

VICTIMS OF COERCIVE PLEA BARGAINING: DEFENDANTS WHO GIVE FALSE TESTIMONY FOR FALSE PLEAS*

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The last decade has seen a significant growth in academic research and literature related to coercive plea bargaining. One thread that emerges from this research is how coercive plea practices encourage innocent defendants to falsely condemn themselves, and sometimes even other innocent people to get the benefit of a “good” deal. This Article compiles and synthesizes this research to highlight how and why typical plea bargaining can lead to false guilty pleas. It also frames those who falsely plead guilty in the face of coercive bargains and those who are subject to false testimony as a result as victims of plea bargaining. In this way, we expand our conceptions of who should be viewed as a victim in our current system of pleas more broadly.

The growing realization that coercive plea bargaining leads to many different types of victims reinforces the pressing need for plea bargaining reform that addresses coercive bargaining and false guilty pleas. To that end, this Article highlights suggestions for reform from a recent report of the ABA Plea Bargain Task Force that address mechanisms for reducing the risks of coercive bargains.

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INTRODUCTION

The last decade has seen significant growth in academic research and literature related to the plea bargaining system.¹ In particular, much research has explored the impact of plea bargaining on the accused, including the phenomena of false guilty pleas by the innocent and false testimony in return for bargains.² Both false guilty pleas and

1. As an example of the focus plea bargaining research has received in recent years in various disciplines, consider the 2018 special edition of the *Federal Sentencing Reporter*, which contained seventeen articles on plea bargaining. See *The Tyranny of the Trial Penalty: The Consensus that Coercive Plea Practices Must End*, 31 FED. SENT'G REP. (2019). Similarly, in 2020, the Vera Institute released a report discussing research in the field of plea bargaining generally. See Ram Subramanian, Léon Digard, Melvin Washington II & Stephanie Sorage, IN THE SHADOWS: A REVIEW OF THE RESEARCH ON PLEA BARGAINING (2020). There have also been several books in recent years, including DAN CANON, PLEADING OUT: HOW PLEA BARGAINING CREATES A PERMANENT CRIMINAL CLASS (2022); Jed Rakoff, WHY THE INNOCENT PLEAD GUILTY AND THE GUILTY GO FREE AND OTHER PARADOXES OF OUR BROKEN LEGAL SYSTEM (2021); Carissa Hessick, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL (2021); AM. PSYCH. L. SOC'Y, A SYSTEM OF PLEAS: SOCIAL SCIENCE CONTRIBUTIONS TO THE REAL LEGAL SYSTEM (Venessa Edkins & Allison Redlich eds., 2019).

2. See Andrew M. Pardieck, Vanessa A. Edkins & Lucian E. Dervan, *Bargained Justice: The Rise of False Testimony for False Pleas*, 44 FORDHAM INT'L L.J. 469, 521 (2020) (discussing how others are “willing to falsely implicate others in return for a plea bargain”); Glinda S. Cooper, Vanessa Meterko & Prahelika Gadtula, *Innocents Who Plead Guilty: An Analysis of Patterns in DNA Exoneration Cases*, 31 FED. SENT'G REP. 234, 236 (2019) (weighing the different factors that might influence a defendant to take a plea bargain); Allison D. Redlich, Miko M. Wilford & Shawn Bushway, *Understanding*

false testimony often result from the coercive bargaining practices regularly found in the criminal system. Plea bargaining is coercive when it overbears the will of the defendant, to borrow a phrase from the Supreme Court's decision in *Brady v. United States*.³ Because of the state's power over a criminal defendant, some argue that every interaction between the two contains some element of coercion. Regardless of where one draws the line of coercion, at a minimum, when an innocent person condemns themselves or other innocent people through the plea process, their will has been overborne by the coercive power of the state. This Article focuses on the link between coercive plea bargaining and both false guilty pleas and false testimony against others.

Here, we seek to bring these harms and their attendant victims to light. We compile and synthesize the expanding body of research that demonstrates the clear connection between coercive plea practices and false guilty pleas and false testimony. This descriptive Part of the Article identifies the types of practices that put defendants most at risk of falsely condemning themselves or others. As the title of this Article suggests, we also identify the defendants who falsely plead guilty or who are compelled to offer false testimony as part of bargains and those against whom such false testimony is elicited as victims of plea bargaining, although they are often not attended to in this way. Understanding this category of defendants as victims expands our conception of the harm of certain regular features of the plea system.

The use of coercive incentives to induce false pleas and false testimony prompts us to recognize the pressing need for reform in the bargained justice space. In particular, the plea bargaining system should be reformed, both to reduce the coercive incentives that lead

Guilty Pleas Through the Lens of Social Science, 23 PSYCH. PUB. POL'Y & L. 458, 458 (2017) (explaining how defendants, prosecutors, and judges alike must weigh the options of a plea bargain); Allison D. Redlich, Stephanos Bibas, Vanessa A. Edkins & Stephanie Madon, *The Psychology of Defendant Plea Decision Making*, 72 AM. PSYCH. 339, 342 (2017) (studying the biases and social influences that affect defendants' choices); Christopher Slobogin, *Plea Bargaining and the Substantive and Procedural Goals of Criminal Justice: From Retribution and Adversarialism to Preventive Justice and Hybrid-Inquisitorialism*, 57 WM. & MARY L. REV. 1505, 1507, 1510 (2016) (explaining how plea bargains often have disproportionate punishments); Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1, 4 (2013) [hereinafter Dervan & Edkins, *The Innocent Defendant's Dilemma*] (noting the possible constitutional issues that come with plea bargains).

3. 397 U.S. 742, 750 (1970).

to false guilty pleas and false testimony and to create more oversight to ensure that the system's inherent discretion is not used improperly. To this end, the Authors—all members of the American Bar Association Criminal Justice Section's Task Force on Plea Bargaining—highlight the sections of the 2023 Task Force Report that most directly speak to the problem of coercive plea bargaining. We hope this Part of the Article will encourage legal stakeholders to prioritize reforming coercive plea bargaining and give them ideas for how to do it.

This Article is the first part of a broader project that intends to shed light on the many, sometimes hidden or ignored, victims of coercive plea bargaining. These victims have received less attention than the practice itself.⁴ While this Article focuses on the first layer of victims of coercive plea bargaining, namely defendants who falsely condemn themselves or other innocents, a later article will focus on a second layer of victims, including the original victim, whose rights remain unvindicated when a false guilty plea allows the true perpetrator to escape justice, and also any victims who later fall prey to the actual guilty party.⁵ This broader two-part project intends to expand our understanding of who counts as a victim in the criminal justice system and the role of coercive bargaining in perpetrating these wrongs.

4. While several research pieces have explored wrongful conviction and the impact of wrongful conviction on victims, less focus has been placed on the specific role of plea bargaining in this space. See, e.g., KIMBERLY J. COOK, SHATTERED JUSTICE: CRIME VICTIMS' EXPERIENCE WITH WRONGFUL CONVICTIONS AND EXONERATIONS (2022) (exploring the impact of wrongful convictions on crime victims); Frank R. Baumgartner, Amanda Grigg, Rachele Ramirez & J. Sawyer Lucy, *The Mayhem of Wrongful Liberty: Documenting the Crimes of True Perpetrators in Cases of Wrongful Incarceration*, 81 ALB. L. REV. 1263, 1264 (2017–18) (considering the impact of wrongful conviction in North Carolina on crime victims and the consequences of the true perpetrators remaining at large); James R. Acker, *The Flipside Injustice of Wrongful Conviction: When the Guilty Go Free*, 76 ALB. L. REV. 1629, 1632 (2012–13) (cataloguing cases of wrongful conviction and noting the possible consequence of future crime by the actual perpetrators). Further, most research considering victims and plea bargaining focuses on the role of victims in plea negotiations, not the way plea bargaining may create scenarios in which additional victimizations occur. See, e.g., Dana Pugach & Michal Tamir, *Nudging the Criminal Justice System into Listening to Crime Victims in Plea Agreements*, 28 HASTINGS WOMEN'S L.J. 45, 47 (2017) (arguing the need for victim participation in plea agreements); Elizabeth N. Jones, *The Ascending Role of Crime Victims in Plea-Bargaining and Beyond*, 117 W. VA. L. REV. 97, 100 (2014) (asserting the need for victims to be active participants in all aspects of criminal prosecution).

5. Lucian Dervan, Vanessa Edkins & Thea Johnson, *Victims of Coercive Plea Bargaining: Unvindicated and Unprotected* (work in progress) (on file with authors).

In Part I, this Article explores the reasons that defendants falsely plead guilty. It provides an overview of the emerging body of literature on false guilty pleas, focusing on the factors that increase the risk of false guilty pleas. In Part II, this Article demonstrates how coercive plea bargaining encourages defendants to give false testimony against others. We also explore how these twin harms—false pleas and false testimony—should be seen as creating a category of victims of plea bargaining, namely defendants who are compelled to falsely condemn themselves and others. Finally, in Part III, this Article turns to a set of on-the-ground reforms that can reduce coercive bargains and their many victims.

I. FALSE GUILTY PLEAS

Late on the evening of Monday, January 23, 1984, Carolyn Jean Hamm, a thirty-two-year-old lawyer living in Arlington, Virginia, was raped and murdered.⁶ Her body was discovered in her home by a friend two days later.⁷ Ms. Hamm had been restrained with the cord from a venetian blind and hanged in her basement.⁸ Within a week, police began focusing on David Vasquez as a suspect in the case.⁹ Mr. Vasquez was identified by two witnesses as having been in the area on January 23, and they described him as “creepy” and “strange.”¹⁰ At the time of the murder, Mr. Vasquez was thirty-eight years old, had an IQ of less than seventy, and lived thirty miles away in Manassas, Virginia.¹¹

6. Jonah Horwitz & Rob Warden, *David Vasquez*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3705> [<https://perma.cc/AS4H-BQQS>] (last updated May 2, 2012); *David Vasquez*, INNOCENCE PROJECT, <https://innocenceproject.org/cases/david-vasquez> [<https://perma.cc/46M4-4YSP>]; Laurie McClellan, *The Arlington Serial Killer Who Changed History*, ARLINGTON MAG. (July 27, 2015), <https://www.arlingtonmagazine.com/the-arlington-serial-killer-who-changed-history> [<https://perma.cc/BGW3-9LMA>]; Lee Lofland, *Twenty-Nine Years Ago, I Looked into the Eyes of a Serial Killer and Watched Him Die*, GRAVEYARD SHIFT (Apr. 30, 2023), <https://leelofland.com/twenty-nine-years-ago-i-looked-into-the-eyes-of-a-serial-killer-and-watched-him-die> [<https://perma.cc/2NN8-HH3H>]; Brooke A. Masters, *Lucky Release from a Life Behind Bars*, WASH. POST (Apr. 28, 2000), <https://www.washingtonpost.com/archive/politics/2000/04/28/lucky-release-from-a-life-behind-bars/0ea9755b-3c88-4389-b44d-b54f6abd98e3> [<https://perma.cc/M9Z4-RMGZ>]. This case is also detailed in Acker, *supra* note 4, at 1694.

7. Horwitz & Warden, *supra* note 6.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

Police brought Mr. Vasquez into the police station for questioning, during which he denied any involvement in the crime and stated that he had “[s]tayed home, like usual” that evening.¹² Without first providing him *Miranda* warnings, police officers interrogated him for several hours.¹³ Various interrogation tactics were used during the interview, including fabricating evidence in the case and feeding him information about the crime scene.¹⁴ One exchange documented by The National Registry of Exonerations is illustrative of the exchanges during the interrogation.

With the logistical question unresolved, Vasquez proceeded to say that he had had sex with Hamm. Asked what he had used to tie her hands, he first said, “The ropes.” But [Officer] Shelton told him it wasn’t ropes. Vasquez then said he used his belt, but that was rejected. When he said, “A coat hanger?” Shelton said, “No, it wasn’t a coat-hanger—remember cutting the venetian blind cord?”

Vasquez replied, “Ah, it was a thin rope.” Shelton then asked Vasquez how he had killed Hamm. “I grabbed the knife and just stabbed her, that’s all,” said Vasquez. When Shelton said that was wrong and that he hung her, Vasquez said, “Okay, so I hung her.”¹⁵

Later realizing they failed to provide Mr. Vasquez with *Miranda* warnings, police re-interviewed him on February 6, 1984.¹⁶ During this interview, he provided a recitation of a “dream” that appeared to describe him committing the offenses against Ms. Hamm.¹⁷ Although

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* Vasquez described the following dream:

“Girl was in my dream, it’s a horrible dream, too horrible,” said Vasquez. “I got myself in hell by breaking glass. The dryer was hooked up, cut my hand in glass. I need help, then I went upstairs, she kept coming out. She startled me. I startled her. We both kinda screamed a little bit. She told me what was I doing. I said I came over to see you. She wanted to make love. She said yes and no and then said okay and we went upstairs to her bedroom. Kissed a little and then took each other’s clothes off . . . she told me would I tie her hands. She said there’s a knife in the kitchen, cut string off the blinds, just tie me. Then I asked her . . . if it’s too tight. She said no . . . Walk downstairs . . . took her pictures, she’s nice. She said tie me some more . . . I brought . . . some big rope and . . . she told me the other way. I says what way is that? She says, by hanging. I says no, don’t have to hang, no, no, no, no. She said yes and called

both of these interrogations were later excluded at trial, a third interview was permitted as evidence in the case because Mr. Vasquez signed a *Miranda* waiver in that instance.¹⁸

As trial approached, the government's case rested on Mr. Vasquez's questionable confession to a dream sequence, two witnesses who claimed to have seen him in the area before and after Ms. Hamm's murder, and forensic evidence matching his hair type to hairs found at the scene.¹⁹ Significantly, semen recovered from the crime scene did not match Mr. Vasquez's blood type, leading prosecutors to hypothesize that there were two accomplices.²⁰ Recognizing the inherent weaknesses in the case, however, prosecutors offered Mr. Vasquez a deal.²¹ In return for an *Alford* plea, which allowed the defendant to maintain his innocence while pleading guilty, the prosecution would remove the death penalty as a potential punishment in the case.²² On advice of counsel, Mr. Vasquez accepted the deal and pleaded guilty to the rape and murder of Ms. Hamm.²³ He was sentenced to twenty years in prison.²⁴ Reflecting on the plea offer years later, Mr. Vasquez said, "they told me, 'Sign it and you won't go to the electric chair.'"²⁵ His attorney later commented, "[i]f he had gone to trial and had been sentenced to death, by the time the exculpatory evidence was discovered, he could have been executed."²⁶

Three years later, in the same neighborhood, another woman was raped and murdered.²⁷ Susan Ann Tucker, a forty-four-year-old U.S. Department of Agriculture employee, was strangled with a white nylon cord.²⁸ Detectives quickly reached out to Mr. Vasquez, believing his "accomplice" acted again.²⁹ But Mr. Vasquez maintained his

me a chicken. So I did it . . . I don't want my dream anymore. That dream, too much."

Id.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. Masters, *supra* note 6.

26. *Id.*

27. Horwitz & Warden, *supra* note 6.

28. *Id.*

29. *Id.*

innocence.³⁰ After interviewing him in prison, the lead detective in Ms. Tucker's case said to the Warden, "I don't think Vasquez belongs here He's innocent."³¹ Soon, police realized that something quite different from their original hypothesis might be occurring in Arlington, Virginia.³² During the three years since Mr. Vasquez's plea of guilty, three other women were raped and strangled in Virginia.³³ Further, between 1983 and 1984, ten women survived attacks by an assailant carrying a cord similar to that from Mr. Vasquez's case.³⁴ Police eventually identified Timothy Spencer as a suspect and, using what was then new technology, conducted a DNA examination of evidence from the cases.³⁵ Mr. Spencer was a match for all of the murders in 1987 and became known as the "Southside Strangler."³⁶ Mr. Vasquez had falsely pleaded guilty to a crime in which he had no involvement. He was eventually pardoned in 1989.³⁷

As acknowledged by the Supreme Court in *Lafler v. Cooper*,³⁸ "criminal justice today is for the most part a system of pleas, not a system of trials."³⁹ Almost ninety-eight percent of criminal convictions in the federal system, and ninety-four percent of criminal convictions in the state systems, result from guilty pleas.⁴⁰ While the exact number of these pleas resulting from "plea bargaining" is unknown, the government estimates that, in the federal system, approximately seventy-five percent of such pleas are induced by threats of further punishment if a defendant proceeds to trial, by offers of leniency in return for waiving the constitutionally protected right to trial, or both.⁴¹

30. *Id.*

31. McClellan, *supra* note 6.

32. Horwitz & Warden, *supra* note 6.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*; see McClellan, *supra* note 6 (noting that Timothy Spencer was put to death in 1994).

37. Horwitz & Warden, *supra* note 6. Mr. Vasquez had to be pardoned by the Governor because Virginia law did not permit new evidence to be admitted following a twenty-day deadline after sentencing. See Masters, *supra* note 6.

38. 566 U.S. 156 (2012).

39. *Id.* at 170.

40. *Missouri v. Frye*, 566 U.S. 134, 143 (2012).

41. See Transcript of Oral Argument at 61–62, *Class v. United States*, 138 S. Ct. 798 (2018) (No. 16-424) (acknowledging that "[twenty-five] percent of pleas in the federal system don't even involve plea agreements").

Despite bargained justice's dominance today, this form of criminal case resolution is a relatively modern American creation.⁴² In both American and English common law prior to the twentieth century, the use of threats of punishment or offers of leniency to induce a plea of guilty was impermissible.⁴³ Yet, over time, the use of incentives to induce guilty pleas from defendants came to dominate the American criminal justice system.⁴⁴ The Supreme Court's 1970 decision in *Brady*

42. See Lucian E. Dervan, *Bargained Justice: The History and Psychology of Plea Bargaining and the Trial Penalty*, 31 FED. SENT'G REP. 239, 239 (2019) [hereinafter Dervan, *The History and Psychology of Plea Bargaining*] (explaining that plea bargaining is a recent invention that first appeared around the time of the American Civil War); Lucian E. Dervan, *Bargained Justice: Plea Bargaining's Innocence Problem and the Brady Safety-Valve*, 2012 UTAH L. REV. 51, 56 (2012) [hereinafter Dervan, *Plea Bargaining's Innocence Problem*] (asserting that the Supreme Court first recognized bargaining between the prosecution and defense in the 1970s to alleviate pressures on the criminal justice system); Albert W. Alschuler, *Plea Bargaining and Its History*, 29 COLUM. L. REV. 1, 4 (1979) (contending that plea bargaining was unknown during most of the history of common law).

43. See, e.g., *Bram v. United States*, 168 U.S. 532, 542–43 (1897) (citing the Fifth Amendment as the controlling law governing the impermissibility of plea bargains); Alschuler, *supra* note 42, at 12–13 (referencing the court's statement in *Rex v. Warickshall*, 168 Eng. Rep. 234, 255 (1783), indicating that any confession that was a result of coercion, even mild, may not be received into evidence).

44. See Alschuler, *supra* note 42, at 6 (stating that bondsmen, prison workers, reporters, and others influenced the criminal justice system); see also NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT: REPORT ON THE ENFORCEMENT OF THE PROHIBITION LAWS OF THE UNITED STATES 100–01 (1931) [hereinafter REPORT ON THE ENFORCEMENT OF THE PROHIBITION LAWS] (discussing the need for plea bargaining to address the overwhelming number of cases brought under Prohibition laws); Dervan & Edkins, *The Innocent Defendant's Dilemma*, *supra* note 2, at 11–12 n.71 (quoting ABA, PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY 2 (1968) [hereinafter ABA GUILTY PLEA STANDARDS]). Plea rates grew significantly during prohibition, as discussed by President Hoover's Wickersham Commission, charged with examining criminal activity at the time. REPORT ON THE ENFORCEMENT OF THE PROHIBITION LAWS, *supra*, at 100.

[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 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.

....

v. United States was a pivotal historic moment for plea bargaining.⁴⁵ The *Brady* decision legitimized the concept of plea bargaining if the guilty plea was voluntary and intelligent and offers of leniency or threats of punishment did not “overbear[] the will” of the defendant.⁴⁶

As evident from the language of the *Brady* decision, many courts and practitioners at this time believed that plea bargaining would entice the guilty, but not overbear the will of the innocent.⁴⁷ For example, in 1967, the American Bar Association wrote:

[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.⁴⁸

The Supreme Court held similarly unsupported views regarding the operation and reliability of guilty pleas.⁴⁹ In *Brady* itself, the Court said, “[w]e would have serious doubts about this case if the encouragement of guilty pleas by offers of leniency substantially increased the

Lawyers everywhere deplore, as one of the most serious effects of prohibition, the change in the general attitude toward the federal courts [T]he huge volume of liquor prosecutions . . . has injured their dignity, impaired their efficiency, and endangered the wholesome respect for them which once obtained.

Id. at 100–01 (quoted in Albert W. Alschuler, *Plea Bargaining and Its History*, *supra* note 42, at 32); *see also* GEORGE FISHER, PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 210–12 (2003) (explaining that, after the advent of the 1987 Sentencing Guidelines, the power of the judge to manage sentencing decreased relative to the power of the prosecutor to promise the defendant a particular sentence in exchange for a guilty plea).

45. 397 U.S. 742, 758 (1970) (holding that *Brady*’s guilty plea was voluntary despite possibly being motivated by wanting to avoid the death penalty).

46. *Id.* at 750, 754–57.

47. *Id.* at 755.

48. ABA GUILTY PLEA STANDARDS, *supra* note 44, at 2.

49. *See, e.g., Brady*, 397 U.S. at 758 (expecting that guilty pleas are made “voluntarily and intelligently . . . by competent defendants with adequate advice of counsel”).

likelihood that defendants, advised by competent counsel, would falsely condemn themselves. But our view is to the contrary”⁵⁰

Similar language appeared five years later in *Menna v. New York*,⁵¹ where the Court wrote, “a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case.”⁵² In the 1985 case of *Hill v. Lockhart*,⁵³ the Court, quoting language from the United States Court of Appeals for the Seventh Circuit, said, “the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea.”⁵⁴ But, as the David Vasquez case illustrates, defendants since the *Brady* decision have often been confronted with bargains so coercive that even the innocent will sometimes falsely confess in return for the benefits of the bargain.

As evidenced by data from several exoneration and innocence databases, the decision by Mr. Vasquez to falsely plead guilty is not an anomaly.⁵⁵ Consider, for example, a 2015 report from the National Registry of Exonerations on the issue of *Innocents Who Plead Guilty*.⁵⁶ Of the first 1,700 exonerees in the database, fifteen percent pleaded guilty

50. *Id.*; Dervan, *The History and Psychology of Plea Bargaining*, *supra* note 42, at 87–88 (quoting the Court in *Brady*).

51. 423 U.S. 61 (1975) (per curiam).

52. *Menna*, 423 U.S. at 62 n.2.

53. 474 U.S. 52 (1985).

54. *Id.* at 58 (quoting *United States v. Smith*, 440 F.2d 521, 529 (7th Cir. 1971) (Stevens, J., dissenting)). The most recent example of this type of language from the Supreme Court was a 2017 dissent in the case of *Lee v. United States*, 582 U.S. 357, 378 (2017) (Thomas, J., dissenting) (“In any event, the Court in *Hill* recognized that guilty pleas are themselves generally reliable.”). Interestingly, Justice Thomas supports this statement by referring to *Menna*. 432 U.S. at 62 n.2. *Menna* makes this statement without reference to any psychological or empirical data. *See id.* Rather, the *Menna* decision simply cites back to earlier cases, such as *Brady*. *Id.*

55. *See, e.g., Innocents Who Plead Guilty*, NAT’L REGISTRY OF EXONERATIONS 1–4 (Nov. 24, 2015), <http://www.law.umich.edu/special/exoneration/Documents/NRE.Guilty.Plea.Article1.pdf> [<https://perma.cc/YP4K-PNBQ>] (database); *2022 Annual Report*, NAT’L REGISTRY OF EXONERATIONS 3 (May 8, 2023), <https://www.law.umich.edu/special/exoneration/Documents/NRE%20Annual%20Report%202022.pdf> [<https://perma.cc/R7KD-G2MG>] (explaining the breakdown of exonerations and false guilty pleas in 2022); *Cases*, INNOCENCE PROJECT, <https://innocenceproject.org/all-cases> [<https://perma.cc/DX4V-79C3>] (listing cases where individuals falsely plead guilty).

56. *See Innocents Who Plead Guilty*, *supra* note 55, at 1–4 (providing statistics relating to exonerations based on guilty pleas).

to an offense they did not commit.⁵⁷ In some types of cases, the rates of false pleas are astonishingly high.⁵⁸ For example, drug crimes comprised forty percent of all guilty plea exonerations, with sixty-six percent of exonerations involving a false guilty plea.⁵⁹ In Harris County, Texas, the report noted that there were seventy-one drug exonerations since 2014, and the defendants in every one of those cases falsely pleaded guilty.⁶⁰ According to the National Registry of Exonerations, “most of these defendants accepted plea bargains to possession of illegal ‘drugs’ because they faced months in jail before trial, and years more if convicted.”⁶¹ The general percentage of exonerations database cases involving false pleas of guilt has also risen over time.⁶² In 2021, for example, the National Registry of Exonerations added 161 new cases.⁶³ Of that number, forty-eight, or almost thirty percent, involved false pleas of guilty.⁶⁴

While statistical analysis of exonerations indicates that false guilty pleas, such as Mr. Vasquez’s, are not anomalies, laboratory evidence has also established this fact over the last decade. In an article published in 2013, Dervan and Edkins conducted a psychological deception study considering the likelihood that a defendant would falsely plead guilty in return for the benefits of a bargain.⁶⁵ As noted above, many have assumed over the years that plea bargains are inherently reliable, in part because innocent defendants will inevitably proceed to trial in hopes of vindication.⁶⁶ This study sought to consider the accuracy of these assumptions through laboratory testing of

57. *Id.* at 1.

58. *Id.* (listing the crime type and corresponding rate of exoneration with guilty pleas).

59. *Id.* at 1–2.

60. *Id.* at 2.

61. *Id.*

62. *See, e.g.*, 2021 ANNUAL REPORT, NATIONAL REGISTRY OF EXONERATIONS 5 (2022) (discussing the exoneration rates over time).

63. *Id.*

64. *Id.*; *see* John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157, 172–73 (2014) (discussing rates of false pleas in misdemeanor cases).

65. Dervan & Edkins, *The Innocent Defender’s Dilemma*, *supra* note 2, at 28; Vanessa A. Edkins & Lucian E. Dervan, *Pleading Innocents: Laboratory Evidence of Plea Bargaining’s Innocence Problem*, 21 CURRENT RES. SOC. PSYCH. 14, 16 (2013) [hereinafter Edkins & Dervan, *Pleading Innocents*].

66. *See supra* notes 49–54 and accompanying materials (illustrating that many courts believe plea bargaining to be a reliable and efficient method of conviction with built in mechanisms to prevent against wrongful sentencing).

decision-making and human behavior.⁶⁷ The study involved students participating in what they believed to be a test designed to understand individual work versus group work through a series of LSAT-style questions.⁶⁸ In reality, the inquiry was interested in how students would respond to accusations of cheating where a plea bargain was offered.⁶⁹

To examine how people respond in the face of actual accusations of wrongdoing where offers of leniency are proposed, all of the students participating in the test as study participants were accused of cheating.⁷⁰ In reality, the paradigm was structured so that only about half of the students actually engaged in this misconduct.⁷¹ The other students completed the test on their own without offering improper assistance to the confederate who was in the room with them.⁷²

Regardless of factual guilt or innocence, and without yet knowing which of the participants had actually cheated, all of the participants were offered a bargain in return for confessing to the alleged offense. If the student admitted to cheating, they would lose their compensation for participating in the study. This was viewed as akin to probation or time served.

The participant was also informed that if they refused the deal, the matter would be referred to an “Academic Review Board.” This board was described to the participants in a manner that made it sound very similar to a criminal jury trial, including the right to present evidence and testify. If convicted before the board, the participants were told that they would lose their compensation, their faculty adviser would be notified, and they would be required to attend an ethics course. This ethics course was viewed as a loss of time, akin to a period of incarceration. While this scenario did not perfectly recreate the actual criminal justice system, the anxieties experienced by participants were similar to, though presumably not as intense as, those experienced by people facing criminal charges. Further, this research advanced our understanding of defendant decisionmaking in ways that earlier studies utilizing only hypothetical scenarios could not.

In response to [the] cheating paradigm, [eighty-nine] percent of the guilty participants took the plea offer. With regard to the innocent students, 56 percent of the participants were willing to

67. Dervan & Edkins, *The Innocent Defendant’s Dilemma*, *supra* note 2, at 28.

68. *Id.* at 28–39.

69. *Id.* at 29–30.

70. *Id.* at 30.

71. *Id.* at 29–30.

72. *Id.* at 30.

falsely confess to an offense they had not committed in return for the benefits of the bargain. For the majority of innocent students who knew definitively that they had not violated the rules, it appears that accepting the deal simply made more sense.⁷³

The results of the psychological deception study supported the proposition that cases like Mr. Vasquez's and those identified by the National Registry of Exonerations were not anomalies.⁷⁴ Further, the results indicated that the assumptions of courts and others regarding how innocent defendants behave when given the choice between proceeding to trial or accepting the benefits of a bargain are wrong.⁷⁵ Subsequent studies by other laboratories have validated these results and found similar rates of false pleas in modified plea bargaining scenarios.⁷⁶ According to Wilford and Wells, there are now several "real-stakes" (i.e., non-hypothetical) studies recording false plea rates near or exceeding fifty percent.⁷⁷

In considering false guilty pleas, their impact on victims, and how their prevalence might be reduced, one must examine the forces that lead to such acts by the accused. Research during the last decade has revealed defendants plead guilty for a variety of reasons and that a host of factors influence these decisions. Often, the reasons for pleading guilty relate to guilt in the matter, but there are other considerations.

73. Lucian E. Dervan, *Class v. United States: Bargained Justice and a System of Efficiencies*, 17 CATO S. CT. REV. 113, 131 (2017–18) [hereinafter Dervan, CATO S. CT. REV.]; see also Brief of the Innocence Project as Amicus Curiae in Support of Petitioner at 9, *Class v. United States*, 138 S. Ct. 798 (2018) (No. 16-424) (discussing the students' option to either admit their guilt, forfeiting any compensation, or to face an academic review board, risking punishment, with sixty percent of innocent students pleading guilty).

74. See Dervan, CATO S. CT. REV., *supra* note 73, at 132 (discussing how "innocents" both in the study and actual defendants will plead guilty when faced with incentives); see also 2021 ANNUAL REPORT, NATIONAL REGISTRY OF EXONERATIONS, *supra* note 62 (discussing the exoneration rates in 2021).

75. See Dervan, CATO S. CT. REV., *supra* note 73, at 132 (debunking the idea that innocent people will not accept a plea bargain).

76. See, e.g., Kelsey S. Henderson & Lora M. Levett, *Investigating Predictors of True and False Guilty Pleas*, 42 L. & HUM. BEHAV. 427, 436 (2018) (highlighting the role that attorney's play in plea bargaining); Miko M. Wilford & Gary L. Wells, *Bluffed by the Dealer: Distinguishing False Pleas from False Confessions*, 24 PSYCH., PUB. POL'Y, & L. 158, 161, 166 (2018) (testing the "evidence-bluff" method in the study, which involved telling participants there was evidence that they had cheated, and that they should accept the plea deal).

77. Wilford & Wells, *supra* note 76, at 166.

As Chief Justice John Roberts acknowledged in *Lee v. United States*,⁷⁸ defendants are motivated by different “determinative issue[s],” such as immigration consequences, when making plea decisions.⁷⁹ The legal community knows from both individual examples and laboratory evidence that these motivations can compel even an innocent person to plead guilty, which accounts for the criminal justice system’s high rate of pleas.

One of the most significant factors leading to a guilty plea is the sentencing benefit offered in return for giving up the right to trial by jury. In a study where adult and juvenile offenders in New York were interviewed, researchers discovered that adult defendants received an eighty percent average reduction of the anticipated sentence that would result from trial.⁸⁰ The discount for pleading guilty for juveniles was even larger, at ninety-five percent.⁸¹

In another study examining plea discounts in Pennsylvania, researchers found that sentences were fifty-seven percent longer for those convicted at trial.⁸² And yet another study, focusing on all federal criminal cases from 2006 to 2008, found that those who exercised their right to trial received sentences that were sixty-four percent longer than similarly situated individuals who pleaded guilty prior to trial.⁸³ Other research indicates that conviction by a jury not only increases the length of sentences, conviction at trial also increases the likelihood of being sentenced to incarceration. One analysis by the Vera Institute

78. 582 U.S. 357 (2017).

79. *Id.* at 362, 371.

80. Tina M. Zottoli, Tarika Daftary-Kapur, Georgia M. Winters & Conor Hogan, *Plea Discounts, Time Pressures, and False-Guilty Pleas in Youth and Adults Who Pleaded Guilty to Felonies in New York City*, 22 PSYCH., PUB. POL’Y & L. 250, 254 (2016); see Brian D. Johnson, *Plea-Trial Differences in Federal Punishment: Research and Policy Implications*, 31 FED. SENT’G REP. 256, 257, 261 (2019) (holding that studies consistently show large sentencing differentials that disadvantage trial defendants).

81. Zottoli, *supra* note 80, at 255.

82. Jeffery T. Ulmer & Mindy S. Bradley, *Variation in Trial Penalties Among Serious Violent Offenses*, 44 CRIMINOLOGY 631, 632, 649 (2006). For a thorough discussion of the various studies addressing plea discounts, see Subramanian et al., *supra* note 1, at 5 (examining multiple empirical studies on plea bargaining); Lauren O’Neill Shermer & Brian D. Johnson, *Criminal Prosecutions: Examining Prosecutorial Discretion and Charge Reductions in U.S. Federal District Courts*, 27 JUST. Q. 394, 397–98, 411 n.12 (2010), (finding, in a large dataset of federal cases, that charge and sentencing bargaining occur).

83. Andrew Chongseh Kim, *Underestimating the Trial Penalty: An Empirical Analysis of the Federal Trial Penalty and Critique of the Abrams Study*, 84 MISS. L.J. 1195, 1199–1200 (2014).

of Justice in 2020 found that the odds of incarceration were 2.7 times higher for those who exercised their right to trial and that the sentences of these individuals were fifty-seven percent longer than the sentences of those accepted guilty pleas.⁸⁴ Another study of federal sentencing practices released in 2019 demonstrated that defendants convicted at trial faced a two to six times greater likelihood of being incarcerated.⁸⁵

Given these discount rates for pleading guilty, it is little wonder why defendants, including innocent defendants, often plead guilty. In one study that examined adults and juveniles, a belief that one was receiving a “deal” was one of the most often cited reasons for accepting a plea bargain.⁸⁶ Data also indicates that the better the “deal,” and the higher the benefit from accepting the plea offer, the more likely a defendant is to accept.⁸⁷ When prosecutors charge defendants with statutes carrying mandatory minimum sentences, they can leverage these extreme potential penalties to encourage defendants to take a favorable deal on the table.⁸⁸ Mary Price, General Counsel of FAMM, said in a 2019 piece, “[m]andatory minimums are essential to the trial penalty.”⁸⁹ The certainty of mandatory minimums means that defendants are not forced to guess at the benefits of pleading guilty.

Another example of the power of sentencing differentials and the gap between the pre-trial offer and potential post-trial sentence in leading a defendant to plead guilty is the case of Chris Ochoa, who falsely pleaded guilty to rape and murder in Texas in 1989.⁹⁰ After his

84. Subramanian et al., *supra* note 1, at 40.

85. Johnson, *supra* note 80, at 257.

86. Allison D. Redlich & Reveka V. Shteynberg, *To Plead or Not to Plead: A Comparison of Juvenile and Adult True and False Plea Decisions*, 40 L. & HUM. BEHAV. 611, 613–18 (2016).

87. *Id.* at 613, 615.

88. Mary Price, *Weaponizing Justice: Mandatory Minimums, the Trial Penalty, and the Purposes of Punishment*, 31 FED. SENT’G REP. 309, 309–12 (2019) (discussing use of mandatory minimums to create incentives for defendants to plead).

89. *Id.* at 309 (also noting that “prosecutors derive their power to pressure and punish from the fact that they often hold the keys to how much prison time a defendant will receive”).

90. Chris Ochoa & Carlita Salazar, *How the Threat of the Trial Penalty Coerces the Innocent to Plead Guilty: A First-Hand Account of an Exoneree*, 31 FED. SENT’G REP. 299, 299 (2019).

plea, Mr. Ochoa was sentenced to life in prison.⁹¹ Thirteen years later, in 2002, DNA evidence exonerated him.⁹²

In Mr. Ochoa's case, he was threatened with the death penalty if he did not plead guilty.⁹³ His attorney had encouraged him to accept the plea offer, but he maintained his innocence and refused.⁹⁴ It was only after his mother became ill from the stress of the case and asked him to accept the offer that he relented.⁹⁵ Mr. Ochoa's case not only reflects the significance of sentencing differentials in leading defendants to plead guilty, but the matter illustrates the important role that counsel may play in encouraging this behavior.

And yet, the Supreme Court has made clear that it believes that the presence of counsel is the very thing that will prevent an innocent person from falsely pleading guilty.⁹⁶ Research from the last decade, however, indicates that this assumption regarding the protections afforded by counsel in plea decision-making was also in error. In a 2020 article by Diamond and Salerno, the researchers, in collaboration with the American Bar Association Commission on the American Jury, examined reasons for the disappearing trial.⁹⁷ The study conducted interviews with judges, prosecutors, and defense counsel and concluded that defense counsel played a significant role in encouraging defendants to take pleas.⁹⁸ The report noted that counsel were recommending pleas, in part, because of overwhelming caseloads and limited resources.⁹⁹ Diamond and Salerno also found that other factors that lawyers consider when encouraging their clients to take pleas are the imposition of mandatory minimum statutes and increased sentences after conviction at trial.¹⁰⁰

Contrary to the Supreme Court's assumption that the role of counsel safeguards against false pleas, research also indicates that counsel can

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 300–01.

95. *Id.* at 301.

96. *Brady v. United States*, 397 U.S. 742, 758 (1970) (emphasis added) (“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.”).

97. Shari Seidman Diamond & Jessica M. Salerno, *Reasons for the Disappearing Jury Trial: Perspectives from Attorneys and Judges*, 81 LA. L. REV. 119, 120–21 (2020).

98. *Id.* at 157.

99. *Id.* at 159.

100. *Id.* at 149, 158.

have a significant role in increasing, not decreasing, the likelihood of false guilty pleas by the innocent. In a study from 2018 regarding attorney perceptions of guilty pleas, the authors interviewed counsel in nine U.S. states (New York, Tennessee, Wisconsin, Wyoming, Vermont, Idaho, Iowa, Arizona, and Rhode Island).¹⁰¹ Roughly seventy-eight percent of those asked indicated that there were definitely cases in the current system where an innocent individual should plead guilty.¹⁰² “When asked whether they had ever been involved in a case where a client chose to plead guilty despite maintaining their innocence,” almost ninety percent said yes.¹⁰³ Not only were the attorneys aware of this occurring, almost forty-five percent admitted to having advised clients they believed were innocent to accept a favorable plea agreement.¹⁰⁴ In fact, even in cases where the defense attorney felt there was less than a fifty percent chance of conviction, a significant proportion stated they would recommend to an innocent client to plead guilty.¹⁰⁵ Again, as identified by Diamond and Salerno, several factors lead to this behavior, including severe sentences after trial and plea offers being beneficial.¹⁰⁶

Henderson and Levett published a study using the cheating paradigm applied to students by Dervan and Edkins in their 2013 study.¹⁰⁷ This time, however, the study protocol was modified to include testing the influence of advocate participation during the decision-making process.¹⁰⁸ Where no advocate participated, the study participants falsely pleaded guilty thirty-five percent of the time.¹⁰⁹

101. Rebecca K. Helm, Valerie F. Reyna, Allison A. Franz, Rachel Z. Novick, Sarah Dincin & Amanda E. Cort, *Limitations on the Ability to Negotiate Justice: Attorney Perspectives on Guilt, Innocence, and Legal Advice in the Current Plea System*, 24 PSYCH., CRIME & L. 915, 922 (2018).

102. *Id.*

103. *Id.* at 921.

104. *Id.*

105. *Id.* at 926.

106. Wilford & Wells, *supra* note 76, at 164 (providing that the top reasons for innocent pleading included pressure, miscellaneous, and easier alternative, and the top reasons for guilty pleading included guilty, easier alternative, pressure, fear of consequences, miscellaneous, and does not matter).

107. Henderson & Levett, *supra* note 76, at 428, 432, 436 (discussing the application of the cheating paradigm in previous studies); *see also* Kelsey S. Henderson, *Examining the Effect of Case and Trial Factors on Defense Attorneys' Plea Decision-Making*, 27 PSYCH., CRIME & L. 357, 361, 376–79 (2021).

108. Henderson, *supra* note 107, at 359–60.

109. Henderson & Levett, *supra* note 76, at 437.

Where an advocate participated and recommended proceeding to trial, the false plea rate dropped to four percent.¹¹⁰ But where an advocate participated and provided only educational information regarding the available options, forty-seven percent of the study participants went on to falsely plead guilty.¹¹¹ This represented a twelve percent increase in the false plea rate compared to scenarios in which there was no advocate present.¹¹² More strikingly, where an advocate participated and recommended pleading guilty, fifty-eight percent of the study participants went on to falsely plead guilty.¹¹³ This plea rate is sixty-six percent higher than that found when there was no advisor at all.¹¹⁴ Other studies have identified the likelihood of an even more pronounced impact of counsel recommendations on juveniles, where they are particularly susceptible to influence.¹¹⁵ Contrary to earlier assumptions regarding the beneficial role of counsel in preventing false guilty pleas, these findings demonstrate that the presence of counsel likely exacerbates the false plea phenomenon.

Finally, not all defendants receive the same advice from counsel, creating a situation in which the potential negative impacts of plea advice from counsel are exacerbated for some and not others. First, studies indicate that wealth impacts the representation and advice that defendants receive.¹¹⁶ Defendants with public defenders, for example, have been found to plead guilty at higher rates.¹¹⁷ The limited resources available to underfunded public defense offices and, by extension, the need to recommend guilty pleas more often to manage burdensome dockets, may be contributing to this increased rate of pleas.¹¹⁸ Second, the defendant's race influences the plea

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 437.

114. *Id.* at 435, 437.

115. See Lindsay C. Malloy, Elizabeth P. Shulman & Elizabeth Cauffman, *Interrogations, Confessions, and Guilty Pleas Among Serious Adolescent Offenders*, 38 L. & HUM. BEHAV. 181, 181–82 (2014) (finding that juveniles self-reported as factually innocent or guilty of the charges to which they had pleaded guilty).

116. See Burton M. Atkins & Emily W. Boyle, *Prisoner Satisfaction with Defense Counsel*, 12 CRIM. L. BULL. 427, 443 (1976) (finding that court-appointed or private attorneys were less likely than public defenders to advise defendants to plead guilty).

117. *Id.*

118. *Id.* at 428.

recommendations of defense lawyers.¹¹⁹ In a 2011 study by Edkins, defense counsel from multiple jurisdictions were asked to make recommendations for defendants considering mock plea offers.¹²⁰ The study found that when the defendant was depicted as Black in the hypothetical, defense counsel was more likely to recommend the defendant take a plea and more likely to recommend a plea that included a custodial sentence.¹²¹

Sentencing differentials and attorney advice to clients are not the only significant influences for defendant-decision making. Pretrial detention is another significant driver of pleas, including false pleas.¹²² A 2018 study considered plea rates, innocence, and pretrial detention through the use of various hypothetical scenarios.¹²³ Participants in the study were asked to review scenarios involving a student charged with a drug offense, a nurse charged with assault, and an unemployed individual living with two children in public housing and charged with breaking and entering.¹²⁴ Participants were then asked to decide whether to accept a plea agreement or proceed to trial.¹²⁵ The results confirmed the validity of the legal community's concerns regarding the impact of plea offers on both the accuracy of the system and the free exercise of individuals' constitutional right to trial.¹²⁶

119. Vanessa A. Edkins, *Defense Attorney Plea Recommendations and Client Race: Does Zealous Representation Apply Equally to All?*, 35 L. & HUM. BEHAV. 413, 415 (2011).

120. *Id.* at 416–17.

121. *Id.* at 419.

122. For a discussion of the current debate regarding pretrial detention and due process rights, including risk assessments related to bail determinations, see Megan T. Stevenson & Sandra G. Mayson, *Pretrial Detention and the Value of Liberty*, 108 VA. L. REV. 709, 709–10 (2022) (examining whether an offender's degree of risk justifies pretrial detention through a relative harm valuation method); Jenny E. Carroll, *The Due Process of Bail*, 55 WAKE FOREST L. REV. 757, 757–61 (2020) (citing *ODonnell v. Harris Cnty.*, 328 F. Supp. 3d 643, 654 (S.D. Tex. 2018)) (analyzing the due process of bail through the lens of the district court case).

123. See Vanessa A. Edkins & Lucian E. Dervan, *Freedom Now or a Future Later: Pitting the Lasting Implications of Collateral Consequences Against Pretrial Detention in Decisions to Plead Guilty*, 24 PSYCH., PUB. POL'Y, & L. 204, 206 (2018) [hereinafter Edkins & Dervan, *Freedom Now or a Future Later*] (hypothesizing that scenarios involving an “innocent” defendant will be less likely to plead guilty than those involving a “guilty” defendant and that knowledge of collateral consequences decreases guilty pleas when pretrial detention is not a factor in the plea bargaining process).

124. *Id.*

125. *Id.*

126. *Id.* at 207.

First, the study found participants assigned to both the factually guilty and factually innocent conditions electing to plead guilty, thus once again confirming the innocence phenomenon. . . . [Further], the study found that pretrial detention significantly influenced plea decisions. Of particular importance here, the rate of innocent individuals who pleaded guilty tripled in the pretrial scenarios.¹²⁷

Other studies have found similar impacts from pre-trial detention.¹²⁸

In a Vera Institute report on plea bargaining, one study cited in the report examined 76,000 arrests in Delaware.¹²⁹ The study determined that pretrial detention increased a person's likelihood of pleading guilty by forty-six percent.¹³⁰ Similarly, in a recent article examining the results of five hundred interviews with public defenders, the authors noted that extra-legal factors such as pre-trial detention influenced counsel's recommendations regarding plea offers.¹³¹ Finally, Leslie and Pope examined almost one million arraignments for felonies and misdemeanors in New York City from 2009–2013.¹³² They found a link between pretrial detention and increased plea rates.¹³³ But the authors also found that defendants detained pretrial were willing to plead to worse offers.¹³⁴ Further, the study demonstrated that many of the individuals who pleaded guilty would have proceeded to trial had they not been detained pretrial.¹³⁵ Importantly, other research has shown that people of color are more likely to receive larger bail amounts and longer pretrial detention periods.¹³⁶ Once again, therefore, the influence of pre-trial detention

127. Dervan, CATO S. CT. REV., *supra* note 73, at 134.

128. See, e.g., Gail Kellough & Scot Wortley, *Remand for Plea: Bail Decisions and Plea Bargaining as Commensurate Decisions*, 42 BRIT. J. CRIMINOLOGY 186, 205–06 (2002); Meghan Sacks & Alissa R. Ackerman, *Pretrial Detention and Guilty Pleas: If They Can't Afford Bail They Must Be Guilty*, 25 CRIM. JUST. STUD. 265, 275 (2012).

129. Subramanian et al., *supra* note 1, at 11.

130. *Id.*

131. Ronald F. Wright, Jenny Roberts & Betina Cutaia Wilkinson, *The Shadow Bargainers*, 42 CARDOZO L. REV. 1295, 1341 (2021); see Thea Johnson, *Measuring the Creative Plea Bargain*, 92 IND. L.J. 901, 920–21 (2017) (finding that defense attorneys consider collateral consequences in plea negotiations).

132. Emily Leslie & Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments*, 60 J.L. & ECON. 529, 530, 536 (2017).

133. *Id.* at 554.

134. *Id.* at 548.

135. *Id.* at 543.

136. Nick Petersen & Marisa Omori, *Is the Process the Only Punishment?: Racial-Ethnic Disparities in Lower-Level Courts*, 42 U. DENVER L. & POL'Y 56, 66, 70 (2020).

is not just contributing to false guilty pleas, but is likely leading to a disproportionate impact on marginalized communities.¹³⁷

Many factors may impact a defendant's decision to plead guilty: assessments the likelihood of success at trial,¹³⁸ a desire for finality,¹³⁹ the impact of collateral consequences,¹⁴⁰ risk aversion,¹⁴¹ temporal discounting,¹⁴² and familial considerations,¹⁴³ among others. However, as discussed above, the three factors that appear most influential are sentencing differentials, the advice of counsel, and pretrial detention.¹⁴⁴ Certainly for Mr. Vasquez, these influences contributed to his decision to falsely plead guilty, a decision that had significant consequences not only for himself, but for the others who became victims as a result.

II. FALSE TESTIMONY IN RETURN FOR FALSE BARGAINS

In May 1979, Eva Gail Patterson was raped and murdered in her home in Hattiesburg, Mississippi.¹⁴⁵ Ms. Patterson's four-year-old son witnessed the attack and later described the perpetrator to police as a single "bad boy."¹⁴⁶ The first suspect identified in the case was Larry Ruffin, a teenager at the time.¹⁴⁷ While Mr. Ruffin had a prior record for stealing some beer and was on leave from a halfway house for that

137. *Id.* at 66–67.

138. Wilford et al., *supra* note 2, at 566 (discussing conviction likelihood); Wright et al., *supra* note 132, at 1319.

139. Subramanian et al., *supra* note 1, at 11 (noting that in one 2012 study from New Jersey defendants pleaded guilty to get out of jail and "get it over with").

140. Edkins & Dervan, *Freedom Now or a Future Later*, *supra* note 123, at 206.

141. Russell Covey, *Reconsidering the Relationship Between Cognitive Psychology and Plea Bargaining*, 91 MARQ. L. REV., 213, 219–20 (2007).

142. Edkins & Dervan, *Freedom Now or a Future Later*, *supra* note 123, at 206.

143. Ochoa & Salazar, *supra* note 90, at 301.

144. Other factors that might influence the decision of a particular defendant include lack of faith in the system, hopelessness and other psychological conditions, pleading to protect another individual from the inquiry, remorse, perceived lack of fairness in the criminal justice system or trial system, and the ease of pleading guilty. See Covey, *supra* note 142, at 225, 228, 240.

145. Campbell Robertson, *30 Years Later, Freedom in a Case with Tragedy for All Involved*, N.Y. TIMES (Sept. 16, 2010), <https://www.nytimes.com/2010/09/17/us/17exonerate.html> [<https://perma.cc/696Y-3N7P>]; see also Valerie Wells, *'Ain't Got Justice, yet'*, JACKSON FREE PRESS (Sept. 22, 2010, 6:18 PM), <https://www.jacksonfreepress.com/news/2010/sep/22/aint-got-justice-yet/> [<https://perma.cc/696Y-3N7P>] (discussing the aftermath). This case is also detailed in James R. Acker, *The Flipside of Wrongful Conviction: When the Guilty Go Free*, 76 ALB. L. REV. 1629, 1658–61 (2012–13).

146. Robertson, *supra* note 145.

147. *Id.*

offense at the time of the attack on Ms. Patterson, it is unclear why he was targeted by police, as there were no witnesses or evidence linking him to the crime.¹⁴⁸ Nevertheless, police brought Mr. Ruffin in for questioning and, according to a federal lawsuit later filed in the matter, beat and coerced him into confessing to the heinous crime.¹⁴⁹ As might be expected, Mr. Ruffin recanted his forced confession and proceeded to trial.¹⁵⁰ Sixteen months later, as prosecutors prepared for Mr. Ruffin's trial, police decided to interrogate Bobby Ray Dixon and Phillip Bivens.¹⁵¹ Mr. Dixon had been in the same halfway house around the same time as Mr. Ruffin.¹⁵² As before, coercive interrogation tactics, including "racially-charged threats and violence," were used to coerce confessions from the men.¹⁵³ Eventually, threatened with the death penalty if they failed to cooperate, Mr. Dixon and Mr. Bivens pleaded guilty to the rape and murder of Ms. Patterson and testified against Mr. Ruffin at his trial.¹⁵⁴ Mr. Ruffin, based entirely on his confession and the testimony of Mr. Dixon and Mr. Bivens, was convicted and sentenced to life in prison.¹⁵⁵

In 2010, DNA testing of semen from the victim's body revealed that the actual assailant in the 1979 attack was Andrew Harris; Mr. Ruffin, Mr. Dixon, and Mr. Bivens were all excluded as sources of the sample.¹⁵⁶ As a result of the new evidence, Mr. Ruffin, Mr. Dixon, and Mr. Bivens were all exonerated.¹⁵⁷ However, the physical and mental injury resulting from years of incarceration for crimes they had not committed took a heavy toll. Mr. Ruffin never saw the day of his exoneration. He died in prison in 2002, still professing his innocence

148. *Id.*; Wells, *supra* note 146 (noting that many of the files in the investigation have gone missing).

149. Third Amended Complaint & Jury Demand at 15, Bivens v. Forrest County, No. 2:13-cv-8-KS-MTP (S.D. Miss. Apr. 20, 2016) [hereinafter Bivens Complaint].

150. Robertson, *supra* note 146.

151. *Id.*

152. *Id.*

153. Bivens Complaint, *supra* note 150, at 3.

154. Robertson, *supra* note 146.

155. *Id.*

156. Bivens Complaint, *supra* note 150, at 3.

157. *Id.*; see also Lici Beveridge, *\$16.5M Settlement Reached in Wrongful Conviction Suit*, HATTIESBURG AM. (Aug. 1, 2016, 10:57 PM) <https://www.hattiesburgamerican.com/story/news/local/2016/08/01/settlement-talks-continue-wrongful-conviction-suit/87756152> [<https://perma.cc/8MNZ-EZK8>] (noting Bivens and Dixon were exonerated in 2010 after a grand jury failed to indict them and Ruffin, who had died in prison in 2002, was exonerated in 2011).

and not knowing that the truth would one day come to light.¹⁵⁸ Mr. Dixon died in 2010, the same year as his exoneration.¹⁵⁹ Mr. Bivens died in 2014.¹⁶⁰ The three men did not even live long enough to receive compensation for their wrongful imprisonment.¹⁶¹ The state of Mississippi provided their estates \$50,000 in 2015, the equivalent of \$1,612 per year or \$4.41 per day for their mistreatment.¹⁶² A multi-million-dollar settlement in a federal lawsuit would not come until 2016.¹⁶³

It was not difficult for law enforcement to track down Andrew Harris, the actual attacker in the 1979 case, because he was already in prison for another rape.¹⁶⁴ Mr. Harris had lived close to Ms. Patterson in 1979 when the initial crime occurred, but police had not identified him as a suspect.¹⁶⁵ Instead, they focused on Mr. Ruffin and then closed the investigation after coercing false pleas from Mr. Bivens and Mr. Dixon.¹⁶⁶ While authorities may have believed that the convictions of Mr. Ruffin, Mr. Bivens, and Mr. Harris had confirmed their theory of the case, the true perpetrator had actually been allowed to go free and victimize others.¹⁶⁷ In the case of Mr. Harris, he went on to perpetrate at least one additional rape, though there were likely additional victims since he was able to remain free for a substantial period of time following the rape and killing of Ms. Patterson.¹⁶⁸

As the judge noted when exonerating Mr. Dixon and Mr. Bivens, “[t]he common thread in this case is tragedy.”¹⁶⁹ Mr. Ruffin, Mr. Dixon, and Mr. Bivens were each victims of the plea bargaining system; a system that coerced innocent defendants to falsely plead guilty and a system that then incentivized innocent defendants to falsely testify at

158. Beveridge, *supra* note 158.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *See* Bivens Complaint, *supra* note 150, at 3.

165. *Id.* at 37.

166. *Id.* at 2.

167. *Id.*

168. *Id.* at 2–3 (noting that 30 years after the wrongful conviction of Ruffin, Dixon, and Bivens, Andrew Harris was in prison for a different brutal rape).

169. Acker, *supra* note 146, at 1660–61; *see also* Associated Press, *DNA Testing Frees 2 Men After 30 Years*, WASH. TIMES (Sept. 16, 2010), <http://www.washingtontimes.com/news/2010/sep/16/dna-testing-frees-2-men-after-30-years/print> [<https://perma.cc/756Q-VJJK>].

trial in return for the benefits of their bargains.¹⁷⁰ Ms. Patterson also suffered an injustice at the hands of plea bargaining, because the false pleas and false testimony in her case meant that the actual perpetrator escaped justice for over thirty years.¹⁷¹

Importantly, the victims of Mr. Harris after 1979 were also victims of the plea bargaining system, because plea bargaining allowed prosecutors to coerce false pleas to support a faulty case. And with those false pleas in hand, the system was able to close the investigation while allowing the true perpetrator to go free and victimize again.

But how likely is it that someone such as Mr. Dixon or Mr. Bivens might falsely plead guilty and then go on to falsely testify at trial against another innocent person they had never even met before?¹⁷² As noted in the previous Part, there are various forces, including sentencing differentials, advice of counsel, and pretrial detention, that can lead to false guilty pleas.¹⁷³ The additional phenomenon of offering false testimony and the relationship between this behavior and plea bargaining raises further questions.

170. Associated Press, *supra* note 170 (pointing out that over sixty confessions had been proven false by DNA testing since 1990); Bivens Complaint, *supra* note 150, at 2–3 (detailing the ways in which Ruffin, Bivens, and Dixon were coerced into false pleas and testimony by the plea bargaining system).

171. See Bivens Complaint, *supra* note 150, at 2–3.

172. Mr. Dixon’s testimony at Mr. Ruffin’s trial was unclear and confused. Though it initially supported the version of events advanced by the prosecution and contained in his plea agreement, he eventually indicated that he did not even know Mr. Ruffin. Mr. Bivens, however, offered more consistent testimony for the prosecution. See Acker, *supra* note 146, at 1659–60. Though outside the focus of this piece, this exchange raises many questions about the role of judges in monitoring the trial and plea systems and, in some jurisdictions, the role of judges in plea negotiations. For further discussion of the role of judges in plea bargaining, see Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325, 326–29 (2016) (analyzing detailed interviews conducted with trial judges and attorneys in order to understand judicial involvement in plea negotiations); Rishi Raj Batra, *Judicial Participation in Plea Bargaining: A Dispute Resolution Perspective*, 76 OHIO ST. L.J. 565, 566–67 (2015) (surveying all fifty states to discover current approaches to judicial involvement in the plea bargaining process, and analyzing the benefits and concerns of this practice to offer recommendations); Albert W. Alschuler, *The Trial Judge’s Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1060–61 (1976) (discussing different types of judicial engagement in plea bargaining systems and “the basic arguments for and against judicial bargaining”).

173. See *supra* Part I and accompanying text.

Significant research has been conducted during the last decade on offering false testimony at trial.¹⁷⁴ In particular, there has been much focus on informants, including jailhouse informants and accomplice informants.¹⁷⁵ In fact, these types of false testimony account for seventeen to twenty-one percent of all exonerations by DNA testing, and the research on this type of testimony raises serious concerns regarding reliability.¹⁷⁶

Jailhouse informants are individuals who offer to testify about information learned from fellow inmates, often alleged confessions that provide strong evidence of culpability.¹⁷⁷ In a 2007 article, Myrna Raeder discussed the danger of using information from jailhouse informants, noting that they “claim no insider knowledge of the crime; rather, their ticket to freedom or other rewards is based entirely on the alleged confessions made to them by defendants, which in an information-friendly world may be spun from whole cloth.”¹⁷⁸ Joy, in his article examining jailhouse informants, chose to not even call these witnesses “informants.”¹⁷⁹ Instead, he called them “snitches” because of

174. In a 2008 piece, Garrett noted that eighteen percent of wrongful convictions were the result of informant testimony. See Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 86 (2008) (“In thirty-five cases [eighteen percent], an informant, jailhouse informant, or cooperating alleged coperpetrator provided false testimony.”).

175. Melanie B. Fessinger, Brian H. Bornstein, Jeffrey S. Neuschatz, Danielle DeLoach, Megan A. Hillgartner, Stacy A. Wetmore & Amy Bradfield Douglass, *Informants v. Innocents: Informant Testimony and Its Contribution to Wrongful Convictions*, 48 CAP. U. L. REV. 149, 150 (2020) (“False informant testimony is a leading cause of wrongful convictions.”).

176. *Id.*

177. *Id.* at 151–52.

178. Myrna S. Raeder, *See No Evil: Wrongful Convictions and the Prosecutorial Ethics of Offering Testimony by Jailhouse Informants and Dishonest Experts*, 76 FORDHAM L. REV. 1413, 1419 (2007) (noting concerns about jailhouse informants’ tendency to fabricate confessions because people are willing to receive such information at face-value); see also Valerie Alter, *Jailhouse Informants: A Lesson in E-snitching*, 10 U. FLA. J. TECH. L. & POL’Y 223, 224–26 (2005) (discussing jailhouse informants’ tendency to lie and fabricate confessions in exchange for sentence reductions); George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 PEPP. L. REV. 1, 29–30 (2000) (recounting the story of one jailhouse informant who expressed a belief that he would receive favorable treatment from the District Attorney, despite briefly recanting testimony, and who wrote that he “no longer [had] to lie” for the District Attorney’s Office); Robert M. Bloom, *Jailhouse Informants*, 18 CRIM. JUST. 20, 20–22 (2003) (stating that informant testimony is unreliable because Informants do not hesitate to lie under oath considering their reward may be a shorter sentence).

179. Peter A. Joy, *Brady and Jailhouse Informants: Responding to Injustice*, 74 CASE W. RESRV. L. REV. 619, 620 (2007).

the “high rate of unreliability of uncorroborated jailhouse informant testimony.”¹⁸⁰ “The untrustworthiness of such witnesses is well documented,” Joy noted, “and even some prosecutors who use jailhouse informants refer to them as ‘snitches.’”¹⁸¹ One judge stated of jailhouse informants:

The most dangerous informer of all is the jailhouse snitch who claims another prisoner has confessed to him. The snitch now stands ready to testify in return for some consideration in his own case. Sometimes these snitches tell the truth, but more often they invent testimony and stray details out of the air.¹⁸²

While this type of testimony is different from that offered in Mr. Bivens’s and Mr. Dixon’s case, one must wonder whether it should be so viewed. As noted by the judge above, jailhouse informants’ testimony is questionable because the statements are offered in return for a benefit.¹⁸³ The same can be said of the testimony of Mr. Bivens and Mr. Dixon, though in the context of a formal plea agreement.¹⁸⁴

The term “accomplice informant” better describes the roles taken by Mr. Bivens and Mr. Dixon in their case. They were alleged to have participated in the crime and received a benefit for their assistance in testifying against those who did not choose to plead guilty.¹⁸⁵ While the use of jailhouse informants comes with considerable skepticism today, the use of accomplice informants is a generally accepted practice in criminal proceedings, and these witnesses tend to carry significant weight with the jury.¹⁸⁶ One court stated:

No practice is more ingrained in our criminal justice system than the practice of the government calling a witness who is an accessory to

180. *Id.* at 620.

181. *Id.*; see also Russell D. Covey, *Abolishing Jailhouse Snitch Testimony*, 49 WAKE FOREST L. REV. 1375, 1375–77 (2014) (“Jailhouse snitch testimony is arguably the single most unreliable type of evidence currently used in criminal trials. Snitches are deeply unreliable witnesses.”).

182. Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 HASTINGS L.J. 1381, 1394 (1996). The quote is also discussed in Covey, *supra* note 182, at 1378.

183. Trott, *supra* note 183, at 1383.

184. There is also some research examining the phenomenon of individuals falsely pleading guilty after a jailhouse informant offers to falsely testify against them. See, e.g., Joy, *supra* note 180, at 625 (discussing jailhouse testimony leading to false pleas by an innocent defendant).

185. Bivens Complaint, *supra* note 150, at *23, *25–27.

186. Joy, *supra* note 180, at 637–39.

the crime for which the defendant is charged and having that witness testify under a plea bargain that promises him a reduced sentence.¹⁸⁷

But that same court went on to state:

It is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence, but courts uniformly hold that such a witness may testify so long as the government's bargain with him is fully ventilated so that the jury can evaluate his credibility.¹⁸⁸

Nevertheless, while the use of accomplice informants is considered commonplace, there is growing concern regarding the reliability of these statements. Further, psychological research over the last decade has begun to more deeply explore the prevalence of false confessions and false implications of others in the context of accomplice informants and jailhouse informants.¹⁸⁹

In one series of studies, participants were brought into a room in pairs.¹⁹⁰ One individual was instructed to type on a computer, and the other individual was instructed to read out what was to be typed.¹⁹¹ The catch was that the typist was instructed not to hit the "TAB" button because that would cause the computer to crash.¹⁹² As these studies were psychological deception studies, the computer inevitably crashed even without the "TAB" key being struck to allow the experiment to test how likely someone might be to falsely confess or falsely implicate another in this situation.¹⁹³

In one version of the study, after the computer crashed, the readers were told that they would not have to attend an additional typing session to make up for the lost data if they implicated the typist.¹⁹⁴ The study revealed that eighty-seven percent of the readers were prepared

187. *United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987).

188. *See Harris*, *supra* note 179, at 20 (quoting *Cervantes-Pacheco*, 826 F.2d at 315).

189. *See Fessinger et al.*, *supra* note 176, at 162–64 (2020) (discussing studies that look at plea bargaining and informants).

190. *See* Jessica K. Swanner, Denis R. Beike & Alexander T. Cole, *Snitching, Lies and Computer Crashes: An Experimental Investigation of Secondary Confessions*, 34 L. & HUM. BEHAV. 53, 57 (2010) (conducting a study on pairs of students to investigate secondary confessions); Jessica K. Swanner & Denise R. Beike, *Incentives Increase the Rate of False but Not True Secondary Confessions from Informants with an Allegiance to a Suspect*, 34 L. & HUM. BEHAV. 418, 421–22 (2010) (placing students in a simulation to see if they would implicate the other student); *see also* Fessinger et al., *supra* note 176, at 162–63 (discussing the studies).

191. Swanner et al., *supra* note 191, at 57.

192. *Id.*

193. *Id.*

194. *Id.* at 63.

to sign a statement falsely alleging that the typist had struck the “TAB” key to secure this benefit.¹⁹⁵ In another version of the study, the researchers inserted a confederate as the typist and then had the confederate deny the allegations that they had struck the “TAB” key.¹⁹⁶ In this scenario, the paradigm demonstrated that study participants were less willing to falsely implicate the typist when the typist denied engaging in the conduct.¹⁹⁷ However, some readers were still willing to falsely implicate the typist and those numbers increased when an incentive was offered to make such a statement.¹⁹⁸

In another study by Robertson and Winkelman, participants were given vignettes and asked to imagine themselves as an individual charged with a crime.¹⁹⁹ The subjects were then asked if they would testify against another individual accused of murder.²⁰⁰ In one version of the study, participants were told they would have to testify that the other individual had admitted to the murder while in jail, but they were also told that this had not actually happened.²⁰¹ In return for testifying, the participants were told that they would receive a sentencing benefit in their own case.²⁰² They were, in essence, serving as the jailhouse informants described above.²⁰³ The study found that only seven percent of those informed that the defendant had not made the statement were willing to lie to receive the benefit.²⁰⁴ However, the incentives did “elicit false testimony in a significant minority of respondents.”²⁰⁵ Further, “the process of wearing down a witness by sequentially offering increasing levels of incentives is successful, nearly tripling the rate of false testimony.”²⁰⁶

Despite the growth in research on false informant testimony, psychological research had not, until recently, explored the specific relationship between false guilty pleas and false testimony by accomplice informants. However, new research provides additional

195. *Id.* at 62.

196. *Id.* at 60.

197. *Id.* at 61.

198. *Id.*

199. Christopher T. Robertson & D. Alex Winkelman, *Incentives, Lies, and Disclosure*, 20 U. PA. J. CONST. L. 33, 59 (2017).

200. *Id.*

201. *Id.* at 59–60.

202. *Id.* at 60.

203. *Id.* at 59.

204. *Id.* at 60.

205. *Id.* at 61.

206. *Id.*

information regarding this type of defendant decision-making. A pivotal moment in the expansion of research in this area was the 2016 decision of the Japanese Diet (national legislature) to allow plea bargaining for the first time.²⁰⁷ This new experiment with plea bargaining in a country with no history of the practice opened up opportunities for researchers to test some of the assumptions on which American plea bargaining has been built.

When plea bargaining finally became lawful in Japan in 2018, the system that had been created was a limited one compared to the breadth of its American counterpart.²⁰⁸ This limited scope was due in part to concerns about false guilty pleas. The new plea bargaining system only permitted agreements for certain types of crimes involving group criminality, and even then, only in exchange for the accused providing information about a crime committed by a third party.²⁰⁹

The assumption underlying the structure was that while defendants might be willing to falsely implicate themselves in return for a bargain, people would not be willing to testify falsely against other innocents in

207. See *Keiji Soshou-Hou-Tou Ga Kaisei Saremashita* (刑事訴訟法等が改正されました) [*The Criminal Procedure Code Has Been Revised*], NICHIBENREN (日本弁護士連合会) [JAPAN FED'N OF BAR ASS'NS (JFBA)] 3 (June 2016) [hereinafter NICHIBENREN], https://www.nichibenren.or.jp/library/ja/publication/booklet/data/keijisoshohoto_kaisei_02.pdf [<https://perma.cc/2MSJ-PQVQ>] (outlining the new plea bargaining system in Japan); Tomohiro Osaki, *Diet Passes Legislation to Revamp Japan's Criminal Justice System*, JAPAN TIMES (May 24, 2016), <https://www.japantimes.co.jp/news/2016/05/24/national/diet-passes-legislation-revamp-japans-secretive-judicial-system> [<https://perma.cc/24EK-B9N4>] (reporting on the new changes created by the Japanese legislature); Mark A. Levin, *Considering Japanese Criminal Justice from an Original Position*, in CRIME AND JUST. IN CONTEMP. JAPAN 173, 183 (Jianhong Liu & Setsuo Miyazawa eds., 2017) (scholars suggest the new rule will apply to only three percent of all cases); see also, *Keiji Soshou-Hou Kaisei, Nihon-Ban "Shihou torihiki" to wa?* (刑事訴訟法改正、日本版「司法取引」とは?) [*Amendments to the Code of Criminal Procedure, What is the Japanese Version of "Plea Bargaining"?*], KIGYOU HOUMU NABI (企業法務ナビ) [CORP. LEGAL NAVIGATION] (July 15, 2016), <https://www.corporate-legal.jp/news/2337> [<https://perma.cc/X7GS-2A6U>] (discussing the new Japanese plea bargaining system); John O. Haley, *Public Prosecution in Japan*, OXFORD HANDBOOK TOPIC ON CRIMINOLOGY & CRIM. JUST. (2015), <https://academic.oup.com/edited-volume/41333/chapter/352358266> [<https://perma.cc/DK37-7QAJ>] ("No industrial democracy has a lower crime rate . . .").

208. See NICHIBENREN, *supra* note 208, at 1 (discussing the revisions to Japan's Criminal Code).

209. KEIJI SOSHOU-HOU (刑事訴訟法) [C. CRIM. PROC.] 2018, arts. 350-2, 350-3 (Japan); NICHIBENREN, *supra* note 208, at 1.

a formal proceeding to secure the benefits of those bargains.²¹⁰ In 2016, the Japan Foundation Center for Global Partnership provided researchers a grant to test whether this assumption was correct and whether the requirement of providing testimony would prevent false guilty pleas.²¹¹ The results of the study showed that the revised plea system still had significant negative effects on the reliability of guilty pleas.²¹²

The new cheating paradigm study was once again built on a methodology originally used to study false confessions.²¹³ This time, the study was run simultaneously in the United States, Japan, and South Korea.²¹⁴ While only the results from the United States will be discussed for purposes of this piece, similar results were discovered in each country where data was available.²¹⁵ As in the 2013 study, the methodology was employed “in a controlled laboratory setting, utilizing college students as participants.”²¹⁶ Students were once again accused of academic misconduct and offered a plea deal.²¹⁷ Despite having many similarities, the new study differed from the prior research in a number of important ways.²¹⁸ For example, the new paradigm included an increased role for counsel and more consistent stigma consequences regardless of whether one took the deal or proceeded to trial.²¹⁹ The new research also tested not only whether participants were willing to confess to their own alleged conduct, but whether the participants were also willing to indicate who instigated

210. Osaki, *supra* note 208 (noting that recording will be limited to “grave” crimes including murder, arson, and kidnapping; crimes tried under the lay judge system; and cases specially investigated by prosecutors); Levin, *supra* note 208, at 183 (scholars suggest the new rule will apply to only three percent of all cases).

211. Pardieck et al., *supra* note 2, at 479; *Accomplishments—July 2016*, S. ILL. U. NEWS, JULY (July 2016), <https://news.siu.edu/accomplishments/1607.php> [<https://perma.cc/DWU5-6QQ7>].

212. Pardieck et al., *supra* note 2, at 521.

213. Melissa B. Russano, Christian A. Meissner, Fadia M. Narchet & Saul M. Kassin, *Investigating True and False Confessions Within a Novel Experimental Paradigm*, 16 PSYCH. SCI. 481, 484–85 (2005).

214. See Pardieck et al., *supra* note 2, at 507 (conducting a study based on increasing concerns over the innocence problem).

215. For a discussion of the data in each country and the limitations on data collection in Japan due to study constraints, see *id.* at 519.

216. *Id.* at 507.

217. *Id.*

218. *Id.* at 507–13.

219. *Id.* at 512–13.

the cheating and whether the participants were willing to provide evidence against the other student at a formal hearing.²²⁰

The study began with participants agreeing to participate in what they believed was a psychological inquiry, who were divided into individual versus group problem-solving rooms.²²¹ Each participant was led, along with another “student,” into a private room where the test procedures were explained.²²² Unbeknownst to the study participant, the other “student” was a confederate working with the research team.²²³

When the individual problems were distributed, the research assistant stated: “Now I will hand out the individual problems, remember that you are to work alone.” In fact, in one half of the study the confederate encouraged the participant to cheat and work together. In half of the cases, the confederate asked the study participant for assistance in answering the questions, a clear violation of the instructions. First, the confederate asked the study participant: “What did you get for No. 2?” If the study participant did not respond with the answer, the confederate followed up by saying, “I think it is . . .” If necessary, the confederate asked for assistance with additional problems: “Did you get . . . for No. 3?” Those study participants who acquiesced and offered assistance were placed in the “guilty condition,” because they “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. Absent unprompted attempts to cheat initiated by the participant, those in this scenario were placed in the “innocent condition,” because they did not “cheat” by violating the research assistant’s instructions.

After completing the second set of logic problems, the research assistant, who did not know whether cheating occurred, collected the logic problems and asked that the students remain in the room while the problems were graded. Approximately five minutes later, the research assistant reentered the room and indicated there was a problem and asked to speak to the students individually.²²⁴

After the students were separated, the study participant was accused of academic misconduct and offered a bargain.²²⁵ The first option for

220. *Id.* at 513.

221. *Id.* at 509.

222. *Id.*

223. *Id.*

224. *Id.* at 509–10.

225. *Id.*, at 510.

the student was to admit the misconduct.²²⁶ The punishment for the offense was losing any promised compensation or credit for participating in the study.²²⁷ The student was also told that their academic advisor would be informed of the misconduct, thus creating a sense of stigma as a consequence.²²⁸ This result was created to mimic probation, where the defendant is able to resolve the matter without incarceration, but the stigma of the conviction remains.

The second option for the student was to maintain their innocence and proceed to a trial.²²⁹ The “trial” was described as an academic review board.²³⁰ While the exact description of the academic review board varied in each location in which the study was conducted to conform with local custom and expectations, the general structure was the same.²³¹ The review board’s structure was modeled after a jury trial system, in which a panel or jury of faculty and staff would hear evidence from both sides and determine whether misconduct had occurred.²³²

The student was told they had the opportunity to be represented by counsel, advocate for their position, and present evidence in their defense.²³³ Regarding punishment, the student was informed that if they were found to have engaged in misconduct by the review board, they would lose their compensation and their advisor would be informed.²³⁴ These were the same punishments as those attaching if a plea had been entered. To reflect the concept of a “trial penalty,” students were informed that one of two additional punishments would also be imposed.²³⁵ Half of the students were told the additional ramification was attendance at an ethics seminar, followed by a pass/fail test on the material.²³⁶ The other half of the students were

226. *Id.* at 511.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. Pardieck et al., *supra* note 2, at 511. The descriptions vary depending on the university’s student code of conduct. *See, e.g.*, RITSUMEIKAN DAIGAKU GAKUSEI CHOUKAI KITEI (立命館大学学生懲戒規定) [RITSUMEIKAN UNIV. STUDENT DISCIPLINARY REGULS.], (Jan. 29, 2010), <https://www.ritsumei.ac.jp/file.jsp?id=410958> [<https://perma.cc/YJP8-H2SC>] (demonstrating what a Japanese university’s student code of conduct looks like).

232. Pardieck et al., *supra* note 2, at 511.

233. *Id.* at 512.

234. *Id.* at 511.

235. *Id.*

236. *Id.* at 512.

told they would be required to attend the ethics seminar, pass the test, and complete ten hours of community service.²³⁷ The reason for the two varying punishments was to test whether increasing the punishment led to higher rates of pleas by either the guilty or innocent students.²³⁸ In each scenario, the seminar and/or community service was intended to represent a deprivation of liberties similar to a sentence of incarceration in the criminal justice system—a loss of time.²³⁹

Before a student decided whether to accept the plea offer, two additional pieces of information were shared with them. First, the student was presented with a document from a “student advocate.”²⁴⁰ The document stated that the student was entitled to representation, reiterated their right to “trial” before the review board, and provided contact information should the student decide to proceed to the review board and desire representation.²⁴¹ While not as robust a form of representation as found in the above-described Henderson and Levett study, this ensured students knew their rights and recognized that representation was available to them. Even this modicum of representation surpasses what many receive in the actual criminal justice system.²⁴² In a 2011 report by the National Association of Criminal Defense Lawyers (“NACDL”), case analysis of misdemeanor courts in Florida revealed that most defendants do not have any access to counsel before deciding how to proceed.²⁴³ Unsurprisingly, in the NACDL study, most people chose to plead guilty.²⁴⁴

237. *Id.*

238. *Id.*

239. *Id.* at 508.

While academic discipline is not precisely equivalent to traditional criminal penalties, the anxiety experienced by students accused of cheating and anticipating punishment is similar in form to the anxiety experienced by one charged with a criminal offense. There are also procedural similarities with students able to contest guilt at a hearing, akin to a trial. Punishments may similarly require students to forfeit time, money, and freedom. These various similarities enable a meaningful comparison.

Id.

240. *Id.* at 512.

241. *Id.*

242. ALISHA SMITH & SEAN MADDAN, THREE-MINUTE JUSTICE: HASTE AND WASTE IN FLORIDA’S MISDEMEANOR COURTS 14 (July 21, 2011), <https://www.nacdl.org/Document/ThreeMinuteJusticeFloridasBrokenMisdemeanorCourts> [<https://perma.cc/PF7Q-AR38>].

243. *Id.* at 15.

244. *Id.*

Second, the student was told that the majority of people who appear before the review board in the past were convicted, though they were also informed that ten to twenty percent of students were found not responsible.²⁴⁵ This was an important element to add to the student's decision-making because similar information is typically communicated to defendants in the actual criminal justice system.²⁴⁶ The conviction rate communicated to participants in this study was similar to or actually below the approximations of actual convictions in the criminal justice systems of the three countries where the study was conducted.²⁴⁷ For example, recent research indicates that less than one percent of defendants in the U.S. federal system are acquitted, which includes seventeen percent of those who proceeded to trial.²⁴⁸ In Japan and Korea, the conviction rate at trial has historically exceeded ninety-nine percent.²⁴⁹

In the 2013 version of the cheating paradigm study, the participant was permitted at this point to decide whether to accept the deal or proceed to trial.²⁵⁰ In the new study methodology, there was an added requirement to reflect the supposition that Japan had created a more reliable plea bargaining system by requiring the defendant to agree to

245. Pardieck et al., *supra* note 2, at 513.

246. *See id.* (stating that this information was assumed to be communicated to defendants).

247. *See id.* (stating that this information was intentionally a low-end approximation).

248. *See* John Gramlich, *Fewer than 1% of Defendants in Federal Criminal Cases Were Acquitted in 2022*, PEW RSCH. CTR. (June 14, 2023), <https://www.pewresearch.org/short-reads/2023/06/14/fewer-than-1-of-defendants-in-federal-criminal-cases-were-acquitted-in-2022> [<https://perma.cc/QRM7-XMCK>] (“In fiscal year 2022, only 290 of 71,954 defendants in federal criminal cases—about 0.4%—went to trial and were acquitted, according to a Pew Research Center analysis of the latest available statistics from the federal judiciary. Another 1,379 went to trial and were found guilty (1.9%).”); *see also* John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty*, PEW RSCH. CTR. (June 11, 2019), <https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty> [<https://perma.cc/AJ46-GY2K>] (providing an overview of data showing that acquittals, even for defendants who go to trial, are relatively rare).

249. Takehiko Kambayashi, *Presumed Guilt? Unpacking Japan's 99.9% Conviction Rate*, CHRISTIAN SCI. MONITOR (May 5, 2023), <https://www.csmonitor.com/World/Asia-Pacific/2023/0505/Presumed-guilt-Unpacking-Japan-s-99.9-conviction-rate> [<https://perma.cc/45LH-WE68>]; Jake Adelstein & Andre Salmon, *'Guilty Until Proven Guilty' in Japan and Korea*, ASIA TIMES (Jan. 13, 2020), <https://asiatimes.com/2020/01/in-japan-and-korea-presumed-guilty-until-proven-guilty> [<https://perma.cc/LET3-E7BF>].

250. Pardieck et al., *supra* note 2, at 514.

testify against someone else to receive the benefits of the bargain.²⁵¹ To capture and test this aspect of the 2016 Japanese law, two versions of the study were conducted by the research teams.²⁵² In the first study, the participant at this point was presented with a sheet of paper asking them to indicate who instigated the cheating.²⁵³ Participants signed the completed form, which indicated that it was a binding document.²⁵⁴ This aspect of the study was intended to test whether innocent participants would be willing to continue when they were required to do more than simply admit their own guilt.²⁵⁵

In the second study, the requirements of the Japanese plea bargaining law were followed more closely.²⁵⁶ The study script required the participant to identify the party to whom they provided assistance or from whom they received assistance.²⁵⁷ The participant was also asked to provide information to the academic review board regarding the cheating incident, thus recreating the Japanese legal requirement that defendants be willing to testify against another person.²⁵⁸ This aspect of the study was intended to test the willingness of innocent participants to not only falsely plead guilty, but also falsely testify against another person they knew to be innocent at a formal proceeding.²⁵⁹

In the United States, 204 individuals participated in the first experiment.²⁶⁰ Of that number, 51.9% pleaded guilty to cheating and

251. *Id.*

252. *Id.* at 513.

253. *Id.*

254. *Id.*

255. *Id.* at 514.

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.* Various safeguards were used in both studies similar to those employed in research on false confessions and in other deception studies to ensure the well-being of the study participants.

The research assistant was instructed to terminate the experiment and debrief the student regarding the true nature of the study if the student took too long to select an option, seemed overly stressed, or tried to leave the room. For those that completed the study, they were fully debriefed at the end. The experimenter explained the study and ensured that the participant left without distress.

Id. at 513.

260. *Id.* at 515. The experimenter had to end eight sessions early due to distress on the part of the participant, evidence that the paradigm elicits some of the same psychological reactions as found in plea bargaining. *Id.*

48.1% rejected the offer and elected to proceed to the academic review board.²⁶¹ As found in other studies, guilt was a strong predictor of whether one would plead or proceed to the academic review board.²⁶² While the study attempted to identify the impact of sentencing differentials on plea rates, there were no statistically significant differences in plea choice between those participants presented with the more lenient punishment before the review board and those presented with the harsher punishment before the review board.²⁶³ For students facing the harsh punishment, the plea rates were 73.1% for the “guilty” and 45.9% for the “innocent.”²⁶⁴ In the more lenient condition, the plea rates were 72.4% for the “guilty” and forty percent for the “innocent.”²⁶⁵

Both versions of the study strongly indicate that Japan’s attempt at creating a more reliable system may have succeeded in modestly reducing false pleas, but a significant innocence problem will persist. In the first version of the study, in which participants were required to indicate on a sheet of paper who instigated the cheating, seventy-three of ninety-four participants who pleaded guilty were willing to sign the “instigator” sheet.²⁶⁶ Of those who had engaged in the conduct, 81.3% correctly identified the confederate as the individual who instigated the cheating.²⁶⁷ Of those who had not engaged in the conduct and were “innocent,” 58.6% said the confederate had instigated the cheating.²⁶⁸ Importantly, these were individuals who knew no cheating had occurred, yet were willing to both falsely plead guilty to such an

261. *Id.* One individual was excluded because the session was not recorded. *Id.* [There were also twenty-one individuals] originally assigned to the “cheat” or “guilty” condition who had to be reassigned to “innocent” when the confederate’s attempts at cheating were unsuccessful or ignored. Of the remaining 181 participants, ages ranged from 18–25 ($M=19.49$, $SD=1.42$), and 30.4% ($N=55$) identified as female while 69.6% ($N=126$) identified as male. Plea rates did not differ by gender.

Id.

262. *Id.* Logistic regression confirmed that “guilt was a strong predictor ($Beta=1.27$, $p<.001$, $Odds\ Ratio=3.57$).” *Id.*

263. *Id.*

264. *Id.*

265. *Id.* “Logistic regression confirmed that punishment did not affect pleas ($Beta=.19$, $p=.55$) but guilt was a strong predictor ($Beta=1.27$, $p<.001$, $Odds\ Ratio=3.57$).”

Id.

266. *Id.* at 515–16.

267. *Id.* at 516.

268. *Id.*

offense and say that another innocent was responsible for the behavior.²⁶⁹ In this study, therefore, it is probable that the plea bargain offered lead to misinformation that pointed to an innocent person.²⁷⁰

In the second version of the study, in which participants were required to implicate the other student and offer evidence at the review board, an additional 133 students participated.²⁷¹ Again, the results from the study in the United States showed significant rates of guilty pleas and of innocent students pleading guilty.²⁷²

The overall plea rate was 67.8%.²⁷³ As in the first version of the study, more “guilty” participants accepted the offer than “innocent” participants.²⁷⁴ Nevertheless, 65.8% of the participants who had not engaged in cheating falsely pleaded guilty.²⁷⁵ Of those who had actually offered improper assistance to the confederate, 66.7% took the blame for the conduct on the “instigator” sheet.²⁷⁶ Every single participant who had not engaged in any cheating and decided to falsely plead guilty was also willing to provide information to secure the deal.²⁷⁷ Of those who falsely pleaded guilty, fifty-two percent stated that the confederate was the one who instigated the cheating.²⁷⁸ Further, eighty-eight percent were willing to testify before the review board that cheating occurred.²⁷⁹

The requirement that one implicate an innocent person in wrongdoing and even offer testimony against that innocent person in a formal proceeding caused a few people to pause, but only a very small few.²⁸⁰ For the vast majority of participants, once a decision had been

269. *Id.*

270. *Id.* “This effect of guilt condition was significant, $\chi^2(1, 73)=12.51, p=.04, \phi=.24$.” *Id.*

271. *Id.* at 516. Of this number, six were excluded because they became upset and the study was terminated, one was excluded for refusing to complete the study, and eight were excluded for suspicion. *Id.* Further, as with study one, several individuals were moved to the “no cheat” condition when they failed to collaborate with the confederate. *Id.* “Of the remaining 118 participants, ages ranged from 18–47 (*Median*=19, *SD*=3.55); 38.1% (*N*=45) identified as female and 60.2% (*N*=71) identified as male. Plea rates did not differ by gender.” *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.* at 517.

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

made to falsely plead guilty for the benefits of the bargain, they were willing to say what was necessary to secure those benefits even if that meant standing before a jury and lying about what had occurred.²⁸¹

And there was something more. Recall above that the plea rate in the second study was 67.8% overall and 65.8% for the “innocent” participants.²⁸² This means that “guilt” was not a significant predictor of plea acceptance as it had been in the first version of this study and in other previous studies.²⁸³ While it is not clear yet why this occurred, it may be that the added requirement of cooperating and agreeing to testify before the review board added additional formality to the scenario.²⁸⁴ It is possible that this additional step made the entire process seem more daunting and, rather than reducing the prevalence of false pleas, increased them because of a greater desire to resolve the matter quickly.²⁸⁵ More research is necessary on this aspect of the study, but the study opens the possibility that Japan’s proposed solution to plea bargaining’s innocence problem may have actually exacerbated the problem.²⁸⁶

With this and the previously discussed psychological evidence in hand, the actions of Mr. Ruffin, Mr. Dixon, and Mr. Bivens become less puzzling and more understandable given how the mind works in such decision-making situations. As noted in the previous Part, people want to secure a favorable resolution and move forward.²⁸⁷ In fact, during debriefings conducted during the 2013 Edkins and Dervan psychological study, participants noted two common concerns that led them to falsely plead guilty—a desire to move forward and a desire to secure a punishment that minimized risk and did not require the loss of a future liberty interest.²⁸⁸ This is exactly what Mr. Bivens and Mr. Dixon did in their situation.²⁸⁹ They accepted a resolution that carried

281. *Id.*

282. *Id.* at 516.

283. *Id.* at 516–17.

284. *Id.* at 517.

285. *Id.*

286. *Id.* at 476, 517.

287. *See supra* notes 122–28 and accompanying text (discussing the innocence phenomenon).

288. Pardieck et al., *supra* note 2, at 523; *see also* Dervan & Edkins, *The Innocent Defendant’s Dilemma*, *supra* note 2, at 2 (discussing how these two common concerns lead to participants’ risk-averse behavior).

289. *See* Robertson, *supra* note 146 (detailing how Mr. Bivens falsely pleaded guilty out of fear of the death penalty).

finality and certainty, along with a significant benefit.²⁹⁰ When required to testify against another person, someone Mr. Dixon and Mr. Bivens had never even met before trial, they did what eighty-eight percent of the “innocent” participants in the new study did and provided the information requested to secure their deals.²⁹¹

We conclude this Part by returning to the title of this Article. It is clear that an innocent person who pleads guilty is a victim of the plea process, or, more broadly, of the criminal justice system. And yet, many debates about criminal justice see defendants and victims of crime as operating in totally different spaces; this is true for debates over plea bargaining, as well. Recent victim-centered plea reform movements focus on the victims of crime who are sometimes ignored or overlooked by the criminal system.²⁹² Among these movements is a push to ensure that prosecutors communicate their case decision to the impacted victims.²⁹³ In a second Article that is part two of this project, we look at how victims of crime may be impacted by coercive plea practices.²⁹⁴ We focus on those victims who believe they have received justice, only to learn later that an innocent person pleaded guilty to the crime against them. We also focus in this second piece on those individuals who are victimized when the actual guilty party is able to go free and reoffend. All of this is to say that attention should be paid to the impact of coercive plea practices on victims of crime.

290. *Id.*

291. *See id.* (Mr. Bivens backed up Mr. Dixon’s account of the crime even though they had never met before); Pardieck et al., *supra* note 2, at 517 (“The most concerning part was that of our [fifty] innocent individuals, 88% ($n=44$) were willing to testify that cheating had, in fact, occurred and that the confederate was involved in the event.”).

292. For instance, Marsy’s Law, has been passed in several states and attempts to give victims of crime access to many of the same rights as criminal defendants. The national movement to pass Marsy’s Law is largely centered on the idea that victims have been ignored by the criminal justice system. *About Marsy’s Law*, MARSY’S LAW, https://www.marsyslaw.us/about_marsys_law [<https://perma.cc/P6JB-V67F>] (noting that Marsy’s Law has been approved by voters in Florida, Georgia, Illinois, Kentucky, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, and Wisconsin).

293. Marsy’s Law requires prosecutors to confer with victims before agreeing to a negotiated plea, among other things. *See, e.g., House Bill 343: Marsy’s Law Implementation*, OHIO JUD. CONF. (Apr. 6, 2023), <http://www.ohiojudges.org/Document.ashx?DocGuid=3d574424-3f64-429a-b8b2-57e98b185711> [<https://perma.cc/9R64-9NJB>] (explaining that judges are required to ask if the victim has had an opportunity to confer with the prosecutor upon request).

294. *See supra* note 5 and accompanying text.

In this current Article, we want to frame the defendants we discuss as victims of coercive bargaining as well. We are certainly not the first to see defendants as victims. Indeed, there is a rich literature that challenges the notion that defendants and victims should be viewed as entirely separate entities.²⁹⁵ “Victim” is a term fraught with many problematic connotations.²⁹⁶ As Aya Gruber has noted, the term has typically “excluded marginalized men and women, often defendants themselves.”²⁹⁷ Instead, the “public face of ‘the’ victims’ rights movement [has] become that of a middle-class white woman.”²⁹⁸ Further, as Miriam S. Gohara argues in recent work, “‘victimization,’ as it is commonly understood in American legal culture, centers on individual offenses inflicted by readily identified perpetrators,” rather than “consideration[s] of structural oppression or contextual harm.”²⁹⁹

295. For example, in recent memory, the Brooklyn Law Review produced a symposium on “The Role of the ‘Victim’ in the Criminal Legal System.” Many of the contributions addressed just this issue. See, e.g., Cynthia Godsoe, *The Victim/Offender Overlap and Criminal System Reform*, 87 BROOK. L. REV. 1319, 1321–22 (2022) (arguing that the victim/offender binary is false and “overly reductionist”); Tamara Rice Lave, *Blame the Victim: How Mistreatment by the State is Used to Legitimize Police Violence*, 87 BROOK. L. REV. 1161, 1164 (2022) (arguing that a “victim’s prior mistreatment by the state is used as institutional mechanisms of structural racism”); Steven Zeidman, *Rotten Social Background and Mass Incarceration: Who is a Victim?*, 87 BROOK. L. REV. 1299, 1322 (2022) (arguing that defendants and their families should have the opportunity at parole hearings to voice the ways they are victimized by the criminal system). In addition, for a review of the broader literature on the problematic nature of what has come to be the paradigmatic view of victims in the criminal justice system, see Miriam S. Gohara, *The Myth of the Ideal Victim and Black Survivors’ Visions for Justice*, 6–14, https://papers.ssrn.com/so13/papers.cfm?abstract_id=4521782 [<https://perma.cc/N59R-AUKR>].

296. Lara Bazelon & Bruce A. Green, *Victims’ Rights from a Restorative Perspective*, 17 OHIO ST. J. CRIM. L. 293, 322–28 (2020) (discussing the “myth of the monolithic victim”); DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR 22 (2019) (“In that way, when the image of an innocent white woman is invoked as the prototypical victim, it not only supplants and displaces the lived experience of the vast majority of victims who do not belong to that demographic. It is also meant to conjure up a story about what justice looks like”); Nils Christie, *The Ideal Victim*, FROM CRIME POL’Y TO VICTIM POL’Y 19, 21 (Ezzat A. Fattah ed., 1986) (describing the “ideal victim” as possessing six distinct characteristics).

297. AYA GRUBER, THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN’S LIBERATION IN MASS INCARCERATION 100 (2020).

298. Gohara, *supra* note 296, at 3.

299. *Id.* at 7.

As such, Gohara explains that the term tends to focus us on retribution against an individual, rather than structural reform of a system.³⁰⁰

We acknowledge that “victim” is an imperfect word. And yet, for all its problems, the term gives us a collective way to understand that someone has been harmed. For this reason, we add here a case-specific call to consider innocent defendants who falsely plead guilty, and the people they may falsely condemn in the process, as a type of victim of the criminal justice system. We think this is important in explaining the type of harm they suffer and in making clear the urgency of the need for reform.

III. REFORMING COERCIVE PLEA BARGAINING

As we demonstrate in Parts I and II, when defendants falsely plead guilty there are many potential victims—the defendant who has pleaded guilty, any innocent parties against whom the defendant provides testimony, the victim of the current crime, and any future victims, as well as society at large. False guilty pleas do not make us safer, and they chip away at the legitimacy of the criminal justice system. As such, false guilty pleas should be a priority for criminal justice reform. While there is no single method to reform the system, a focus on addressing the four main contributing factors identified in this piece—sentencing differentials, advice of counsel, pretrial detention, and discretion—would create a significantly more accurate and just plea bargaining system.³⁰¹

The Authors each recently participated in a multi-year project launched by the American Bar Association’s Criminal Justice Section to examine plea bargaining and propose reforms that might increase the current system’s reliability and fairness. The Task Force, created in 2019, included prosecutors, defenders, judges, academics, and members of several national and international advocacy organizations.³⁰² Over the course of three years, the Task Force took

300. *Id.* at 43.

301. The authors do not advocate eliminating the plea bargaining system. The plea bargaining system holds many positive attributes for prosecutors, defendants, and the criminal justice system more broadly. However, the reforms proposed herein are intended to help create a plea bargaining system that better protects the interests of defendants and victims as identified in this piece.

302. See *2023 Plea Bargain Task Force Report*, ABA CRIM. JUST. SECTION 8 (2023), <https://www.americanbar.org/content/dam/aba/publications/criminaljusti>

testimony from experts in the field and those impacted by the plea system.³⁰³ The Task Force also reviewed submitted materials and statements.³⁰⁴ The Report from the Task Force focused on fourteen principles.³⁰⁵ The following topic areas and principles are particularly relevant:

A. *Acknowledging that Innocent People Plead Guilty*

Principle Five: The criminal justice system should recognize that plea bargaining induces defendants to plead guilty for various reasons, some of which have little or nothing to do with factual and legal guilt. In the current system, innocent people sometimes plead guilty to crimes they did not commit.³⁰⁶

Perhaps most relevant to the current discussion is Principle Five of the Report, which recognizes the reality that innocent people sometimes plead guilty to crimes that they did not commit.³⁰⁷ At least one major motivating factor for why innocent people plead guilty is that they are subject to undue pressure and impermissibly coercive bargains that are nearly impossible to refuse.³⁰⁸

Acknowledging the problem is a first step, but the Task Force also calls for a procedural change that will make it easier to investigate and re-open cases even when the defendant pleaded guilty.³⁰⁹ Many jurisdictions impose blanket restrictions on post-conviction challenges

ce/plea-bargain-tf-report.pdf [https://perma.cc/3KSB-3WFW] (“The Plea Bargain Task Force was convened under the auspices of the American Bar Association’s Criminal Justice Section and was made up of a wide and diverse group of lawyers, judges, academics, those serving as prosecutors and defenders, and representatives from a broad spectrum of advocacy groups.”).

303. *Id.* at 6 (“This Report comes after three years of work, during which the Task Force collected and reviewed testimony from experts in the field and those impacted by the plea system, scholarly and legal reports on plea bargaining, state and federal rules of criminal procedure, and other materials.”).

304. *See id.* at 34 (listing the names of those who submitted oral and written testimony).

305. *See id.* at 9–11 (advocating for sharing these principles with members of the legal community to change the larger criminal justice system).

306. *Id.* at 20.

307. *Id.*

308. *Id.* at 15 (Principle 2).

309. *Id.* at 20 (“Because we know that innocent people plead guilty, defendants should have access to all available mechanisms for post-conviction review of innocence claims, regardless of the method of conviction.”).

for those who are convicted by guilty plea (as opposed to trial).³¹⁰ The Task Force is not recommending increased post-conviction scrutiny for a case simply because it was resolved through a guilty plea, but instead that these convictions be treated the same as any trial conviction, allowing for review when the necessary legal standards have been met.

Additionally, while plea bargaining undoubtedly frees up resources so that courts and lawyers can put energy into the few cases that do head to trial, plea bargaining also poses a risk that weak or questionable cases end up with the most enticing plea offers. To secure a conviction in a case with weaker evidence, prosecutors may be tempted to offer deals with significantly shorter sentences than would be expected with a conviction at trial.³¹¹

B. Limiting Sentencing Differentials

Principle Two: Guilty pleas should not result from the use of impermissibly coercive incentives or incentives that overbear the will of the defendant.

Principle Three: In general, while some difference between the sentence offered prior to trial and the sentence received after trial is permissible, a substantial difference undermines the integrity of the criminal system and constitutes a penalty for exercising one's right to trial. This differential, often referred to as the trial penalty, should be eliminated.

Principle Four: Charges should not be selected or amended with the purpose of creating a sentencing differential, sentencing enhancement, punishment or collateral consequence to induce a defendant to plead guilty or to punish defendants for exercising their rights, including the right to trial.³¹²

The Task Force spent significant time discussing sentencing differentials and the need to curb the potential for deals that would lead to widely discrepant punishments for the same or similar crimes, deals that may be so enticing that an innocent individual would be tempted to plead guilty.³¹³ The three principles above highlight the concern regarding the coercive nature of disparate sentencing and include recommendations for both prosecutors and state legislators to reduce the ability to enact (or threaten) this "trial penalty."

310. Colin Miller, *Why States Must Consider Innocence Claims After Guilty Pleas*, 10 U.C. IRVINE L. REV. 671, 674–78 (2020).

311. 2023 *Plea Bargain Task Force Report*, *supra* note 303, at 18.

312. *Id.* at 15, 17, 18.

313. *Id.* at 17.

The threat of a significantly longer sentence if a defendant chooses to proceed to trial is far from empty. A defendant convicted after trial on a felony in federal court can expect to receive a sentence that is about seven years longer than if they had taken a plea; for some drug offenses, the difference is around nine years.³¹⁴ In many ways the trial penalty is entrenched in the system because of mandatory minimum sentences and sentencing guidelines that encourage acceptance of responsibility as a mitigating factor.³¹⁵

Although the Task Force agrees that acceptance of responsibility can be awarded with a sentence reduction, it recommends that the same reduction should be granted to individuals who accept responsibility after trial.³¹⁶ In this way, defendants who may have a legitimate legal or factual issue in dispute are not punished for litigating these issues. Additionally, state legislators should reconsider the use of mandatory minimum sentences. The American Bar Association calls for the abolition of mandatory minimums.³¹⁷ At the very least, their use as a coercive tool during plea bargaining should be halted.³¹⁸ The Task Force emphasizes that prosecutors should not have the ability to offer a defendant a reduced (or alternate) charge just to avoid triggering mandatory minimums.³¹⁹

Another recommendation from the Task Force is to allow a judge to act as a “safety valve” and permit the judge to depart from the mandated sentence in order to avoid the large discrepancies currently present in the system.³²⁰ The Task Force also recognizes that the differentials within the court’s purview (e.g., those that exist within

314. *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It*, NAT’L ASS’N OF CRIM. DEF. LAW. 20 (2018), <https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf> [<https://perma.cc/TFL5-VV5G>].

315. *2023 Plea Bargain Task Force Report*, *supra* note 303, at 17.

316. *Id.*

317. Debra Cassens Weiss, *ABA House Backs Ban on Mandatory Minimums*, ABA J. (Aug. 15, 2017, 10:15 AM), https://www.abajournal.com/news/article/aba_house_backs_ban_on_mandatory_minimums_prosecutor_discretion_in_sentencing [<https://perma.cc/AA5Z-8G39>]. ABA Resolution 10B passed the American Bar Association House of Delegates on August 15, 2017. *Id.* The measure “opposes the imposition of mandatory minimum sentences in any criminal case” and it urges “Congress and state legislatures to repeal laws requiring mandatory minimums.” *Id.*

318. *2023 Plea Bargain Task Force Report*, *supra* note 303, at 15.

319. *Id.*

320. *Id.* at 15–16.

sentencing ranges and not due to mandated or guideline sentencing) should be limited.³²¹ Enacting a maximum sentencing differential for crimes would go a long way towards removing coercion.³²²

Beyond the requirements put forth by the state or federal government lies arguably the largest reason for the trial penalty: prosecutorial discretion. The Task Force touches on prosecutorial discretion many times throughout the report, and Principle Four outlines some of the major concerns.³²³

The Principle highlights that criminal charges should be selected and brought only when they are in the interests of justice.³²⁴ The tactic of charging as many separate offenses as possible in the hopes of dismissing some in exchange for a guilty plea must be stopped.³²⁵ If a prosecutor does not reasonably believe that—based on probable cause and the admissible evidence in the case—a particular charge could result in a conviction, then that charge should not be brought.³²⁶

Additionally, the Task Force recommends that prosecutor offices should have specific charging policies and a process of oversight that ensures adherence to these policies.³²⁷ That oversight would not just apply to bringing initial charges, but to amending charges, as well.³²⁸ Testimony to the Task Force made it clear that sometimes prosecutors will amend charges once plea bargaining discussions are underway, even where the facts and legal interests remain the same. It is the Task Force's view that charges should only be amended where there has been an actual, material change to the evidence or available proof in

321. *Id.*

322. The Report discusses some specific differentials proposed by scholars. For some examples, see DARRYL BROWN, *FREE MARKET CRIMINAL JUSTICE: HOW DEMOCRACY AND LAISSEZ FAIRE UNDERMINE THE RULE OF LAW* 12 (2016) (discussing the “exceedingly thin concept of coercion”; Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 *HARV. L. REV.* 2463, 2488 (2004) (“Here, the Federal Guidelines do not create gradations between sixteen and twenty-two years because they are not designed to facilitate bargained concessions.”); Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 *TUL. L. REV.* 1237, 1240–42 (2008) (discussing the plea/trial sentence differential and explaining scholars varying methods of reducing such a differential).

323. *2023 Plea Bargain Task Force Report*, *supra* note 303, at 18–19.

324. *Id.*

325. *Id.* at 18–19.

326. *Id.* at 18.

327. *Id.* at 29.

328. *Id.* at 19.

the case.³²⁹ Prosecutor offices should institute oversight procedures to ensure that the original charges match the evidence and offense (as they are understood at the time), that additional charges are not being filed as punishment for the defendant requesting a trial, and that all charges brought are consistent with ABA standards.³³⁰

C. *Strengthening the Role of Counsel*

Principle Six: A defendant should have a right to qualified counsel in any criminal adjudication before the defendant enters a guilty plea. Counsel should be afforded a meaningful opportunity to satisfy their duty to investigate the case without risk of penalty to their client.³³¹

Just as important as the right to trial is the right to have adequate representation through the entirety of the process. Defendants who face incarceration are entitled to counsel, but this leaves huge swaths of defendants without counsel.³³² Misdemeanor cases, in particular, are some of the quickest to be resolved, and frequently consist of defendants entering a guilty plea upon first appearance/arraignment, without the opportunity to seek counsel.³³³ While incarceration may not be a possible outcome in these cases, the Task Force notes that collateral consequences, such as large fines/fees and immigration-related consequences, are possible and common.³³⁴ These penalties can be as important to many defendants as the possibility of being incarcerated.

As such, the Task Force recommends that all criminal defendants be provided the opportunity to have defense counsel, even if they choose to waive it.³³⁵ The defendant can of course waive this right, but that should not be encouraged by the prosecutor nor made a requirement of accepting a plea deal (e.g., giving an offer that expires within a very

329. *Id.*

330. In Principle Two, the Task Force also discusses the coerciveness of threatening the death penalty to obtain a guilty plea. *Id.* at 15–19.

331. *Id.* at 21.

332. *Argersinger v. Hamlin*, 407 U.S. 25, 38 (1972) (explaining that states get to decide how to classify crimes as a felony or misdemeanor within their discretion, but assistance of counsel is a non-negotiable constitutional right regardless of these classifications).

333. Smith & Maddan, *supra* note 243, at 14–18.

334. *2023 Plea Bargain Task Force Report*, *supra* note 303, at 21.

335. *Id.* at 24 (detailing how insufficient time causes defendants to waive counsel and explaining that such waiver must be knowingly and voluntarily).

short time period, preventing the defendant from seeking counsel).³³⁶ If the defendant is accepting a plea deal, it is especially important that an advocate is provided to help the defendant understand the full range of consequences³³⁷—which, of course, also requires that the advocate know the consequences of the conviction.

As we have noted through Parts I and II, though, counsel does not guarantee that a defendant will not enter a false plea. Indeed, counsel may encourage a defendant to take a false plea. In acknowledging this fact, we do not mean to suggest that defense counsel is not critical—only that defense counsel can fall prey to many of the same limitations, threats, and constraints that plague the plea system more broadly. For this reason, the Task Force notes that jurisdictions dedicated to providing all criminal defendants with counsel should also be dedicated to funding such counsel in a meaningful way. If defense attorneys are overwhelmed by their caseloads, then—as the research shows—there is a risk that they encourage their clients to make pleas of all kinds, including false pleas, to move the process along. A merely present attorney is not a competent attorney.

But we also understand that even competent defense attorneys are sometimes responding in good faith to the predicaments of their clients and that a false plea is often a way to avoid a worse outcome. We are hopeful that if the recommendations of the Task Force are adopted, then some of the pressures on defendants to plead guilty, falsely or otherwise, may be relieved and defense attorneys can better assist their clients to plead or proceed to trial in ways that reflect the true facts of the case. Further, enacting these other recommendations may help deal with the underfunding and understaffing that has been a consistent issue with public defense because they help free up resources by only focusing on the most serious cases.³³⁸

D. Avoiding Pretrial Detention

Principle Eight: The use of bail or pretrial detention to induce guilty pleas should be eliminated.³³⁹

As the research demonstrates, a defendant's decision to plead guilty is also strongly correlated with whether they are held in pre-trial

336. *Id.* at 25.

337. *Id.* at 22.

338. *Id.* at 6, 13.

339. *Id.* at 23.

detention or released to fight their case from outside a jail cell.³⁴⁰ When a defendant has the option of going home or sitting in a jail cell for months to await trial, the “right” choice becomes quickly apparent. For this reason, the Report finds that prosecutors should not request bail in a case that is unlikely to result in incarceration even if the defendant is found guilty after a trial.³⁴¹ If the punishment is unlikely to ever include detention, one could argue that detaining someone in that case has only one purpose: to coerce a guilty plea. It is current ABA policy that the imposition of bail should be reserved for cases where it is needed.³⁴²

E. Instituting Discretion, Oversight, and Auditing

Principle Fourteen: At every stage of the criminal process, there should be robust oversight by all actors in the criminal system to monitor the plea process for accuracy and integrity, to ensure the system operates consistent with the Principles in this Report, and to promote transparency, accountability, justice, and legitimacy in the criminal system.³⁴³

The final principle proposed by the Task Force ties together all fourteen recommendations under the umbrella of oversight and transparency. Commitment to true reform of the plea process necessitates that plea bargaining move out of the “shadows.”³⁴⁴ Part of the process involves the collection of data in the aggregate and in individual cases, for which the Task Force advocates.³⁴⁵ But additionally, the Task Force calls for an oversight and auditing process that can shed light on how cases are actually resolved.³⁴⁶ For instance, the Report recommends that institutional actors play an active role in monitoring plea offers to ensure that the “trial penalty” is not occurring.³⁴⁷ Beyond recording all offers, this suggestion directs that

340. See *2023 Plea Bargain Task Force Report*, *supra* note 303 and accompanying text; Subramanian et al., *supra* note 1, at 11–13 (examining a 2012 study of plea bargaining behavior in 634 criminal cases in New Jersey); Leslie & Pope, *supra* note 133, at 529–30 (finding that detainment results in a 13% increased probability of conviction).

341. *2023 Plea Bargain Task Force Report*, *supra* note 303, at 23.

342. A.B.A., RESOLUTION 112C 1–2 (2017), <https://www.americanbar.org/content/dam/aba/directories/policy/annual-2017/2017-am-112c.pdf> [<https://perma.cc/95QE-MKZD>].

343. *2023 Plea Bargain Task Force Report*, *supra* note 303, at 29.

344. Subramanian et al., *supra* note 1, at 7.

345. *2023 Plea Bargain Task Force Report*, *supra* note 303, at 28–29.

346. *Id.* at 29.

347. *Id.* at 17.

both judges and lawyers should monitor the offers and final dispositions of cases in which they are involved.³⁴⁸

In the same vein, the Task Force offers a number of solutions for creating transparency and accountability in Principle Four.³⁴⁹ Harnessing prosecutorial discretion to ensure that ethical obligations are at the forefront in charging decisions requires oversight. Within prosecutor offices, the Task Force recommends written, publicly accessible policies on charging and that charging decisions be overseen by the most experienced prosecutors.³⁵⁰ As discussed previously, this oversight is especially important if charges are being amended in some substantial manner.

Importantly, Principle Fourteen holds that we cannot ensure integrity in plea bargains unless we have access to the entire process, from charging to final disposition.³⁵¹ Careful monitoring and recording of data at every step is necessary. But the Task Force acknowledges that monitoring alone might not be enough to show validity of plea bargains.³⁵² For that step, the Task Force encourages the adoption of novel processes to “audit” the criminal justice system.³⁵³ This review of cases that are resolved by guilty pleas can

348. *Id.* at 29.

349. *Id.* at 18–19.

350. *Id.* at 18, 28.

351. *Id.* at 29.

352. *Id.*

353. *Id.* (stating that “jurisdictions should establish mechanisms to monitor the plea process from charging decision to disposition, as well as implement an audit process to test the validity and integrity of guilty pleas”). See the following papers for some examples of possible auditing mechanisms: Stephen E. Henderson, *The Jury Veto*, 40 *YALE L. & POL’Y REV.* 488, 488 (2022) (recommending the implementation of a veto system that permits juries to revoke prosecutors’ judicial sentences to increase democracy in the criminal justice system); Kiel Brennan-Marquez, Darryl K. Brown & Stephen E. Henderson, *The Trial Lottery*, 56 *WAKE FOREST L. REV.* 1, 1 (2021) (suggesting that the criminal justice system adopt a trial lottery that randomly selects cases for jury trial regardless of a plea to increase accountability); Nazgol Ghandnoosh, *A Second Look at Injustice*, SENTENCING PROJECT (May 12, 2021), <https://www.sentencingproject.org/publications/a-second-look-at-injustice> [<https://perma.cc/9FKP-FHJG>] (referencing resentencing reforms in California, the District of Columbia, and New York that seek to end mass incarceration and racial disparities in the criminal justice system); Clark Neily, *A Distant Mirror: American-Style Plea Bargaining Through the Eyes of a Foreign Tribunal*, 27 *GEO. MASON L. REV.* 719, 741–45 (2020) (describing three potential approaches to end coercive plea bargaining: plea integrity units that provide independent review of federal defendants’ cases, trial audits that randomly check prosecutors’ use of plea bargaining, and Founding-era-informed juries that ensure modern jurors know their right to acquit an unjust conviction).

ascertain whether coercive tactics were used, whether the defendant received the necessary advice of counsel (including whether that counsel addressed all outcomes of the guilty plea), and whether a judge had indeed affirmed that the plea is knowing and voluntary.

CONCLUSION

Coercive plea bargaining is a threat to the legitimacy of the criminal justice system because it encourages defendants to falsely condemn themselves and, sometimes, even other innocent people. Bargained justice calls into question the fairness and accuracy of plea resolutions. When defendants falsely plead guilty to crimes they did not commit, there are a number of potential victims. The defendant, of course, is victimized by a system that coerces innocent people to plead guilty. But when the system gets it wrong, it also risks retraumatizing the victims of the true perpetrator and creating new victims who are injured when the actual wrongdoer is free to harm again. Finally, defendants often plead guilty to seemingly favorable plea deals in exchange for testimony against others. As research demonstrates, even innocent people who falsely plead guilty are susceptible to condemning other innocents to secure the best plea deal. Those additional innocent parties also become victims of coercive bargaining. By linking the research on coercive bargaining to these potential categories of victims, this Article, the first of two in this series, unearths a further need for plea reform. The reforms outlined here are the beginning of a process that limits coercive bargaining and its victims.