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BARGAINED JUSTICE: PLEA-BARGAINING'S INNOCENCE PROBLEM
AND THE *BRADY* SAFETY-VALVE

Lucian E. Dervan*

INTRODUCTION

On January 17, 1959, James Zeno walked deliberately up three flights of stairs and knocked on the door of Beatrice Lynumn's Chicago apartment.² Zeno, who had been arrested by Chicago police for possession of narcotics earlier that day, was acting as an informant in return for a promise of leniency.³ Lynumn opened the door and Zeno walked inside.⁴ After a brief interaction, Zeno left the apartment with a package of marijuana under his arm.⁵

A few minutes later, Lynumn was in custody.⁶ Despite the strong evidence provided by Zeno, she vehemently professed her innocence as police filed into her

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² See *Lynumn v. Illinois*, 372 U.S. 528, 529 (1963).

³ See *id.* On January 17, 1959, three Chicago police officers arrested James Zeno for unlawful possession of narcotics. They took him to a district police station. There they told him that if he “would set somebody up for them, they would go light on him.” He agreed to “cooperate” and telephoned [Lynumn], telling her that he was coming over to her apartment. *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ See *id.* at 529–30. Officer Sims testified as follows:

He called Beatrice and said he had left his glasses in the apartment; she opened the door and as she came out into the hall, I was standing in the common hall, in the vestibule part with the door partly closed. As she walked down the hallway toward Zeno, I opened the door and stepped into the hallway. I told her she was under arrest and I grabbed her by her hands, both hands. At this point, I told her that she had been set up, that she had just made a sale and I showed her the package.

See *id.* at 529 n.1.

apartment.⁷ At that moment, the issue of most concern to Lynumn was not her guilt or innocence, however, but the fate of her children, ages three and four.⁸ The concern was particularly acute given that the children's father had passed away and Lynumn was raising them on her own.⁹ Perhaps seeing an opportunity, the police began their interrogation right there in the apartment.¹⁰

Then he [the police officer] started telling me I could get 10 years and the children could be taken away, and after I got out they would be taken away and strangers would have them, and if I could cooperate he would see they weren't; and he would recommend leniency and I had better do what they told me if I wanted to see my kids again.¹¹

According to Lynumn, the offer of leniency and the belief that she would be able to remain with her children created an overwhelming motivation to cooperate.¹² As a result, she confessed to the police in her apartment. Lynumn later stated, "[t]he only reason I had for admitting [guilt] to the police was the hope of saving myself from going to jail and being taken away from my children."¹³

Lynumn later recanted her admission of guilt and proceeded to trial where, despite her renewed proclamations of innocence, the confession was entered into evidence.¹⁴ Rather than refute Lynumn's account of the events, the police officers involved admitted that the events had transpired largely as the defendant had described.¹⁵ Based on the weight of her earlier admission of guilt and Zeno's testimony, Lynumn was convicted and sentenced to not less than ten years in prison.¹⁶ Just as the officers had accurately predicted would occur during her

⁷ *See id.* at 530.

⁸ *Id.* at 531.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *See id.* at 531–32.

¹³ *Id.* at 532.

¹⁴ *See id.* at 529.

¹⁵ *See id.* at 532. According to one officer:

I asked her who the clothing belonged to. She said they were her children's. I asked how many she had and she said 2. I asked her where they were or who took care of them. She said the children were over at the mother's or mother-in-law. I asked her how did she take care of herself and she said she was on ADC. I told her that if we took her into the station and charged her with the offense, that the ADC would probably be cut off and also that she would probably lose custody of her children. That was not before I said if she cooperated, it would go light on her. It was during that conversation.

Id. at 533.

¹⁶ *See id.* at 529.

arrest, Lynumn was sentenced to a decade behind bars for challenging the state to prove her guilt in court rather than cooperating in her own prosecution.¹⁷

In 1963, the United States Supreme Court took up the issue of the admissibility of Lynumn's confession.¹⁸ In a unanimous opinion, the Justices concluded that the confession was inadmissible as a coerced, rather than voluntary, statement.¹⁹ The Court stated, "[i]t is thus abundantly clear that the petitioner's oral confession was made only after the police had told her that state financial aid for her infant children would be cut off, and her children taken from her, if she did not 'cooperate.' These threats were made while she was encircled in her apartment by three police officers and a twice convicted felon who had purportedly 'set her up.'"²⁰ Based on precedent establishing that confessions must be both voluntary and intelligent, the Court stated that where the defendant's "will was overborne at the time [s]he confessed," the confession cannot be deemed the product of a "rational intellect and a free will."²¹ The court concluded that it was a blatant violation of the United States Constitution for the police to threaten Lynumn with the reality of the situation if she failed to cooperate through confession, even though they were correct when they told her that she faced a possible sentence of ten years in prison which would result in her losing custody of her children.²²

In 2004, just over forty years after the *Lynumn* case, another mother of two small children was brought before the criminal justice system, and, once again, she was threatened with ten years in prison unless she agreed to cooperate.²³ Also like *Lynumn*, the threat of ten years in prison meant that her children would be without both parents.²⁴ As might be expected, the defendant once again acquiesced to the demands of her accusers, yet this time the Supreme Court was silent.²⁵

Lea Fastow served as Director and Assistant Treasurer of Corporate Finance at the now infamous Texas energy trading company Enron from 1991 until 1997.²⁶ Her husband, Andrew Fastow, was also an integral part of the corporation and served as Chief Financial Officer from 1997 until the corporation's collapse in

¹⁷ See *id.* at 531 ("Then he started telling me I could get 10 years and the children could be taken away . . .").

¹⁸ See *id.* at 528.

¹⁹ *Id.* at 534.

²⁰ *Id.*

²¹ *Id.* (quoting *Blackburn v. Alabama*, 361 U.S. 199, 208 (1960)).

²² See *id.* ("We think it clear that a confession made under such circumstances must be deemed not voluntary, but coerced.").

²³ See Michelle S. Jacobs, *Loyalty's Reward—A Felony Conviction: Recent Prosecutions of High-Status Female Offenders*, 33 *FORDHAM URB. L.J.* 843, 857 (2006); Mary Flood, *Lea Fastow in Plea-Bargain Talks; Former Enron CFO's Wife Could Get 5-Month Term but Deal Faces Hurdles*, *HOUS. CHRON.*, Nov. 7, 2003, at A1.

²⁴ See Jacobs, *supra* note 23, at 857.

²⁵ See Mary Flood, *Wife of Former Enron Chief Financial Officer Begins Prison Sentence in Houston*, *HOUS. CHRON.*, July 13, 2004, at A1.

²⁶ Jacobs, *supra* note 23, at 856.

2001.²⁷ Although Lea Fastow was a stay-at-home mother raising two small children in 2001, federal investigators determined that she had known of her husband's fraudulent financial dealings and had even assisted him in perpetrating the frauds.²⁸ In response, the government indicted Lea Fastow along with her husband, who had already been charged with ninety-eight counts of criminal conduct.²⁹ Lea Fastow's indictment contained six counts, including conspiracy to commit wire fraud and defraud the United States, money laundering conspiracy, aiding and abetting, and filing a false tax return.³⁰

Conviction on all six counts of the indictment would result in a prison term of up to ten years, but the government was more interested in persuading Lea Fastow to cooperate than in convicting her.³¹ As a result, the government offered her a deal.³² In return for confessing her guilt in court, the prosecution would only charge her with a single count of filing a false tax return and the government would recommend a sentence of one year of supervised release.³³ The deal also included an agreement that Lea Fastow and her husband, who also intended to plead guilty in return for leniency, would not have to serve their prison sentences simultaneously, thus ensuring their children would always have one parent at

²⁷ *Id.*

²⁸ *See id.* at 856–57.

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

Id.; *see also* Flood, *supra* note 23, at A1.

²⁹ *See* Indictment, *United States v. Fastow* (S.D. Tex. 2004) (Cr. No. H-03-150), available at <http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/enron/usleafstw43003ind.pdf> (last visited July 13, 2010).

³⁰ *Id.*

³¹ The ten-year sentence is calculated using the 2002 sentencing guidelines for fraud. Beginning with a base offense level of six points, Fastow would have received twenty points for a \$17 million loss and four points for an offense involving more than fifty people. A defendant with no previous criminal history and thirty points has a sentencing range between 97–121 months. *See* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (2002), available at http://www.ussc.gov/Guidelines/2002_guidelines/2002_manual.cfm.

³² *See* Flood, *supra* note 23, at A1.

³³ *See* Bruce Zucker, *Settling Federal Criminal Cases in the Post-Enron Era: The Role of the Court and Probation Office in Plea Bargaining Federal White Collar Cases*, 6 FLA. COASTAL L. REV. 1, 3–4 (2004).

home.³⁴ As the lead prosecutor in the case stated, “[t]he Fastows’ children can be taken into account in deciding when Andrew Fastow will begin serving his sentence. There is no reason for the government, when it can [avoid it], to have a husband and wife serve their sentences at the same time.”³⁵

For Lea Fastow, the reality of her situation removed any free will she might have had to weigh her options.³⁶ With two small children at home and the prospect that she and her husband might both be in prison at the same time, the decision to accept the offer was made for her.³⁷ As one family friend stated, “[i]t’s a matter of willing to risk less when it’s for her children than she would risk if it were just for herself.”³⁸ As such, she succumbed to the pressure to confess her guilt and accepted the deal.³⁹

Eventually, the judge forced the government to revise its offer because he believed five months was too lenient.⁴⁰ As a result, Lea Fastow pleaded guilty to a misdemeanor tax charge and was sentenced to one year in prison. Nevertheless, the agreement to confess her guilt in return for a promise of leniency lessened her sentence by nine years and ensured her children would not be without a parent.⁴¹ As promised, Andrew Fastow was not required to report to prison for his offenses until after Lea Fastow was released.⁴²

³⁴ Jacobs, *supra* note 23, at 859 (“During the renegotiation of the second plea, it was widely reported that Ms. Fastow was interested in a plea that would allow her children to stay at home with one parent while the other was incarcerated, rather than running the risk that both parents would be incarcerated at the same time. The government apparently acquiesced to this request.”).

³⁵ Mary Flood & Clifford Pugh, *Lea Fastow Expresses “Regret” at Sentencing; Wife of ex-Enron CFO Faces Years in Prison*, HOUS. CHRON., May 7, 2004, at A1.

³⁶ See *Lynumn v. Illinois*, 372 U.S. 528, 534 (“[T]he question in each case is whether the defendant’s will was overborne at the time he confessed. If so, the confession cannot be deemed ‘the product of a rational intellect and a free will.’” (citations omitted) (quoting *Blackburn v. Alabama*, 361 U.S. 199, 208 (1960))).

³⁷ See Greg Farrell & Jayne O’Donnell, *Plea Deals Appear Close for Fastows; Could Mean Task Force on Verge of Filing More Charges*, USA TODAY, Jan. 8, 2004, at B.01 (“One of the reasons that Lea Fastow wants to limit her jail time to five months is that she and her husband have two young children, and they’re trying to structure their pleas so they’re not both in jail at the same time.”).

³⁸ Flood, *supra* note 23, at A1 (“A family friend previously said Lea Fastow is willing to consider pleading guilty and forgoing a chance to tell her side to a jury because it would be better for her two small children and could ensure they would not be without a parent at home.”).

³⁹ See Mary Flood, *Fastows to Plead Guilty Today; Feds Now Focus on Skilling, Lay*, HOUS. CHRON., Jan. 14, 2004, at A1 (“The plea bargains for the Fastows, who said they wanted to be sure their two children are not left parentless, have been in limbo for more than a week.”).

⁴⁰ See Farrell & O’Donnell, *supra* note 37, at B.01 (“U.S. Judge David Hittner told Lea Fastow Wednesday that he refused to be locked in to the five-month prison sentence that her lawyers had negotiated with prosecutors.”); Flood, *supra* note 25, at A1.

⁴¹ See Farrell & O’Donnell, *supra* note 37, at B.01; Flood, *supra* note 25, at A1.

⁴² See Flood, *supra* note 25, at A1.

In a 1942 Supreme Court case, the Justices wrote, “a plea of guilty coerced by a federal law enforcement officer is no more consistent with due process than a conviction supported by a coerced confession.”⁴³ Yet Lea Fastow’s guilty plea, the product of the same threats the Supreme Court found coercive forty years before, was simply assumed by everyone involved to be constitutional. This type of assumption seems well supported, as Lea Fastow’s guilty plea represents just one of hundreds of thousands of similar deals entered into by prosecutors and defendants every year in the American criminal justice system.⁴⁴ The first question this Article seeks to answer, therefore, is how and why the Supreme Court shifted from being a protector of coerced defendants to being a supporter of the plea bargaining machine.⁴⁵ The answer involves a great compromise by the Justices in 1970, a compromise necessitated by strains on the criminal justice system resulting from the additional rights afforded to defendants during the Warren Court’s due process revolution and the crushing and ever-increasing number of criminal prosecutions in America.⁴⁶ The great compromise was to allow prosecutors and defendants to bargain for justice in hopes this might alleviate pressures on the system while simultaneously benefitting clearly guilty defendants willing to reap an advantage in return for an admission of guilt.⁴⁷

Unfortunately, the plea bargaining system has not evolved as the Justices had hoped.⁴⁸ Rather than a system in which guilty defendants bargain for a mutually beneficial outcome and innocent defendants wage forward toward trial in hopes of acquittal, the plea bargaining system has come to engulf almost everyone.⁴⁹ Today, the incentives to bargain are powerful enough to force even an innocent defendant to falsely confess guilt in hopes of leniency and in fear of reprisal.⁵⁰ The second question this Article seeks to answer, therefore, is whether, in 1970, the Supreme Court was willing to permit the incentives offered for bargaining to become so powerful as to induce even innocent defendants to plead guilty.⁵¹

⁴³ *Waley v. Johnston*, 316 U.S. 101, 104 (1942).

⁴⁴ See U.S. SENTENCING COMM’N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at fig.C (2009), available at http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2009/SBTOC09.htm (last visited Feb. 7, 2012) (stating that in 2009, 96.3% of federal defendants pleaded guilty). For a discussion of scholarship on plea bargaining generally and the debate over whether plea bargaining is an appropriate part of our criminal justice system, see Jacqueline E. Ross, *The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 AM. J. COMP. L. 717 (2006).

⁴⁵ See *infra* Part II (examining the Supreme Court’s great plea bargaining compromise of 1970).

⁴⁶ See *infra* Part II.B (examining the reasons for the Supreme Court’s decision in *United State v. Brady*).

⁴⁷ See *infra* Part II.B.

⁴⁸ See *infra* Part III (examining plea bargaining’s innocence problem).

⁴⁹ See *infra* Part III.A (examining the prevalence of innocent defendants pleading guilty).

⁵⁰ See *infra* Part III.

⁵¹ See *infra* Part III.B (examining the Supreme Court’s safety-valve in *United States v. Brady*).

In answering this question, this Article proposes that the Supreme Court in *Brady* specifically contemplated the possibility that prosecutors would utilize the plea bargaining system in an impermissible manner and, as a result, created both a safety-valve and a litmus test for a failure of the safety-valve.⁵² The *Brady* safety-valve limits the amount of pressure that may be asserted against defendants by prohibiting prosecutors from offering incentives in return for guilty pleas that are so coercive as to overbear defendants' abilities to act freely.⁵³ The number of innocent defendants who are induced to falsely confess their guilt is a litmus test to determine when prosecutors have applied excessive pressure and the safety-valve has failed.⁵⁴ The *Brady* Court stated that if the plea bargaining system began to operate in a manner resulting in a significant number of innocent defendants pleading guilty, the Court would reexamine the constitutionality of bargained justice.⁵⁵ The significant innocence problem that plea bargaining has today indicates that the *Brady* safety-valve has failed and, as a result, the constitutionality of modern day plea bargaining is in great doubt.⁵⁶

In Part I, this Article examines the rise of plea bargaining in America and explores the forces behind this jurisprudential revolution.⁵⁷ In Part II, this Article analyzes Supreme Court precedent regarding plea bargaining dating back to the 1800s.⁵⁸ In so doing, this Article demonstrates that the Supreme Court was strongly opposed to bargained justice for over a century prior to its great compromise of 1970.⁵⁹ Finally, in Part III, this Article examines a significant portion of the Supreme Court's great compromise that has gone largely unnoticed by scholars, practitioners, and judges.⁶⁰ The Supreme Court created a safety-valve in 1970 to ensure that the pressures placed on defendants to plead guilty would never reach impermissible levels.⁶¹ As this Part demonstrates, there is a significant innocence problem with plea bargaining today. This being the case, the *Brady* safety-valve may not be working and, if so, defendants, both innocent and guilty, are being offered unconstitutional incentives to confess.⁶²

⁵² See *infra* Part III.B.

⁵³ See *infra* Part III.B.

⁵⁴ See *infra* Part III.B.

⁵⁵ See *infra* Part III.B.

⁵⁶ See *infra* notes 257–261 (examining the literature regarding plea bargaining's current innocence problem).

⁵⁷ See *infra* Part I.

⁵⁸ See *infra* Part II.

⁵⁹ See *infra* Part II.

⁶⁰ See *infra* Part III.

⁶¹ See *infra* Part III. For purposes of this article, the terms “innocent” and “innocence” are used to refer to any defendant who would not have been convicted at trial. Of course, this is not to say a defendant is necessarily free of moral culpability or responsibility for the charged conduct. Nevertheless, the terms “innocent” and “innocence” herein serve as terms to discuss those who are not criminally liable in the eyes of the law.

⁶² See *infra* Part III.

I. THE RISE OF THE PLEA BARGAINING MACHINE

Before delving deeply into Supreme Court plea bargaining precedent, it is important to understand the rise and operation of the modern day plea bargaining machine. Of particular significance is the fact that plea bargaining began its rise to dominance well before it had been approved as a form of justice by the Supreme Court in 1970. In fact, plea bargaining began to grow in popularity during periods of American history when Supreme Court precedent specifically found the practice of offering incentives for defendants to plead guilty unconstitutional.⁶³

A. *The Historical Rise of Plea Bargaining*

The evolution of plea bargaining into a force that affects over 95 percent of defendants in the American criminal justice system took place mainly in the nineteenth and twentieth centuries.⁶⁴ While the right to plead guilty dates back to English common law traditions, a new phenomenon began to appear in America shortly after the Civil War. It was during this period that state courts began witnessing an influx of appellate cases dealing with apparent “bargains” between defendants and prosecutors.⁶⁵ With resounding frequency, these early experiments with bargained justice were rejected by the judiciary as demonstrated by the case excerpts below.⁶⁶

The least surprise of influence causing [the defendant] to plead guilty when he had any defense at all should be sufficient cause to permit a change of the plea from guilty to not guilty.⁶⁷

⁶³ See *infra* Part II.B (discussing the Supreme Court’s rejection of bargained justice prior to 1970).

⁶⁴ See John Baldwin & Michael McConville, *Plea Bargaining and Plea Negotiation in England*, 13 LAW & SOC’Y REV. 287, 287–91 (1979); Lucian E. Dervan, *Plea Bargaining’s Survival: Financial Crimes Plea Bargaining, A Continued Triumph in a Post-Enron World*, 60 OKLA. L. REV. 451, 478 (2007); Mark H. Haller, *Plea Bargaining: The Nineteenth Century Context*, 13 LAW & SOC’Y REV. 273, 273 (1979) (“[Alschuler and Friedman] agree that plea bargaining was probably nonexistent before 1800, began to appear during the early or mid-nineteenth century, and became institutionalized as a standard feature of American urban criminal courts in the last third of the nineteenth century.”); John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 LAW & SOC’Y REV. 261, 261–62 (1979); Lynn M. Mather, *Comments on the History of Plea Bargaining*, 13 LAW & SOC’Y REV. 281, 81–83 (1979).

⁶⁵ See Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 19 (1979) (“It was only after the Civil War that cases of plea bargaining began to appear in American appellate court reports.”).

⁶⁶ See *id.* at 19–21.

⁶⁷ *Id.* at 20.

No sort of pressure can be permitted to bring the party to forego any right or advantage however slight. The law will not suffer the least weight to be put in the scale against him.⁶⁸

[W]hen there is reason to believe that the plea has been entered through inadvertence . . . and mainly from the hope that the punishment to which the accused would otherwise be exposed may thereby be mitigated, the Court should be indulgent in permitting the plea to be withdrawn.⁶⁹

Despite these early defeats for plea bargaining, the idea of bargained justice did not die. On the contrary, though infrequent by today's standards, plea bargaining continued to exist in the local and district court systems.⁷⁰

By the turn of the century, plea bargaining was on the rise, but not because it served mutually beneficial considerations of prosecutors and defendants or because it advanced judicial economy.⁷¹ Plea bargaining began to thrive in the early twentieth century because judges and prosecutors began accepting bribes from defendants in return for "plea agreements" that guaranteed reduced sentences. According to Professor Albert Alschuler, "[t]he gap between these judicial denunciations of plea bargaining [in the late nineteenth century] and the practices of many urban courts at the turn of the century and thereafter was apparently extreme. In these courts, striking political corruption apparently contributed to a flourishing practice of plea bargaining."⁷²

While corruption introduced plea bargaining to the broader legal community, it was the rise in criminal cases before and during Prohibition that spurred its growth and made it a legal necessity.⁷³ Between the early twentieth century and 1925, the number of cases in the federal system resulting in pleas of guilty rose sharply from 50 to 90 percent.⁷⁴ In return for defendants' assistance in moving a

⁶⁸ *Id.*

⁶⁹ *Id.* In an 1877 Wisconsin Supreme Court decision, the court stated that plea bargaining was "hardly, if at all, distinguishable in principle from a direct sale of justice." *Id.* at 21 (quoting *Wight v. Rindskopf*, 43 Wis. 344, 354 (1877)).

⁷⁰ *See id.* at 22.

⁷¹ *See id.* at 24.

⁷² *See id.*

⁷³ *See id.* at 27; GEORGE FISHER, *PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* 210–12 (2003).

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

Alschuler, *supra* note 65, at 32.

flood of cases through an overwhelmed system, they were often permitted to plead guilty to lesser charges or given lighter sentences.⁷⁵ As Prohibition was extinguished, the United States continued its drive to create new criminal laws, a phenomenon that only added to the courts' growing case loads and the pressure to continue to use bargaining to move cases through the system.⁷⁶

By 1967, the American Bar Association (ABA) was proclaiming the benefits of plea bargaining, even though it had not, as of yet, been specifically approved by the Supreme Court.⁷⁷ The ABA stated:

[A] high proportion of pleas of guilty and *nolo contendere* does benefit the system. Such pleas tend to limit the trial process to deciding real disputes and, consequently, to reduce the need for funds and personnel. If the number of judges, courtrooms, court personnel and counsel for prosecution and defense were to be increased substantially, the funds necessary for such increases might be diverted from elsewhere in the criminal justice process. 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.⁷⁸

By the time the Supreme Court agreed that plea bargaining was an available form of justice in 1970, plea bargaining's rise to dominance was already complete. The *Brady* decision was delivered in the shadows of a force that led 90 percent of

⁷⁴ See Alschuler, *supra* note 65, at 27 ("By 1925, the percentage of convictions by guilty plea had reached almost 90 . . .").

⁷⁵ See *id.* at 28 ("The rewards associated with pleas of guilty were manifested not only in the lesser offenses of which guilty-plea defendants were convicted but also in the lighter sentences that they received.").

⁷⁶ See *id.* at 33 ("Dean Pound observed that 'of one hundred thousand persons arrested in Chicago in 1912, more than one half were held for violation of legal precepts which did not exist twenty-five years before.'"); see also Donald A. Dripps, *Overcriminalization, Discretion, Waiver: A Survey of Possible Exit Strategies*, 109 PENN. ST. L. REV. 1155, 1156–61 (2005) (discussing the relationship between broadening legal rules and plea bargaining); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 519–20 (2001) (discussing the influence of broader laws on the rate of plea bargaining); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 129 (2005) ("Changes in federal sentencing practices during the 1980s and 1990s increased the certainty and size of the penalty for going to trial, and mightily influenced the guilty plea and acquittal rates during those times.").

⁷⁷ See AM. BAR ASS'N PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY 2 (1968) [hereinafter ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE].

⁷⁸ *Id.*

criminal defendants in the 1960s to waive their right to trial and confess their guilt in court.⁷⁹

B. *The Force Behind Plea Bargaining's Rise*

As demonstrated in the previous subpart, plea bargaining rose to dominate the American criminal justice system in the nineteenth and twentieth centuries. But how did members of the legal system succeed in making plea bargaining attractive to defendants? Today, a general consensus has evolved within plea bargaining scholarship that plea bargaining became a dominant force as a result of prosecutors gaining increasing power and control in an ever more complex criminal justice system.⁸⁰ As prosecutors' powers to both operate within and manipulate the system grew, their ability to create incentives for defendants to plead guilty also escalated. The key element of this machine, of course, is prosecutorial discretion and the ability to select from various criminal statutes with significantly different sentences.⁸¹

⁷⁹ Diana Borteck, *Pleas for DNA Testing: Why Lawmakers Should Amend State Post-Conviction DNA Testing Statutes to Apply to Prisoners Who Pled Guilty*, 25 CARDOZO L. REV. 1429, 1439 n.43 (2004) (citing Corinna Barrett Lain, *Accuracy Where It Matters: Brady v. Maryland in the Plea Bargaining Context*, 80 WASH. U. L.Q. 1, 1 (2002)) (noting "that since the 1960s the plea bargaining rate has been around ninety percent"); see ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *supra* note 77, at 1–2 ("The plea of guilty is probably the most frequent method of conviction in all jurisdictions; in some localities as many as 95 per cent of the criminal cases are disposed of in this way."). Today, guilty pleas account for over 95 percent of all federal cases. See U.S. SENTENCING COMM'N, *supra* note 44, at fig.C.

⁸⁰ For instance, through analysis of plea bargaining in Massachusetts, Professor George Fisher argues that as the criminal justice system became more sophisticated, prosecutors gained the power to use selective charge bargaining to offer reduced sentences for those willing to negotiate. See FISHER, *supra* note 73, at 210 ("[Sentencing Guidelines] invest prosecutors with the power, moderated only by the risk of loss at trial, to dictate many sentences simply by choosing one set of charges over another."); Alschuler, *supra* note 65, at 40; Albert W. Alschuler, *Plea Bargaining and Its History*, 13 LAW & SOC'Y REV. 211 (1979); Dervan, *supra* note 64, at 478.

⁸¹ For a discussion of charge bargaining and its use by prosecutors, see Mary P. Brown & Stevan E. Bunnell, *Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia*, 43 AM. CRIM. L. REV. 1063, 1066–67 (2006) ("Like most plea agreements in federal or state courts, the standard D.C. federal plea agreement starts by identifying the charges to which the defendant will plead guilty and the charges or potential charges that the government in exchange agrees not to prosecute."); Joy A. Boyd, *Power, Policy, and Practice: The Department of Justice's Plea Bargaining Policy as Applied to the Federal Prosecutor's Power Under the United States Sentencing Guidelines*, 56 ALA. L. REV. 591, 592 (2004) ("Not only may a prosecutor choose whether to pursue any given case, but she also decides which charges to file."); Jon J. Lambiras, *White-Collar Crime: Why the Sentencing Disparity Despite Uniform Guidelines?*, 30 PEPP. L. REV. 459, 512 (2003) ("Charging decisions are a critical sentencing matter and are left solely to the discretion of the prosecutor. When determining which charges to bring,

While prosecutors possessed the ability to control charging decisions and sentencing recommendations throughout the nineteenth and twentieth centuries, their power to control the criminal justice system and offer defendants deals increased throughout the 1900s.⁸² For example, as the number of criminal statutes grew during the early twentieth century, prosecutors had more choices when charging defendants and more discretion when selecting reduced charges in return for guilty pleas.⁸³ A further example is the implementation of the United States Sentencing Guidelines in the last decade of the twentieth century, a tool that greatly increased prosecutors' control of the system and increased their ability to force defendants into plea agreements.⁸⁴

Before the advent of modern sentencing guidelines, both prosecutor and judge held some power to bargain without the other's cooperation Today, sentencing guidelines have recast whole chunks of the criminal code in the mold of the old Massachusetts liquor laws. By assigning a fixed and narrow penalty range to almost every definable offense, sentencing guidelines often empower prosecutors to dictate a defendant's sentence by manipulating the charges. Guidelines have unsettled the old balance of bargaining power among prosecutor, judge, and defendant by ensuring that the prosecutor, who always had the strongest interest in plea bargaining, now has almost unilateral power to deal.⁸⁵

prosecutors may often choose from more than one statutory offense.”); Geraldine S. Moohr, *Prosecutorial Power in an Adversarial System: Lessons from Current White Collar Cases and the Inquisitorial Model*, 8 BUFF. CRIM. L. REV. 165, 177 (2004) (“The power of the prosecutor to charge is two-fold; the power to indict or not . . . and the power to decide what offenses to charge.”).

⁸² See FISHER, *supra* note 73, at 16–17.

⁸³ See Alschuler, *supra* note 65, at 32 (“Dean Pound observed that ‘of one hundred thousand persons arrested in Chicago in 1912, more than one half were held for violation of legal precepts which did not exist twenty-five years before.’”).

⁸⁴ See FISHER, *supra* note 73, at 17.

⁸⁵ FISHER, *supra* note 73, at 17; see also Boyd, *supra* note 81, at 591–92 (“While the main focus on the Sentencing Guidelines appeared to be narrowing judicial discretion in sentencing, some critics argued that the Sentencing Guidelines merely shifted the federal judge’s discretionary power to federal prosecutors.”); Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1252 (2004) (“The overwhelming and dominant fact of the federal sentencing system, beyond the Commission and the guidelines and mandatory penalties, is the virtually absolute power the system has given prosecutors over federal prosecution and sentencing.”).

While defendants also play an important role in the plea bargaining process, prosecutors' control of charging decisions and their influence over sentencing are key elements that contributed to the system's dominance.⁸⁶

Prosecutors have been successful in using their increased powers to create incentives that attract defendants to plead guilty by structuring plea agreements where the sentence a defendant receives in return for pleading guilty is far lower than the sentence he or she risks with a loss at trial.⁸⁷ In a 1981 article on plea bargaining, Professor Albert Alschuler wrote of this "sentencing differential" and stated, "[c]riminal defendants today plead guilty in overwhelming numbers primarily because they perceive that this action is likely to lead to more lenient treatment than would follow conviction at trial. A number of studies suggest this perception is justified."⁸⁸ Among these studies was an examination by David Brereton and Jonathan Casper that analyzed robbery and burglary defendants in three California jurisdictions.⁸⁹ The results were striking and illustrated that defendants who exercised their constitutional right to a trial received significantly higher sentences than those who worked with prosecutors to reach an agreement.⁹⁰

⁸⁶ See FISHER, *supra* note 73, at 230 ("[P]lea bargaining grew so entrenched in the halls of power that today, though its patrons may divide its spoils in different ways, it can grow no more. For plea bargaining has won.").

⁸⁷ See Stephanos Bibas, *Bringing Moral Values into a Flawed Plea-Bargaining System*, 88 CORNELL L. REV. 1425, 1425 (2003) ("The criminal justice system uses large sentence discounts to induce guilty pleas. Of course these discounts exert pressure on defendants to plead guilty."); Lucian E. Dervan, *The Surprising Lessons from Plea Bargaining in the Shadow of Terror*, 27 GA. ST. U. L. REV. 239, 242 (2011). Along with sentencing differentials, of course, are considerations by the defendant of the likelihood of success at trial. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2465 (2004) ("In short, the classic shadow-of-trial model predicts that the likelihood of conviction at trial and the likely post-trial sentence largely determine plea bargains.").

⁸⁸ Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652, 652–56 (1981). Alschuler goes on to state, "Although the empirical evidence is not of one piece, the best conclusion probably is that in a great many cases the sentence differential in America assumes shocking proportions." *Id.* at 654–56; see also Jenia I. Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 251 (2006) ("While practitioners disagree about the acceptability of a large sentence differential between the post-plea and post-trial sentence, they agree that such a differential is common.").

⁸⁹ See David Brereton & Jonathan D. Casper, *Does it Pay to Plead Guilty? Differential Sentencing and the Functioning of Criminal Courts*, 16 LAW & SOC'Y REV. 45, 55–59 (1981); see also H. Joo Shin, *Do Lesser Pleas Pay?: Accommodations in the Sentencing and Parole Process*, 1 J. CRIM. JUST. 27, 40 (1973) (finding that charge reduction directly results in reduction of the maximum sentence available and indirectly results in lesser actual time served).

⁹⁰ See Brereton & Casper, *supra* note 89, at 55–59; see also Daniel Givelber, *Punishing Protestations of Innocence: Denying Responsibility and Its Consequences*, 37 AM. CRIM. L. REV. 1363, 1382 (2000) ("The differential in sentencing between those who plead and those convicted after trial reflects the judgment that defendants who insist upon a

Not limiting themselves to a mere observation of sentencing trends, the researchers also made an insightful statement regarding the impact of high differentials on the rates of plea bargaining.

The point of the preceding discussion is simple enough: when guilty plea rates are high, expect to find differential sentencing. We believe that recent arguments to the effect that differentials are largely illusory do not withstand serious scrutiny, even though this revisionist challenge has been valuable in forcing us to examine more closely what is too often taken to be self-evidently true.⁹¹

Significant differentials, Brereton and Casper argued, are a tool used to increase plea bargaining rates by increasing the incentives for negotiation.⁹²

Thus, plea bargaining's rise to dominance during the nineteenth and twentieth centuries resulted from prosecutors gaining increased power over the criminal justice system and, through such power, the ability to offer increasingly significant incentives to those willing to confess their guilt in court. Today, sentencing differentials have reached new heights and, as a result, the incentives for defendants to plead guilty are greater than at any previous point in the history of our criminal justice system.⁹³ It should be no surprise, therefore, that every year more than 95 percent of defendants accept the government's offers of leniency and plead guilty rather than risk the consequences of failure at trial.⁹⁴

trial are doing something blameworthy.”); Tung Yin, *Not a Rotten Carrot: Using Charges Dismissed Pursuant to a Plea Agreement in Sentencing Under the Federal Guidelines*, 83 CALIF. L. REV. 419, 443 (1995) (“Curiously, the arena of plea bargaining pits the concepts of duress and consideration against each other: a large sentencing differential makes it more likely that a defendant is coerced into pleading guilty, and yet it also increases the benefit offered in exchange for the guilty plea.”).

⁹¹ Brereton & Casper, *supra* note 89, at 69.

⁹² *See id.* at 45 (“It is this sentence differential (whether conceived of as a reward to guilty pleaders or as a punishment of those who waste the court’s time by ‘needless’ trials) which has traditionally been seen as the engine driving the plea-bargaining assembly line.”); *see also* Givelber, *supra* note 90, at 1382 (“The pragmatic justification for differential sentencing is simple and powerful: we want those charged with crimes to plead guilty, and differential sentencing provides an accused with a strong incentive to do just that.”).

⁹³ *See* Dervan, *supra* note 64, at 478–88. Along with increasing sentencing differentials, increasingly severe sentences have also increased the motivation for defendants to accept offers of leniency. *See id.*

⁹⁴ *See* U.S. SENTENCING COMM’N, *supra* note 44, at fig.C.

II. THE SUPREME COURT'S GREAT COMPROMISE REGARDING PLEA BARGAINING

A. *The Court's Early Rejection of Bargained Justice*

While plea-bargaining quickly grew in prominence within the trenches of the criminal justice system during the nineteenth and twentieth centuries, the Supreme Court was much slower and more deliberate with its consideration of this new form of justice. In fact, for much of the time period during which plea-bargaining was rising from obscurity to prominence, the Supreme Court considered this bargained justice unconstitutional.⁹⁵ This, of course, did not prevent judges, prosecutors, and defendants from continuing to bargain in the shadows, a phenomenon which eventually became a significant reason for the Supreme Court's sudden embrace of plea-bargaining in 1970.⁹⁶

The starting place for a historical analysis of the jurisprudence of plea-bargaining is actually within the law of confession.⁹⁷ This is because up until the twentieth century, guilty pleas were simply considered a form of confession that occurred inside a courtroom.⁹⁸ Professor Albert Alschuler addressed the link between the law of confession and guilty pleas in his 1979 work regarding the history of plea-bargaining.⁹⁹ “[W]hile the legal phenomenon that we call a guilty plea has existed for more than eight centuries, the term ‘guilty plea’ came into common use only about one century ago. During the previous 700 years, what we call a guilty plea was simply called a ‘confession.’”¹⁰⁰

The most noteworthy pre-American common law case regarding confession is the 1783 English case of *Rex v. Warickshall*.¹⁰¹ In this case, the English court stated that confessions are improper and inadmissible where they are induced by “promises of favor.”¹⁰² The court continued, “[A] confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape

⁹⁵ See *infra* text accompanying notes 124–197.

⁹⁶ See *infra* text accompanying notes 136–138, 221–236.

⁹⁷ See Alschuler, *supra* note 65, at 12. Professor Alschuler's article contains a gripping account of the link between the law of confession and the law of guilty pleas. Although I will examine many of the same cases, this Article will focus more squarely on the issue of voluntariness as that term has evolved throughout the nineteenth and twentieth centuries. See *infra* Part III (discerning the current meaning of the term “voluntary” through consideration of the history of plea bargaining case law as discussed in Part II.A.).

⁹⁸ See Alschuler, *supra* note 65, at 12.

⁹⁹ *Id.* at 12–13.

¹⁰⁰ *Id.*; see also Loftus E. Becker, Jr., *Plea Bargaining and the Supreme Court*, 21 LOY. L.A. L. REV. 757, 776 (1988) (“Time and again, the Court analogized ‘involuntary’ guilty pleas to ‘compelled’ self-incrimination, to ‘coerced’ confessions and to the ‘involuntary’ waiver of constitutional rights in general.”).

¹⁰¹ (1783) 168 Eng. Rep. 234, 1 Leach 263.

¹⁰² *Id.* at 234, 1 Leach at 263.

. . . that no credit ought to be given to it.”¹⁰³ Thus, the concept that confessions and guilty pleas must be voluntary was born.¹⁰⁴

It was not until 1892 that the United States Supreme Court affirmed a guilty plea by a defendant in the matter of *Hallinger v. Davis*,¹⁰⁵ wherein the Supreme Court clarified that the high standard for the admissibility of confessions utilized in England was equally applicable to a guilty plea in America.¹⁰⁶ Hallinger was indicted by a grand jury in New Jersey for murder.¹⁰⁷ Shortly thereafter, he entered a guilty plea to the charges.¹⁰⁸ The lower court was so uncomfortable with the idea of a defendant waving his or her right to trial, however, that it held the plea in abeyance and required the defendant to consult with counsel.¹⁰⁹ Following the consultation, Hallinger again requested to plead guilty.¹¹⁰ After hearing testimony regarding the basis for the defendant’s plea, the court accepted the confession and sentenced Hallinger to death.¹¹¹ In considering the case, the United States Supreme Court concluded that the defendant had “voluntarily” availed himself of the option to plead guilty and, while perhaps unwise, the decision did not violate any provisions of the Constitution.¹¹² *Hallinger* was the first case in which the Supreme

¹⁰³ *Id.* at 235, 1 Leach at 264.

¹⁰⁴ See Alschuler, *supra* note 65, at 12 (discussing *Rex*, 168 Eng. Rep. at 255, 1 Leach at 263–64). “It soon became clear that any confession ‘obtained by [a] direct or implied promise[], however slight’ could not be received in evidence. Even the offer of a glass of gin was a ‘promise of leniency’ capable of coercing a confession.” *Id.* (citations omitted); see also Baldwin & McConville, *supra* note 64, at 287–91 (discussing the use of plea bargaining in England).

¹⁰⁵ *Hallinger v. Davis*, 146 U.S. 314, 324 (1892).

¹⁰⁶ See *id.* at 318–20. One of the earliest American cases discussing the need for guilty pleas to be voluntary was an 1804 Massachusetts Supreme Court case titled *Commonwealth v. Battis*, 1 Mass. 95, 95 (1804). Battis, an African American, was indicted in Massachusetts for the rape and murder of a thirteen-year-old Caucasian girl. *Id.* Upon being brought to court to answer the charges, Battis pleaded guilty. *Id.* Surprised by the defendant’s actions, the court remanded Battis to prison to reconsider his decision. *Id.* at 95–96. Later that day, Battis was brought back before the judge and again pleaded guilty. *Id.* at 96. After thorough questioning, it was determined that there had been no “tampering with him, either by promises, persuasions, or hopes of pardon, if he would plead guilty.” *Id.* The court accepted the plea and Battis was sentenced to death. *Id.* The *Battis* case provides a glimpse into criminal practice in the nineteenth century and demonstrates that courts were reluctant to permit defendants to plead guilty. See *id.* Further, when such guilty pleas were permitted, they were only allowed where it was clear the defendant had been offered no promises and had endured no threats in deciding to confess his or her crime. See *id.*

¹⁰⁷ *Hallinger*, 146 U.S. at 315 (“Hallinger, the appellant, was on the 14th day of April, 1891, indicted by the grand jury of Hudson County for the murder of one Mary Hallinger.”).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* (“[H]e was condemned to be hanged.”).

¹¹² *Id.* at 324.

Court concluded that pleas of guilty must be “voluntary,” a legal doctrine drawn directly from the English law of confession.¹¹³

Though the Supreme Court failed to define the term “voluntary” with any precision in *Hallinger*, it was not necessary. At the time, one needed only examine case law regarding the definition of the term “voluntary” in the context of confessions, because, as described above, guilty pleas were simply in-court confessions in the eyes of the law.¹¹⁴ One such case was the 1897 case of *Bram v. United States*.¹¹⁵ Bram was accused of murdering a ship’s captain and others.¹¹⁶ During his trial, the prosecution admitted a confession Bram made to police, though Bram protested that the confession had been extracted from him involuntarily.¹¹⁷ In ruling on the matter, the Supreme Court referred to the long history of case law establishing that one may not be compelled to testify against himself.¹¹⁸

But a confession, in order to be admissible, must be free and voluntary: that is, must not be extracted by any sort of threats of violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. . . . [F]or the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner¹¹⁹

According to the Court, the “true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort.”¹²⁰ In the *Bram* case, the detective was found to have held out hope of leniency in return for Bram disclosing the identity of his accomplice.¹²¹ The Court concluded that

¹¹³ See *id.*; see also Alschuler, *supra* note 65, at 10 (noting that this was also the first U.S. case to uphold a guilty plea).

¹¹⁴ See *supra* notes 99–102 and accompanying text.

¹¹⁵ *Bram v. United States*, 168 U.S. 532 (1897).

¹¹⁶ *Id.* at 537.

¹¹⁷ *Id.* at 538–39.

¹¹⁸ See *id.* at 545 (“There can be no doubt that long prior to our independence the doctrine that one accused of crime could not be compelled to testify against himself had reached its full development in common law. . . .”); see also U.S. CONST. amend. V.

¹¹⁹ *Bram*, 168 U.S. at 542–43 (quoting 3 RUSSELL ON CRIMES 478 (6th ed.)).

¹²⁰ *Id.* at 548 (quoting *Wilson v. United States*, 162 U.S. 613, 623 (1896)). Citing to *Rex v. Thompson*, (1783) 1 Leach 291, the Court stated:

In *Rex v. Thompson* . . . a declaration to a suspected person that unless he gave more satisfactory account of his connection with a stolen bank note his interrogator would take him before a magistrate, was held equivalent to stating that it would be better to confess, and to have operated to lead the prisoner to believe that he would not be taken before a magistrate if he confessed.

Id. at 551–52.

¹²¹ *Id.* at 565.

Bram's statements were involuntary, because they were induced by a promise of benefits.¹²² Based on the rulings in *Hallinger* and *Bram*, one can deduce that, had a plea bargaining case risen to the Supreme Court in the late 1800s, the Court would have clearly opposed the idea, just as so many state appellate courts did in the post-Civil War period.¹²³

In 1878, the Supreme Court took up a series of cases termed the *Whiskey Cases*.¹²⁴ The Court's ruling in the *Whiskey Cases* dealt more with prosecutorial authority to offer deals than with the involuntary nature of an induced confession, but the cases offer confirmation of the Supreme Court's antagonist view of bargained justice at a time when plea bargaining was just beginning its rise in the American criminal justice system.¹²⁵ The *Whiskey Cases* involved prosecutions for violations of internal revenue laws regarding liquor sales.¹²⁶ Perhaps in an effort to reward cooperation or clear a number of matters from his desk at one time, the prosecutor offered the defendants a deal in return for pleading guilty.

[The parties] entered into an agreement by which it was, among other things, agreed that if the said defendants would testify on behalf of the plaintiffs frankly and truthfully . . . , and should plead guilty to one count in an indictment . . . , and should withdraw their pleas in a certain condemnation case then pending against them . . . , no new proceedings should be commenced against said defendants on account of transactions then past.¹²⁷

At the time, it was not uncommon for defendants to receive immunity from the governor in return for testifying against an accomplice.¹²⁸ The bargain here, however, went further in that the agreement did not emanate from the governor but directly from the prosecutor.¹²⁹ Further, the agreement did not merely offer immunity in return for cooperation, but also required the defendants to plead guilty to a single charge of the indictment in return for the other two charges being dropped.¹³⁰ Regarding this effort by the prosecution to induce the defendants to

¹²² *Id.*

¹²³ See *supra* notes 64–70 and accompanying text (discussing the rise of plea bargaining in the post-Civil War period).

¹²⁴ See *Whisky Cases*, 99 U.S. 594 (1878).

¹²⁵ See *supra* notes 121–128 and accompanying text; see also *Sanders v. State*, 85 Ind. 318, 333 (1882) (holding that a guilty plea must be voluntary, and finding that where a defendant pleaded guilty for fear of mob violence, the plea was not voluntary).

¹²⁶ See *Whisky Cases*, 99 U.S. at 594–95.

¹²⁷ *Id.*

¹²⁸ See Alschuler, *supra* note 65, at 15 (“[W]hen defendants were induced to testify against their accomplices, Anglo-American courts refused to convict them on the basis of their bargained confessions. The courts instead insisted that these defendants be given what modern lawyers would call transactional immunity.”).

¹²⁹ See *Whisky Cases*, 99 U.S. at 598.

¹³⁰ See *id.*

plead guilty, the Supreme Court stated, “[T]he district attorney had no authority to make the agreement alleged in the plea in bar,” and, as such, the bargain was unenforceable.¹³¹ While the *Whiskey Cases* decision did not refer to the defendants’ guilty pleas as “involuntary,” the Court’s concern over this perception likely influenced its decision to prohibit such deal making.

As the *Rex*, *Hallinger*, *Bram* and *Whiskey* cases demonstrate, plea-bargaining was impermissible in the eyes of the Supreme Court during the late nineteenth century.¹³²

However, while the Supreme Court and various state courts were succinctly rejecting attempts by prosecutors to offer inducements to defendants in return for guilty pleas, plea-bargaining continued to be utilized in the trenches.¹³³ It is not surprising that more cases did not reach the Supreme Court to challenge this growing phenomenon because defendants who were satisfied with their bargain had no reason to appeal their convictions.¹³⁴ Gradually, however, appellate cases began appearing in the federal system and, by the early twentieth century, the Court was once again addressing this ever-growing phenomenon.

In 1927, the Supreme Court was tasked with addressing the constitutionality of prosecutors offering incentives for defendants to plead guilty in the case of *Kercheval v. United States*.¹³⁵ Kercheval pleaded guilty to a charge of using the mail to defraud and was sentenced to three years in prison.¹³⁶ According to the defendant, he was induced to plead guilty because the prosecutor promised to

¹³¹ *Id.* at 606.

¹³² One legal annotation from the period summarized the law as follows:

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

Alschuler, *supra* note 65, at 24 (quoting Hopkins, *Withdrawal of Plea of Guilty*, 11 CRIM. L. MAG. 479, 484 (1889)).

¹³³ See *supra* notes 97–135 and accompanying text.

¹³⁴ In 1968, the American Bar Association released a report that included discussion of the shadowy nature of plea bargaining up to that point in the American criminal system. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *supra* note 77, at vii (“The subject of this report—pleas of guilty, including the related matter of plea negotiations—was given a high priority by the Special Committee. One of the purposes of the Project was to turn a spotlight on what have been called ‘low visibility’ areas in the criminal process, those not likely to be scrutinized by the appellate courts and to be discussed in widely-printed opinions. This is such an area, and its importance is indicated by the fact that the great majority of all convictions are the result of pleas of guilty.”).

¹³⁵ *Kercheval v. United States*, 274 U.S. 220, 221 (1927).

¹³⁶ *Id.*

recommend a sentence of three months in jail.¹³⁷ After being sentenced to three years in prison, Kercheval filed a petition seeking to enforce the prosecutor's promise.¹³⁸ The court declined, but did allow him to withdraw his guilty plea.¹³⁹ At trial, however, the court permitted the prosecution to introduce the prior guilty plea as evidence against the defendant.¹⁴⁰ As might be expected, Kercheval was convicted and once again sentenced to three years in prison.¹⁴¹

On appeal to the Supreme Court, the Justices concluded that Kercheval's withdrawn guilty plea was inadmissible.¹⁴² More importantly, however, the Court commented on the plea bargain between the government and the defendant.¹⁴³

A plea of guilty differs in purpose and effect from a mere admission or an extrajudicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence. Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences. . . . But, on timely application, the court will vacate a plea of guilty shown to have been unfairly obtained or given through ignorance, fear or inadvertence.¹⁴⁴

Rather than positing that prosecutors are afforded more leeway to bargain for guilty pleas than might be permitted in the context of confessions to police officers, the Court indicated that even greater care should be taken to ensure guilty pleas are voluntary.¹⁴⁵ Once again, the Court reiterated the long-standing principle that guilty pleas must be voluntary and may not be induced by "ignorance, fear or inadvertence."¹⁴⁶

As the criminal dockets swelled during the early twentieth century and prosecutors began to offer plea bargains in greater numbers, the Supreme Court remained on the sidelines. It was not until 1941 that the Court again addressed the issue of bargained justice, this time in its most direct manner yet.¹⁴⁷ In 1936, Jack Walker pleaded guilty to an indictment charging him with armed robbery of a

¹³⁷ *Id.* During the negotiations, the prosecutor also asserted that the court would impose the recommended sentence. *Id.*

¹³⁸ *See id.*

¹³⁹ *Id.* ("After hearing evidence on the issue, the court declined so to change the sentence, but on petitioner's motion, set aside the judgment and allowed him to withdraw his plea of guilty and to plead not guilty.")

¹⁴⁰ *Id.* at 221–22.

¹⁴¹ *Id.* at 222.

¹⁴² *See id.* at 223, 225.

¹⁴³ *See id.* at 223–24.

¹⁴⁴ *Id.*

¹⁴⁵ *See id.*

¹⁴⁶ *Id.*

¹⁴⁷ *See Walker v. Johnston*, 312 U.S. 275 (1941).

national bank.¹⁴⁸ After being sentenced to twelve years in prison, Walker filed a writ of habeas corpus.¹⁴⁹ In his writ, he alleged that he had been induced to plead guilty by promises of leniency and threats of harsher sanctions for a failure to cooperate.¹⁵⁰ According to the Court:

[The District Attorney] told him to plead guilty, warning him that he would be sentenced to twice as great a term if he did not so plead In view of the District Attorney's warning, and in fear of a heavy prison term, he told the District Attorney he would plead guilty.¹⁵¹

While these arrangements seem common by today's standards, the Supreme Court found the prosecutor's actions to be improper in 1941.¹⁵² The Court concluded that prosecutor's threats had resulted in Walker involuntarily pleading guilty, a clear violation of the standard established in earlier precedent regarding voluntariness, confession, and pleas of guilt.¹⁵³ The Court remarked:

[Walker] was deceived and coerced into pleading guilty when his real desire was to plead not guilty or at least to be advised by counsel as to his course. If he did not voluntarily waive his right to counsel, or if he was deceived or coerced by the prosecutor into entering a guilty plea, he was deprived of a constitutional right.¹⁵⁴

As a result, the Supreme Court remanded the case for a hearing regarding Walker's allegations.¹⁵⁵ While the language of *Walker* should have given prosecutors pause before continuing to offer defendants plea bargains, the rising tide of plea-bargaining and the courts' growing reliance on such swift justice was likely already unstoppable.

A year later, the Supreme Court again addressed the standards applicable to guilty pleas. In *Waley v. Johnston*,¹⁵⁶ the Supreme Court examined allegations that Federal Bureau of Investigation (FBI) agents had physically threatened a defendant and had threatened to "publish false statements and manufacture false evidence that the kidnaped person had been injured, and by such publications and false evidence to incite the public and to cause the State of Washington to hang the petitioner" ¹⁵⁷ According to Waley, the government's threats that he would be

¹⁴⁸ *Id.* at 279.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 280–81.

¹⁵¹ *Id.* at 280.

¹⁵² *See id.* at 286–87.

¹⁵³ *See id.* at 286; *see also* *Hallinger v. Davis*, 146 U.S. 314, 324 (1892) (requiring that the defendant voluntarily avail himself of the option to plead guilty).

¹⁵⁴ *Walker*, 312 U.S. at 286.

¹⁵⁵ *Id.* at 287.

¹⁵⁶ *Waley v. Johnston*, 316 U.S. 101 (1942).

¹⁵⁷ *Id.* at 102.

thrown out a window and beaten were unpersuasive.¹⁵⁸ However, the threats that false evidence would be offered to increase his punishment to death were compelling and induced him to plead guilty as demanded.¹⁵⁹

In ordering the lower court to conduct a hearing regarding Waley's writ of habeas corpus, the Supreme Court concluded that while the allegations may "tax credulity," they certainly called for further inquiry.¹⁶⁰ In describing the applicable considerations during the lower court hearing, the Supreme Court reiterated the requirement that guilty pleas be entered voluntarily.¹⁶¹ According to the Court, "[i]f the allegations are found to be true, petitioner's constitutional rights were infringed. For a conviction on a plea of guilty coerced by a federal law enforcement officer is no more consistent with due process than a conviction supported by a coerced confession."¹⁶² As late as 1940, therefore, the voluntariness standard as applied uniformly to guilty pleas and confessions remained the same and coercive tactics and incentives rendered any such admissions unconstitutional.¹⁶³

In 1958, the issue of plea bargaining again reached the Supreme Court, but, on this occasion, the case was never decided for fear the result would throw the entire American criminal justice system into chaos.¹⁶⁴ The case for consideration was that of Paul Shelton, who, despite consistently maintaining his innocence, pleaded guilty to one count of interstate transportation of stolen vehicles after being promised leniency.¹⁶⁵ The prosecution had induced Shelton to confess his guilt by promising a sentence of no more than one year and dismissal of all other pending charges.¹⁶⁶ Though these promises sound similar to those made to Lea

¹⁵⁸ *See id.* ("The petitioner stated generally that threats of . . . agents to throw petitioner out of a window and 'beat [him] up' 'didn't bother [him].'").

¹⁵⁹ *Id.* ("But [the petition] specifically alleged that petitioner's plea of guilty had been induced by the threats of a named [FBI] agent to publish false statements and manufacture false evidence that the kidnaped person had been injured . . .").

¹⁶⁰ *See id.* at 104.

¹⁶¹ *See id.*

¹⁶² *Id.*

¹⁶³ *See id.*

¹⁶⁴ *See Shelton v. United States*, 242 F.2d 101 (5th Cir. 1957), *judgment set aside*, 246 F.2d 571 (5th Cir. 1957) (en banc), *rev'd per curiam on confession of error*, 356 U.S. 26 (1958).

¹⁶⁵ *Shelton*, 242 F.2d at 102.

¹⁶⁶ *Id.* at 102 & n.1. According to the opinion, Shelton was induced to plead guilty based on the following promises:

- (1) government counsel's promise to arrange for dismissal of all other federal charges,
- (2) government's counsel's 'guarantee' of a sentence of not more than one year in the instant case,
- (3) government's counsel's threat that it would take defendant longer to get tried on the other pending charges than it would take him to serve a one year sentence, and
- (4) defendant's confused, anxious, desperate, and incompetent state of mind resulting from prolonged confinement in county jails while awaiting trial as aforesaid.

Fastow in 2004, the United States Court of Appeals for the Fifth Circuit concluded that Shelton's plea must be vacated because the prosecutor's promises of leniency likely meant the plea was not entered "voluntarily."¹⁶⁷

There is no doubt, indeed it is practically conceded, that the appellant pleaded guilty in reliance on the promise of the Assistant United States Attorney that he would receive a sentence of only one year. The court, before accepting the plea, did not ascertain that it was in truth and in fact a voluntary plea not induced by such promise. It necessarily follows that the judgment of conviction must be set aside and the plea of guilty vacated.¹⁶⁸

In the opinion of the judges on the Fifth Circuit in 1957: "Justice and liberty are not the subjects of bargaining and barter."¹⁶⁹

Interestingly, the panel decision from the Fifth Circuit was later overturned *en banc*, and the case proceeded to the Supreme Court.¹⁷⁰ The Court never addressed the challenge to plea-bargaining, however, because the government filed an admission that the guilty plea may have been improperly obtained and the case was remanded to the District Court without further discussion.¹⁷¹ According to Professor Albert Alschuler, evidence indicates that the government likely confessed its error for fear that the Supreme Court would finally make a direct ruling that all manner of plea bargaining was wholly unconstitutional.¹⁷²

By 1963, when the Supreme Court ruled in the *Lynnum* case that her confession was involuntarily coerced due to threats regarding her children and her potential prison sentence, one other significant plea bargaining case had come before the Court.¹⁷³ In 1962, the court considered whether it was appropriate for a

Id.

¹⁶⁷ See *id.* at 113 ("If a plea of guilty is made upon any understanding or agreement as to the punishment to be recommended, it is essential, we think, that, before accepting such plea, the district court should make certain that the plea is in fact made voluntarily.").

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Shelton v. United States*, 246 F.2d 571, 573 (5th Cir. 1957) (*en banc*).

¹⁷¹ See *Shelton v. United States*, 356 U.S. 26, 26 (1958) ("The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. Upon consideration of the entire record and confession of error by the Solicitor General that the plea of guilty may have been improperly obtained, the judgment of the United States Court of Appeals for the Fifth Circuit is reversed and the case is remanded to the District Court for further proceedings.").

¹⁷² Alschuler, *supra* note 65, at 37 ("In 1958, the Solicitor General (or perhaps some other official in the Justice Department) may have assessed the probable votes of individual Supreme Court Justices, may have sensed a substantial likelihood that the Court would hold the practice of plea bargaining unlawful, and may have sought to foreclose this ruling through a confession of error on narrow and disingenuous grounds.").

¹⁷³ See *Machibroda v. United States*, 368 U.S. 487 (1962).

United States Attorney to promise a defendant that in return for pleading guilty his sentence would be no more than twenty years in prison.¹⁷⁴ In the alternative, the prosecutor stated that if the defendant did not cooperate, “certain unsettled matters concerning two other robberies would be added to the petitioner’s difficulties.”¹⁷⁵ The Supreme Court remanded the *Machibroda* case for further fact finding, but concluded that if the allegations were true, the petitioner was “clearly entitled to relief.”¹⁷⁶

There can be no doubt that, if the allegations contained in the petitioner’s motion and affidavit are true, he is entitled to have his sentence vacated. A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void. . . . Like a verdict of a jury [a plea of guilty] is conclusive. . . . Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences.¹⁷⁷

With such strong language regarding the requirement that plea bargains be voluntary and the historical context that guilty pleas and confessions were treated in the same manner, it is little surprise that a year later the Supreme Court struck down Beatrice Lynumn’s confession as a statement made after threats of punishment and promises of leniency.¹⁷⁸

In 1968, the Supreme Court once again struck a blow to plea-bargaining, though this did not stop the acceleration of its growth. In *United States v. Jackson*,¹⁷⁹ the Court examined a federal statute that differentiated between the punishment available to those who pleaded guilty and those who put the government to its burden.¹⁸⁰ The law, 18 U.S.C. section 1201(a), reads as follows:

Whoever knowingly transports in interstate . . . commerce, any person who had been unlawfully . . . kidnaped and held for ransom . . . or otherwise . . . shall be punished (1) by death if the kidnapped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.¹⁸¹

As illustrated in the statute’s text above, the death penalty was only available where a jury convicted the defendant and recommended capital punishment.

¹⁷⁴ *Id.* at 489–90.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 493, 496.

¹⁷⁷ *Id.* at 493 (internal quotation marks omitted).

¹⁷⁸ See *Lynumn v. Illinois*, 372 U.S. 528, 537–38 (1963).

¹⁷⁹ *United States v. Jackson*, 390 U.S. 570 (1968).

¹⁸⁰ *Id.* at 570–72.

¹⁸¹ *Id.* at 570–71.

Where the defendant pleaded guilty, however, the judge was limited to imposing a sentence of life in prison.¹⁸² In October 1966, a federal grand jury in Connecticut charged Charles Jackson and two others with a kidnapping that resulted in an injury to the victim.¹⁸³ The District Court, however, struck the indictment because it found that the statute unconstitutionally made the “risk of death” the “price for asserting the right to jury trial.”¹⁸⁴

On appeal to the Supreme Court, a majority of the Justices agreed that the statute imposed an “impermissible burden upon the exercise of a constitutional right.”¹⁸⁵

It is no answer . . . that federal trial judges may be relied upon to reject coerced pleas of guilty and involuntary waivers of jury trials. For the evil in the federal statute is not that it necessarily *coerces* guilty pleas and jury waivers but simply that it needlessly *encourages* them. A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right. Thus the fact that the [statute] tends to discourage defendants from insisting upon their innocence and demanding trial by jury hardly implies that every defendant who enters a guilty plea to a charge under the [statute] does so involuntarily. The power to reject coerced guilty pleas and involuntary jury waivers might alleviate, but it cannot totally eliminate, the constitutional infirmity in the capital punishment provision of the [statute].¹⁸⁶

This is perhaps one of the most significant statements ever made about plea-bargaining by the Supreme Court. According to the Court, and consistent with earlier precedent, voluntary guilty pleas are permissible.¹⁸⁷ In fact, the Court states that the power of the lower court's to accept a guilty plea is traditional and “necessary for the . . . practical . . . administration of the criminal law.”¹⁸⁸ The Court offers as an example of a voluntary plea motivated by constitutional considerations the case where an individual pleads guilty to “spare themselves and their families the spectacle and expense of protracted courtroom proceedings.”¹⁸⁹ The Court implies, however, that guilty pleas induced by coercive threats of punishment or offers of leniency are unconstitutional.¹⁹⁰ With regard to the federal kidnapping statute, the threat of death only for those who refuse to confess their

¹⁸² *See id.*

¹⁸³ *Id.* at 571 & n.1.

¹⁸⁴ *Id.* at 571.

¹⁸⁵ *Id.* at 572. The Court, however, disagreed that the statute as a whole was unconstitutional and, instead, severed the provision from the remainder of the statute. *Id.*

¹⁸⁶ *Id.* at 583.

¹⁸⁷ *Id.* at 584–85.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 584.

¹⁹⁰ *See id.* at 583.

guilt is an example of a coercive incentive that makes any resulting guilty plea invalid.¹⁹¹

In a dissenting opinion, Justice White argued that the kidnapping statute should not be held unconstitutional.¹⁹² Relying on the majority's conclusion that "not every plea of guilty or waiver of the jury trial would be influenced by the power of the jury to impose the death penalty," Justice White stated that trial courts need only carefully examine a defendant's guilty plea.¹⁹³ In so doing, the lower court can make an individual determination "to make sure that they have been neither coerced nor encouraged by the death penalty power in the jury."¹⁹⁴ For the majority, however, there was no legitimate justification for the imposition of death upon only those who seek a trial and, therefore, while Justice White's approach may be appropriate in most cases, it was not sufficient to correct the unconstitutional construction of this particular statute.¹⁹⁵

By 1968, the Supreme Court had struck down every guilty plea induced by threats of punishment or promises of leniency that had arrived on its docket.¹⁹⁶ The necessity of the plea bargaining machine, however, had never been greater. As the implementation of the procedural rights given to defendants during the Due Process Revolution slowed trial proceedings and criminal dockets continued to swell,¹⁹⁷ prosecutors had no choice but to continue to utilize a constitutionally questionable system. Finally, in 1970, the Supreme Court directly addressed the issue of plea-bargaining's constitutionality, but the result was stunning in that it was inconsistent with over a century of precedent and the Court's prior animosity towards bargained justice.

¹⁹¹ *Id.*

¹⁹² *Id.* at 592 (White, J., dissenting).

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *See id.* at 583. Following *Jackson*, the Supreme Court ruled in the 1969 case of *McCarthy v. United States* that federal courts must personally address the defendant to satisfy the requirements of Rule 11. *McCarthy v. United States*, 394 U.S. 459, 463–64 (1969). Interestingly, in *McCarthy*, one sees that even in the late 1960s, prosecutors were weary of creating plea agreements that contained direct promises of leniency. *See id.* at 461–62. In *McCarthy*, the defendant agreed to plead guilty to one charge of tax evasion. *Id.* at 461. After the guilty plea was accepted, the prosecutor moved to dismiss two other pending tax charges. *Id.* at 461. In so doing, the prosecutor made clear to the court that the dismissal was primarily motivated by the defendant's agreement to pay all taxes, penalties, and interest with regard to any remaining tax burden. *See id.* at 461–62. In fact, the prosecutor went on to insist that the judge ask the defendant if he had been induced by any threats or promises. *Id.* at 461. The defendant stated that he had not and, therefore, the lower court concluded the plea was voluntary. *See id.*; *see also* *Boykin v. Alabama*, 395 U.S. 238, 242–43 (1969) (ruling that Rule 11 requirements also apply to state court proceedings and stating that "[i]gnorance, incomprehension, coercion, terror, inducement, subtle or blatant threats might be a perfect cover-up of unconstitutionality").

¹⁹⁶ *See supra* notes 115–199 and accompanying text.

¹⁹⁷ *See infra* notes 230–233 and accompanying text.

B. The Supreme Court's Great Compromise of 1970

In 1970, a case came before the Supreme Court that would help usher in the final stages of plea-bargaining's triumph. In 1959, Robert Brady was charged with kidnapping in violation of 18 U.S.C. § 1201(a), the same criminal statute that had been at issue in the *Jackson* case in 1968.¹⁹⁸ As previously discussed, the statute allowed for the death penalty only when recommended by a jury.¹⁹⁹ As a result, a defendant who pleaded guilty and avoided a jury trial could successfully avoid the death penalty in favor of the alternative maximum sentence of life in prison.²⁰⁰ The victim in the *Brady* case had not been liberated unharmed and, therefore, Brady was subject to the death penalty provision if recommended by a jury.²⁰¹ At first, Brady pleaded not guilty and intended to proceed to trial.²⁰² Brady later learned that his co-defendant had agreed to plead guilty and intended to testify against him at trial.²⁰³ As such, Brady changed his plea to guilty and was sentenced to fifty years in prison.²⁰⁴ Brady later sought relief from the Supreme Court, claiming that his plea was involuntary because the statute coerced him into avoiding a jury trial to ensure that he would not be sentenced to death.²⁰⁵ In examining Brady's claim, the lower court concluded, "no representations [were] made with respect to a reduced sentence or clemency."²⁰⁶ Thus, the lower court held the guilty plea voluntary.²⁰⁷

The Supreme Court began its analysis by noting that guilty pleas must be voluntary and intelligent, a determination that must be conducted based on the facts of the case.²⁰⁸ The first question examined by the Court, therefore, was whether Brady's plea was involuntary because he faced a more severe sentence if found guilty after trial.²⁰⁹ The Court concluded that just because the enhanced penalty led to Brady's decision, it does not follow that the plea was necessarily involuntary.²¹⁰ Rather, Brady's decision was similar to one made by a defendant who pleads guilty in the face of overwhelming evidence rather than subjecting his

¹⁹⁸ *Brady v. United States*, 397 U.S. 742, 743 (1970).

¹⁹⁹ *See id.*

²⁰⁰ *See id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.* at 743–44.

²⁰⁵ *Id.* at 744.

²⁰⁶ *Id.* at 745.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 748.

²⁰⁹ *Id.* at 749.

²¹⁰ *Id.* at 749–50 ("But even if we assume that Brady would not have pleaded guilty except for the death penalty provision of § 1201(a), this assumption merely identifies the penalty provision as a "but for" cause of his plea. That the statute caused the plea in this sense does not necessarily prove that the plea was coerced and invalid as an involuntary act.").

or her family to the expense of trial.²¹¹ The Court continued, however, with a caveat regarding coercive tactics by the prosecution.

Of course, the agents of the State may not produce a plea by actual or threatened physical harm or by mental coercion overbearing the will of the defendant. But nothing of the sort is claimed in this case; nor is there evidence that Brady was so gripped by fear of the death penalty or hope of leniency that he did not or could not, with the help of counsel, rationally weigh the advantages of going to trial against the advantages of pleading guilty.²¹²

According to the Court, where the defendant pleads guilty in return for the “certainty or probability of a lesser penalty [as contained in the statute] rather than face the wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged,” the plea is voluntary and constitutionally sound.²¹³ The Court concluded that a guilty plea to avoid a possible death penalty under the applicable statute is valid.²¹⁴

Based on its statements that a defendant may plead guilty in return for the promise or possibility of a reduced sentence, the Supreme Court appears to have adopted language crafted by Judge Tuttle of the United States Court of Appeals for the Fifth Circuit to describe the applicable test for “voluntariness” moving forward.²¹⁵

[A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises

²¹¹ *Id.* at 750 (“The State to some degree encourages pleas of guilty at every important step in the criminal process. For some people, their breach of a State’s law is alone sufficient reason for surrendering themselves and accepting punishment. For others, apprehension and charge, both threatening acts by the Government, jar them into admitting their guilt. In still other cases, the post-indictment accumulation of evidence may convince the defendant and his counsel that a trial is not worth the agony and expense to the defendant and his family. All these pleas of guilty are valid in spite of the State’s responsibility for some of the factors motivating the pleas . . .”).

²¹² *Id.* at 750.

²¹³ *Id.* at 751.

²¹⁴ *Id.* at 755.

²¹⁵ *Id.* at 755. The Court attempts to explain the apparent inconsistency between its decision in *Brady* and the prior precedent of *Bram*. According to the Court, the decision in *Bram* is distinguishable because there was no counsel present, the threats and promises were made face-to-face, and there was a hazard of an impulsive and improvident response to a seeming but unreal advantage. *Id.* at 754–55.

that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes).²¹⁶

By the end of 1970, therefore, confession law and the law of guilty pleas had diverged significantly. No longer was any promise of leniency thought to corrupt a guilty plea as the Court had ruled throughout the nineteenth and early twentieth centuries. Though the plea must still be "voluntary," the term had shifted to mean merely that the plea could not be induced "by actual or threatened physical harm or by mental coercion overbearing the will of the defendant."²¹⁷ A dramatic shift had occurred in the law, and, although there was still an upper limit beyond which inducements to plead guilty could not venture, that limit was much higher than it had been just a few short years before.²¹⁸ Plea-bargaining, it seemed, had finally established itself as an unseverable part of the American criminal justice system.

It is clear that the Supreme Court radically departed from its previous decisions to craft its decision in *Brady*, but it is unclear why the Court felt it necessary to make such a significant departure from past precedent. The answer, it appears, has much to do with plea-bargaining's rise to dominance by 1970 and the realities of an overburdened criminal justice system.

Despite the hostility expressed towards bargained justice by the Supreme Court prior to the *Brady* decision in 1970, the plea-bargaining machine continued to evolve and to increase in influence. Early records indicate that in the first half of the nineteenth century only 10 to 15 percent of cases resulted in a guilty plea.²¹⁹ While plea-bargaining may have occurred in certain of these cases, it is likely many were merely cases in which the defendant did not wish to endure trial when the evidence appeared overwhelming, such as occurred in the *Hallinger* case in 1892.²²⁰ Shortly thereafter, however, the rate of convictions by guilty plea began an upward climb.²²¹ By 1908, 50 percent of federal criminal cases resulted in pleas

²¹⁶ *Id.* at 755. Interestingly, this test appears to be plucked from the *en banc* decision in *Shelton v. United States*, the case the solicitor general removed from the Supreme Court's jurisdiction by offering a confession of error for fear the Supreme Court as composed in 1958 would strike plea bargaining as unconstitutional in its entirety. *Shelton v. United States*, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (*en banc*), *rev'd per curiam on confession of error*, 356 U.S. 26 (1958).

²¹⁷ See *Brady*, 397 U.S. at 750–51; see also Becker, *supra* note 100, at 759 ("Although the Court agreed that guilty pleas were invalid if not 'voluntary,' its treatment of voluntariness cut that concept loose from its moorings in the law.").

²¹⁸ See *Brady*, 397 U.S. at 757–58; see also Becker, *supra* note 100, at 759 ("In *Brady v. United States* and its companion cases, however, the Court denied the relevance not merely of some but all prior doctrine.").

²¹⁹ See Alschuler, *supra* note 65, at 10 (noting that Boston Police Court records from 1824 indicated that only 11 percent of defendants entered pleas of guilty); *id.* at 18 (noting that in 1839, 15% of all defendants in Manhattan and Brooklyn pleaded guilty).

²²⁰ *Hallinger v. Davis*, 146 U.S. 314 (1892).

²²¹ See Alschuler, *supra* note 65, at 27 ("In the federal courts, the statistics date from 1908, when only about 50% of all convictions were by plea of guilty. This percentage remained fairly constant until 1916, when it increased to 72%.").

of guilty, and by 1916 this number had increased to 72 percent.²²² By 1960, the decade just prior to the *Brady* decision, approximately 90 percent of cases in the American criminal justice system were resolved through a guilty plea.²²³ Perhaps the increase in guilty pleas reflected a growing desire by defendants to confess their sins, but, more likely, it is a reflection of the growing dominance of plea-bargaining throughout this period.

Given that 90 percent of all convictions by 1970 were the result of a guilty plea, most acquired in return for some benefit from the prosecution, the Supreme Court was tasked with a very difficult decision in *Brady*. If the Court continued with the century-old line of cases regarding confession, plea-bargaining would certainly have been found unconstitutional. The results of such a ruling, however, would be to destroy the criminal justice system, a system that was already struggling to dispose of its ever-growing docket even with 90 percent of cases ending without a trial.²²⁴ The shadowy rise of plea-bargaining during the late nineteenth and early twentieth centuries helped solidify its role in the criminal justice system, because, by the time the Supreme Court came to address the issue specifically, all court systems in the United States relied on bargained justice to survive.²²⁵

²²² *Id.*

²²³ Bortek, *supra* note 79, at 1439 n.43 (2004) (citing Corinna Barrett Lain, *Accuracy Where It Matters: Brady v. Maryland in the Plea Bargaining Context*, 80 WASH. U. L.Q. 1, 1 (2002) (noting that since the 1960s the plea bargaining rate has been around 90 percent)); *see also* ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *supra* note 77, at 1–2 (“The plea of guilty is probably the most frequent method of conviction in all jurisdictions; in some localities as many as 95 per cent of the criminal cases are disposed in of this way.”). Today, pleas of guilty account for over 95 percent of all federal cases. *See* U.S. SENTENCING COMM’N, *supra* note 44.

²²⁴ *See* F. Andrew Hessick III & Reshma M. Saujani, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. PUB. L. 189, 192 (2002) (noting that if plea-bargaining were not available, “the legal system would crumble under the weight of the cases requiring juries and judges”); Thomas R. McCoy & Michael J. Mirra, *Plea Bargaining as Due Process in Determining Guilt*, 32 STAN. L. REV. 887, 895 n.40 (1980) (citing John Kaplan, *American Merchandising and the Guilty Plea: Replacing the Bazaar with the Department Store*, 5 AM. J. CRIM. L. 215, 220 (1977)) (stating that the costs of administering the criminal justice system in the 1970s would have doubled if plea-bargaining had been reduced even from 90 percent to 80 percent of all cases).

²²⁵ The Court also likely realized that even if it explicitly ruled that plea-bargaining was unconstitutional, the reluctance of prosecutors, defendants, and courts to observe the Court’s earlier rejection of bargained justice meant that plea-bargaining would simply slip back into the shadows as an unofficial means of dealing with the pressures of the system. *See* *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978) (“[A] rigid constitutional rule that would prohibit a prosecutor from acting forthrightly in his dealings with the defense could only invite unhealthy subterfuge that would drive the practice of plea bargaining back into the shadows from which it has so recently emerged.”).

As if the criminal justice system were not already bogged down with growing caseloads, in part due to overcriminalization, the Supreme Court had just finished handing defendants a number of significant victories during the due process revolution of the 1960s.²²⁶ For instance, the Supreme Court imposed the “exclusionary rule” for violations of the Fourth Amendment, granted the right to counsel, and imposed the obligation that suspects be informed of their rights prior to being interrogated.²²⁷ The result was not only to increase the complexity of criminal prosecutions, but also to increase the length of trials. In many jurisdictions, the length of trial almost doubled from the early 1960s to the late 1960s.²²⁸ According to one commentator, “A major effect of the ‘due process revolution’ was to augment the pressures for plea negotiation. For one thing, the Supreme Court’s decisions contributed to the growing backlog of criminal cases. . . . In addition, the Court’s decisions probably contributed to the increased length of the criminal trial.”²²⁹

The Supreme Court considered the necessity of plea-bargaining as a tool to promote judicial economy in reaching its decision in *Brady*.²³⁰ The Court noted that 90 to 95 percent of all convictions are the result of a guilty plea and that “with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant’s guilt.”²³¹ The Court also went on to cite an American Bar Association report on plea-bargaining issued in 1968.²³² The report stated, “It may be noted . . . that a high proportion of plea of guilty and *nolo contendere* does benefit the system. Such pleas tend to limit

²²⁶ See generally Dripps, *supra* note 76, at 1156–61 (discussing the relationship between broadening legal rules and plea-bargaining); Stuntz, *supra* note 76, at 519–20 (2001) (discussing the influence of broader laws on the rate of plea-bargaining).

²²⁷ See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966) (self-incrimination); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel); *Mapp v. Ohio*, 367 U.S. 643 (1961) (exclusionary rule).

²²⁸ See Alschuler, *supra* note 65, at 38 (“In the District of Columbia, the length of the average felony trial grew from 1.9 days in 1950 to 2.8 days in 1965, and in Los Angeles the length of the average felony jury trial increased from 3.5 days in 1964 to 7.2 days in 1968.”).

²²⁹ *Id.*

²³⁰ *Brady v. United States*, 397 U.S. 742, 752 (1970); see also Hessick and Saujani, *supra* note 224, at 192 (noting that “efficiency is the overriding cause for entering plea negotiations in general”); Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 308–22 (1983).

²³¹ *Brady*, 397 U.S. at 752 & n.10; see also *Santobello v. New York*, 404 U.S. 257, 260 (1971) (“The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called ‘plea bargaining,’ is an essential component of the administration of justice. Properly administered, it is to be encouraged.”).

²³² *Brady*, 397 U.S. at 752 n.9 (citing ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *supra* note 77, at 37–52); see also *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) (citing ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *supra* note 77, at 60–69 in support of its conclusion that a recommendation of leniency is permitted as part of a plea bargain).

the trial process to deciding real disputes and, consequently, to reduce the need for funds and personnel.”²³³

Faced with a daunting decision, the Supreme Court chose to make a great compromise. Defendants had already been afforded significant additional rights during the 1960’s due process revolution. Now the Court would permit defendants, armed with their new rights, the ability to bargain for a more lenient sentence when the government had significant evidence against them. At the same time, plea-bargaining would provide courts with a mechanism for keeping up with their growing case loads and allow them to continue dispensing justice in a timely manner.

III. PLEA BARGAINING’S INNOCENCE PROBLEM

A. *The Coercive Consequences of the Great Compromise*

In the same year the Supreme Court decided *Brady*, it also handed down another plea-bargaining decision that helped to solidify bargained justice as a major facet of the American criminal justice system. In *North Carolina v. Alford*,²³⁴ the Court stated that a defendant could plead guilty in return for some benefit, such as a reduced sentence, while continuing to maintain his or her innocence.²³⁵ The Court inserted a caveat, however, requiring the “record before the judge contain[] strong evidence of actual guilt” to ensure the rights of the innocent are protected and guilty pleas are the result of “free and intelligent choice.”²³⁶

In 1977, Kerry Max Cook was arrested for the rape and murder of a woman in Tyler, Texas.²³⁷ Though Cook was convicted by a jury and sentenced to death a year later, he continued to profess his innocence.²³⁸ During his time on death row, Cook was abused, raped, and attempted to commit suicide twice.²³⁹ After one suicide attempt, prison officials found a note that stated, “I really was an innocent man.”²⁴⁰ His initial conviction was eventually overturned and a second trial in

²³³ See ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *supra* note 77, at 2.

²³⁴ *North Carolina v. Alford*, 400 U.S. 25 (1970).

²³⁵ *Id.* at 37; see also Andrew D. Leipond, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1156 (2005) (“An *Alford* plea, where the defendant pleads guilty but simultaneously denies having committed the crime, clearly puts the court on notice that this guilty plea is problematic . . .”).

²³⁶ *Alford*, 400 U.S. at 37, 38 n.10; Leipond, *supra* note 235. Currently, the federal system, the District of Columbia, and forty-seven states permit *Alford* pleas. See Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1372 n.52 (2003).

²³⁷ *The Plea*, FRONTLINE (June 17, 2004), available at <http://www.pbs.org/wgbh/pages/frontline/shows/plea/four/cook.html>.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

1992 resulted in a hung jury.²⁴¹ The government retried Cook again, and the death penalty was imposed by a jury a second time.²⁴² In 1996, Cook's conviction was again overturned, this time due to police and prosecutorial misconduct dating back to the initial investigation and trial of Cook in 1978.²⁴³ Despite the numerous setbacks, the government moved forward to retry Cook a fourth time.²⁴⁴ Due to the prior misconduct, however, the prosecutor in the case would no longer be able to use the testimony of a central witness in the case.²⁴⁵ As the trial for Cook's life approached, the prosecution conceded that the case was looking increasingly weak.²⁴⁶

Having discussed the evolution of the plea-bargaining machine it will come as no surprise that the prosecutor responded to the significant likelihood of losing a trial by offering Cook a plea deal.²⁴⁷ In return for pleading guilty, Cook would receive a sentence of time served and walk out of prison.²⁴⁸ Cook refused, however, continuing to profess his innocence.²⁴⁹

Kerry [Max Cook] looked [his attorney] in the eye and said, "I want to be free, I want this behind me, but I will go back to death row, I will let them strap me to the gurney and put the poison in my veins before I lie, before I plead guilty."²⁵⁰

In response, the prosecutor offered Cook the same deal in return for an *Alford* plea.²⁵¹ Cook could now plead guilty, while, at the same time, continuing to maintain his innocence.²⁵² Cook took the plea agreement and, twenty-two years after being placed in prison, walked free.²⁵³ Two months later, a DNA test conclusively demonstrated that Cook was not a match to forensic evidence

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.* (The Texas Court of Criminal Appeals "wrote that the investigation was intentionally misleading, the testimony of the key witness, Robert Hoehn, was prejudicial, and the first conviction was obtained through fraud and in violation of the law.").

²⁴⁴ *Id.*

²⁴⁵ *Id.* ("The irony was that the testimony of the witness, Robert Hoehn, who had died in the meantime, was the example cited by the Texas Court of Criminal Appeals as prejudicial and contradictory.").

²⁴⁶ *See id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

obtained at the scene of the crime in 1977.²⁵⁴ Though he had been induced to plead guilty, Cook was, in fact, innocent.²⁵⁵

Today, over 95 percent of defendants in the criminal justice system plead guilty and, in most cases, such confessions are prompted by offers of leniency or other benefits from the prosecution.²⁵⁶ It is unclear how many of these defendants are innocent, but it is clear that plea-bargaining has an innocence problem.²⁵⁷ At

²⁵⁴ *Id.*

²⁵⁵ *Id.* (“So, you know, was it worth it? Sometimes when I’m holding my son I can say yes. Sometimes, when I’m by myself, I say no. They won.”). Cook is certainly not the only innocent defendant coerced into pleading guilty by overpowering plea offers. A 1999 Los Angeles Times article describing newly discovered evidence in a police corruption case discussed the case of two defendants who may have been framed by police. See Samuel H. Pillsbury, *Even the Innocent Can be Coerced Into Pleading Guilty*, L.A. TIMES (Nov. 28, 1999), <http://articles.latimes.com/1999/nov/28/opinion/op-38287>. According to the article, though the new evidence indicated that both men were innocent, each had previously pleaded guilty to the fabricated charges to avoid the risk of serving lengthy prison sentences if convicted at trial. *Id.* (“Oscar Peralta (aka Jose Perez) pleaded guilty to assault on a police officer in a shooting incident, although he believed that he was framed in the case to cover up improper police conduct. Peralta admitted guilt to win a promised sentence of time served—10 months in county jail—and avoid the life sentence he faced had he been convicted at trial.”); see also Morris B. Hoffman, *The Myth of Factual Innocence*, 82 CHI.-KENT L. REV. 663, 672 (2007) (“Do innocent people plead guilty? Of course. Innocent people sometimes even preempt their false guilty pleas by falsely confessing, both with and without overbearing interrogation.”).

²⁵⁶ See U.S. SENTENCING COMM’N, *supra* note 44, at fig.C (stating that in 2009, 96.3 percent of federal defendants pleaded guilty).

²⁵⁷ See Baldwin & McConville, *supra* note 64, at 296 (“[T]he results of our research suggest that some defendants who perhaps were innocent, and a larger group who probably would have been acquitted had the case gone to trial, were nonetheless induced to plead guilty.”); Russell D. Covey, *Signaling and Plea Bargaining’s Innocence Problem*, 66 WASH. & LEE L. REV. 73, 74 (2009) (“Plea bargaining has an innocence problem.”); Michael O. Finkelstein, *A Statistical Analysis of Guilty Plea Practices in the Federal Courts*, 89 HARV. L. REV. 293, 295 (1975) (“On the basis of the analysis that follows, I conclude that the pressure on defendants to plead guilty in the federal courts has induced a high rate of conviction by ‘consent’ in cases in which no conviction would have been obtained if there had been a contest.”); Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1343–44 (1997) (arguing “that America’s criminal justice system creates a significant risk that innocent people will be systematically convicted”); Leipond, *supra* note 235, at 1154 (“Yet we know that sometimes innocent people plead guilty”); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1949–51 (1992) (discussing plea-bargaining’s innocence problem); David L. Shapiro, *Should a Guilty Plea Have Preclusive Effect?*, 70 IOWA L. REV. 27, 27 (1984) (discussing the opposition to argument that plea bargain should “be preclusive against the person who entered the plea”); see also Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 CARDOZO L. REV. 2295, 2295–96 (2006) (arguing a partial ban on plea-bargaining would assist in preventing innocent defendants from being forced to plead guilty by forcing prosecutors to allocate their limited resources towards only strong cases).

least one study has concluded that as many as 27 percent of defendants who plead guilty would not have been convicted at trial, though this estimate seems exceptionally high.²⁵⁸ Another more empirically driven study examined DNA evidence in capital rape-murder cases and determined that between 3.3 and 5 percent of those convicted, either through trial or a guilty plea, were factually innocent.²⁵⁹ Other studies have placed the number of defendants who plead guilty as a result of inducements by the government but who are factually innocent between 1.6 percent and 8 percent.²⁶⁰ Taking even the lowest of these estimates, the reality is striking and means that in 2009 there were over 1,250 innocent defendants forced to falsely admit guilt in the federal system alone.²⁶¹ Extrapolated out to the entire American criminal justice system since 1970, there are

²⁵⁸ See Shapiro, *supra* note 257, at 45; see also Finkelstein, *supra* note 257, at 309–10 (concluding that “at least one-third of all defendants pleading guilty in high-[plea-bargaining] rate districts would ultimately have escaped conviction if they had refused to consent”).

²⁵⁹ D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 778 (2007) (demonstrating through analysis of DNA exonerations for capital rape-murders from 1982 to 1989 that the minimum factually wrongful conviction rate was 3.3 percent); see also Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 74 (2008) (noting that nine of the first two hundred individuals exonerated by the Innocence Project had pleaded guilty); Scott & Stuntz, *supra* note 257, at 1948 n.134 (“[I]f acquittal is correlated (albeit not perfectly) with innocence, and there is an unusually high percentage of acquittals in murder cases, then there may be an unusually high number of innocent defendants on trial for murder. Since risk aversion should lead many (perhaps most) innocent defendants to plead guilty, even given a substantial acquittal rate, the pool of *all* murder defendants probably includes an unusually high number of innocents.”).

²⁶⁰ See Baldwin & McConville, *supra* note 64, at 296–98 (discussing plea-bargaining's innocence problem in England); Givelber, *supra* note 257, at 1343–44 (estimating nearly 8 percent of all convictions would be false if “innocent people plead guilty at as high a rate as innocent people are convicted following trial”); *id.* (“These figures represent convictions of innocent people following trial. In this country at least, 90 percent of convictions are secured through guilty pleas. Here, the criminal justice system is truly operating without a compass. If it is modestly assumed that, at the least, there are as many total convictions of innocent defendants resulting from pleas as there are from trials, one arrives, using the English study percentages, at a figure of 1.6 percent. This figure is a slightly higher estimate than that of the criminal justice officials surveyed by Huff, Rattner and Sagarin. If the more aggressive assumption is made that innocent people plead guilty at as high a rate as innocent people are convicted following trial, then nearly 8% of all convictions would be false.”); George C. Thomas III, *Two Windows Into Innocence*, 7 OHIO ST. J. CRIM. L. 575, 577–78 (2010) (“McConville and Baldwin concluded that two percent of the guilty pleas were of doubtful validity. As there were roughly two million felony cases filed in 2006, if two percent result in conviction of an innocent defendant, 40,000 wrongful felony convictions occur per year.”).

²⁶¹ U.S. SENTENCING COMM'N, *supra* note 44, at tbl.10 (stating that in 2009, there were 81,372 defendants convicted in the federal system, of which 96.3 percent pleaded guilty).

conservatively tens of thousands of innocent persons who have been induced to plead guilty by overpowering plea bargains. If this is the case, plea-bargaining certainly has a significant and unacceptable innocence problem.

In 1991, John Dixon pleaded guilty to first degree kidnapping, first degree robbery, two counts of first degree aggravated sexual assault, and unlawful possession of a weapon in the third degree, and was sentenced to forty-five years in prison.²⁶² Dixon had not entered a guilty plea because he was remorseful for something he had done.²⁶³ Dixon pleaded guilty because he was threatened with the possibility of a higher sentence if he lost at trial and offered the promise of leniency if he relieved the government of its burden at trial.²⁶⁴ In 2001, Dixon's conviction was vacated after DNA testing revealed that he could not have been the assailant in the crime.²⁶⁵ A week later, after ten years in prison, he was released.²⁶⁶ Dixon reminds us of the real people behind the statistics and demonstrates that with significant regularity defendants are being compelled to falsely plead guilty to offenses they did not commit.²⁶⁷ The question remains, however, is there a remedy to plea bargaining's innocence problem or did, as some believe, the Supreme Court grant prosecutors unlimited powers to bargain in *Brady*?

²⁶² *The Innocence Project - Know the Cases: Browse Profiles: John Dixon*, INNOCENCE PROJECT, <http://www.innocenceproject.org/Content/86.php> (last visited Feb. 7, 2012) (describing the story of John Dixon, who pleaded guilty to rape charges for fear he would receive a harsher sentence if he proceeded to trial, but was later exonerated by DNA evidence).

²⁶³ *Id.*; see also Richard Klein, *Due Process Denied: Judicial Coercion in the Plea Bargaining Process*, 32 HOFSTRA L. REV. 1349, 1408 (2004) ("The defendant pleads guilty to reduce his punishment; it's a matter of expediency. Remorse has very little to do with it, and judges, who, if anything, are more cynical than [sic] the rest of us, are fully aware of that.").

²⁶⁴ *The Innocence Project - Know the Cases: Browse Profiles: John Dixon*, INNOCENCE PROJECT, <http://www.innocenceproject.org/Content/86.php> (last visited Feb. 7, 2012); see also Klein, *supra* note 263, at 1398 ("By the time of the plea allocution it is clear that the defendant has decided to take the plea bargain and knows or has been instructed by counsel to tell the court that he did indeed do the crime. Predictably, the National Institute of Justice survey found that judges rejected guilty pleas in only two percent of cases. Since efficiency and speed is the name of the game, it is not unexpected that meaningful questioning of the defendant does not occur and it is not surprising that the Institute concluded that the plea allocution procedure is 'close to being a new kind of pious fraud.'"); Wright, *supra* note 76, at 93 ("But when it comes to the defendant's 'voluntariness'—the second half of the formula—courts have walked away. The proper knowledge, together with a pro forma statement from the defendant that her guilty plea was not coerced, normally suffices.").

²⁶⁵ *The Innocence Project*, *supra* note 264.

²⁶⁶ *Id.*

²⁶⁷ See *id.*; Leipold, *supra* note 235, at 1154 ("[S]ometimes the prosecutor offers such a generous discount for admitting guilt that the defendant feels he simply can't take the chance of going to trial.").

*B. The Constitutional Limits of the Great Compromise
and a Litmus Test for the Brady Safety-Valve*

While the *Brady* decision signaled a shift away from wholesale rejection of bargained justice, it contained an important limitation regarding how far the Court would permit prosecutors to venture in attempting to induce defendants to plead guilty. In the concluding paragraphs of the decision, the Supreme Court discussed its vision for the utilization of plea-bargaining in the criminal system.²⁶⁸ Plea-bargaining was a tool for use only in cases where the evidence was overwhelming and where the defendant, unlikely to succeed at trial, might benefit from the opportunity to bargain for a reduced sentence.²⁶⁹ Plea-bargaining, however, was not to be used to overwhelm defendants into pleading guilty where their guilt was in question.²⁷⁰

For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious—his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated. For the State there are also advantages—the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are *conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof.*²⁷¹

According to the Court, if the government were to begin offering significant incentives to defendants whose guilt was uncertain in an effort to motivate them to plead guilty, defendants who might in fact be innocent, the Court would be forced to reconsider its approval of the plea-bargaining system.²⁷²

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

²⁶⁸ *Brady v. United States*, 397 U.S. 742, 756–58 (1970).

²⁶⁹ *See id.* at 752.

²⁷⁰ *See id.* at 750, 752.

²⁷¹ *Id.* at 752 (emphasis added).

²⁷² *See id.* at 757–58.

defendants, advised by competent counsel, would falsely condemn themselves.²⁷³

While the Supreme Court was willing to permit a compromise in the interests of justice and judicial economy in 1970, it also created a safety-valve.²⁷⁴ Safety-valves are intended to relieve pressure when forces within a machine become too great and, thereby, preserve the integrity of the machine.²⁷⁵ The *Brady* safety-valve serves just such a purpose by placing a limit on the amount of pressure that can constitutionally be placed on defendants to plead guilty. According to the Court, however, should plea-bargaining become so common that prosecutors offer deals to all defendants, including those whose guilt is in question, and the incentives to bargain become so overpowering that even innocent defendants acquiesce, then the *Brady* safety-valve will have failed and the plea-bargaining machine will have ventured into the realm of unconstitutionality.²⁷⁶

Interestingly, the *Brady* decision is not the only Supreme Court case from the 1970's that discusses the Court's concerns regarding innocent defendants and that makes mention of a safety-valve or threshold regarding acceptable incentives to bargain.²⁷⁷ In *Alford*, the Court stated that *Alford* plea agreements must only be

²⁷³ *Id.* The sentiment that innocent defendants should not be encouraged to plead guilty has been echoed by academics. *See, e.g.*, Bibas, *supra* note 236, at 1382 (“Even if innocent defendants want to plead guilty, the law should not go out of its way to promote these unjust results.”); Leipold, *supra* note 235, at 1158 (supporting the statements of Stephanos Bibas regarding innocent defendants and plea bargaining).

²⁷⁴ *See Brady*, 397 U.S. at 757–58.

²⁷⁵ *Safety Valve*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/safety%20valve> (last visited Feb. 7, 2012) (defining safety valve as “an automatic escape or relief valve,” “an outlet for pent-up energy or emotion,” or “something that relieves the pressure of overcrowding”).

²⁷⁶ *See Brady*, 397 U.S. at 757–58.

²⁷⁷ *See Bordenkircher v. Hayes*, 434 U.S. 357, 363–65 (1978) (discussing plea bargains and noting there are “undoubtedly constitutional limits” to the exercise of plea bargaining); *North Carolina v. Alford*, 400 U.S. 25, 37–39 (1970) (holding as valid a guilty plea made to avoid the death penalty and discussing when a court should accept guilty pleas”). Even the 1968 ABA report regarding plea-bargaining accepted the premise that plea-bargaining should be for defendants whose guilt is demonstrated by overwhelming evidence, thus freeing resources for the trial of those defendants whose guilt is less certain.

[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 [if necessitated by a decreased use of plea bargains], the funds necessary for such increases might be diverted from elsewhere in the criminal justice process. Moreover, the limited use of the trial process for those cases in which the defendant has grounds for contesting the

utilized in cases where the evidence regarding actual guilt is strong and sufficient to negate the defendant's claim of innocence.²⁷⁸ Where there is doubt as to the defendant's culpability, the case must be sent to trial and no plea bargain may be struck so as to protect the "innocent and. . . insur[e] that guilty pleas are a product of free and intelligent choice."²⁷⁹ Unfortunately, despite this clear standard from the Supreme Court, Kerry Max Cook's false confession of guilt was accepted even though the offer itself signaled the prosecution's belief that it would lose at trial.²⁸⁰

In 1978, the Supreme Court addressed plea-bargaining once more in *Bordenkircher v. Hayes*,²⁸¹ and, once again, expressed concern regarding innocent defendants. Paul Hayes was indicted on a charge of uttering a forged instrument, an offense under Kentucky law punishable by two to ten years in prison.²⁸² During plea negotiations, the prosecution stated that if Hayes pleaded guilty, he would recommend a sentence of five years.²⁸³ If he did not "save the court the inconvenience and necessity of a trial," however, the prosecution threatened to re-indict Hayes under a habitual offender law that carried a life sentence.²⁸⁴ Hayes refused to plead guilty and, as a result, was re-indicted, found guilty at trial, and sentenced to life in prison.²⁸⁵

In holding that the prosecutor in the *Bordenkircher* case had not acted inappropriately, the Supreme Court began by clearly stating that "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort."²⁸⁶ The Court continued, however, "in the 'give-and-take' of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer."²⁸⁷ As long

matter of guilt aids in preserving the meaningfulness of the presumption of innocence.

ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *supra* note 77, at 2.

²⁷⁸ See *Alford*, 400 U.S. at 37–38.

²⁷⁹ *Id.* at 38 n.10; see also *Bibas*, *supra* note 236, at 1382 ("It should go without saying that it is wrong to convict innocent defendants. Thus, the law should hinder these convictions instead of facilitating them through *Alford* and nolo contendere pleas.").

²⁸⁰ See *infra* notes 237–255 and accompanying text (discussing the Kerry Max Cook case).

²⁸¹ *Bordenkircher*, 434 U.S. 357.

²⁸² *Id.* at 358.

²⁸³ *Id.*

²⁸⁴ *Id.* at 358–59.

²⁸⁵ *Id.* at 359.

²⁸⁶ *Id.* at 363.

²⁸⁷ *Id.*; see also *Corbitt v. New Jersey*, 439 U.S. 212, 225 (1978) ("Finally, we are unconvinced that the New Jersey statutory pattern exerts such a powerful influence to coerce inaccurate pleas *non vult* that it should be deemed constitutionally suspect. There is no suggestion here that Corbitt was not well counseled or that he misunderstood the choices that were placed before him. Here, as in *Bordenkircher*, the State did not trespass on the defendant's rights 'so long as the accused [was] free to accept or reject' the choice presented to him by the State that is, to go to trial and face the risk of life imprisonment or

as the incentives to bargain are sufficiently reasonable and the defendant retains this sense of freedom, the Court determined that it is unlikely an innocent defendant would be “driven to false self-condemnation.”²⁸⁸ Of course, the Supreme Court was wrong regarding its estimation of the impact of prosecutors’ offers on innocent defendants. As John Dixon demonstrates, it is very likely that innocent defendants will plead guilty in return for the incredible incentives currently being offered by the prosecution, incentives that strip away a defendant’s ability to freely decide whether to accept or reject the government’s advances.²⁸⁹

While the Supreme Court in *Brady*, *Alford*, and *Bordenkircher* noted that plea bargains were only intended for cases with strong evidentiary support and not as a tool to induce all defendants, including the innocent, to plead guilty, modern day plea-bargaining is clearly at odds with this central edict of the Supreme Court’s great compromise of 1970.²⁹⁰ Today, defendants whose guilt is uncertain are offered plea bargains as often, if not more often, than those for whom the evidence is particularly strong.²⁹¹ Not only are these defendants of questionable guilt offered

to seek acceptance of a *non vult* plea and the imposition of the lesser penalty authorized by law.”).

²⁸⁸ *Bordenkircher*, 434 U.S. at 363 (“Indeed, acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process.”).

²⁸⁹ See *supra* notes 262–267 and accompanying text (discussing the John Dixon case).

²⁹⁰ See, e.g., Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1969 (1992) (“Persons at risk of unjust conviction may prefer a certain (but low) punishment in a plea bargain to the risk of conviction and high punishment after trial.”); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1979 (1992) (“[P]lea bargaining seriously impairs the public interest in effective punishment of crime and in accurate separation of the guilty from the innocent.”). Interestingly, in a 1980 article, Thomas R. McCoy and Michael J. Mirra argued that “plea bargaining is constitutionally defensible . . . [but] demands the development of guidelines expressly designed to ensure that the incremental inaccuracy of plea bargaining does not exceed the limits tolerated by procedural due process.” McCoy & Mirra, *supra* note 224, at 925–26. As demonstrated by plea-bargaining’s innocence problem, no guidelines sufficient to satisfy this need were ever created.

²⁹¹ See John G. Douglass, *Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining*, 50 EMORY L.J. 437, 449 (2001) (The prosecutor “will offer greater sentencing concessions in those cases where conviction is less likely, and fewer concessions where she is more confident of conviction.”); Gazal-Ayal, *supra* note 257, at 2298–99 (“When the case is weak, meaning when the probability that a trial would result in conviction is relatively small, [the prosecutor] can assure a conviction by offering the defendant a substantial discount—a discount big enough to compensate him for foregoing the possibility of being found not guilty.”); Hessick & Saujani, *supra* note 224, at 199 (“Assuming the innocent defendant is more likely to be acquitted at trial, the prosecutor has much higher incentives to enter a plea agreement with the innocent defendant than with a guilty defendant because the prosecutor perceives the innocence as a lack of evidence.”); Yin, *supra* note 90, at 443 (“Curiously, the arena of plea bargaining pits the concepts of duress and consideration against each other: a large sentencing differential makes it more likely that a defendant is coerced into pleading guilty, and yet it also increases the benefit

plea bargains, their bargains are often more generous and, therefore, more irresistible than those offered to defendants against whom the government believes it has a strong chance of success at trial.²⁹² As a result, while the Supreme Court in 1970 did not desire that plea-bargaining be utilized to induce the innocent to plead guilty, it is precisely these defendants who are placed under the most severe pressure to confess today.²⁹³

It is important to note that while plea bargaining's innocence problem serves as an indication that we have gone beyond the types of incentives and persuasions to plead guilty permitted by the *Brady* safety-valve, the Supreme Court did not intend that this threshold on pressure apply only to the innocent. Rather, the innocent serve as a litmus test for plea-bargaining more generally. If prosecutors are offering incentives that are sufficient to force innocent defendants to plead guilty, these same types of incentives are equally unconstitutional when offered to guilty defendants because both sets of defendants are involuntarily entering their pleas.

Recall that while *Brady* drastically changed the landscape of American criminal justice by permitting plea-bargaining, it retained the requirement that all pleas be "voluntary." Clearly, the *Brady* court did not intend "voluntary" in the plea-bargaining context to retain the restrictive meaning it had held when pleas of guilt were considered legally identical to confessions, because such a definition would make almost every offer of leniency impermissible. Instead, "voluntary" took on a new, although woefully undefined, meaning.²⁹⁴ To discern what "voluntary" meant after *Brady* one must examine the use of this term throughout Supreme Court precedent.²⁹⁵ In so doing, one learns that the term has less to do with the type of incentives offered and more to do with the effect of such offers on defendants. This is why plea-bargaining's innocence problem serves as a litmus test for voluntariness generally.

offered in exchange for the guilty plea."); see also Finkelstein, *supra* note 257, at 311–12 ("Since it appears that prosecutors' stronger cases tended to be selected for guilty pleas in the historical period, while weaker than average cases are selected with greater frequency today [(1975)], a refocusing of plea bargaining on stronger cases might improve the statistical picture without adding materially (if at all) to the number of trials.").

²⁹² See *infra* note 291.

²⁹³ See Covey, *supra* note 257, at 74, 79–80 ("Plea bargaining has an innocence problem. . . . In short, as long as the prosecutor is willing and able to discount plea prices to reflect resource savings, regardless of guilt or innocence, pleading guilty is the defendant's dominant strategy. As a result, non-frivolous accusations—not proof beyond a reasonable doubt—is all that is necessary to establish legal guilt. This latter point forms the root of plea-bargaining's 'innocence problem,' which refers here not merely to the fact that innocent people plead guilty, but that the economics of plea bargaining drives them to do so.").

²⁹⁴ See *supra* notes 198–218 and accompanying text (discussing *Brady v. United States*).

²⁹⁵ See *supra* Part I.

Cases dating back to the eighteenth century, such as *Rex v. Warickshall* (1783), imparted a central tenet that has remained true throughout modern times—admissions of guilt forced from defendants by overwhelming incentives strip such defendants of free will and must be discredited.²⁹⁶ In the earliest examples of American case law regarding guilty pleas and confessions, the Court trumpets this same overarching theme of free will. In cases such as *Hallinger v. Davis* (1892) and *Bram v. United States* (1897), the Court specifically required confessions and pleas of guilty to be more than just voluntary—they had to be entered “freely.”²⁹⁷ By the mid-twentieth century, in cases such as *Walker v. Johnson* (1941), *Waley v. Johnson* (1942), and *United States v. Jackson* (1968), the Supreme Court began using the term “coercive” to describe guilty pleas and confessions that were not given freely, but the intent was the same.²⁹⁸ After all, since the fifteenth century “coercive” has meant to dominate by force or threat.²⁹⁹ By 1962, in *Machibroda v. United States*,³⁰⁰ the Supreme Court was once again drawing a clear line between permissible pleas and those “induced by promises or threats which deprive [the plea] of the character of a voluntary act”³⁰¹ Perhaps no case better summarizes the concept that guilty pleas must be entered into freely than the first case discussed in this Article—the case of Beatrice Lynumn.³⁰² The *Lynumn* Court

²⁹⁶ See Alschuler, *supra* note 65, at 12–13.

²⁹⁷ *Hallinger v. Davis*, 146 U.S. 314, 324 (1892); *Bram v. United States*, 168 U.S. 532, 542–43, 544–48 (1897) (“But a confession, in order to be admissible, must be free and voluntary: that is, must not be extracted by any sort of threats of violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence . . . for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner” (quoting 3 RUSSELL ON CRIMES 478 (6th ed.))).

²⁹⁸ See *Waley v. Johnston*, 316 U.S. 101, 104 (1942) (“For a conviction on a plea of guilty coerced by a federal law enforcement officer is no more consistent with due process than a conviction supported by a coerced confession.”); *Walker v. Johnston*, 312 U.S. 275, 286–87 (1941) (“If he did not voluntarily waive his right to counsel, or if he was deceived or coerced by the prosecutor into entering a guilty plea, he was deprived of a constitutional right.”); *c.f.* *United States v. Jackson*, 390 U.S. 570, 583 (1968) (“[T]he evil in the federal statute is not that it necessarily *coerces* guilty pleas and jury waivers but simply that it needlessly *encourages* them. A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right.”).

²⁹⁹ MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 240 (11th ed. 2003) (definition of *coerce*).

³⁰⁰ *Machibroda v. United States*, 368 U.S. 487 (1962).

³⁰¹ *Id.* at 493 (“There can be no doubt that, if the allegations contained in the petitioner’s motion and affidavit are true, he is entitled to have his sentence vacated. A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void. . . . Like a verdict of a jury[, a plea of guilty] is conclusive. . . . Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences.”).

³⁰² See *Lynumn v. Illinois*, 372 U.S. 528 (1963); see also *supra* notes 2–22 and accompanying text.

stated, where the defendant's "will was overborne at the time [s]he confessed, . . . [the] confession cannot be deemed 'the product of a rational intellect and a free will.'"³⁰³ That Lynumn had a choice when confronted with the possibility of losing her children was clear, but, as the Supreme Court recognized, the choice was illusory.³⁰⁴ The incentive to bargain, which she believed meant retaining custody of her children, was so powerful as to be overbearing and remove any elements of freedom in her decision. Her confession, though gladly offered, was nonetheless involuntary.³⁰⁵

When the Supreme Court addressed plea-bargaining in *Brady*, almost two centuries of precedent established that the incentives offered in return for a plea must not be so powerful as to remove the defendant's ability to consider the choice and act with "free will."³⁰⁶ Though the Court permitted a major shift in plea bargaining policy in *Brady*, it certainly did not remove this requirement. In fact, *Brady*, *Alford*, and *Bordenkircher* all specifically retained the threshold requirement of free will by continuing to require that all pleas be entered into voluntarily.³⁰⁷ In *Brady*, the Court stated, there may be no "mental coercion *overbearing the will* of the defendant."³⁰⁸ The same year, in *Alford*, the Court reiterated that guilty pleas must be "free and intelligent," not irrational acts forced

³⁰³ *Lynnum*, 372 U.S. at 534 ("We think it clear that a confession made under such circumstances must be deemed not voluntary, but coerced.").

³⁰⁴ In his article regarding judicial intervention in plea bargaining, Richard Klein briefly discusses the similarities between coerced confessions and the activities prohibited by *Miranda v. Arizona*. See Klein, *supra* note 263, at 1419 ("This is an inherently coercive atmosphere; one which could well cause even an innocent individual to realize that his most sensible option, indeed perhaps his only option, is to take the plea deal that will never be offered again. The setting and the pressures are strikingly similar to those the Supreme Court found to be intolerable in *Miranda v. Arizona*, where the entire thrust of the suspect's interrogation 'was to put the defendant in such an emotional state as to impair his capacity for rational judgment. . . . [T]he compelling atmosphere of the in-custody interrogation, and not an independent decision on his part, caused the defendant to speak.'").

³⁰⁵ See *supra* notes 2–22 and accompanying text (discussing the Lynumn confession).

³⁰⁶ See *supra* notes 296–305 and accompanying text.

³⁰⁷ *Brady v. United States*, 397 U.S. 742, 758 (1970); *North Carolina v. Alford*, 400 U.S. 25, 37–39 (1970); *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978). Even the American Bar Association report from 1968 seemed to adhere to this basic tenet of plea bargaining as it was then understood. See ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *supra* note 77, at 29 ("The court should not accept a plea of guilty or nolo contendere without first determining that the plea is voluntary. . . . The court should [] address the defendant personally and determine whether any other promises or any force or threats were used to obtain the plea.").

³⁰⁸ *Brady*, 397 U.S. at 750 (emphasis added) ("Of course, the agents of the State may not produce a plea by actual or threatened physical harm or by mental coercion overbearing the will of the defendant.").

from the defendant.³⁰⁹ Finally, eight years later, in *Bordenkircher*, the Court stated, the key criteria for acceptance of guilty pleas is the determination that the defendant, in making his or her decision, was “free to accept or reject the prosecution’s offer.”³¹⁰ “Voluntary,” therefore, even after *Brady*, means that the incentives offered to defendants may not be so coercive as to overbear the individual’s ability to act freely and decide in a rational manner whether to accept or reject the government’s offer.

When one considers this definition of “voluntary,” the reason the Supreme Court created a litmus test regarding innocent defendants to monitor the operation of the *Brady* safety-valve becomes evident. Innocent defendants serve as the most efficient monitor of whether defendants are being afforded the opportunity to exercise their free will and decide in a rational manner whether to accept or reject a plea bargain. As the *Bordenkircher* Court stated, innocent defendants should not be “driven to false self-condemnation” by the plea-bargaining system.³¹¹ Instead, innocent defendants should challenge the government in most cases and, though trials are not perfect, exercise their right to be proven guilty beyond a reasonable doubt before a jury. Where, however, innocent defendants in significant numbers are not exercising these rights, but are being coerced to plead guilty, such acts serve as a strong indication that the *Brady* safety-valve has failed and defendants, both innocent and guilty, are being overborne by unconstitutional incentives.³¹²

It is important to note that just because plea-bargaining has an innocence problem, it does not necessarily follow that all plea bargains are unconstitutional. Rather, the innocence litmus test serves only to alert the Court that plea-bargaining as an institution has begun to drift into impermissible territory. For instance, few would argue that a defendant offered six years in prison for pleading guilty or seven years in prison if he or she losses at trial would be stripped of the ability to make a rational and free decision because of the polarity of these options. But, perhaps, the offer in the *Lea Fastow* case does represent an impermissible inducement. Did *Lea Fastow* really have a choice after she was presented with her

³⁰⁹ *Alford*, 400 U.S. at 38 n.10 (cautioning against accepting “pleas coupled with claims of innocence” without a factual basis for the plea, so as to protect the “innocent and . . . insur[e] that guilty pleas are a product of free and intelligent choice . . .”).

³¹⁰ *Bordenkircher*, 434 U.S. at 363 (“[I]n the ‘give-and-take’ of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution’s offer.”).

³¹¹ *Id.* (“Indeed, acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process.”).

³¹² It is important to note that this Article is not arguing that innocent defendants should never be permitted to plead guilty. In rare cases, a defendant who is innocent may nonetheless have an exceedingly small chance of success at trial because of the available evidence. An example would include a case involving a mistaken, yet convincing, eyewitness identification. These defendants should be given the opportunity to plead guilty in return for a benefit. Where significant numbers of defendants are pleading guilty, however, this serves as an indication of a larger and more systemic problem.

options? Did Beatrice Lynumn have such a choice? The distinction, therefore, between plea bargains that are permitted by *Brady* and those that violate the great compromise of 1970 is the size of the sentencing differential in each case. At some point, the sentencing differential becomes so large that it destroys the defendant's ability to act freely and decide in a rational manner whether to accept or reject the government's offer. The solution to the failure of the *Brady* safety-valve, therefore, is to limit the size of the sentencing differentials used to induce defendants to plead guilty.³¹³

It should come as no surprise that the *Brady* safety-valve is failing and pleas are being entered involuntarily by both innocent and guilty defendants, because prosecutors have been gaining increased powers to bargain for over half a century.³¹⁴ As discussed in Part I.B, as prosecutors' powers to bargain increase, so too does their ability to create startling sentencing differentials as inducements for defendants to plead guilty.³¹⁵ Consider for a moment the sentencing differential for Lea Fastow: ten years in prison and parentless children versus five months in jail and a guarantee that one parent will always be at home.

While the Supreme Court did not discuss the relationship between voluntary plea-bargaining and sentencing differentials in its *Brady* opinion, the 1968 American Bar Association report on plea-bargaining, which the Court cited with approval, had some very noteworthy comments.

Assuming that two defendants have engaged in the same conduct under essentially the same circumstances and that the usual presentence information as to the two does not materially differ, is it proper to give a somewhat lower sentence to one defendant because he has consented to enter a plea of guilty? . . . [I]t appears that most judges consider such leniency proper *if the sentence disparity is not unreasonable*.³¹⁶

³¹³ As various commentators have noted, abolishing plea-bargaining in its entirety would not only crush the existing criminal justice system, it would eliminate a system that is beneficial in many ways for defendants, prosecutors, and courts. *See, e.g.,* Covey, *supra* note 257, at 83–86 (noting that abolishing plea-bargaining does not solve the innocence problem, and does not improve the quality or accuracy of trials); Gazal-Ayal, *supra* note 257, at 2299 (“As many scholars have shown, a total ban on plea bargaining is hardly feasible in the overloaded American criminal justice system.”).

³¹⁴ *See supra* Part I.B (discussing the increases in prosecutorial power during the twentieth century).

³¹⁵ *See supra* Part I.B; *see also* Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1238–41 (2008) (arguing that large sentencing differential forced some innocent defendants to accept plea bargains); Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 204 (2006) (“Two features of our current federal system are especially concerning in this respect—harsh sentences and steep discounts for pleading guilty. Together, they may induce even defendants with good odds of prevailing at trial to accept a plea bargain.”).

³¹⁶ *See* ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *supra* note 77, at 37–38 (emphasis added).

Thus, even the ABA's report praising plea-bargaining in 1968 made clear that when sentencing disparities reach unreasonable levels they reflect an unacceptable type of bargained justice.³¹⁷ The Supreme Court agreed and, therefore, while it embraced plea-bargaining in the *Brady* decision, it also created a safety-valve and a litmus test to monitor its success. As the Court understood in 1970, one can hardly be expected to make a rational and free decision regarding an offer to plead guilty when the differences between the offered leniency and the threat of punishment are staggering and life altering.

Various scholars have discussed the means by which the size of sentencing differentials may be limited.³¹⁸ Some have proposed requiring judges to reject plea bargains that contain significant benefits,³¹⁹ while others have argued for "fixed discounts" for those who admit their guilt in court.³²⁰ Regardless of how one achieves reduced sentencing differentials, however, such reforms are key to eliminating plea-bargaining's innocence problem and, at the same time, ensuring that plea bargains are entered into "voluntarily" by defendants as required by the Supreme Court's great compromise of 1970.

Exactly how small sentencing differentials must be to ensure they do not exert pressure in excess of that permitted by the *Brady* safety-valve is still unclear and outside the scope of this Article.³²¹ What is clear, however, is that the sentencing differentials being offered in a significant number of cases today are too large. As explained under the express terms of *Brady*, defendants whose guilt at trial is almost assured should not require large sentencing differentials to plead guilty and defendants whose culpability is questionable should not be offered such benefits as an inducement to waive their right to walk free unless proven guilty by a jury. To offer staggering sentencing differentials to all defendants violates the spirit of the

³¹⁷ *See id.*

³¹⁸ *See, e.g.,* Covey, *supra* note 315, at 1241–43 (discussing the potential of using a fixed-discount system such as "plea-based ceilings" to limit sentencing differentials); Gazal-Ayal, *supra* note 257, at 2299–2300 (discussing the possibility of a "partial ban" that "would allow prosecutors to extract guilty pleas when defendants are almost certainly guilty, while forcing them to conduct jury trials when they bring more questionable charges").

³¹⁹ *See, e.g.,* Gazal-Ayal, *supra* note 257, at 2299–2300 ("The best way to cope with the innocence problem is to allow plea bargaining only in strong cases and to ban plea bargaining in weak cases. . . . How would this partial ban work? . . . Courts only have to reject plea bargains that result in substantial concessions.").

³²⁰ *See* Covey, *supra* note 315, at 1241 ("Fixed discounts regularize the guilty-plea process by establishing a fixed and nonnegotiable discount for pleading guilty."). Covey goes on to discuss the advantages to the plea bargaining system that might result from limiting the size of sentencing differentials. *See id.* at 1245–46.

³²¹ The author is currently engaged in research designed to determine the impact of particular sentencing differentials on defendants and ascertain how the relative size of differentials influences the likelihood that innocent defendants will plead guilty. The results of this research will be published in a future article that will draw from the definition of "voluntariness" proposed herein.

Supreme Court's great compromise and represents an abandonment of the fundamental tenets underlying the Constitutional rights afforded to all who are accused of committing a crime.

CONCLUSION

If any number of attorneys were asked in 2004 whether Lea Fastow's plea bargain in the Enron case was constitutional, the majority would respond with a simple word—*Brady*. Yet while the 1970 Supreme Court decision *Brady v. United States* authorized plea-bargaining as a form of American justice, the case also contained a vital caveat that has been overlooked by scholars, practitioners, and courts for almost forty years. *Brady* contains a safety-valve that caps the amount of pressure that may be asserted against defendants by prohibiting prosecutors from offering incentives in return for guilty pleas that are so coercive as to overbear defendants' abilities to act freely. Further, as a means to discern whether the safety-valve fails in the future and prosecutors are offering unconstitutional incentives, the *Brady* Court in 1970 created a litmus test regarding innocent defendants. The Court stated that should the plea-bargaining system begin to operate in a manner resulting in a significant number of innocent defendants pleading guilty the Court would be forced to reexamine the constitutionality of bargained justice. That plea-bargaining today has a significant innocence problem indicates that the *Brady* safety-valve has failed and, as a result, the constitutionality of modern day plea bargaining is in great doubt.³²²

³²² While plea-bargaining began its rise in the mid-1800s, relatively few plea bargaining cases reached the Supreme Court until the mid-1900s. There is a procedural reason for this phenomenon. Those who are coerced into accepting plea bargains, the innocent and the guilty alike, are happy merely for the chance to receive a benefit rather than risk the astounding penalties they believe await them if they lose at trial.