase prosecutorial control since prosecutors choose whether to charge a crime triggering mandatory sentences, and whether to propose the one kind of departure (substantial assistance) that allows departures below mandatory minimum sentences.

Id.; *see also* William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2569 (2004) ("The bodies of law, state and federal, that claim to define crimes and sentences do not really do what they claim. Instead, those bodies of law define a menu—a set of options law enforcers may exercise, or a list of threats prosecutors may use to induce the plea bargains they want.").

94. *See supra* Part I.C.

95. *See* Bowman, *Sarbanes-Oxley Act*, *supra* note 27, at 232 (explaining that while increases in statutory maximums have little impact alone, these reforms coupled with amendments to the Sentencing Guidelines "add real years for real defendants"); *see also* Bowman, *supra* note 7, at 389; Bowman, *Sentencing Reforms*, *supra* note 27, at 7.

96. *See* FINAL SOX AMENDMENTS, *supra* note 36; *see also* Bowman, *supra* note 7, at 433; Bowman, *Sarbanes-Oxley Act*, *supra* note 27, at 231.

97. *See* Kroger, *supra* note 47, at 114-15; *see also* Bowman, *supra* note 7, at 433; Bowman,

have used the 2001 Economic Crime Package, SOX, and the subsequent Sentencing Guideline amendments to increase enforcement and ratchet up punishments, prosecutors instead have used these reforms to increase their power over sentencing differentials. Just as the selection of a particular statutory offense changes the maximum allowable sentence, so too does the selection of a statute affect a defendant's base offense level.[98] By offering defendants a plea agreement which includes conviction for a statute carrying a six point, rather than seven point, base offense level, prosecutors can significantly impact a defendant's sentence. Therefore, the result of the adoption of this Sentencing Guidelines amendment, which was intended to increase sentences for all fraud cases, was to further strengthen plea bargaining's triumph and ensure that prosecutors have the tools necessary to present defendants with large differentials as incentives to plead guilty.

Further evidence to support the above conclusions is found through examination of post-Enron cases where one can compare the differential between the plea offer the government presented and the sentence the defendant faced at trial. The best example of the significance of the post-Enron differential is Jamie Olis of Dynegy.[99] Olis, a mid-level executive, was initially sentenced in excess of twenty four years after losing at trial. In comparison, the CEO of the company only received fifteen months in return for a guilty plea. As a mid-level executive, one must imagine Olis was offered a similar, if not more lenient, deal. Therefore, Olis likely faced a differential of fifteen months for pleading guilty or 292 months for proceeding to trial, an almost 2000% increase for putting the government to its burden. It is hard to imagine any defendant, including an innocent one, rejecting such odds. Olis, however, exercised his right to a trial, and, unlike his colleagues, reaped the full wrath of post-Enron reforms. Another example is Lea Fastow, former Director and Assistant Treasurer of Corporate Finance at Enron, who was offered a plea deal that required her to plead guilty to a single count of filing a false tax return and serve one year of supervised release.[100] If she had rejected the offer, she would have gone to trial facing a six count indictment that charged her with

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Sarbanes-Oxley Act, *supra* note 27, at 231.

98. *See* Bowman, *supra* note 7, at 434 ("[S]etting different base offense levels within the same guideline based on the statutory maximum sentence of the offense of conviction results in a net transfer of sentencing discretion to prosecutors.").

99. Gibeaut, *supra* note 43; Johnson & Masters, *supra* note 43, at A1.

100. *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 (2004). Though Fastow's initial deal with the government was rejected by the court, it provides an example of the significant differential between the government's plea offer and the sentence Fastow faced at trial. *Id.* at 3-5.

participation in a $17 million fraud. If convicted on these six counts, her sentence may have exceeded ten years in prison.[101] Unlike Olis, Fastow chose not to risk facing the trial differential. Other instances of staggering sentences do not allow for a glimpse at what was offered by the government, but do illustrate the type of sentences faced by those who go to trial. For instance, Bernard Ebbers, former head of WorldCom, was sentenced to twenty-five years in prison.[102] More recently, Jeffrey Skilling, former chief executive of Enron, was sentenced to twenty-four years and four months in prison.[103] It appears, therefore, that while those who risk trial face the possibility of radically increased sentences, the 95% or more of defendants who plead guilty, even in some of the most publicized post-Enron cases, have received sentences similar to those handed down in these types of cases for over a decade.

Conclusion

Plea bargaining is an integral part of the American criminal justice system, and it rose to prominence because prosecutors gained sufficient control of the system to offer defendants incentives to confess. While many believed that post-Enron reforms would result in increased prosecutions, higher sentences, and, perhaps, less plea bargaining, the actual impact was simply to increase prosecutors' control of the criminal justice system, in turn perpetuating the prominence of the plea bargaining machine. With more tools and increased control, prosecutors have increased differentials in financial crimes cases to staggering new levels by offering plea bargains carrying sentences similar to the pre-Enron era while threatening sentences following trial that take full advantage of SOX and the new Sentencing Guidelines structure. While it is possible that these new powers could actually result in more defendants accepting plea offers in the future, plea bargaining rates have been so high in recent years there is little room left for expansion. Plea bargaining triumphed many years ago, and, therefore, the reforms following Enron merely served to

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101. This calculation was made 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 97-121 months. *See* U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 2B1.1, at 68-69 (2002), *available at* http://www.ussc.gov/2002guid/2002guid.pdf.

102. *See* Steven B. Duke et al., *A Picture's Worth a Thousand Words: Conversational Versus Eyewitness Testimony in Criminal Convictions*, 44 AM. CRIM. L. REV. 1, 8 (2007).

103. *See* Alexei Barrionuevo, *Enron's Skilling Is Sentenced to 24 Years*, N.Y. TIMES, Oct. 24, 2006, at C1; Carrie Johnson, *Skilling Gets 24 Years for Fraud at Enron*, WASH. POST, Oct. 24, 2006, at A1.

perpetuate this triumph and further solidify plea bargaining's place in the criminal justice system.

The promises of SOX, the DOJ policy memoranda, and the Sentencing Commission amendments remain unfulfilled. While these post-Enron reforms affected the war on financial crimes, the true impact was merely to aid in plea bargaining's survival, not to get tough on the majority of financial criminals. For most of those accused of financial crimes, therefore, little is different; ninety-five percent or more will receive a sentence relatively unchanged by the events of the last seven years. For those few souls that do risk trial, the outlook has become much more severe. So, in many ways, one can argue that the most significant legacy of the government's efforts to get tough on financial criminals is to have created further incentives for defendants to plead guilty and further risks for those who put the government to its burden at trial.

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.ussc.gov/ANNRPT/2009/FigC.pdf.

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

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

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

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

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

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

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

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

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

> the purpose 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 codefend-

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[8] Indictment, *supra* note 3.

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

[10] Indictment, *supra* note 3.

[11] *Id.* at 38.

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

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

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

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

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

Berenson, *supra* note 6.

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

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

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

Harkness & LaVerne, *supra* note 9.

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

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

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

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

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

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

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

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

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

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

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

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

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

22 *Id.* at 32.

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

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

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

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

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

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

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

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

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

27 *Id.*

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

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

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

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

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

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29 *Id.*

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

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

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

33 *See id.*

34 *Id.* at 743-44.

35 *Id.* at 747, 751.

36 *Id.* at 752.

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

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

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

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

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

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

39 *Id.* at 758.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id.

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

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

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

And so we wait.

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

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

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

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

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

55 Flood & Pugh, *supra* note 50.

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

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

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

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and

Vanessa A. Edkins, PhD[2]

INTRODUCTION

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

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

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.[9] Just moments before, a graduate student had accused her of cheating on a logic test being administered as part of a psychological study. The young student was offered two choices. If she admitted her offense and saved the university the time and expense of proceeding with a trial before the Academic Review Board, she would simply lose her right to compensation for participating in the study. If, however, she proceeded to the review board and lost, she would lose her compensation, her faculty advisor would be informed, and she would be forced to enroll in an ethics course.

In Beatrice, Nebraska, the choice for Taylor was difficult, but the incentives were enticing.[10] 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.[11] The alternative, a lifetime behind bars, was grim by comparison.[12] After contemplating the options, Taylor pleaded guilty to aiding and abetting

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[3] *See* THE INNOCENCE PROJECT – KNOW THE CASES: ADA JOANN TAYLOR, available at www.innocenceproject.org/Content/Ada_JoAnn_Taylor.php (last visited January 1, 2012).

[4] *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.").

[5] *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.'").

[6] *See id.*

[7] *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.").

[8] *See id.*

[9] *See infra* Section II (discussing the plea bargaining study).

[10] *See* THE INNOCENCE PROJECT – TAYLOR, *supra* note 3.

[11] *See id.*

[12] *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:

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

That Taylor and the college student both pleaded guilty is not the only similarity between the cases. Both were also innocent of the offenses for which they had been accused.[17] 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.[18] 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.[19] The study, conducted by the authors, involving dozens of college students, and taking place over several months, not only

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

See id. (quoting Leon Shaskolsky Sheleff, ULTIMATE PENALTIES: CAPITAL PUNISHMENT, LIFE IMPRISONMENT PHYSICAL TORTURE 60 (1987) (quoting John Stuart Mill, Parliamentary Debate on Capital Punishment Within Prisons Bill (Apr. 21, 1868))).

[13] *See infra* section II (discussing the plea bargaining study).

[14] *See id.*

[15] *See id.*

[16] *See id.*

[17] *See* THE INNOCENCE PROJECT – TAYLOR, *supra* note 3.

[18] *See id.* It should also be noted that five of the six defendants in the Wilson murder case pleaded guilty. As described above, all six defendants were innocent and played no role in the sexual assault or murder of Wilson. *See id.*; *see also* THE INNOCENCE PROJECT – KNOW THE CASES: DEBRA SHELDEN, available at www.innocenceproject.org/Content/Debra_Shelden.php (last visited Jan. 1, 2012) ("Debra Shelden agreed with prosecutors to plead guilty and testify falsely to her alleged role in the crime at the trial of co-defendant Joseph White in exchange for a lighter sentence."); THE INNOCENCE PROJECT – KNOW THE CASES: JAMES DEAN, available at www.innocenceproject.org/Content/James_Dean.php (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.").

[19] *See infra* section II (discussing the plea bargaining study).

recreated the innocent defendant's dilemma experienced by Taylor, but revealed that plea bargaining's innocence problem is not isolated to an obscure and rare set of cases.[20] Strikingly, the study demonstrated that more than half of innocent defendants will falsely admit guilt in return for a perceived benefit.[21] This finding not only brings finality to the long-standing debate regarding the possible extent of plea bargaining's innocence problem, but also ignites a fundamental constitutional question regarding an institution the Supreme Court reluctantly approved of in 1970 in return for an assurance it would not be used to induce innocent defendants to falsely admit guilt.[22]

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

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[20] *See id.*

[21] *See id.*

[22] *See id.*

[23] *See infra* section I (discussing the historical rise of plea bargaining and its innocence problem).

[24] *See infra* section II (discussing the plea bargaining study).

[25] *See id.*

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

[27] *Id.* at 752.

[28] *Id.* at 757-58; *see also* Lucian E. Dervan, *Bargained Justice: Plea Bargaining's Innocence Problem and the Brady Safety-Valve*, -- UTAH LAW REVIEW -- (forthcoming 2012) (discussing the "Brady Safety-Valve.").

I. The Historical Rise of Plea Bargaining and Its Innocence Problem

On December 23, 1990, a twenty-one year old woman was robbed and sexually assaulted by an unknown assailant in New Jersey.[29] Three days after the attack, and again a month later, the victim identified John Dixon as the perpetrator from a photo array.[30] Dixon was arrested on January 18, 1991, and ventured down a road familiar to criminal defendants in the United States.[31] 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.[32] He received a sentence of forty-five years in prison.[33] Ten year later, however, Dixon was released from prison after DNA evidence established that he could not have been the perpetrator of the crime.[34] 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.[35]

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

[30] *See id.*

[31] *See id.*

[32] *See id.*; *see also* Richard Klein, *Due Process Denied: Judicial Coercion in the Plea Bargaining Process*, 32 HOFSTRA L. REV. 1349, 1398 (2004).

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

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

[33] *See* THE INNOCENCE PROJECT – DIXON *supra* note 29.

[34] *See id.*

[35] *See* United States Sentencing Commission, *2010 Sourcebook of Federal Sentencing Statistics*, Figure C, available at http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/FigureC.pdf (last

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

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

[36] *See* Dervan, *Bargained Justice*, *supra* note 28, at --; Lucian E. Dervan, *Plea Bargaining's Survival: Financial Crimes Plea Bargaining, A Continued Triumph in a Post-Enron World*, 60 OKLAHOMA LAW REVIEW 451, 478 (2007); Mark H. Haller, *Plea Bargaining: The Nineteenth Century Context*, 13 LAW & SOC'Y REV. 273, 273 (1978) ("[Alschuler and Friedman] agree that plea bargaining was probably nonexistent before 1800, began to appear during the early or mid-nineteenth century, and became institutionalized as a standard feature of American urban criminal courts in the last third of the nineteenth century."); *see also* John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 LAW & SOC'Y REV. 261 (1978); Lynn M. Mather, *Comments on the History of Plea Bargaining*, 13 LAW & SOC'Y REV. 281 (1978); John Baldwin and Michael McConville, *Plea Bargaining and Plea Negotiation in England*, 13 LAW & SOC'Y REV. 287 (1978).

[37] *See* Dervan, *Bargained Justice*, *supra* note 28, at --.

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

[39] George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 859 (2000) (hereinafter "*Plea Bargaining's Triumph (Yale)*").

> There is no glory in plea bargaining. In place of a noble clash for truth, plea bargaining gives us a skulking truce. . . . But though its victory merits no fanfare, plea bargaining has triumphed. . . . The battle has been lost for some time. . . . [V]ictory goes to the powerful.

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

[40] *See* United States Sentencing Commission, *2010 Sourcebook of Federal Sentencing Statistics*, Figure C, available at http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/FigureC.pdf (last visited January 2, 2012).

a. THE RISE OF PLEA BARGAINING

While most discussions regarding the rise of plea bargaining begin in the late nineteenth century, the full history of plea bargaining dates back hundreds of years to the advent of confession law.[41] 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.'"[42] Interestingly, early legal precedent regarding confessions prohibited the offering of any inducement to prompt the admission.[43] 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."[44] 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.[45]

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

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[41] *See* Alschuler, *supra* note 38, at 12.

[42] *See id.* at 13.

[43] *See id.* at 12.

[44] *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.").

[45] *See* Dervan, *Bargained Justice*, *supra* note 28, at – (discussing the evolution of the doctrine that guilty pleas must be voluntary); *see also* Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652, 657 (1981).

> Plea negotiation works . . . only because defendants have been led to believe that their bargains are in fact bargains. If this belief is erroneous, it seems likely that the defendants have been deluded into sacrificing their constitutional rights for nothing. Unless the advocates of plea bargaining contend that defendants should be misled, they apparently must defend the proposition that these defendants' pleas should make some difference in their sentences.

Id. (footnotes omitted).

[46] *See* Alschuler, *supra* note 38, at 19-21.

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

however, did not prevent plea bargaining from continuing to operate in the shadows.[48] That plea bargains continued to be used despite strong precedential condemnation can be traced, at least in part, to the need for plea bargaining as a tool of corruption during this period.[49] As an example, and as Professor Alschuler has noted previously, there are documented accounts that by 1914 a defense attorney in New York would "stand out on the street in front of the Night Court and dicker away sentences in this form: $300 for ten days, $200 for twenty days, $150 for thirty days."[50] Such bargains were not limited to New York.[51] One commentator wrote the following in 1928 regarding plea bargaining in Chicago, Illinois:[52]

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

See id. at 20. A legal annotation from the period stated:

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

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

[48] *See id.* at 22.

[49] *See id.* at 24.

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

See id.

[50] *Id.*

[51] *See id.*

[52] *See* id. at 25. (this cite seems unnecessary to me)

> When the plea of guilty is found in records it is almost certain to have in the background, particularly in Cook County, a session of bargaining with the State's Attorney. ... These approaches, particularly in Cook County, are frequently made through another person called a "fixer." This sort of person is an abomination and it is a serious indictment against our system of criminal administration that such a leech not only can exist but thrive. The "fixer" is just what the word indicates. As to qualifications, he has none, except that he may be a person of some small political influence.[53]

The use of plea bargaining by such "fixers" ensured it would continue to survive despite judicial repudiation, though another phenomenon would be needed to bring it out of the shadows.[54]

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

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

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

[55] *See id.* at –.

> Between the early twentieth century and 1916, the number of cases in the federal system resulting in pleas of guilty rose sharply from fifty to seventy-two percent. In return for defendants' assistance in moving a flood of cases through an overwhelmed system, they were often permitted to plead guilty to lesser charges or given lighter sentences. As prohibition was extinguished, the United States continued its drive to create new criminal laws, a phenomenon that only added to the courts' growing case loads and the pressure to continue to use bargaining to move cases through the system.

See id.; see also Donald A. Dripps, *Overcriminalization, Discretion, Waiver: A Survey of Possible Exit Strategies*, 109 PENN. ST. L. REV. 1155, 1156-61 (2005) (discussing the relationship between broadening legal rules and plea bargaining); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 519-20 (2001) (discussing the influence of broader laws on the rate of plea bargaining). For a definition of "overcriminalization," *see* Lucian E. Dervan, *Over-Criminalization 2.0: The Symbiotic Relationship Between Plea Bargaining and Overcriminalization*, 7 J. L. ECON. & POL'Y 645, 645-46 (2011) (discussing overcriminalization).

> Similarly, consider the significant ramifications that would follow should there no longer be overcriminalization. The law would be refined and clear regarding conduct for which criminal liability may attach. Individual benefits, political pressure, and notoriety would not incentivize the invention of novel legal theories upon which to base liability where none otherwise exists, despite the already expansive size of the United States criminal code. Further, novel legal theories and overly-broad statutes would not be used to create

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

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

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

Id.

[56] *See* Alschuler, *supra* note 38, at 32.

[57] *See* Dervan, *supra* note 55, at 649-50.

> In return for agreeing not to challenge the government's legal assertions and for assisting in lessening the strain created by overcriminalization, defendants were permitted to plead guilty to reduced charges and in return for lighter sentences.[57] The strategy of using plea bargaining to move cases through the system was effective, as the number of defendants relieving the government of its burden at trial swelled.

Id. at 650.

[58] *See id.*

[59] *See* Alschuler, *supra* note 38, at 33.

[60] *See id.*

[61] *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).

[62] *See* Fisher, PLEA BARGAINING'S TRIUMPH, *supra* note 39, at 210; *see also* Alschuler, *supra* note 38, at 28 ("The rewards associated with pleas of guilty were manifested not only in the lesser offenses of which guilty-plea defendants were convicted but also in the lighter sentences that they received.").

> [F]ederal prosecutions under the Prohibition Act terminated in 1930 had become nearly eight times as many as the total number of all pending federal prosecutions in 1914. In a number of urban districts the enforcement agencies maintain that the only practicable way of meeting this situation with the existing machinery of the federal courts ... is for the United States Attorneys to make bargains with defendants or their counsel whereby defendants plead guilty to minor offenses and escape with light penalties.[63]

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

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

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

Walker later appealed his sentence and the United States Supreme Court found the bargain constitutionally impermissible, noting that the threats and inducements had made Walker's plea involuntary.[70]

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[63] *Id.* at 32.

[64] *See id.* at 33.

[65] *See* Dervan, *supra* note 28, at – ("As prohibition was extinguished, the United States continued its drive to create new criminal laws, a phenomenon that only added to the courts' growing case loads and the pressure to continue to use bargaining to move cases through the system.").

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

[67] *See id.*

[68] *See id.* at 280.

[69] *Id.* at 281.

> [Walker] was deceived and coerced into pleading guilty when his real desire was to plead not guilty or at least to be advised by counsel as to his course. If he did not voluntarily waive his right to counsel, or if he was deceived or coerced by the prosecutor into entering a guilty plea, he was deprived of a constitutional right.[71]

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

By 1967, despite a continued rejection of plea bargaining by appellate courts, even the American Bar Association ("ABA") was beginning to see the benefits of the institution.[72] In a

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

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

> Trial judges failed to advise the unrepresented defendants of their right to counsel in open court (i.e., not by way of an announcement by the public defenders, written waiver form, or video-recorded information) only 27% of the time. Judges asked defendants if they wanted to hire a lawyer or if they wanted counsel less than half of the time. And only about one-third of the time did the trial judge discuss the importance and benefits of counsel or disadvantages of proceeding without counsel.

Id.

[72] *See* American Bar Association Project on Standards for Criminal Justice, *Pleas of Guilty* 2 (Approved Draft 1968). During the period between 1941 and 1970, several additional appellate cases challenged the constitutionality of plea bargaining. *See also* United States v. Jackson, 390 U.S. 570 (1968) (striking down a statute that allowed for the death penalty only when a defendant failed to plead guilty and moved forward with a jury trial as an "impermissible burden upon the exercise of a constitutional right."); Machibroda v. United States, 368 U.S. 487 (1962) (finding a prosecutor's offer of leniency and threats of additional charges an improper inducement that stripped the defendant's plea of guilty of voluntariness); *see also* Shelton v. United States, 242 F.2d 101 (5th Cir. 1957), *judgment set aside*, 246 F.2d 571 (5th Cir. 1957) (en banc), *rev'd per curiam on confession of error*, 356 U.S. 26 (1958) (involving a defendant the court determined had been induced to plead guilty by the promise of a light sentence and the dismissal of other pending charges). In *Shelton*, the court stated:

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

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

report regarding the criminal justice system, the ABA noted that the use of plea bargaining allowed for the resolution of many cases without a trial, something necessary given the system's lack of resources.[73] 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."[74]

Three years after the ABA embraced plea bargaining as a necessary tool of an overburdened system, the United States Supreme Court finally directly addressed the constitutionality of modern day plea bargaining in the case of *Brady v. United States*.[75] The case involved a defendant charged with kidnapping in violation of federal law.[76] The law permitted the death penalty, but only where recommended by a jury.[77] This meant that a defendant could

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[73] *See supra* note 72.

[74] *See* ABA Project on Standards for Criminal Justice, *supra* note 72, at 2.

> [A] high proportion of pleas of guilty and *nolo contendere* does benefit the system. Such pleas tend to limit the trial process to deciding real disputes and, consequently, to reduce the need for funds and personnel. If the number of judges, courtrooms, court personnel and counsel for prosecution and defense were to be increased substantially, the funds necessary for such increases might be diverted from elsewhere in the criminal justice process. Moreover, the limited use of the trial process for those cases in which the defendant has grounds for contesting the matter of guilty aids in preserving the meaningfulness of the presumption of innocence.

Id.

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

[76] *See id.* Interestingly, the defendant in *Brady* was charged under the same federal statute at issue in the 1968 case of United States v. Jackson. *See* United States v. Jackson, 390 U.S. 570 (1968) (striking down a statute that allowed for the death penalty only when a defendant failed to plead guilty and moved forward with a jury trial as an "impermissible burden upon the exercise of a constitutional right."); *see also* Dervan, *Bargained Justice*, *supra* note 28, at – ("With regard to the federal kidnapping statute, [the *Jackson* court stated that] the threat of death only for those who refuse to confess their guilt is an example of a coercive incentive that makes any resulting guilty plea invalid.").

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

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

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

avoid capital punishment by pleading guilty.[78] Realizing his chances of success at trial were minimal given that his co-defendant had agreed to testify against him at trial, Brady pleaded guilty and was sentenced to fifty years in prison.[79] He later changed his mind, however, and sought to have his plea withdrawn, arguing his act was induced by his fear of the death penalty.[80]

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

> 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.[84]

The Court continued:

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

[79] *See id.* at 743-44.

[80] *See id.* at 744.

[81] *See supra* notes 46 to 71 and accompanying text.

[82] *See Brady*, 397 U.S. at 752-58; *see also* Dervan, *Bargained Justice*, *supra* note 28, at –.

> As if the criminal justice system were not already bogged down with growing case loads, in part due to over-criminalization, the Supreme Court had just finished handing defendants a number of significant victories during the Due Process Revolution of the 1960s. For instance, the Supreme Court imposed the "exclusionary rule" for violations of the Fourth Amendment, granted the right to counsel, and imposed the obligation that suspects be informed of their rights prior to being interrogated.

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

[83] *See Brady*, 397 U.S. at 750-51.

[84] *Id.*

> [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).[85]

After *Brady,* plea bargaining was permitted and could fully emerge into the mainstream of the American criminal justice system.[86] 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.[87]

Plea bargaining continued its rise over the next four decades and, today, over ninety-six percent of defendants in the federal system plead guilty rather than proceed to trial.[88] While plea bargaining was a powerful force in 1970, the ability of prosecutors to create significant incentives for defendants to accept plea offers grew exponentially after *Brady* with the implementation of sentencing guidelines throughout much of the country.[89] As one commentator explained:

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[85] *Id.* at 755. Interestingly, the language used by the Supreme Court in *Brady* is similar to language proposed by the United States Court of Appeals for the Fifth Circuit several years earlier to address "voluntariness." *See* Shelton v. United States, 242 F.2d 101, 115 (5th Cir. 1957), *judgment set aside,* 246 F.2d 571 (5th Cir. 1957) (en banc), *rev'd per curiam on confession of error*, 356 U.S. 26 (1958). The *Shelton* case almost rose to the United States Supreme Court for review of the constitutionality of plea bargaining in 1958, but was surreptitiously withdrawn prior to argument.

> Interestingly, the panel decision from the Fifth Circuit was later overturned *en banc*, and the case proceeded to the Supreme Court. The Court never addressed the challenge to plea bargaining, however, because the government filed an admission that the guilty plea may have been improperly obtained and the case was remanded to the District Court without further discussion. According to Professor Albert Alschuler, evidence indicates that the government likely confessed its error for fear that the Supreme Court would finally make a direct ruling that all manner of plea bargaining was wholly unconstitutional.

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

[86] *See Brady*, 397 U.S. at 750-55 (permitting the use of plea bargaining).

[87] *See id.* at 750.

[88] *See* United States Sentencing Commission, *2010 Sourcebook of Federal Sentencing Statistics*, Figure C, available at http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/FigureC.pdf (last visited January 2, 2012).

> Before the advent of modern sentencing guidelines, both prosecutor and judge held some power to plea bargain without the other's cooperation.... Today, however, sentencing guidelines have recast whole chunks of the criminal code.... By assigning a fixed and narrow penalty range to almost every definable offense, sentencing guidelines often empower prosecutors to dictate a defendant's sentence by manipulating the charges. Guidelines have unsettled the old balance of bargaining power among prosecutor, judge, and defendant by ensuring that the prosecutor, who always had the strongest interest in plea bargaining, now has almost unilateral power to deal.[90]

Through charge selection and manipulation of sentencing ranges, prosecutors today possess striking powers to create significant sentencing differentials, a term used to describe the difference between the sentence a defendant faces if he or she pleads guilty versus the sentence risked if he or she proceeds to trial and is convicted.[91] Many have surmised that the larger the

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[89] *See* Fisher, PLEA BARGAINING'S TRIUMPH, *supra* note 39, at 210 ("[Sentencing Guidelines] invest prosecutors with the power, moderated only by the risk of loss at trial, to dictate many sentences simply by choosing one set of charges over another."); *see also* Mary P. Brown and Stevan E. Bunnell, *Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia*, 43 AM. CRIM. L. REV. 1063, 1066-1067 (2006) ("Like most plea agreements in federal or state courts, the standard D.C. federal plea agreement starts by identifying the charges to which the defendant will plead guilty and the charges or potential charges that the government in exchange agrees not to prosecute."); Joy A. Boyd, *Power, Policy, and Practice: The Department of Justice's Plea Bargaining Policy as Applied to the Federal Prosecutor's Power Under the United States Sentencing Guidelines*, 56 ALA. L. REV. 591, 592 (2004) ("Not only may a prosecutor choose whether to pursue any given case, but she also decides which charges to file."); Geraldine S. Moohr, *Prosecutorial Power in an Adversarial System: Lessons from Current White Collar Cases and the Inquisitorial Model*, 8 BUFF. CRIM. L.R. 165, 177 (2004) ("The power of the prosecutor to charge is two-fold; the power to indict or not ... and the power to decide what offenses to charge."); Jon J. Lambiras, *White-Collar Crime: Why the Sentencing Disparity Despite Uniform Guidelines?*, 30 PEPP. L. REV. 459, 512 (2003) ("Charging decisions are a critical sentencing matter and are left solely to the discretion of the prosecutor. When determining which charges to bring, prosecutors may often choose from more than one statutory offense.").

[90] Fisher, PLEA BARGAINING'S TRIUMPH, *supra* note 39, at 17; *see also* Boyd, *supra* note 89, at 591-92 ("While the main focus of the Sentencing Guidelines appeared to be narrowing judicial discretion in sentencing, some critics argued that the Sentencing Guidelines merely shifted the federal judges' discretionary power to federal prosecutors."); *see also* Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1252 (2004) ("The overwhelming and dominant fact of the federal sentencing system, beyond the Commission and the guidelines and mandatory penalties, is the virtually absolute power the system has given prosecutors over federal prosecution and sentencing.").

[91] *See* Alschuler, *supra* note 45, at 652-53 ("Criminal defendants today plead guilty in overwhelming numbers primarily because they perceive that this action is likely to lead to more lenient treatment than would follow conviction at trial. A number of studies suggest this perception is justified."); *see also* Dervan, *Bargained Justice*, *supra* note 28, at –.

sentencing differential, the greater the likelihood a defendant will forego his or her right to trial and accept the deal.[92]

b. PLEA BARGAINING'S INNOCENCE DEBATE

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

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> Plea bargaining's rise to dominance during the nineteenth and twentieth centuries resulted from prosecutors gaining increased power over the criminal justice system and, through such power, the ability to offer increasingly significant incentives to those willing to confess their guilt in court. Today, sentencing differentials have reached new heights and, as a result, the incentives for defendants to plead guilty are greater than at any previous point in the history of our criminal justice system.

Id.; *see also* Lucian E. Dervan, *The Surprising Lessons from Plea Bargaining in the Shadow of Terror*, 27 GA. ST. U. L. REV. 239, 245 (2010) ("Key to the success of prosecutors' use of increasing powers to create incentives that attracted defendants was their ability to structure plea agreements that included significant differences between the sentence one received in return for pleading guilty and the sentence one risked if he or she lost at trial."); Stephanos Bibas, *Bringing Moral Values into a Flawed Plea-Bargaining System*, 88 CORNELL L. REV. 1425, 1425 (2003) ("The criminal justice system uses large sentence discounts to induce guilty pleas. Of course these discounts exert pressure on defendants to plead guilty.").

[92] One study analyzed robbery and burglary defendants in three California jurisdictions and found that defendants who went to trial received significantly higher sentences. *See* David Brereton and Jonathan D. Casper, *Does it Pay to Plead Guilty: Differential Sentencing and the Functioning of Criminal Courts*, 16 LAW & SOC'Y REV. 45, 55-59 (1981-82); see also Daniel Givelber, *Punishing Protestations of Innocence: Denying Responsibility and Its Consequences*, 37 AM. CRIM. L. REV. 1363, 1382 (2000) ("The differential in sentencing between those who plead and those convicted after trial reflects the judgment that defendants who insist upon a trial are doing something blameworthy."); Tung Yin, *Not a Rotten Carrot: Using Charges Dismissed Pursuant to a Plea Agreement in Sentencing Under the Federal Guidelines*, 83 CALIF. L. REV. 419, 443 (1995) ("Curiously, the arena of plea bargaining pits the concepts of duress and consideration against each other: a large sentencing differential makes it more likely that a defendant is coerced into pleading guilty, and yet it also increases the benefit offered in exchange for the guilty plea."); H. Joo Shin, *Do Lesser Pleas Pay? Accommodations in the Sentencing and Parole Process*, 1 J. CRIM. JUST. 27 (1973) (finding that charge reduction directly results in reduction of the maximum sentence available and indirectly results in lesser actual time served). The Brereton and Casper study stated:

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

Brereton and Casper, *supra* note 92, at 69.

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

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

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[93] *See* Department of Justice Indictment of Lea Fastow, available at http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/enron/usleafstw43003ind.pdf (last visited July 13, 2010); *see also* Michelle S. Jacobs, *Loyalty's Reward – A Felony Conviction: Recent Prosecutions of High-Status Female Offenders*, 33 FORDHAM URB. L.J. 843 (2006); Mary Flood, *Lea Fastow in Plea Bargain Talks; Former Enron CFO's Wife Could Get 5-Month Term but Deal Faces Hurdles*, HOUSTON CHRONICLE at A1 (Nov. 7, 2003).

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

[95] *See id.* In Fastow's eventual plea agreement, the prosecutors used a federal misdemeanor charge as a mechanism by which to ensure the judge could not sentence Fastow beyond the terms of the arrangement. *See* Mary Flood, *Fastows to Plead Guilty Today; Feds Now Focus on Skilling, Lay*, HOUSTON CHRONICLE at A1 (Jan. 14, 2004).

[96] *See* Greg Farrell and Jayne O'Donnell, *Plea Deals Appear Close for Fastows*, USA TODAY at 1B (Jan. 8, 2004) ("One of the reasons that Lea Fastow wants to limit her jail time to five months is that she and her husband have two young children, and they're trying to structure their pleas so they're not both in jail at the same time."); *see also* Flood, supra, note 95at A1 (Jan. 14, 2004) ("The plea bargains for the Fastows, who said they wanted to be sure their two children are not left parentless, have been in limbo for more than a week.").

[97] Dervan, *Bargained Justice*, *supra* note 28, at – ("Today, the incentives to bargain are powerful enough to force even an innocent defendant to falsely confess guilt in hopes of leniency and in fear of reprisal."); Dervan, *supra* note 55, at 645 (Professor Ribstein notes in his article entitled *Agents Prosecuting Agents*, that "prosecutors can avoid the need to test their theories at trial by using significant leverage to virtually force even innocent, or at least questionably guilty, defendants to plead guilty."); *see also* Larry E. Ribstein, *Agents Prosecuting Agents*, 7 J.L. ECON. & POL'Y 617 (2011).

[98] *See* Michael O. Finkelstein, *A Statistical Analysis of Guilty Plea Practices in the Federal Courts*, 89 HARV. L. REV. 293, 295 (1975) ("On the basis of the analysis that follows, I conclude that the pressure on defendants to plead guilty in the federal courts has induced a high rate of conviction by 'consent' in cases in which no conviction would have been obtained if there had been a contest."); Robert E. Scott and William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1950-51 (1992) (discussing plea bargaining's innocence problem); David L Shapiro, *Should a Guilty Plea Have Preclusive Effect?*, 70 IOWA L. REV. 27, 27 (1984); *see also* Russell D. Covey, *Signaling and Plea Bargaining's Innocence Problem*, 66 WASH. & LEE L. REV. 73, 74 (2009) ("Plea bargaining has an innocence problem."); Oren

> When the deal is good enough, it is rational to refuse to roll the dice, regardless of whether one believes the evidence establishes guilt beyond a reasonable doubt, and regardless of whether one is factually innocent. The risk of inaccurate results in the plea bargaining system thus seems substantial.[99]

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.[100]

Some argue that plea bargaining's innocence problem is significant and brings into question the legitimacy of the entire criminal justice system.[101] Professor Ellen S. Podgor wrote recently of plea bargaining:

Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 CARDOZO L. REV. 2295, 2295-96 (2006) (arguing for a partial ban on plea bargaining to reduce the likelihood innocent defendants will plead guilty); Andrew D. Leipond, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1154 (2005).

[99] Russell D. Covey, *Longitudinal Guilt: Repeat Offenders, Plea Bargaining, and the Variable Standard of Proof*, 63 FLA. L. REV. 431, 450 (2011); *see also* Gregory M. Gilchrist, *Plea Bargains, Convictions and Legitimacy*, 48 AM. CRIM. L. REV. 143, 148 (2011).

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

Id; *see also* Gazal-Ayal, *supra* note 98 at 2306 ("In all these cases, an innocent defendant might accept the offer in order to avoid the risk of a much harsher result if he is convicted at trial, and thereby plea bargaining could very well lead to the conviction of factually innocent defendants."); Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1154 (2005) ("Yet we know that sometimes innocent people plead guilty, and we know some of the reasons why.... [S]ometimes the prosecutor offers such a generous discount for admitting guilt that the defendant feels he simply can't take the chance of going to trial.").

[100] It is worth mention that even Joan of Arc and Galileo Galilei fell victim to the persuasions of plea bargaining. *See* Kathy Swedlow, *Pleading Guilty v. Being Guilty: A Case for Broader Access to Post-Conviction DNA Testing*, 41 CRIM. L. BULL. 1, 1 (describing Galileo's decision to admit his belief in the theory that the earth was the center of the universe in return for a lighter sentence); Alschuler, *supra* note 38, at 41 ("[Joan of Arc] demonstrated that even saints are sometimes unable to resist the pressures of plea negotiation.").

[101] *See* Dervan, *Bargained Justice*, *supra* note 28, at – ("That plea bargaining today has a significant innocence problem indicates that the *Brady* safety-valve has failed and, as a result, the constitutionality of modern day plea bargaining is in great doubt."); Gilchrist, *supra* note 99, at 147 ("By failing to generate results correlated with the likely outcome at trial, plea bargaining undermines the legitimacy of the criminal justice system."); F. Andrew Hessick III and Reshma Saujani, *Plea Bargaining and Convicting*

> [I]nnocence is no longer the key determinant in some aspects of the federal criminal justice system.... Rather, our existing legal system places the risk of 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.[102]

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

Others argue, however, that plea bargaining's innocence problem is "exaggerated" and the likelihood of persuading an innocent defendant to falsely confess is minimal.[105] This

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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.").

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

> In short, as long as the prosecutor is willing and able to discount plea prices to reflect resource savings, regardless of guilt or innocence, pleading guilty is the defendant's dominant strategy. As a result, non-frivolous accusation – not proof beyond a reasonable doubt – is all that is necessary to establish legal guilty. This latter point forms the root of plea-bargaining's "innocence problem," which refers here not merely to the fact that innocent people plead guilty, but that the economics of plea bargaining drives them to do so.

Id.

[103] *See* Dervan, *Bargained Justice*, *supra* note 28, at – (discussing plea bargaining's innocence problem, but acknowledging that the exact impact of bargained justice on innocent defendants is, as of yet, unknown.); *see also* Scott W. Howe, *The Value of Plea Bargaining*, 58 OKLA. L. REV. 599, 631 (2005) ("The number of innocent defendants who accept bargained guilty pleas is uncertain.").

[104] *See* Ric Simmons, *Private Plea Bargains*, 89 N.C. L. REV. 1125, 1173 (2011).

> If the plea bargaining process is indeed a reasonable replacement for a trial, then plea bargaining should be encouraged, since it can achieve the same result with far fewer resources. On the other hand, if the results are dependent on factors unrelated to what would occur at trial, then society should work to reform, limit, or abolish the practice.

Id.

[105] *See* Avishalom Tor, Oren Gazal-Ayal, and Stephen M. Garcia, *Fairness and the Willingness to Accept Plea Bargain Offers*, 7 J. EMPIRICAL L. STUDIES 97, 114 (2010) ("[I]f innocents tend to reject offers that

argument rests, in part, on a perception that innocent defendants will reject prosecutors' advances and proceed to trial backed by the belief that their factual innocence will protect them from conviction.[106] 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."[107]

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

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guilty defendants accept, the concern over the innocence problem may be exaggerated."); Oren Gazal-Ayal and Limor Riza, *Plea Bargaining and Prosecution* 13 (European Association of Law and Economics Working Paper No. 013-2009, April 2009) ("Since trials are designed to reveal the truth, an innocent defendant would correctly estimate that his chances at trial are better than the prosecutor's offer suggests. As a result, innocent defendants tend to reject offers while guilty defendants tend to accept them."); Shapiro, *supra* note 98, at 40 ("[Plea bargaining's] defenders deny that the chances of convicting the innocent are substantial…."); *see also* Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1165 (2008).

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

Id.

[106] *See* Gazal-Ayal, *supra* note 98, at 2298.

[107] *See id.*

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

[109] *Id.* at 758.

This sentiment was expressed by the Court again eight years later in the *Bordenkircher v. Hayes* plea bargaining decision.[110] In *Bordenkircher*, the Court stated that as long as the defendant is free to accept or reject a plea bargain, it is unlikely an innocent defendant would be "driven to false self-condemnation."[111] 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.[112]

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

> Only twenty of the [340] exonerees in our database pled guilty, less than six percent of the total: fifteen innocent murder defendants and four innocent rape defendants who took deals that included long prison terms in order to avoid the

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

[111] *Bordenkircher*, 434 U.S. at 363 ("Indeed, acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process.").

[112] *See supra* notes 105 to 107 and *infra* notes 113 to 126 and accompanying text.

[113] *See infra* note 114.

[114] *See* George C. Thomas III, *Two Windows into Innocence*, 7 OHIO ST. J. CRIM. L. 575, 577-78 (2010) ("McConville and Baldwin concluded that two percent of the guilty pleas were of doubtful validity. As there were roughly two million felony cases filed in 2006, if two percent result in conviction of an innocent defendant, 40,000 wrongful felony convictions occur per year."); Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 74 (2008) (noting that nine of the first two-hundred individuals exonerated by the innocence project had plead guilty); D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 778-79 (2007) (examining DNA exonerations for capital rape-murder convictions); Samuel R. Gross et al., *Exonerations in the United States 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 524 (2005) (examining the number of persons exonerated who pleaded guilty); John Baldwin and Michael McConville, *Plea Bargaining and Plea Negotiation in England*, 13 LAW & SOC'Y REV. 287, 296-98 (1978) (discussing plea bargaining's innocence problem in England).

[115] *See* Gross et al., *supra* note 114, at 523.

[116] *See id.* at 536.

> risk of life imprisonment or the death penalty, and one innocent defendant pled guilty to gun possession to avoid life imprisonment as a habitual criminal.[117]

That professor Gross found so few innocent defendants who falsely pleaded guilty could be utilized as support for those who believe the innocence problem is exaggerated.[118] Upon closer examination of this and other exoneration studies, however, one realizes that while exoneration data is vital to our understanding of wrongful convictions generally, it cannot accurately or definitively explain how likely innocent defendants are to plead guilty.[119]

As noted by other scholars in the field, three problems exist with exoneration data when applied to plea bargaining research.[120] 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.[121] This focus means that the data cannot incorporate the role of innocence and plea bargaining in the vast majority of criminal cases, those not involving murder or rape, including misdemeanor cases.[122] Second, because many individuals who plead guilty do so in return for a

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[117] *Id.* Professor Gross goes on to note that in two cases of mass exoneration involving police misconduct, a subset of cases not included in his study, a significant number of the defendants pleaded guilty. *See id.* ("By contrast, thirty-one of the thirty-nine Tulia defendants pled guilty to drug offenses they did not commit, as did the majority of the 100 or more exonerated defendants in the Rampart scandal in Los Angeles.").

[118] *See* Howe, *supra* note 103, at 631 ("Particularly if many innocent defendants who go to trial are acquitted, [Professor Gross's] figure does not support claims that innocent defendants are generally more risk averse regarding trials than factually guilty defendants or that prosecutors frequently persuade innocent defendants with irresistibly low plea offers."). Howe goes on, however, to caution those who might rely on this study in such a manner because of the difficulty in gaining an exoneration following a guilty plea as opposed following to a conviction by trial. *See id.*

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

[120] *See* Covey, *supra* note 119, at 1; Howe, *supra* note 103, at 631.

[121] *See* Covey, *supra* note 119, at 1.

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

Id.

reduced sentence, it is highly likely that most innocent defendants who plead guilty might not have an incentive or sufficient time to receive exoneration.[123] Finally, even if some innocent defendants who pleaded guilty had the desire and time to move for exoneration, most would be prohibited from challenging their convictions by the mere fact that they had pleaded guilty in the first place.[124] As such, innocent defendants who plead guilty are not accurately captured by the exoneration data sets and, therefore, it is highly likely that the true extent of plea bargaining's innocent problem is significantly underrepresented and, therefore, underestimated by these studies.[125] As such, one must look elsewhere to determine the true likelihood an innocent

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[122] The Federal Bureau of Investigation crime statistics indicate that in 2010 there were 1,246,248 violent crimes and 9,082,887 property crimes in the United States in 2010. *See* U.S. Department of Justice, *Crime in the United States*, Table 1, available at http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10tbl01.xls (last visited January 22, 2012). Of this number, murder accounted for 1.2 percent and forcible rape accounted for 6.8 percent of the violent crimes. *See id.* Further, in 2011, the National Association of Criminal Defense Attorneys released a report regarding misdemeanor cases in Florida. *See* Smith & Maddan, *supra* note 71. The report noted that nearly a half-million misdemeanor cases are filed in Florida each year, and over 70% of those cases are resolved with a guilty plea at arraignment. *See id.* at 10.

[123] *See* Howe, *supra* note 103, at 631 ("Those relying on [Professor Gross's] study, however, should do so cautiously. The proportion of false convictions due to guilty pleas probably exceeds the exoneration figure from the study, because pleading guilty, as opposed to being convicted after trial, likely makes subsequent exoneration more difficult.")

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

Id. at 631 n. 170.

[124] *See* J.H. Dingfelder Stone, *Facing the Uncomfortable Truth: The Illogic of Post-Conviction DNA Testing for Individuals Who Pleaded Guilty*, 45 U.S.F. L Rev. 47, 50-51 (2010) (discussing restrictions on the ability of defendants who pleaded guilty to utilize post-conviction DNA testing).

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

> They were exonerated because the false convictions in their cases were produced by systematic programs of police perjury that were uncovered as part of large scale investigations. If these same defendants had been falsely convicted of the same crimes by mistake – or even because of unsystematic acts of deliberate dishonesty – we would never have known.

defendant might falsely condemn himself or herself in return for an offer of leniency in the form of a plea bargain.[126]

One such source of information are psychological studies regarding plea bargaining and the decision-making processes of defendants in the criminal justice system.[127] Unfortunately, these studies are also problematic and fail to definitively resolve plea bargaining's innocence debate because the majority merely employ vignettes in which participants are asked to imagine themselves as guilty or innocent and faced with a hypothetical decision regarding whether to accept or reject a plea offer.[128] As a result of the utilization of such imaginary and hypothetical scenarios, these studies are unable to capture the full impact of a defendant's knowledge that he or she is factually innocent or the true gravity of the choices one must make when standing before the criminal justice system accused of a crime he or she did not commit.[129] Nevertheless, these studies do offer some preliminary insights into the world of the innocent defendant's dilemma.

Gross et al., *supra* note 114, at 536-37; *see also* Allison D. Redlich and Asil Ali Ozdogru, *Alford Pleas in the Age of Innocence*, 27 BEHAV. SCI. & L. 467, 467-68 (2009).

> Exonerations, a once rare occurrence, are now becoming commonplace... [and] the number of identified miscarriages of justice in the United States continues to rise.... Determining the prevalence of innocents is methodologically challenging, if not impossible. There is no litmus test to definitively determine who is innocent and who is guilty. Exonerations are long, costly, and arduous processes; efforts towards them are often unsuccessful for reasons having little to do with guilt or innocence.

Id.

[126] *See infra* notes 127 to 143 (discussing psychological studies of plea bargaining).

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

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

[129] *See supra* note 128.

One of the first such psychological studies to attempt to understand a defendant's plea bargaining decision-making process through the use of vignettes was conducted by Professors Larry Gregory, John Mowen, and Darwyn Linder in 1984 ("Gregory").[130] In the Gregory study, students were asked to "imagine that they were innocent or guilty of having committed an armed robbery."[131] The students where then presented with the evidence against them and asked to make a decision regarding whether they would plead guilty or proceed to trial.[132] 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.[133] In the experiment, 18% of the "innocent" students and 83% of the "guilty" students pleaded guilty.[134] While these results might lend support to the argument that few innocent defendants in the criminal justice system falsely condemn themselves – even if you can consider 18% to be an insignificant number – the study suffered from its utilization of hypotheticals.[135] As has been

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[130] *See* Gregory et al., *supra* note 128.

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

> After listening to a tape recording of their defense attorney's summary of the evidence that would be presented for and against them at their trial, students opened an experimental booklet that contained information about the charges against them (four versus one), the punishment they would face if convicted (10 to 15 years in prison versus 1 to 2 years in prison), and the details of the plea bargain that was offered them. Students then indicated whether they accepted or rejected the plea bargain, responded to manipulation checks, indicated their perceived probability of conviction, and indicated how sure were their defense attorney and the judge of their innocence or guilt.

Id.

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

	Innocent Defendants				Guilty Defendants			
	High Charge		Low Charge		High Charge		Low Charge	
Severity	%	*n*	%	*n*	%	*n*	%	*n*
High	33	18	12	17	100	19	82	17
Low	11	18	13	15	83	23	63	16

Id. at 1524, Table 1.

[133] *See id.* at 1524-26.

[134] *See id.*

shown in social psychological studies for decades, what people say they will do in a hypothetical situation and what they would do in reality are two very different things.[136]

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.[137] 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)."[138] 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.[139] The participants were then offered a plea bargain that required their immediate admission of guilt in return for a less severe punishment.[140] Unfortunately, the second study was only successfully administered to sixteen students, too few to draw any significant conclusions.[141] 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?[142] It would take another thirty years for a study to successfully create an environment in which this question could be definitively answered, a study that should forever change the way plea bargaining and innocence are viewed in the American criminal justice system.[143]

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[135] *See supra* notes 128-29 and accompanying text.

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

[137] *See* Gregory et al., *supra* note 128, at 1526-27.

[138] *See id.* at 1526.

[139] *See id.*

[140] *See id.*

[141] *See id.* at 1528. The results of the second Gregory et al. study were that six of eight guilty students accepted the deal and zero of eight innocent defendants accepted the deal. *See id.* These findings led to further research regarding the effect of an innocent defendant's belief that he or she would succeed at trial. In their work regarding fairness and plea negotiations, Tor, Gazal-Ayal, and Garcia showed that "guilty" participants were more likely to accept a plea than the "innocent" participants. *See* Tor, *supra* note 105, at 113-14.

[142] *See infra* Section IV (discussing the results of the authors' plea bargaining study).

[143] *See id.*

II. LABORATORY EVIDENCE OF PLEA BARGAINING'S INNOCENCE PROBLEM

In 2006, a wave of new accounting scandals pervaded the American corporate landscape.[144] According to federal prosecutors, numerous companies were backdating stock options for senior executives to increase compensation without disclosing such expenses to the public as required by Securities and Exchange Commission regulations.[145] One such company, according to federal prosecutors, was Broadcom, a large semiconductor manufacturer in California.[146] After Broadcom restated $2.2 billion in charges because of backdating in January 2007, the government indicted Dr. Henry Samueli, co-founder of the company and former Chief Technical Officer.[147] Dr. Samueli pleaded guilty and, as part of his deal, agreed to testify for the prosecution against Henry T. Nicholas III, Broadcom's other co-founder, and William J. Ruehle, the company's Chief Financial Officer ("CFO').[148] 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.[149] The judge stated in open court:

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

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

> Stock options, typically used as incentive pay, allow employees to buy stock in the future at current prices. Broadcom Corp. and other companies also backdated the options to a previously lower price to give employees a little extra when they cashed in the options. Backdating was legal as long as the expense was disclosed publicly.

Id.

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

[147] *See* Department of Justice Press Release, *Broadcom Co-Founder Pleads Guilty to Making False Statement to the SEC in Backdating Investigation* (June 23, 2008), available at http://www.justice.gov/usao/cac/Pressroom/pr2008/086.html (last visited January 25, 2012).

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

> The uncontroverted evidence at trial established that Dr. Samueli was a brilliant engineer and a man of incredible integrity. There was no evidence at trial to suggest that Dr. Samueli did anything wrong, let along criminal. Yet, the government embarked on a campaign of intimidation and other misconduct to embarrass him and bring him down.
>
> . . .
>
> One must conclude that the government engaged in this misconduct to pressure Dr. Samueli to falsely admit guilt and incriminate [the other defendants] or, if he was unwilling to make such a false admission and incrimination, to destroy Dr. Samueli's credibility as a witness for [the other defendants].
>
> Needless to say, the government's treatment of Dr. Samulei was shameful and contrary to American values of decency and justice.[150]

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

> Based on the complete record now before me, I find that the government has intimidated and improperly influenced the three witnesses critical to Mr. Ruehle's defense. The cumulative effect of that misconduct has distorted the truth-finding process and compromised the integrity of the trial.
>
> To submit this case to the jury would make a mockery of Mr. Ruehle's constitutional right to compulsory process and a fair trial.

Id.

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

> Among other wrongful acts the government, one, unreasonably demanded that Dr. Samueli submit to as many as 30 grueling interrogations by the lead prosecutor.
>
> Two, falsely stated and improperly leaked to the media that Dr. Samueli was not cooperating in the government's investigation.
>
> Three, improperly pressured Broadcom to terminate Dr. Samueli's employment and remove him from the board.
>
> Four, misled Dr. Samueli into believing that the lead prosecutor would be replaced because of misconduct.

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

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

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> Five, obtained an inflammatory indictment that referred to Dr. Samueli 72 times and accused him of being an unindicted coconspirator when the government new (sic), or should have known, that he did nothing wrong.
>
> And seven (sic), crafted an unconscionable plea agreement pursuant to which Dr. Samueli would plead guilty to a crime he did not commit and pay a ridiculous sum of $12 million to the United States Treasury.

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

[151] *See* Ribstein, *supra* note 97, at 630 ("In the Broadcom backdating case, particularly egregious prosecutorial conduct caused defendants to plead guilty to crimes they knew they had not committed…."); Koehler, *supra* note 146, at 941 ("In pleading guilty, Samueli did what a 'disturbing number of other people have done: pleaded guilty to a crime they didn't commit or at least believed they didn't commit' for fear of exercising their constitutional right to a jury trial, losing, and 'getting stuck with a long prison sentence.'"); Ashby Jones, *Are Too Many Defendants Pressured into Pleading Guilty?*, THE WALL ST. J. LAW BLOG (Dec. 21, 2009), available at http://blogs.wsj.com/law/2009/12/21/are-too-many-defendants-pressured-into-pleading-guilty/ (last visited January 25, 2012) ("Samueli did what lawyers and legal scholars fear a disturbing number of other people have done: pleaded guilty to a crime either they didn't commit or at least believed they didn't commit.").

[152] *See supra* notes 130 and 136 and accompanying discussion.

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

[154] *See id.* at 481.

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

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

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[156] *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.'").

[157] *See id.* at 482.

[158] *See id.*

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

Id. (internal quotations omitted) (emphasis in original).

[159] *See id.* 483.

[160] *See id.*

[161] *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.").

[162] *See id.* at 484.

[163] *See id.*

Condition	**True Confessions**	**False Confessions**
No Tactic	46%	6%
Deal	72%	14%
Minimization	81%	18%
Minimization + Deal	87%	43%

In 2011, utilizing the Russano study as a guide, we constructed a new investigatory paradigm that would better reflect the mechanics of the criminal justice system and more precisely focus the inquiry on the innocent defendant's dilemma.[164] The new study was administered to eighty-two students from a small, southeastern, private technical university.[165] The results of the study were groundbreaking and established what Gregory and Russano had hinted at in their earlier forays into the plea bargaining machine.[166] Plea bargaining has a significant innocence problem because innocent defendants are more likely than not to falsely confess guilt in return for an incentive.[167]

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.[168] The study participants had each signed up for what they believed was a psychological inquiry into individual versus group problem-solving performance. When a study participant arrived for the problem-solving experiment, he or she was met by another student pretending to also be participating in the exercise. Unbeknownst to the study participant, however, the second student was actually a confederate working with the authors.[169] At this point, a research assistant, also working with the authors, led the two students into a private room and explained the testing procedures.[170] The research assistant informed the students that they would be participating in an experiment about performance on logic problems. According to the

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See id. at Table 1.

[164] *See* infra sections IV(a) and (b) (discussing the results of the authors' plea bargaining study).

[165] *See id.*

[166] *See id.*

[167] *See id.*

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

[169] *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.

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

research assistant, the two students would be left alone to complete three logic problems together as a team.[171] The research assistant then informed them that after the first problems were completed, the students would receive three additional logic problems that must be completed individually. When these problems were distributed, the research assistant script required the following statement, "Now I will hand out the individual problems, remember that you are to work alone. I will give you 15 minutes to complete these."

While the study participant and the confederate were solving the individual logic problems, one of two conditions would occur. In half of the cases, the confederate asked the study participant for assistance in answering the questions, a clear violation of the research assistant's explicit instructions. First, the confederate asked the study participant, "What did you get for number 2?" If the study participant did not respond with the answer, the confederate followed up by saying, "I think it is 'D' because [some scripted reasoning based on the specifics of the problem]." Finally, if necessary, the confederate would ask, "Did you get 'E' for number 3?"[172] It is worth noting that all but two study participants approached to offer assistance by the confederate violated the requirement that each student work alone.[173] 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.[174] The study participants in this

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[171] *See id.* The research script required the research assistants to make the following statement during the introduction.

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

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

[173] *See id.* The two students who refused to offer assistance were removed from the study.

[174] *See id.* The study protocol stated:

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

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

After completing the second set of logic problems, the research assistant, who did not know whether cheating had occurred, collected the logic problems and asked that the students remain in the room for a few minutes while the problems were graded.[175] Approximately five minutes later, the research assistant reentered the room and said, "We have a problem. I'm going to need to speak with each of you individually." The research assistant then looked at the sign-in sheet and read off the confederate's name and the two then left the room together. Five minutes later, the research assistant reentered the room, sat down near the student, and made the following statement.

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

To ensure the study participant was unable to argue he or she had answered the question correctly, the second set of logic questions were designed to have no correct answer. The research assistant then informed the student that this had occurred before and she had been given authority to offer two alternatives.[176]

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.[177] 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.[178] The research assistant then offered each study participant one of two alternative options if the plea offer was rejected.

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[175] *See id.* The research assistants were not informed regarding whether cheating had occurred to ensure that their approach to each study participant during the plea bargaining component of the study was consistent and not influenced by omnipotent knowledge of guilt or innocence that would not be available to a prosecutor or investigator in the actual criminal justice system.

[176] *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.

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

[178] *See* Edkins & Dervan, *supra* note 168; *see also* Bowers, *supra* note 105, at 1136-37.

> The trial course is long; even if convicted, the defendant often has already served any postconviction sentence, and then some. In this way, conviction may counterintuitively

In roughly half of the cases (hereinafter the "harsh sentencing condition"), the research assistant informed the student that if the "deal" was not accepted, the professor leading the experiment would bring the matter before the Academic Review Board ("ARB"). The ARB was described as a group of ten to twelve faculty and staff members that ruled on such matters. To make the ARB sound similar to a jury in an actual criminal trial, the research assistant described it as being a forum in which the student had the option of telling his or her version of events, presenting evidence, and arguing for his or her position. Again, to better reflect the actual mechanics of the criminal justice system, the research assistant also informed the student that "the majority of students, like 80-90%, are usually found guilty" before the ARB. This percentage was selected and communicated because it is consistent with the actual current conviction rate of defendants proceeding to trial in the United States.[179] The research assistant then informed the student that if he or she were "convicted" by the ARB, he or she would lose his or her study compensation, his or her faculty advisor would be notified, and he or she would have to enroll in a three credit hour ethics course. The course was described as a pass/fail class that would be offered free of charge, but which would require mandatory weekly attendance and the completion of a paper and a final examination. In roughly the other half of the cases (hereinafter the "lenient sentencing condition"), the research assistant provided the same information to the student regarding the ARB process, but informed the student that if he or she was "convicted" by the ARB, he or she would lose his or her study compensation, his or her faculty advisor would be notified, and he or she would undergo nine hours of ethics training in the form of three three-hour seminars. The seminars were described as free of charge, but requiring mandatory attendance and the completion of a final examination. Half the students were offered the harsh sentencing condition and the other half were offered the lenient sentencing condition to test the impact of "sentencing differentials" on the rate of innocent and guilty students accepting the plea offer rather than proceeding to trial before the ARB.

Once the study participants were presented with their option of pleading guilty or proceeding to the ARB, the research assistant presented them with a piece of paper. The paper outlined their options and asked that they circle their selection.[180] To ensure study participants

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

Id.

[179] *See* Edkins & Dervan, *supra* note 168; *see also* Gregory et al., *supra* note 128.

[180] *See* Edkins & Dervan, *supra* note 168. The research assistants had scripted answers to common questions that might be asked while the students deliberated their choices. For example, answers were prepared for questions such as "I didn't do it," "What did the other person say?" "How can I be in trouble

did not become distraught under the pressure of the scenario, the research assistant was instructed to terminate the experiment and debrief the student regarding the true nature of the study if he or she took too long to select an option, seemed overly stressed, or tried to leave the room.[181]

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.[182] While it was anticipated that this plea bargaining study would reveal that innocent students, just like innocent defendants, sometimes plead guilty to an offense they did not commit in return for a promise of leniency, the rate at which such false pleas occurred was beyond anticipation and should lead to a reevaluation of the role and method of plea bargaining today.

i. *Pleading Rates for Guilty and Innocent Students*

As had been anticipated, both guilty and innocent students accepted the plea bargain and confessed to the alleged conduct.[183] In total, almost nine out of ten guilty study participants

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

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

[182] *See id.* One important distinction between the experimental methodology used in the authors' study and previous studies is that the new study included a definitive top end to the sentencing differential. This better reflects the reality of modern sentencing, particularly in jurisdictions utilizing sentencing guidelines, and, thus, better captures the decision-making process of criminal defendants faced with a plea bargaining decision. *See* Russano et al., *supra* note 153, at 483 (discussing the lack of a definitive sentence for those who failed to accept the deal).

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

accepted the deal, while slightly less than six out of ten innocent study participants took the same path.[184]

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

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

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[184] *See id.* We conducted a three-way loglinear analysis to test the effects of guilt (guilt vs. innocence) and type of sanction (lenient vs. harsh) on the participant's decision to accept the plea bargain. The highest order interaction (guilt x sanction x plea) was not significant, χ^2 (1, N = 76) = 0.26, p = 0.61. What was significant was the interaction between guilt and plea, χ^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, χ^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.

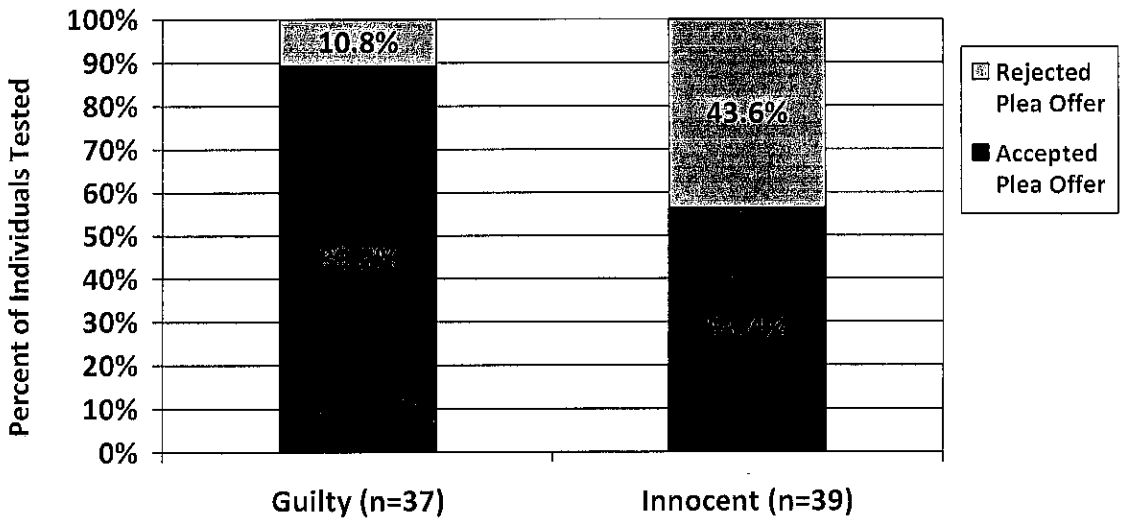
[185] *See id.*

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

[187] *See* Edkins & Dervan,, *supra* note 168.

Figure 2.

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



Interestingly, these results are consistent with predictions made by other scholars relying on case studies to predict the impact of innocence on plea bargaining decisions.[188]

In his recent article entitled *Mass Exoneration Data and the Causes of Wrongful Convictions*, Professor Russell Covey examined two mass exoneration cases and predicted, based on the choices of defendants in those cases, that innocence mattered.[189] While Professor Covey concedes that his examination of case studies only permits "some tentative comparisons," it is fascinating to observe that the actions of the defendants in these two cases mirror the actions of our study participants.[190]

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[188] *See* Covey, *supra* note 119, at 1.

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

[190] *See* Covey, *supra* note 119, at 34.

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

Id.

Figure 3.

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

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

The second, and, perhaps, most important conclusion stemming from the study is that plea bargaining has a significant innocence problem and those who argue the matter is "exaggerated" have drastically underestimated the likelihood an innocent person will falsely condemn themselves before a court.[195] In our study, well over half of the innocent study participants, regardless of whether the lenient or harsh sentencing condition was employed, were willing to falsely admit guilt in return for a reduced punishment.[196] Previous research has argued

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[191] *See id.*

[192] *See id;* Edkins & Dervan,, *supra* note 168.

[193] *See* Covey, *supra* note 119, at 34; Edkins & Dervan,, *supra* note 168.

[194] *See* Bowers, *supra* note 105, at 1136-37.

[195] *See* Tor, *supra* note 105, at 113 (arguing that plea bargaining's innocence problem is "exaggerated.").

[196] *See* Edkins & Dervan,, *supra* note 168. This finding is not only important for legal research, but is also of vital importance for those studying other institutions employing models based on the criminal justice system. That students will acquiesce in such a manner should not only bring the criminal justice system's use of plea bargaining into question, but also all other similar forms of adjudication throughout society. For example, this would include reevaluation of student conduct procedures that contain offers of leniency in return for admissions of guilt.

that the innocence problem is minimal because defendants are risk-prone and willing to defend themselves before a tribunal.[197] Our research, however, demonstrates that when study participants are placed in real, rather than hypothetical, bargaining situations and are presented with accurate information regarding their statistical probability of success, just as they might be so informed by their attorney or the government during a criminal plea negotiation, innocent defendants are highly risk-averse.[198]

Based on examination of the detailed notes compiled during the debriefing of each study participant, two common concerns drove the participants' risk-averse behavior. First, study participants sought to avoid the Academic Review Board process and move directly to punishment.[199] Second, study participants sought a punishment that would not require the deprivation of direct future liberty interests.[200] Further research is necessary in this area to fully understand these motivations, but one key aspect of this trend is worth noting at this juncture. The study participants' actions in this regard appear to be directly mimicking a phenomenon that has drawn much debate and concern in recent years.[201] The students appear to have been

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[197] *See* Tor, *supra* note 105, at 106 (arguing based on a study utilizing an email questionnaire that innocent defendants are risk prone and on average were willing to proceed to trial rather than accept a plea); *see also* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2507 ("Defendants' attitudes toward risk and loss will powerfully shape their willingness to roll the dice at trial.").

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

> In short, most people are inclined to gamble to avoid sure losses and inclined to avoid risking the loss of sure gains; they are risk averse, but they are even more loss averse. When these gains and losses are uncertain probabilities rather than certain, determinate amounts, the phenomenon is reversed.

[199] *See* Edkins & Dervan,, *supra* note 168; *see also* Bowers, *supra* note 105, at 1136-37.

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

Id. at 1144.

[200] *See* Edkins & Dervan,, *supra* note 168.

[201] *See* Smith & Maddan, *supra* note 71, at 7 ("But even where no jail time is imposed, and the court and the prosecutor keep their promises and allow a defendant to pay his fine and return to his home and job the same day, there are real punishments attendant to a misdemeanor conviction that have not yet begun."); Bibas, *supra* note 197, at 2492-93.

selecting "probation" and immediate release rather than risking further "incarceration" through forced participation in a trial and, if found guilty, "confinement" in an ethics course or seminar.[202] In essence, the study participants simply wanted to go home.[203] This study demonstrates, therefore, that one need not only be concerned that significant offers of leniency might lead defendants in large felony cases to falsely condemn themselves through plea bargaining, but one must also be concerned that the millions of misdemeanor defendants cycled through the criminal justice system each year are pleading guilty based on factors wholly distinct from their actual factual guilt.[204]

ii. *The Impact of Sentencing Differentials*

One goal of the study was to offer two distinct punishments as a result of conviction by the Academic Review Board to determine if the percentage of guilty and innocent study participants accepting the plea offer rose as the sanction they risked if they lost at trial increased.[205] 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.[206]

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

Id.

[202] *See* Bowers, *supra* note 105, at 1136-37.

[203] *See id.*

[204] *See* Smith & Maddan, *supra* note 71, at 7 (discussing concerns regarding uncounseled defendants pleading guilty in quick arraignments and returning home the same day without understanding the collateral consequences of their decision).

[205] *See* Edkins & Dervan,, *supra* note 168.

[206] *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.[207] Unfortunately, this shift is not statistically significant due to the limited size of the study population, but the data does demonstrate that perhaps the study was on the right track and more research with a larger pool of participants and a greater "sentencing differential" is needed to further examine this phenomenon.[208] Significant questions remain regarding how large a sentencing differential can become before the rate at which innocent and guilty defendants plead guilty becomes the same and regarding how sentencing differentials that include probation, as opposed to a prison sentence, influence a defendant's decision-making. Such questions, however, must be reserved for future study, research that is vital now that plea bargaining's innocence problem has been squarely established.

Just as interesting as the above shift in the percentage of study participants pleading guilty, perhaps, is the diagnosticity data collected during this portion of the study.[209] Diagnosticity, as used in this study, is a calculation that ascertains whether a process (e.g. plea bargaining) is efficient at identifying truthful pleas by guilty defendants or whether the process is inefficient because it also inadvertently leads to false pleas by the innocent.[210] A similar test was applied in the Russano study of interrogation tactics.[211] When Russano's interrogators did not

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[207] *See id.*

[208] *See id.*

[209] *See id.*

[210] *See id.*; *see also* Russano, *supra* note 153, at 484 (noting that diagnosticity in that study illustrated the "ratio of true confessions to false confessions.").

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

In our study, the diagnosticity of the plea bargaining process utilized was extremely low, standing at a mere 1.58.[216] That the diagnosticity of our plea bargaining process was considerably lower than the diagnosticity of Russano's combined interrogation tactics is significant.[217] First, it is important to note that plea bargaining's diagnosticity in this study was hovering dangerously close to that which would be expected from torture, despite the fact that our process did not threaten actual prison time or deprivations of significant liberty interests as happens every day in the actual criminal justice system.[218] Further, this diagnosticity result

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[211] *See* Russano, *supra* note 153, at 484.

[212] *See id.* (the 7.67 diagnosticity was the result of only 6% of test subjects falsely confessing).

> Given the goal of identifying techniques that might yield a high rate of true confessions and a low rate of false confessions, we felt it was also important to examine diagnosticity.... [D]iagnosticity was highest when neither of the techniques was used and lowest when both were used. More specifically, diagnosticity was reduced by nearly 40% with the use of a single interrogation technique... and by 74% when both techniques were used in combination.

Id.

[213] *See id.*

[214] *See id.*

[215] *See id.*

[216] *See* Edkins & Dervan,, *supra* note 168.
[217] *See id.*; Russano, *supra* note 153, at 484.

[218] John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 12-13 (1978).

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

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.[219]

The other interesting aspect of our study's diagnosticity data is that the diagnosticity of the harsh and lenient sentencing conditions were very similar.[220] This was surprising, because it had been anticipated that the efficiency of the process would greatly suffer as we increased the punishment risked at trial.[221] That the diagnosticity did not drop in this way when the harsh sentencing condition was applied means further research is necessary to better understand the true impact of sentencing differentials.

Though further research is warranted, the diagnosticity element of this study does warrant discussion of two important possibilities. First, perhaps future studies will demonstrate that diagnosticity here did not drop significantly because it had little place left to go.[222] The

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> crushed if you refuse to confess, or suffering some extra years of imprisonment if you refuse to confess, but the difference is of degree, not kind. Plea bargaining, like torture, is coercive.

Id.

[219] *See* Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 495-96 (1998) ("When police are trained to seek both independent evidence of a suspect's guilt and internal corroboration for every confession before making an arrest … the damage wrought and the lives ruined by the misuse of psychological interrogation methods will be significantly reduced."); Russano, *supra* note 153, at 485 ("[W]e encourage police investigators to carefully consider the use of interrogation techniques that imply or directly promise leniency, as they appear to reduce the diagnosticity of an elicited confession.").

[220] *See* Edkins & Dervan, *supra* note 168.

[221] *See id.*

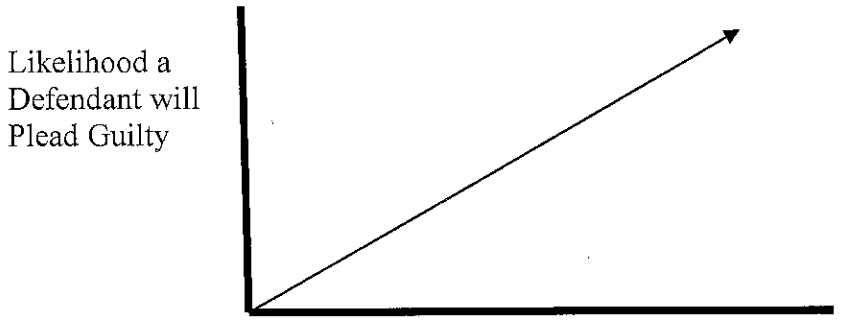
[222] *See* Dervan, *supra* note 36, at 488 (discussing a similar phenomenon with regard to plea bargaining rates, which are now in excess of 96% at the federal level).

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

diagnosticity for the lenient sentencing condition was already at 1.62, which, as discussed above, is exceptionally low. That it did not drop meaningfully below this threshold when the sentencing differential was increased, therefore, may not be surprising, particularly given that a diagnosticity of 1.0 represents the utilization of a process akin to torture.[223] 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.[224] Until now, many observers have predicted that sentencing differentials operate in a linear fashion, which means there is a direct relationship between the size of the sentencing differential and the likelihood a defendant will accept the bargain.[225]

Figure 5.

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



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

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Id.

[223] *See* Langbein, *supra* note 210, at 12-13 .

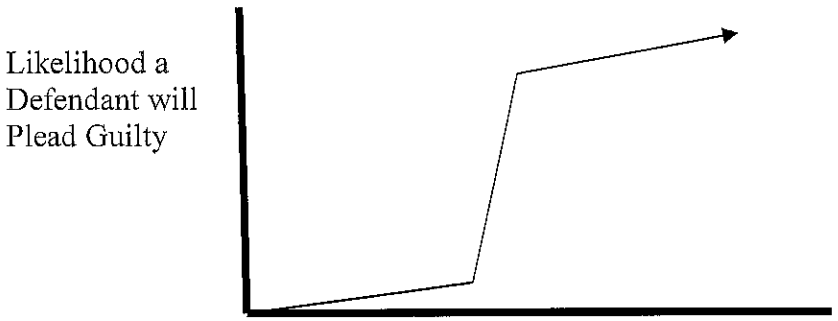
[224] *See* Dervan, *supra* note 91, at 282 ("[I]n a simplistic plea bargaining system the outcome differential and the sentencing differential track closely."); Yin, *supra* note 92, at 443 ("Curiously, the arena of plea bargaining pits the concepts of duress and consideration against each other: a large sentencing differential makes it more likely that a defendant is coerced into pleading guilty, and yet it also increases the benefit offered in exchange for the guilty plea.").

[225] *See id.*

in diagnosticity for both a harsh and lenient sentencing condition, because, once the critical size is reached, there is little additional impact that can be gained from further increasing the size of the differential.

Figure 6.

Graph Illustrating Possible "Cliff" Relationship Between Plea Bargaining Rates and Sentencing Differentials



If future research indicates that this "cliff" effect is occurring, then there are two reasons for concern. First, this might mean that research suggesting that the answer to plea bargaining's innocence problem is merely better control of sentencing differentials is based on an incorrect assumption regarding the operation and effect of such differentials.[227] Second, it should be of concern that a minimal sentencing differential, such as was present in our study, may be

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[226] There are many factors that might shift when this "cliff" is reached for a particular defendant. *See* Bibas, *supra* note 197 (article discussing factors that influence a particular defendant's decision to plead guilty).

[227] *See* Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1245 (2008) (discussing the benefits of fixed-plea discounts, including that such fixed discounts "prevent prosecutors from offering discounts so large that innocent defendants are essentially coerced to plead guilty to avoid the risk of a dramatically harsher sentence.").

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

Id. at 1240; *see also* Donald G. Gifford, *Meaningful Reform of Plea Bargaining: Control of Prosecutorial Discretion*, 1983 UNIV. OF ILL. L.R. 37, 81-82 (1983) ("Dean Vorenberg suggests that a sentence discount of ten or twenty percent should encourage the requisite number of desired pleas. This figure appears to be a reasonable one with which to begin.... Excessive sentence discounts should be constitutionally suspect because they place a burden on the defendant's exercise of constitutional rights and negate the voluntary nature of his plea.").

sufficient to reach this "cliff" and overwhelm the study participants' free will and decision-makings processes. While further research is necessary to better understand this possible phenomenon, consideration must now be given to the possibility that small sentencing differentials are more powerful than previously predicted and operate in a very different way than previously assumed.

III. THE CONSTITUTIONALITY OF THE INNOCENT DEFENDANT'S DILEMMA

In 1970, the same year the Supreme Court ruled that plea bargaining was a permissible form of justice in the *Brady* decision, the Court also accepted the case of *North Carolina v. Alford*.[228] In *Alford*, the Court stated that it was permissible for a defendant to plead guilty even while maintaining his or her innocence.[229] The Court stated that there must, however, be a "record before the judge contain[ing] strong evidence of actual guilt" to ensure the rights of the truly innocent are protected and guilty pleas are the result of "free and intelligent choice."[230] 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.[231]

In May 1993, the mutilated bodies of three eight-year-old boys were discovered in a drainage canal in Arkansas.[232] Spurred by growing concern regarding satanic cults, police desperately searched for the killer or killers.[233] As part of their investigation, Police focused on a seventeen year old named Jessie Lloyd Misskelley, Jr. Subjected to a twelve hour interrogation,

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

[229] *Id* at 37; *see also* Andrew D. Leipond, *supra* note 98, at 1156 (2005) ("An *Alford* plea, where the defendant pleads guilty but simultaneously denies having committed the crime, clearly puts the court on notice that this guilty plea is problematic....").

[230] *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).

[231] Campbell Roberts, *Deal Frees 'West Memphis Three' in Arkansas*, N.Y. TIMES (Aug. 19, 2011), available at www.nytimes.com/2011/08/20/us/20arkansas.html (last visited January 31, 2012); *see also* Mara Leveritt, *Are 'Voices For Justice' Heard? A Star-Studded Rally on Behalf of the West Memphis Three Prompts the Delicate Question*, 33 U. ARK. LITTLE ROCK L. REV. 137, 150-53 (2011) (discussing publicity surrounding the case); Paul G. Cassell, *The Guilty and the 'Innocent': An Examination of Alleged Cases of Wrongful Conviction from False Confessions*, 22 HARV. J.L. & PUB. POL'Y 523, 557-60 (1999) (discussing facts of the case); Leo & Ofshe, *supra* note 219, at 461-62 (discussing the Misskelley confession).

[232] *See* Roberts, *supra* note 231.

[233] *See id.*

Misskelley eventually confessed to committing the killings along with two others teenagers, Damien Echols and Jason Baldwin, though his confession was "inconsistent with the facts of the case, was not supported by any evidence, and demonstrated that he lacked personal knowledge of the crime."[234] Though Misskelley later recanted his statement, all three teenagers were convicted at trial and became known as the "West Memphis Three."[235] Misskelley and Baldwin received life sentences, while Echols received the death penalty.[236]

Following their convictions, the three young men continued to maintain their innocence and, gradually, publicity regarding the case began to grow.[237] 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.[238] Interestingly, however, the DNA testing did find a match.[239] Hair from the ligatures used to bind one of the victims matched Terry Hobbs, one of the victims' step-fathers.[240] Though Hobbs had claimed not to have seen the murdered boys at all on the day of their disappearance, several witnesses came forward after the DNA test results were released to say they had seen him with the boys shortly before their murder.[241]

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[234] *See* Leo & Ofshe, *supra* note 231, at 461.

[235] *See* Roberts, *supra* note 231.

[236] *See id.*

[237] *See id.*

[238] *See* Leveritt, *supra* note 231, at 151-52.

[239] *See id.* at 151.

[240] *See id.* (discussing the release of this DNA evidence by singer Natalie Maines during a rally for the "West Memphis Three.")

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

Id. at 151-152.

[241] *See id.*

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.[242] 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.[243] According to the lead prosecutor, there was no longer sufficient evidence to convict the three at trial.[244] Despite the strong language in *Alford* indicating that it was appropriate only in cases where the evidence was overwhelming and conviction at trial was almost ensured, the government offered the "West Memphis Three" a deal.[245] They could continue to maintain their innocence, but would be required to enter an *Alford* plea of guilty to the murder of the three boys in 1993.[246] In return, they would be immediately released.[247] While Baldwin was reluctant to accept the offer, he agreed to ensure Echols would be released from death row.[248] Baldwin stated, "[T]his was not justice. However, they're trying to kill Damien."[249] 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.[250] Whether they were guilty of the charged offenses may never truly be known, but it is clear that despite insufficient evidence to convict them at trial and strong indications they were innocent the three were enticed by the power of the plea bargaining machine.[251]

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[242] *See* Roberts, *supra* note 231.

[243] *See id.*

[244] *See id.*

[245] *See id.*

[246] *See id.*

[247] *See id.*

> Under the seemingly contradictory deal, Judge David Laser vacated the previous convictions, including the capital murder convictions for Mr. Echols and Mr. Baldwin. After doing so, he ordered a new trial, something the prosecutors agreed to if the men would enter so-called Alford guilty pleas. These pleas allow people to maintain their innocence and admit frankly that they are pleading guilty because they consider it in their best interest.

Id.

[248] *See id.*

[249] *See id.*

[250] *See id.*

[251] *See id.*

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.[252] At the same time the Court made clear its belief that innocent defendants were not vulnerable to the powers of bargained justice, the Court reserved for itself the ability to reexamine the entire institution should it become evident they were mistaken.[253] 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.*[254]

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.*[255]

This caveat about the power of plea bargaining has been termed the *Brady* Safety-Valve, because it allows the Supreme Court to reevaluate the constitutionality of bargained justice if the persuasiveness of the offers are coercive and surpass a point at which they begin to ensnarl an unacceptable number of innocent defendants.[256]

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[252] Brady v. United States, 397 U.S. 742, 752-58.

[253] *Id.* at 757-58; *see also* Dervan, *supra* note 28, at --.

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

[255] *See id.* at 757-58 (emphasis added).

[256] *see* Dervan, *supra* note 28, at --.

> Safety-valves are intended to relieve pressure when forces within a machine become too great and, thereby, preserve the integrity of the machine. The *Brady* safety-valve serves

Interestingly, *Brady* is not the only Supreme Court plea bargaining case to include mention of the innocence issue and the safety-valve.[257] In *Alford*, for instance, the Court made clear that this form of bargained justice was reserved only for cases where the evidence against the defendant was overwhelming and sufficient to easily overcome the defendant's continued claims of innocence.[258] 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.[259] 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*.[260] In *Hayes*, the Court stated that the accused must be "free to accept or reject the prosecution's offer."[261] Just as the Court had stated in *Brady* and *Alford*, the *Hayes* Court concluded its discussion by assuring itself that as long as such free choice existed and the pressure to plead guilty was not overwhelming, it would be unlikely that an innocent defendant might be "driven to false self-condemnation."[262] As is now evident from the study described herein, the Supreme Court was wrong to place such confidence

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> 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.

[257] *See id.* at --.

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

> [A] high proportion of pleas of guilty and *nolo contendere* does benefit the system. Such please tend to limit the trial process to deciding real disputes and, consequently, to reduce the need for funds and personnel. If the number of judges, courtrooms, court personnel and counsel for prosecution and defense were to be increased substantially [due to the use of plea bargains], the funds necessary for such increases might be diverted from elsewhere in the criminal justice process. Moreover, the limited use of the trial process for those cases in which the defendant has grounds for contesting the matter of guilt aids in preserving the meaningfulness of the presumption of innocence.

Id.

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

[260] Bordenkircker v. Hayes, 434 U.S. 357 (1978).

[261] *Id.* at 363.

[262] *Id.*

in the ability of defendants to assert their constitutional right to trial in the face of grave choices.[263]

As our research demonstrates, more than half of innocent defendants are willing to falsely condemn themselves in return for a perceived benefit.[264] That the plea bargaining system operates in a manner vastly different from that presumed by the Supreme Court in 1970 and has the potential to capture far more innocent defendants than previously predicted, means that the *Brady* Safety-Valve has failed and it is time for the Court to reevaluate the constitutionality of the institution with an eye towards the true power and resilience of the plea bargaining machine.[265]

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[263] *See supra* section II (discussing the plea bargaining study).

[264] *See* Edkins & Dervan,, *supra* note 168.

[265] In considering the significance of plea bargaining's innocence problem, one must also consider how likely it is that police inadvertently target the wrong suspect in a particular case, something that might eventually lead to an innocent suspect being offered a plea bargain in return for a false confession. *See* Thomas, *supra* note 114, at 576.

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

Id.